

1986

U.S. Trade Law and Policy Series #8: Recent Developments Regarding Antidumping and Countervailing Duty Injury Determinations

Judith Hippler Bello

Alan F. Holmer

Recommended Citation

Judith Hippler Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series #8: Recent Developments Regarding Antidumping and Countervailing Duty Injury Determinations*, 20 INT'L L. 689 (1986)
<https://scholar.smu.edu/til/vol20/iss2/15>

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CURRENT DEVELOPMENTS

U.S. Trade Law and Policy Series # 8: **Recent Developments Regarding Antidumping and Countervailing Duty Injury Determinations**

In all antidumping and most countervailing duty investigations,¹ offsetting duties are imposed on imports sold at less than fair value or subsidized *only* if the International Trade Commission determines that a U.S. industry has been materially injured or threatened with material injury, or that establishment of a U.S. industry has been materially retarded, by reason of such “dumped”² or subsidized imports. This article reviews three recent

*Deputy General Counsel, Office of the U.S. Trade Representative.

†General Counsel, Office of the U.S. Trade Representative. The views expressed in this article are solely those of the authors.

1. Injury determinations are required in all investigations conducted under Title VII of the Tariff Act of 1930, as amended (the Act), 19 U.S.C. §§ 1671–1677g (1982); *see* §§ 701 and 731, 19 U.S.C. §§ 1671, 1673 (1982). While antidumping investigations are conducted under Title VII, some countervailing duty investigations proceed instead under § 303 of the Act, 19 U.S.C. § 1303 (1981). Title VII applies to imports from any country: (1) to which the United States applies the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Subsidies Code, 31 U.S.T. 513, T.I.A.S. No 9619); (2) which has concluded a “substantially equivalent” agreement with the United States; or (3) which was a party to certain Treaties of Friendship, Commerce and Navigation with the United States. *See* § 701 of the Act, 19 U.S.C. § 1671 (1982), defining “country under the Agreement.” Section 303, on the other hand, applies in countervailing duty investigations of imports from all other countries. Under § 303, an injury determination is required only where the imports are duty-free and where, in such circumstances, the international obligations of the United States require an injury determination. Section 303(a)(2) of the Act, 19 U.S.C. § 1303(a)(2) (1981).

2. “Dumped” merchandise refers to imports that have been determined by the Department of Commerce to have been sold at less than fair value, *and* by the International Trade Commission to have caused or threatened material injury to a U.S. industry, or to have materially retarded the establishment of a U.S. industry. However, it is often used less

developments regarding such injury determinations: (1) interpretation of the "reasonable indication" standard in preliminary injury determinations; (2) margins analysis—that is, whether the International Trade Commission should take into account the level of less-than-fair-value sales or subsidization in making its final injury determination; and (3) application of the cumulation provision of the Trade and Tariff Act of 1984.

I. The Reasonable Indication Standard in Preliminary Injury Determinations

A. INTRODUCTION

Under Title VII of the Tariff Act of 1930, as amended (the Act),³ the Department of Commerce (Commerce)⁴ determines whether to initiate an antidumping (AD) or countervailing duty (CVD) investigation in response to a petition filed by an interested party.⁵ The Act requires Commerce to initiate where an interested party⁶ files a petition on behalf of a domestic industry, alleges subsidization or sales at less than fair value and (where required⁷) injury to a U.S. industry, and provides information reasonably available to it substantiating the allegations.⁸ If Commerce initiates (or self-initiates) an investigation, the next step in any Title VII investigation and certain section 303 investigations⁹ is a preliminary injury determination by the International Trade Commission (Commission).¹⁰ The Act directs the Commission to determine whether there is a "reasonable indication" of material injury, threat of material injury, or material retardation of establishment of a U.S. industry by reason of imports allegedly subsidized or sold at less than fair value.¹¹

In a series of recent cases, the U.S. Court of International Trade inter-

technically (as here) to refer to merchandise that Commerce has determined to have been sold at less than fair value.

3. 19 U.S.C. §§ 1671–1677g (1982).

4. Commerce is the "administering authority" under Title VII of the Act. Reorg. Plan No. 3 of 1979, § 2(a), 44 Fed. Reg. 69,273–74 (1979), *reprinted in* 5 U.S.C. app. at 1170 (1982); Exec. Order No. 12,188, 3 C.F.R. 131, 135 (1983).

5. Sections 702(b), 732(b) of the Act, 19 U.S.C. §§ 1671a(b), 1673a(b) (1982). The Act also authorizes Commerce to self-initiate AD and CVD investigations. 19 U.S.C. §§ 702(a), 732(a); 19 U.S.C. §§ 1671a(a), 1673a(a). *See, e.g.*, Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan, 50 Fed. Reg. 51,450 (1985) (self-initiation).

6. "Interested party" is defined in § 771(9) of the Act, 19 U.S.C. § 1677(9) (1982).

7. *See supra* note 1.

8. Sections 702, 732 of the Act, 19 U.S.C. §§ 1671a, 1673a (1982).

9. *See supra* note 1.

10. Sections 703(a), 733(a) of the Act, 19 U.S.C. §§ 1671b(a), 1673b(a) (1982).

11. For purposes of its preliminary determination, the Commission simply must assume subsidization or less-than-fair-value sales, as appropriate. The Commission makes a final determination only if Commerce, in the interim, has actually found subsidies or sales at less than fair value. Sections 705(b), 735(b) of the Act, 19 U.S.C. §§ 1671d(b), 1673d(b) (1982).

preted this "reasonable indication" standard as "resembl(ing) the low threshold of the ITA (International Trade Administration, Department of Commerce) decision on the sufficiency of the petition."¹² In each case the petitioner appealed a negative preliminary injury determination to the Court, which reversed the Commission for weighing evidence and terminating the investigation¹³ even though there was some evidence indicating a possibility of injury. On February 28, 1986, the Court of Appeals for the Federal Circuit reversed the lower court, concluding that the Commission's practice in applying the "reasonable indication" standard "accords with clearly discernible legislative intent and is sufficiently reasonable."¹⁴

B. BACKGROUND

Preliminary injury determinations did not become mandatory in all AD or even some CVD investigations until enactment of the Trade Agreements Act of 1979.¹⁵ Prior to enactment of the Trade Act of 1974,¹⁶ there was no injury determination at all in any CVD investigation under section 303 of the Act,¹⁷ and there was only a single injury determination following a determination by the Secretary of the Treasury¹⁸ of sales at less than fair value.¹⁹

The Trade Act of 1974 extended the CVD law by making it applicable to duty-free imports.²⁰ In CVD investigations of duty-free imports, an injury determination was provided where required by the international obligations of the United States.²¹ Moreover, Congress amended the Antidumping Act,

12. *Republic Steel Corp. v. United States*, 590 F. Supp. 640 (Ct. Int'l Trade 1984). *reh'g denied*, slip op. 85-27 (March 11, 1985), *dismissed* (order of Aug. 13, 1985).

13. Where the Commission finds no reasonable indication of injury, the entire AD or CVD proceeding terminates. Commerce does not determine whether the imports concerned are sold at less than fair value or subsidized.

14. *American Lamb Co. v. United States*, slip op. 86-560 (Ct. Int'l Trade Feb. 28, 1986).

15. Pub. L. No. 96-39, 93 Stat. 144 (1979). January 1, 1980 was the effective date for most Title VII amendments, pursuant to § 107 of the Trade Agreements Act, 93 Stat. 193 (1979).

