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## COMMENTS

### The Domestic Industry Definition in Value-Added Agricultural Investigations: Why All the Attention?

#### I. Introduction

With the passage of the first national tariff act on July 4, 1789,<sup>1</sup> the United States government began its regulation of the effects of imported goods on domestic competition. Unfair trade practices were first addressed by a countervailing duty law passed in 1890,<sup>2</sup> and later, in an effort to comprehensively address the problem, Congress enacted the Tariff Act of 1930 (the Act).<sup>3</sup> The Act and its subsequent amendments<sup>4</sup> laid the groundwork for the current United States International Trade Commission (the Commission).

The Commission investigates allegedly unfair trade practices and in appropriate situations imposes compensatory duties.<sup>5</sup> This Article discusses the effect of the two most recent amendments<sup>6</sup> to Title VII of the Act, on Commission investigations of value-added agricultural products. These statutory provisions are the basis of an-

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<sup>1</sup> Tariff Act of July 4, 1789, ch. 2, 1 Stat. 24 (1789).

<sup>2</sup> Tariff Act of 1890, ch. 1244, 26 Stat. 567 (1890). *See also* de Kieffer, *When, Why and How to Bring a Countervailing Duty Proceeding: A Complainant's Perspective*, 6 N.C.J. INT'L L. & COM. REC. 363, 364 (1981)(arguing that the first countervailing duty act was enacted in combination with the Sherman Antitrust Act, ch. 647, § 1, 76 Stat. 209 (1890), in response to increasing sensitivity to unrestrained monopolization).

<sup>3</sup> Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (1930)(codified as amended at 19 U.S.C. §§ 1671-77 (1982 & Supp. III 1985)). *See also* STAFF OF HOUSE COMM. ON WAYS AND MEANS, SUBCOMM. ON TRADE, 98TH CONG., 2D SESS., OVERVIEW OF CURRENT PROVISIONS OF U.S. TRADE LAW 47 (Comm. Print 1984).

<sup>4</sup> *See, e.g.*, Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