16. Pub. L. No. 93-618, 88 Stat. 1978 (1974).

17. 19 U.S.C. § 1303 (1981).

18. Prior to January 3, 1980, Treasury determined whether imports were subsidized or sold at less than fair value in CVD and AD investigations. Section 303 of the Act, 19 U.S.C. § 1303 (1981). Antidumping Act, 1921, 19 U.S.C. § 160(c)(2), *repealed by* § 106(a) of the Trade Agreements Act of 1979, 93 Stat. 144, 193 (1979).

19. See S. REP. NO. 1298, 93rd Cong., 2d Sess. 170 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADM. NEWS 7186, 7306.

20. Prior to the Trade Act of 1974, Title V of which established the Generalized System of Preferences (GSP), relatively little merchandise was imported duty-free. The GSP program significantly increased the value of goods eligible for and benefitting from duty-free treatment.

21. Section 331(a) of the Trade Act of 1974, 88 Stat. 1978, 2049, codified at 19 U.S.C. § 1303(a)(2) (1981). The reason for this amendment was to conform to the requirements of the General Agreement on Tariffs and Trade (GATT), T.I.A.S. No. 1700, Article VI of which applies to AD and CVD investigations and requires an injury determination. However, the United States applies the GATT through its Protocol of Provisional Application, which

1921,²² to provide for an additional injury determination at an early stage of the antidumping proceedings in cases where "the Secretary, in the course of determining whether to initiate an antidumping investigation, concludes that there is substantial doubt as to whether injury under the Act exists. . . ."²³

As amended by the Trade Act of 1974, section 201(c)(2) of the Antidumping Act, 1921,²⁴ provided a procedure whereby the Secretary of the Treasury referred to the Commission antidumping investigations in which he had concluded that there was a substantial doubt as to whether there was injury under the Act. The Commission then conducted a 30-day investigation to determine whether there was no reasonable indication that an industry was being or was likely to be injured, or if the establishment of an industry was prevented by reason of imports. The Commission's determinations under section 201(c)(2) required clear and convincing evidence that there was no reasonable indication that an industry was being or was likely to be injured.²⁵ Its application of the reasonable indication standard resulted in a finding of no reasonable indication of injury or likelihood of injury in nine of the twenty-nine investigations conducted under the 1921 Act.²⁶ The 1974 amendment's legislative history indicates that its purpose was to "eliminate

grandfathers then-existing (*i.e.*, in 1947) domestic legislation that fails to conform to requirements in part II of the GATT, including Article VI. Because the U.S. CVD law predated the United States' signature of the Protocol, its failure to provide an injury determination was grandfathered. However, the significant extension of that law in 1974 to apply to duty-free imports would not have been so grandfathered. Consequently, an injury determination was required.

22. Antidumping Act, 1921, ch. 14, art. II, 42 Stat. 11 (1921), codified at 19 U.S.C. § 160 *et seq.*, repealed by the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 144, 193 (1979).

23. S. REP. NO. 1298, 93rd Cong., 2d Sess. 170, 171 (1974).

24. 19 U.S.C. § 160(c)(2), repealed by the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 144, 193 (1979) provided that:

If within thirty days after receipt of such information from the Secretary [regarding the basis for a substantial doubt as to whether there is injury under the Act], the Commission, after conducting such inquiry as it deems appropriate, determines there is no reasonable indication that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States, it shall advise the Secretary of its determination and any investigation under subsection (b) of this section then in progress shall be terminated.

25. See, e.g., Butadiene Acrylonitrile Rubber from Japan, Inq. No. AA1921-Inq.-1, ITC Pub. 727 at 5 (1975); Methyl Alcohol from Brazil, Inq. No. AA1921-Inq.-7, USITC Pub. 837 at 4-5 (1977). The Commission adopted the clear and convincing standard in its first opinion under § 201(c)(2), based upon the belief that Congress had not intended to make it more difficult for the domestic industry to obtain relief under the antidumping law than prior to the 1974 amendment. Butadiene Acrylonitrile Rubber from Japan, Inq. No. AA1921-Inq.-1, ITC Pub. 727 (1975).

26. Brief of appellant United States in *American Lamb Co. v. United States*, Fed. Cir. Appeal No. 86-560 (interlocutory appeal) at 32.

unnecessary and costly investigations which are an administrative burden and an impediment to trade."²⁷

The Trade Agreements Act of 1979²⁸ significantly amended the CVD law by providing both preliminary and final injury determinations in investigations of imports from any "country under the Agreement."²⁹ It repealed the Antidumping Act, 1921,³⁰ and provided both preliminary and final injury investigations in *all* AD investigations. Thus it established a preliminary injury determination for the first time in certain CVD investigations, and mandated in every AD investigation a preliminary injury determination (of the type conducted discretionarily under section 201(c)(2) of the Antidumping Act, 1921). Moreover, the preliminary injury determination was no longer procedurally related to the determination to institute an investigation. The Act sets forth the standards for a Commission preliminary determination in the same section as the provisions for Commerce's preliminary determination of the existence of less-than-fair-value sales.³¹ In addition, the Act establishes substantive elements for the Commission to consider in making its preliminary determination.³² Each of these substantive provisions requires the Commission to evaluate the significance of the enumerated factors, such as volume of imports, price effects, and impact on the domestic industry.³³

The legislative history of the 1979 Act provides guidance as to the interpretation of the provisions governing Commerce's initiation determination and the Commission's preliminary injury determination. It analogized Commerce's initiation decision to a trial court's decision on a motion to dismiss because the complaint "fails to state a claim upon which relief can be granted or fail[s] to make out a cause of action for purposes of civil litigation."³⁴

The Commission's preliminary injury determination, on the other hand,

27. S. REP. NO. 1298, 93rd Cong., 2d Sess. 170-71 (1974). The report elaborated:

The Committee felt that there ought to be a procedure for terminating investigations at an earlier stage where there was no reasonable indication that injury or the likelihood of injury could be found. Therefore, the Committee adopted a new provision, section 201(c)(2), which provides for the elimination, at an early stage of the antidumping proceedings, of those cases in which there is no reasonable indication that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of importation of the merchandise concerned into the United States.

28. Pub. L. No. 96-39, 93 Stat. 144 (1979).

29. Sections 701, 703(a), 705(b) of the Act, 19 U.S.C. §§ 1671, 1671b(a), 1671d(b) (1982). See generally *supra* note 1.

30. Section 106(a) of the Trade Agreements Act of 1979, 93 Stat. 144, 193 (1979).

31. Section 733 of the Act, 19 U.S.C. § 1673b (1982).

32. Section 771(7) of the Act, 19 U.S.C. § 1677(7) (1982).

33. *Id.*

34. S. REP. NO. 249, 96th Cong., 1st Sess. 47, 63 (1979), reprinted in 1979 U.S. CODE CONG. & ADM. NEWS 433, 449; H.R. REP. NO. 317, 96th Cong., 1st Sess. 51 (1979).

requires the Commission to "investigate the allegations in the petition in as thorough a manner as possible using the information available within that time period [45 days]," and to "provide interested parties a reasonable opportunity to present their views."³⁵ The Senate Finance Committee Report stated the intention that "the 'reasonable indication' standard . . . be applied in essentially the same manner as the 'reasonable indication' standard under section 201(c)(2) of the Antidumping Act [1921] has been applied."³⁶

C. THE COMMISSION'S AND COURT OF INTERNATIONAL TRADE'S DIFFERING INTERPRETATION OF THE REASONABLE INDICATION STANDARD

Pursuant to longstanding practice, the Commission determines whether there is a reasonable indication of injury using a two-pronged test: (1) is there clear and convincing evidence of the absence of such injury, and (2) does the record developed during the course of the preliminary investigation show that it is extremely unlikely that contrary evidence would be developed in a final investigation?³⁷ The tests are cumulative rather than alternative; in

35. H.R. REP. NO. 317, 96th Cong., 1st Sess. 61 (1979). The Senate report likewise noted that the Commission has a duty to "make every effort to conduct a thorough inquiry during that [45 day] period." S. REP. NO. 249, 96th Cong., 1st Sess. 66 (1979).

36. S. REP. NO. 249, 96th Cong., 1st Sess. 66 (1979), *reprinted in* 1979 U.S. CODE CONG. & ADM. NEWS 452. The legislative history of the Trade Agreements Act unfortunately serves as a cause of some confusion as well as clarification. For example, the Senate report stated that "The petition determination by the authority under section 702(c) and the determination by the ITC under section 703(a) will implement that requirement [consideration of both the existence of a subsidy and injury prior to initiation] for the United States."

S. REP. NO. 249, 96th Cong., 1st Sess. 49 (1979), *reprinted in* 1979 U.S. CODE CONG. & ADM. NEWS 435. This statement refers to the requirements under both the Agreement on Interpretation and Application of Article VI of the General Agreement on Tariffs and Trade (Antidumping Code), 31 U.S.T. 4919, T.I.A.S. No. 9650, and the Subsidies Code for there to be evidence and consideration of both sales at less than fair value or subsidies *and* injury prior to initiation of an investigation. Subsidies Code Art. 2; Antidumping Code Art. 5. The United States position in the Subsidies and Antidumping Code Committees is that for purposes of the codes, "initiation" occurs when the Commission finds a reasonable indication of injury, rather than at the earlier stage when Commerce initiates an investigation.

Another source of some confusion is the House report's statement that "The standard to be applied in exercising this authority [to institute] is, of necessity, less rigorous than the 'reasonable indication' standard which serves as the basis for a preliminary determination of less than fair value sales." H.R. REP. NO. 317, 96th Cong., 1st Sess. 59 (1979). This statement mixes apples with oranges, since it compares the Commission's preliminary injury determination with Commerce's preliminary determination of sales at less than fair value. Presumably it intended to compare the Commission's preliminary and final determinations, or Commerce's initiation and preliminary determination.

37. Butadiene Acrylonitrile Rubber from Japan, Inq. No. AA1921-Inq.-1, ITC Pub. 727 at 5 (1975); Methyl Alcohol from Brazil, Inq. No. AA1921-Inq.-7, USITC Pub. 837 at 4-5 (1977). The information gathered in this investigation was extremely detailed and complete.

many cases the Commission has expressly noted the need for more specific information to be developed in a final investigation.³⁸ In applying this test, the Commission evaluates evidence in the petition and from other sources, principally responses to any questionnaires it sends to U.S. producers, distributors and/or importers.³⁹

Petitioners in investigations in which the Commission found no reasonable indication of injury appealed to the Court of International Trade, which interpreted the reasonable indication standard very differently. The first decision on this issue was rendered in *Republic Steel Corp. v. United States*.⁴⁰ Judge Watson held that the Commission's determination of a "reasonable indication" of material injury was "part of a two-step decision on whether a full-fledged investigation should take place," and that the reasonable indication standard "resembles the low threshold of the ITA decision on the sufficiency of the petition."⁴¹ He interpreted the requirement of a "reasonable indication" of material injury to mean a possibility of material injury. He then concluded that the need to establish a possibility of injury precluded the Commission from engaging in the weighing of conflicting evidence.⁴²

The object of these [preliminary] determinations should have been simply to find whether there were any facts which raised the possibility of injury. The resolution or interpretation of conflicting facts should have been reserved for a possible final injury determination.⁴³

Subsequently, Judge Watson denied the Commission's request for a rehearing on the issue of the appropriate standard in a preliminary investigation by the Commission. He expressly rejected the Commission's argument that it should be permitted to reach a negative determination if there is clear and convincing evidence that there is no possibility of injury.⁴⁴ The court clarified its former opinion, explaining that a "well-pled" petition could satisfy the reasonable indication standard. It ruled that a negative preliminary determination is appropriate only in limited circumstances. "If the petition does not contain the evidence of injury which could reasonably be expected to be within petitioner's knowledge, or is false, or is in conflict on

38. See, e.g., *Certain Fresh Potatoes from Canada*, Inv. No. 731-TA-124 (preliminary), USITC Pub. 1364 at 15 (1983).

39. E.g., in *Uncoated Free Sheet Offset Paper from Canada*, Inq.-No. AA1921-Inq.-10, USITC Pub. 869 (1978), the Commission clearly assessed the relative importance of market conditions and conflicting evidence on the issue of causation of injury.

40. 591 F. Supp. 640 (Ct. Int'l Trade 1984), *reh'g denied*, slip op. 85-27 (March 11, 1985), *dismissed* (order of Aug. 13, 1985) (Watson, J.).

41. *Id.* at 646.

42. *Id.*

43. *Id.* at 650.

44. *Republic Steel Corp. v. United States*, slip op. 85-27 at 3.

essential points with matters of public record, or does not state injury as a matter of law even if its contents are taken as true, then the ITC may properly conclude that there is no reasonable indication of injury and no need for further investigation."⁴⁵

The Commission was unable to appeal Judge Watson's decision in *Republic Steel*, because the case was dismissed as a result of a voluntary restraint agreement negotiated between the United States and the countries involved in the underlying Commission investigations.⁴⁶ However, the Commission appealed all the Court of International Trade decisions that relied on *Republic Steel* in construing the appropriate standard for preliminary determinations by the Commission, including *Jeannette Sheet Glass v. United States*,⁴⁷ *American Lamb Co. v. United States*,⁴⁸ *Armstrong Rubber Co. v. United States International Trade Commission*,⁴⁹ and *American Grape Growers Alliance for Fair Trade v. United States*.⁵⁰ Thus several appeals were currently pending before the Court of Appeals for the Federal Circuit.⁵¹

The lead case was *American Lamb*, in which Judge DiCarlo reversed the Commission's determination that the U.S. lamb meat industry was materially injured or threatened with material injury by reason of imports of lamb meat from New Zealand, allegedly sold at less than fair value.⁵² The Court of International Trade certified that immediate appeal of the question of the appropriate interpretation of the reasonable indication standard could materially advance the ultimate termination of that litigation.⁵³

45. *Id.*

46. The seven preliminary determinations involved were: Carbon Steel Structural Shapes from Brazil, Inv. No. 701-TA-118 (preliminary), USITC Pub. 1221 (Feb. 1982); Hot-Rolled Carbon Steel Bar from Brazil, Inv. No. 701-TA-126 (preliminary), USITC Pub. 1221 (Feb. 1982); Cold-Formed Carbon Steel Bar from Brazil, Inv. No. 701-TA-135 (preliminary), USITC Pub. 1221 (Feb. 1982); Hot-Rolled Carbon Steel Sheet from Spain, Inv. No. 701-TA-156 (preliminary), USITC Pub. 1255 (June 1982); Hot-Rolled Alloy Steel Bar from Spain, Inv. No. 701-TA-161 (preliminary), USITC Pub. 1255 (June 1982); Cold-Formed Alloy Steel Bar from Spain, Inv. No. 701-TA-163 (preliminary), USITC Pub. 1255 (June 1982); and Cold-Rolled Carbon Steel Sheet from Korea, Inv. No. 701-TA-172 (preliminary), USITC Pub. 1261 (June 1982).

47. 607 F. Supp. 123 (Ct. Int'l Trade 1985) (Newman, J.).

48. Slip op. 85-59 (Ct. Int'l Trade May 31, 1985), *amended* (order of July 19, 1985) (DiCarlo, J.).

49. 614 F. Supp. 1252 (Ct. Int'l Trade 1985) (Watson, J.).

50. Slip op. 85-84 (Ct. Int'l Trade Aug. 8, 1985) (Watson, J.).

51. *Jeannette Sheet Glass Corp. v. United States*, Ct. No. 83-05-00729, Appeal No. 86-519; *American Lamb Co. v. United States*, Ct. No. 84-07-00952, Appeal No. 86-560; *Armstrong Rubber Co. v. United States*, Appeal No. 85-2707; and *American Grape Growers Alliance for Fair Trade v. United States*, Ct. No. 84-04-00575, Appeal No. 85-2717.

52. *Lamb Meat from New Zealand*, Inv. No. 731-TA-188 (preliminary), USITC Pub. 1534 (1984).

53. Order of July 19, 1985.

D. THE COURT OF APPEALS' DECISION

On February 28, 1986, the Court of Appeals for the Federal Circuit reversed the lower court's decision in *American Lamb*, upholding the reasonableness of the Commission's consistent past practice in applying the "reasonable indication" standard.⁵⁴ First, the appellate court stressed that a reviewing court must accord substantial weight to an agency's interpretation of a statute it administers. "One writing on a clean slate might find the court's reasoning fully acceptable, but a 'court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.'"⁵⁵ Applying the "appropriate standard of judicial review,"⁵⁶ the appellate court held that the Commission's "long-standing practice must be viewed as permissible within the statutory framework."⁵⁷

Second, the Court of Appeals relied upon the plain meaning of the statute in rejecting the lower court's interpretation of "reasonable indication" to mean "mere possibility."⁵⁸ Third, the court concluded that the Commission's application of the preliminary injury standard was more in accord with legislative intent than the lower court's interpretation.⁵⁹ The appellate court noted support in legislative history for the statutory requirement for the Commission to use "best information available."⁶⁰ It also noted legislative history anticipating "as thorough [an investigation] . . . as possible using the information available within that time period. . . ."⁶¹ Finally, it cited Congress' expectation of an opportunity for interested parties to present their views to the Commission prior to its preliminary determination.⁶² The presentation of respondents' views would be meaningless if the Commission then simply disregarded them.

American Lamb will widely be considered the most significant court decision to date regarding injury determinations in antidumping and countervailing duty cases. While the standard for a preliminary injury determination still tips in favor of affirmative and against negative determinations,⁶³ under the Court of Appeals' ruling, some future negative preliminary injury determinations can be expected. Perhaps more importantly, the Court of Appeals has again assigned great weight to the administering agency's

54. *American Lamb Co. v. United States*, slip op. 86-569 (Ct. Int'l Trade Feb. 28, 1986).

55. *Id.* at 9.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 10-12.

60. *Id.* at 11.

61. *Id.*

62. *Id.* at 12.

63. *Id.* at 9.

interpretation of the statute.⁶⁴ If the Court of International Trade were to do likewise, probably fewer determinations by the Commission and Commerce would be overturned in the first instance by the lower court.

II. Margins Analysis by the Commission in its Injury Determinations

A. INTRODUCTION

A longstanding issue in AD and CVD injury determinations is whether the Commission must or should take into account the level of subsidies or margin of dumping⁶⁵ found by Commerce in deciding whether material injury is caused by subsidized or "dumped" imports.⁶⁶ The Court of International Trade has recently ruled that such "margins analysis" is not required by the Act. Despite this precedent, there are still challenges to a Commission majority's refusal to employ margins analysis in its examination of causation.

B. BACKGROUND

In a final AD or CVD injury determination, the Commission must decide whether material injury is caused or threatened to a U.S. industry⁶⁷ "by reason of" imports found to have been subsidized or sold at less than fair value.⁶⁸ Under the earlier Antidumping Act, 1921,⁶⁹ and initially under Title VII of the Trade Agreements Act,⁷⁰ a majority of commissioners often considered the size of the less-than-fair-value margin or net subsidy⁷¹ in its

64. See also, e.g., *Smith Corona Group Corp. v. United States*, 713 F.2d 1568 (Fed. Cir. 1983), cert. denied, 104 U.S. 1274 (1984); and *Consumer Products Div., SCM Corp. v. Silver Reed*, 753 F.2d 1033 (Fed. Cir. 1985).

65. The term "dumping margin" refers to the *ad valorem* amount by which a product is sold below fair value.

66. See *supra* note 2.

67. A third criterion is whether the establishment of a U.S. industry is materially retarded "by reason of" such imports.

68. Sections 701(a)(2), 705(b)(1), 731(a)(2), 735(b)(1) of the Act, 19 U.S.C. §§ 1671(a)(2), 1671d(b)(1), 1673(a)(2), 1673d(b)(1) (1982). For other articles on the Commission's injury determinations and in particular its causation analysis, see Palmeter, *Countervailing Subsidized Imports: The International Trade Commission Goes Astray*, 2 UCLA PAC. BASIN L.J. 1 (1983); Easton and Perry, *The Causation of Material Injury: Changes in the Antidumping and Countervailing Duty Investigations of the International Trade Commission*, 2 UCLA PAC. BASIN L.J. 35 (1983); Palmeter, *Remarks*, 2 UCLA PAC. BASIN L.J. 57 (1983); and Note, *ITC Injury Determination in Countervailing Duty Investigations*, 15 LAW & POL'Y INT'L BUS. 911 (1983).

69. Pub. L. No. 67-10, Act of May 27, 1921, c.14, §§ 201-12, 42 Stat. 9 (1921), repealed by § 106(a) of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979).

70. Pub. L. No. 96-39, 93 Stat. 144 (1979).

71. Of course, injury determinations were not required in CVD investigations until 1975 for duty-free imports and 1980 for certain dutiable imports. See *supra* note 1.

analysis of underselling and causation.⁷² Apparently the last determination in which a majority of commissioners considered the size of the less-than-fair-value margin or net subsidy in its causation analysis was in December 1980, during the first year of Title VII's application.⁷³

In 1982, however, for the first time a Commission majority expressly declined to consider the size of a less-than-fair-value margin or net subsidy in its causation analysis. In a CVD investigation of *Certain Steel Wire Nails from Korea*,⁷⁴ initially Vice Chairman Calhoun alone refused to consider the net subsidy. His reasons were first, that the Trade Agreements Act directs the Commission to determine if material injury was by reason of imports rather than by reason of subsidies.⁷⁵ Second, the legislative history of the 1979 Act fails to instruct the Commission to base its injury determinations on tracing specific subsidies or dumping margins to a specific quantum of injury.⁷⁶ Third, Calhoun pointed to the purpose of the statutory scheme, which does not require a precise tracing of the net subsidy (or margin) to its impact on prices.⁷⁷ Fourth, Calhoun cited the administrative difficulties of engaging in a "close and detailed analysis of the nature and operation of a

72. Margins analysis was used during the period 1964 to December 1980. See the following briefs in *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, Court No. 84-10-01435 (Ct. Int'l Trade): Brief of Amicus Curiae Hyundai Pipe Co., Ltd. at 8-18; Defendant's Brief in Opposition to That Part of Plaintiff's Motion for Judgment upon the Agency Record Which Challenges the Determination of the International Trade Commission at 20 n.17; and Plaintiff's Brief at 3. According to Hyundai's brief, there were at least 53 determinations under the 1921 Act in which the Commission expressly addressed the less-than-fair-value margin in its rationale. Brief of Amicus Curiae Hyundai Pipe Co., Ltd. at 9.

73. *Anhydrous Sodium Metasilicate from France*, Inv. No. 731-TA-25 (final), USITC Pub. 1118 (December 1980). Commission determinations do not serve as precedents with the force of *stare decisis* in the way that court decisions do. The appellate court has held that "determinations in prior cases are of very limited guidance in future cases. . . . 'The Tariff Commission [now the International Trade Commission], unlike American courts of law, is not bound by its own precedents.'" *Armstrong Bros. Tool Co. v. United States*, 84 Cust. Ct. 16, 36 (1980), *aff'd*, 626 F.2d 168 (CCPA 1980), quoting Hendrick, *The U.S. Antidumping Act*, 58 AM. J. INT'L L. 914, 924 (1964). However, "[a]n agency in its deliberations is under an obligation to follow, distinguish, or overrule its own precedent." *Local 777, Democratic Union Organizing Comm. v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978), *reh'g denied* (1979).

74. Inv. No. 701-TA-145 (preliminary), USITC Pub. 1223 at 15-22 (March 1982).

75. *Id.* at 16, referring to §§ 701(a)(2) and 705(b)(1) of the Act, 19 U.S.C. §§ 1671(a)(2), 1671d(b)(1) (1982).

76. To the contrary, Congress did not want the Commission to weigh causes of injury. It indicated that material injury was to be found if the imports were a cause of material injury, without weighing cases. "Nor is the issue whether less-than-fair-value imports are the principal, a substantial, or a significant cause of material injury. Any such requirement has the undesirable result of making relief more difficult to obtain. . . ." S. REP. NO. 249, 96th Cong., 1st Sess. 74-75 (1979).

77. *Certain Steel Wire Nails from Korea*, *supra* note 74, at 19. "It would seem somewhat self-defeating to make this rather restrained remedy contingent upon a detailed tracking of these sometimes narrow practices through the complexities of the manufacturing, pricing and marketing patterns of foreign producers to an impact in the U.S. market." *Armstrong Bros. Tool Co. v. United States*, 84 Cust. Ct. 16, 18 (1980), *aff'd*, 626 F.2d 168 (CCPA 1980).

specific foreign practice and . . . following its effects through the marketplace.”⁷⁸ Fifth, predictability of relief would be enhanced and the burdensomeness of obtaining relief reduced by disregarding net subsidies or margins in determining causation.⁷⁹ Sixth, margins analysis would necessarily result in the application of different standards in preliminary and final determinations, since Commerce has not yet calculated a net subsidy or less-than-fair-value margin at the time of the Commission’s preliminary determination. According to Calhoun, Congress made no provision for such different standards.⁸⁰

Calhoun’s viewpoint became a majority position nine months later when Commissioners Eckes and Haggart also expressly declined to consider the size of the net subsidy in their causation analysis in another CVD case, *Certain Carbon Steel Products from Spain*.⁸¹ They stated that “the statute does not direct the Commission to consider the amount of the net subsidy in determining whether there is material injury. At most, the amount of the net subsidy is a factor which the Commission may consider under section 771(7)(B) of the Act.”⁸² Commissioner Haggart added that her decision to disregard the size of the net subsidy was further based on the Act’s specific language,⁸³ the absence of any legislative history indicating a Congressional intent to require consideration of the net subsidy in injury determinations, and the Act’s express provision that the presence or absence of even the factors specified in the statute are not to be dispositive.⁸⁴ Haggart also noted

78. *Id.* at 19. Commissioner Calhoun noted that if the Commission were to consider the effect of the net subsidy (rather than the imports) on the domestic industry,

“Either Commerce, or [the Commission] would have to investigate the financial, manufacturing and management practices of foreign companies in order to determine how the subsidy is used so we can determine its impact in the U.S. market. . . . [But] subsidies may be used in numerous ways that have little or no easily discernible relationship to price in the market. Such uses include improvement in manufacturing technology, increased return to shareholders, more aggressive advertising, higher salaries, accelerated debt retirement, and greater allocations to research and development. How are we to quantify their impact on the U.S. industry? Why is there no Congressional guidance on such an important matter if Commissioner Stern’s construction (which calls for considering the effect of the margin on the domestic industry) were intended? Title VII and the legislative history do provide great detail on similar complicated but important aspects of this legislation.”

Id. at 19–20.

79. *Id.* at 21.

80. *Id.* at 21–22.

81. Inv. Nos. 701-TA-155, 157-160, 162 (final), USITC Pub. 1331 (Dec. 1982).

82. *Id.* at 14.

83. *I.e.*, in CVD investigations, §§ 701(a)(2) and 705(b)(1) of the Act, 19 U.S.C. §§ 1671(a)(2), 1671d(b)(1) (1982).

84. Section 771(7)(E)(ii), 19 U.S.C. § 1677(7)(E)(ii) (1982), provides:

The presence or absence of any factor which the Commission is required to evaluate under subparagraph (C) or (D) shall not necessarily give decisive guidance with respect to the determination by the Commission of material injury.

that the net subsidy found by Commerce is an accounting calculation that may not accurately be compared to actual prices in the U.S. market; the commercial reality that a subsidy may not be reflected in prices charged for the import in the U.S.; the fact that the Act permits the Commission to find material injury even if no underselling exists; and Commerce's use of a different period of investigation in its subsidy investigations than the Commission uses in its injury investigations.⁸⁵

A Commission majority⁸⁶ applied such reasoning for the first time in an AD investigation, *Certain Welded Carbon Steel Pipes and Tubes from the Republic of Korea and Taiwan*.⁸⁷ Then Chairman Eckes stressed that in determining causation, the statute specifically indicates that the Commission should examine the imports which the Department of Commerce has determined are sold at less than fair value. Despite an ambiguous reference to margins in a Committee report,⁸⁸ the law makes no reference to Commission consideration of LTFV margins, nor does it suggest that the size of such margins is dispositive of the causation issue.

Also, the Department of Commerce has the responsibility for determining whether LTFV margins are *de minimis*. While one may question the value of an antidumping order based on such low LTFV margins, the Commission's function is not to review or redefine *de minimis* margins.⁸⁹

Since the time of the *Certain Carbon Steel Products from Spain* determination in late 1982, a majority of the Commission has consistently declined to consider the size of the less-than-fair-value margin or net subsidy in its analysis of underselling and causation. However, individual Commissioners have performed, and continue to perform, a margins analysis in some cases. In the same opinion that then Vice Chairman Calhoun expressly rejected margins analysis,⁹⁰ Commissioner Stern endorsed it. She concluded that the Act, its legislative history and the Subsidies and Antidumping Codes demonstrate that the proper basis for assessing causality is *not* to judge the full impact of the subject imports, which happen to benefit from a subsidy; but rather to judge the effects of the subsidy in causing the injury through the subject imports.⁹¹ As a result, she believed the Commission was

85. In light of these problems, a compelling argument can be made that the amount of the net subsidy calculation may have no methodological connection with any attempt to assess the effects in the U.S. market likely to be caused by certain foreign subsidy practices.

86. Chairman Eckes and Commissioner Haggart. Commissioners Liebeler and Röhr did not participate, and Commissioner Stern dissented.

87. Inv. Nos. 731-TA-131, 132, 138 (final), USITC Pub. 1519 (1984).

88. S. REP. NO. 249, 96th Cong., 1st Sess. 88 (1979).

89. Inv. Nos. 731-TA-131, 132, 138 (final), USITC Pub. 1519 at 11, n.46 (April 1984).

90. *Certain Steel Wire Nails from Korea*, *supra* note 74.

91. *Id.* at 12 (additional views of Comm'r Stern).

required "to trace, to whatever extent possible, the actual effects of the subsidies on the domestic industry."⁹²

In supporting her conclusion, Commissioner Stern noted legislative history of the Trade Agreements Act.⁹³ It notes that in determining causation, the Commission "considers, among other factors, . . . how the effects of the net bounty or grant relate to the injury, if any, to the domestic industry."⁹⁴ She further cited the Subsidies Code,⁹⁵ which was described by its negotiators as requiring a demonstration that "subsidized imports are, through the effects of the subsidy, causing injury. . . ."⁹⁶ She also stressed the Commission's "longstanding practice"⁹⁷ under the Antidumping Act, 1921, to link dumping margins to injury; and the repetition of that precedent in the first CVD injury investigation ever conducted by the Commission.⁹⁸ The Commission made a negative determination in that case, reasoning that a CVD order could not remedy the injury in light of the small portion of the margin of underselling accounted for by the net subsidy.⁹⁹

Moreover, in a recent case, *Fabric and Expanded Neoprene Laminate from Japan*,¹⁰⁰ Commissioner Stern based her dissent from the majority opinion (which found injury) on the fact that the margins of underselling far exceeded the less-than-fair-value margins. As a result, she reasoned, any incremental impact of dumping margins on prices of less-than-fair-value imports is clearly insignificant. She concluded, therefore, that less-than-fair-value imports were not a cause or threat of injury.¹⁰¹ Chairman Liebelier also has considered recently the size of a net subsidy or less-than-fair-value margin in determining whether injury is caused by imports that were subsidized or sold at less than fair value. In *Certain Red Raspberries from Canada*,¹⁰² she articulated a five-factor analysis that she proposed to apply in determining causation of injury. One of these factors is the size of net

92. *Id.* at 11.

93. *Id.* at 11-12.

94. S. REP. NO. 249, 96th Cong., 1st Sess. 57 (1979), cited in *Certain Steel Wire Nails from Korea*, *supra* note 74, at 13. Commissioner Stern focused on the subsidies language, since the investigation concerned was a CVD rather than AD investigation.

95. *Supra* note 1.

96. Rivers and Greenwald, *The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences*, 11 L. & POLICY INT'L BUS. 1447, 1457 (1979), cited in *Certain Steel Wire Nails from Korea*, *supra* note 74, at 12. See also Art. 3(4) of the Antidumping Code, *supra* note 36, and Art. 6(4) of the Subsidies Code, *supra* note 1. Each refers to a demonstration that injury is caused or threatened "through the effects of [dumping] [the subsidy]."

97. *Certain Steel Wire Nails from Korea*, *supra* note 74, at 13.

98. *Certain Zoris from the Republic of China (Taiwan)*, Inv. No. 303-TA-1, USITC Pub. 787 (Sept. 1976).

99. *Id.*

100. Inv. No. 731-TA-206 (final), USITC Pub. 1721 (July 1985).

101. *Id.*

102. Inv. No. 731-TA-196 (final), USITC Pub. 1707 (June 1985).

subsidies or less-than-fair-value margins. "The stronger the evidence of the following [including high net subsidies/margins], . . . the more likely that an affirmative determination will be made. . . ." ¹⁰³

C. THE TRADE AND TARIFF ACT OF 1984

The most recent amendments to the antidumping and countervailing duty laws were enacted by the Trade and Tariff Act of 1984. ¹⁰⁴ An early draft of that Act contained a provision requiring the Commission to take into account, in its final AD and CVD injury determinations, the size of the dumping margin or net subsidy found by Commerce. ¹⁰⁵ However, the House Ways and Means Committee voted to delete this provision. ¹⁰⁶

Similar language on margins analysis in a provision on interlocutory appeals to the courts ¹⁰⁷ survived temporarily, but erroneously. In a colloquy on the House floor, Representative Jenkins called to the attention of Representative Gibbons, Chairman of the House Ways and Means Committee's International Trade Subcommittee, the reference in the interlocutory appeals provision to authority for margins analysis. He recalled that the Ways and Means Committee voted to delete the provision expressly devoted to margins analysis, and "assume(d) that this language . . . should have been deleted [too]." ¹⁰⁸ Chairman Gibbons agreed that "The gentleman is correct. Regrettably, we should have deleted this reference in section 110. . . . I also want to assure you we will work with the Senate to modify the language and correct the problem. . . ." ¹⁰⁹

Subsequently, that provision was not included in the later bill that became the Trade and Tariff Act of 1984. ¹¹⁰ From this legislative history, it appears

103. *Id.* at 16 (additional views of Vice Chairman Liebler). The other four factors are: (1) large and increasing market share, (2) homogeneous products, (3) declining prices, and (4) barriers to entry to other foreign producers. *Id.* See also, e.g., Tubular Steel Framed Stacking Chairs from Italy, Inv. No. 731-TA-202 (final), USITC Pub. 1722 at 12 (July 1985). Commissioner Stern, on the other hand, does not believe it is necessary or desirable to determine the question of material injury separately from the consideration of causality. See, e.g., *id.* at 7, n.14.

104. Pub. L. No. 98-573, 98 Stat. 2948 (1984).

105. SUBCOMM. ON TRADE, H.R. COMM. ON WAYS AND MEANS 4 (undated, unpublished), DESCRIPTION OF POSSIBLE TRADE REMEDY BILL; DISCUSSION DRAFT #2, H.R. —, § 104 (a)(2) (A) at 13 (Aug. 19, 1983).

106. See H.R. 4784, 98th Cong., 2d Sess., 130 CONG. REC. H652 (daily ed. Feb. 8, 1984), which does not include this provision.

107. *Id.*, § 110.

108. 96 CONG. REC. H7908 (daily ed. July 26, 1984).

109. *Id.* at 7908-09.

110. H.R. 3398 was first passed by the Senate on Sept. 20, 1984, 130 CONG. REC. 511, 581 (daily ed. Sept. 20, 1984); and by the House on Oct. 3, 1984, 130 CONG. REC. H11, 012 (daily ed. Oct. 3, 1984). It was passed by both sides on Oct. 9, 1984, 130 CONG. REC. 513, 974, H11, 667-68; and signed by President Reagan on Oct. 30.

that at least the House considered but decided not to require the Commission to take into account the size of the net subsidy or dumping margins in determining whether material injury is caused or threatened by reason of imports that were subsidized or sold at less-than-fair-value.

D. THE COURT OF INTERNATIONAL
TRADE'S *MAINE POTATO*
AND *REPUBLIC STEEL* DECISIONS

In November 1983, Commerce found weighted-average less-than-fair-value margins ranging from .6 to 58.3 percent *ad valorem* on Fall-Harvested Round White Potatoes from Canada.¹¹¹ In its subsequent final injury investigation, the Commission issued a negative determination and the majority declined to consider the size of the less-than-fair-value margin.¹¹² The petitioner then sued in the Court of International Trade, arguing that the Commission erred because it refused to consider the less-than-fair-value margin.

In *Maine Potato Council v. United States*,¹¹³ the Court ruled that the Commission is not required to ascertain whether there is a causal link between the less-than-fair-value margin and the imported product's ability to undersell the domestic like product. The Court relied in part on the legislative history of the Trade and Tariff Act of 1984, *supra*.¹¹⁴ It also noted that the Commission's interpretation of the Act—that it does not require consideration of less-than-fair-value margins—is entitled to great weight.¹¹⁵ On these two bases alone, the Court concluded that "the Commission is not required to consider dumping margins in reaching a decision on material injury by reason of LTFV [less-than-fair-value] imports."¹¹⁶

In addition to *Maine Potato*, the Court has also addressed the issue of margins analysis in *dicta*. In *Republic Steel Corp. v. United States*,¹¹⁷ the Court noted that "Our law does not go so far as to require that the *subsidy itself* be shown to be the cause of injury. . . ." (emphasis in original).¹¹⁸

111. 48 Fed. Reg. 51,669 (1983) (final).

112. Fall-Harvested Round White Potatoes from Canada, Inv. No. 731-TA-124 (final), USITC Pub. 1463 (Dec. 1983).

113. 613 F. Supp. 1237 (Ct. Int'l Trade) (1985).

114. *Id.* at 1242-43. See *supra* notes 94-100 and accompanying text.

115. *Id.* at 1242. The court cited *Melamine Chemicals, Inc. v. United States*, 732 F.2d 924, 928 (Fed. Cir. 1984).

116. 613 F. Supp. at 1243.

117. 591 F. Supp. 640 (Ct. Int'l Trade 1984), *reh'g denied*, slip op. 85-27 (March 11, 1985) *dismissed* (order of Aug. 13, 1985).

118. *Id.* at 646.

E. SIGNIFICANCE OF *Maine Potato*

The *Maine Potato* ruling was not appealed to the Court of Appeals for the Federal Circuit, so the issue of whether the Commission is *required* to conduct a margins analysis would seem to have been decided.¹¹⁹ However, in *Luciano Pisoni Fabrica Accessori Instrumenti Musicali and Enzo Pizzi, Inc. v. United States*,¹²⁰ respondent in an AD investigation in which Commerce found low margins¹²¹ and the Commission found injury¹²² has claimed the Commission erred in refusing to consider the small size of the less-than-fair-value margin. Unless appellant prevails in this litigation, any further judicial challenges concerning margins analysis presumably would be limited to whether the Commission *may* consider the size of net subsidies or less-than-fair-value margins in determining causation.

III. Application of the Cumulation Provision of the Trade and Tariff Act of 1984

A. INTRODUCTION

The Trade and Tariff Act of 1984¹²³ includes a provision requiring the Commission, in specified circumstances, to cumulate imports from different countries in determining whether material injury is caused by reason of imports that were subsidized or sold at less than fair value. Since that Act's passage, the Commission has significantly refined its interpretation and application of this important provision. Moreover, the Court of International Trade has recently ruled that the Commission must "cross-cumulate" imports subject to antidumping and countervailing duty investigations.¹²⁴

B. BACKGROUND

The Act requires the Commission, in its Title VII injury determinations, to assess, among other things, both the volume of imports and the price effects of such imports.¹²⁵ Formerly the Commission enjoyed discretion

119. The Court of Customs and Patent Appeals has held that a party seeking reversal of prior precedent must provide a "clear and convincing showing of error." *Department of Energy v. Westland*, 565 F.2d 685, 690 (CCPA 1977).

120. Ct. Int'l Trade No. 84-10-0135.

121. Pads for Woodwind Instrument Keys from Italy, 49 Fed. Reg. 28,295 (1984) (final). The margins ranged from 1.03 to 1.16 percent *ad valorem*.

122. Pads for Woodwind Instrument Keys from Italy, Inv. No. 731-TA-152 (final), USITC Pub. 1566 (Aug. 1984).

123. Pub. L. No. 98-573, 98 Stat. 2948 (1984).

124. *Bingham & Taylor v. United States*, slip op. 86-14 (Ct. Int'l Trade, Feb. 14, 1986).

125. Section 771(7) of the Act, 19 U.S.C. § 1677(7) (1982).

about whether to cumulate imports of a product from various countries being investigated.¹²⁶ For example, in determining the absolute and relative volume of imports, the Commission decided whether it was appropriate to add imports of a product from three countries under investigation, or to consider them separately in each case. Cumulating them increases the likelihood of an affirmative injury determination.

Section 612(a)(2)(A) of the Trade and Tariff Act of 1984 amended Title VII of the Act by the enactment of a new subsection pertaining to cumulation:

(iv) CUMULATION.—For the purposes of clauses (i) and (ii), the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such products compete with each other and with the like products of the domestic industry in the United States market.¹²⁷

The subject imports must satisfy three requirements before cumulation is warranted. They must: (1) compete with other imports and with the domestic like products, (2) be marketed within a reasonably coincident time period, and (3) be subject to investigation.¹²⁸

In applying these conditions to the facts of particular cases, the Commission has developed criteria for each condition. In determining whether the imported products compete with each other and with the like product in the U.S. market, it has established five criteria:

126. The issue of cumulation was reached only if the Commissioners were unable to vote affirmatively on an individual country basis. The decision to cumulate was made on a case-by-case basis and was solely within the discretion of each individual commissioner. Most commissioners applied cumulation under certain circumstances, but articulated a variety of differing criteria and conditions. See, e.g., *Certain Steel Products from Belgium, Brazil, France, Italy, Luxembourg, the Netherlands, Romania, the United Kingdom, and West Germany*, Inv. Nos. 701-TA-86-144, 701-TA-146, 701-TA-147, and 731-TA-53-86 (preliminary), USITC Pub. 1221 at 16-17 (1982), cited in *Carbon Steel Wire Rod from the German Democratic Republic*, Inv. No. 731-TA-205 (preliminary), USITC Pub. 1607 at 10 n.29 (1984).

127. Pub. L. No. 98-573, § 612(a)(2)(A), to be codified at 19 U.S.C. § 1677(7)(C)(vi) (1982). A substantially less stringent cumulation provision was included in H.R. 4784 as introduced. See 130 CONG. REC. H652 (daily ed. Feb. 8, 1984); H.R. 4784 (as introduced), 98th Cong., 2d Sess., § 104(a)(2)(A) (1984). It was approved by the House Trade Subcommittee. SUBCOMM. ON TRADE OF THE HOUSE COMM. ON WAYS AND MEANS, 98TH CONG., 2D SESS., REPORT ON H.R. 4784: TRADE REMEDIES REFORM ACT OF 1984 at 26-27 (Comm. Print 1984). However, the full Ways and Means Committee substituted tougher criteria requiring cumulation of imports from two or more countries if the imports compete with each other and with like products of the domestic industry in the United States. See § 612(a)(2) of the Trade and Tariff Act, to be codified at 19 U.S.C. § 1677(7)(C)(vi) (1982).

While the Senate opted for the looser approach, the Conference Committee adopted the stricter Ways and Means Committee language. Consequently, more AD/CVD cases are likely to be filed. A U.S. company intending to file an AD or CVD petition on imports from one country now more seriously considers filing a companion petition on the same imports from other countries as well, even if they account for absolutely or relatively small volumes.

128. *Id.*; H.R. REP. NO. 1156, 98th Cong., 2d Sess. 173 (1984), reprinted in 1984 U.S. CODE CONG. & ADM. NEWS 5290.

- (1) the degree of fungibility between imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality-related questions;¹²⁹
- (2) the presence of sales or offers to sell in the same geographic markets of imports from different countries and the domestic like product;¹³⁰
- (3) the existence of common or similar channels of distribution of imports from different countries and the domestic like product;¹³¹
- (4) whether the prices of imports and the domestic like product are within a reasonable range;¹³² and

129. *E.g.*, in *Oil Country Tubular Goods from Argentina, Canada, and Taiwan*, Inv. Nos. 701-TA-255-256 and 731-TA-275-277 (preliminary), USITC Pub. 1747 at 9 (Sept. 1985), Canadian suppliers of seamless oil country tubular goods (OCTG) argued that their higher quality product was not fungible with other OCTG. However, the Commission noted that the seamless product accounted for only about a third of imports from Canada; and that Canadian producers supply a range of product quality, including products the same as those imported from other countries concerned. Therefore, it considered the products fungible.

In *Certain Cast-Iron Pipe fittings from Brazil, Korea and Taiwan*, Inv. Nos. 731-TA-278-281 (preliminary), USITC Pub. 1753 at 9 (Sept. 1985), the Commission noted evidence that imports from Korea and Taiwan are sold to a greater extent in the residential market than are either domestic or Brazilian products. Yet it concluded that there was apparently a "reasonable overlap" among the importers and domestic producers as to the end-users to whom the product is directed.

130. *E.g.*, in *Oil Country Tubular Goods from Argentina, Canada, and Taiwan*, *supra* note 129, at 9-10, Canadian producers argued that their OCTG entered the U.S. through northern ports such as Detroit and Buffalo, rather than Houston, New Orleans and other Gulf and East Coast ports used by OCTG imports from the other countries concerned. They also argued that they served different markets, such as the Appalachian and Rocky Mountain regions, rather than the Gulf Coast and Southwestern U.S. markets served by OCTG imported from the other countries concerned. However, the Commission considered evidence of a domestic sale lost to Canadian imports in the Houston area, and of a Canadian sale lost to Argentine imports in the Midwest, to indicate that the Canadian product does compete in the same market to which the domestic and other imported OCTG are directed.

In *Certain Welded Carbon Steel Pipes and Tubes from India, Taiwan, Turkey, and Yugoslavia*, Inv. Nos. 701-TA-251-253 and 731-TA-271-274 (preliminary), USITC Pub. 1742 at 14 n.42 (Aug. 1985), the Commission cumulated imports from Thailand with others even though they predominantly entered the U.S. through West Coast ports (whereas other imports predominantly entered through East and Gulf Coast ports). The Commission relied on the lack of information of record that Thai imports into the West Coast were sold exclusively to West Coast users, or that other imports imported through Gulf Coast ports were sold exclusively to Gulf Coast users. The Commission expressly agreed to explore this issue in detail should it later conduct final investigations.

131. *E.g.*, in *Oil Country Tubular Goods from Argentina, Canada, and Taiwan*, *supra* note 129, at 10, Canadian producers argued that they used established distributors rather than selling directly to end users as do the Argentines and Taiwanese. The Commission noted, however, that at least one Canadian producer maintains a sales office in Houston.

132. *E.g.*, in *Oil Country Tubular Goods from Argentina, Canada and Taiwan*, *id.*, the Commission concluded that the prices of domestic and certain imported OCTG were "reasonably comparable" despite evidence of higher priced imports from Canada in some instances. It stressed that pricing data in these preliminary investigations were limited, and that it would "look more closely" at this issue in any final investigations.

(5) whether the imports are simultaneously present in the market.¹³³ These criteria are not exclusive, and no single factor is determinative.¹³⁴

In determining whether the marketing of imports is reasonably coincident, the Commission has considered: (1) the geographic markets for imports and domestic products, (2) the channels of distribution, and (3) the simultaneous presence of both imports and domestic products within the same markets.¹³⁵

Finally, in determining which imports are "subject to investigation," the Commission has considered whether to cumulate imports subject to an outstanding AD or CVD order or a voluntary restraint agreement (VRA), and whether to cross-cumulate imports subject to AD and CVD investigations.

First, it has declined to cumulate imports subject to investigation with imports subject to VRAs with the United States, at least where the VRA was concluded prior to any final determination whether the imports were unfairly traded.¹³⁶

Second, a Commission majority has decided to cumulate imports under investigation with imports subject to an outstanding AD or CVD order, as appropriate, provided that such orders are not so remote in time that the unfairly traded imports subject to the investigations resulting in the orders did not enter the U.S. market reasonably coincident in time with imports currently under investigation.¹³⁷

Third, the Commission had consistently declined to cumulate imports across AD and CVD investigations.¹³⁸ However, on February 14, 1986, the

133. *E.g., id.* For cases stating these five criteria, *see, e.g.*, Certain Welded Carbon Steel Pipes and Tubes from India, Taiwan, Turkey, and Yugoslavia, *supra* note 130, at 12; Certain Steel Wire Nails from the People's Republic of China, Poland, and Yugoslavia, Inv. Nos. 731-TA-266-268 (preliminary), USITC Pub. 1730 at 8 (July 1985); Oil Country Tubular Goods from Australia, Romania, and Venezuela, Inv. Nos. 701-TA-240-241 and 731-TA-249-251 (preliminary), USITC Pub. 1679 at 8 (1985).

134. *Id.*

135. *E.g.*, Iron Construction Castings from Brazil, Canada, India, and the People's Republic of China, Inv. Nos. 701-TA-249-252 and 731-TA-262-265 (preliminary), USITC Pub. 1720 (June 1985).

136. *See, e.g.*, Certain Carbon Steel Products from Austria and Sweden, *supra* note 125, at 10-11; Oil Country Tubular Goods from Argentina, Canada, and Taiwan, *supra* note 129, at 11, 17.

137. *See, e.g.*, Certain Carbon Steel Products from Austria and Sweden, Inv. Nos. 701-TA-225, 227-228, 230-231 and 731-TA-219 (final), USITC Pub. 1759 at 11-12 (Sept. 1985). *But cf.* the dissenting views of Chairman Liebler set forth, *e.g.*, in Certain Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden and Venezuela, Inv. Nos. 701-TA-225-234 and 731-TA-213-217, 219, 221-226, 228-235 (preliminary), USITC Pub. 1642 at 44-48 (Feb. 1985) (additional views of Vice Chairman Liebler).

138. *E.g.*, Certain Carbon Steel Products from Austria and Sweden, *supra* note 137, at 11; Iron Construction Castings from Brazil, Canada, India, and the People's Republic of China, *supra*, note 135, at 12; Certain Carbon Steel Products from Austria, Czechoslovakia, East

Court of International Trade ruled that such "cross-cumulation" is required. In *Bingham & Taylor v. United States*,¹³⁹ the court held that cross-cumulation—aggregation of less-than-fair-value and subsidized imports from two or more countries for purposes of volume and price analysis—is mandated by the statute, and that the Commission's refusal to cross-cumulate was contrary to the statute, its purpose and legislative intent.¹⁴⁰

Germany, Hungary, Norway, Poland, Romania, Sweden and Venezuela, *supra*, note 137, at 44-48.

139. Slip Op. 86-14 (Ct. Int'l Trade Feb. 14, 1986).

140. *Id.* at 60.

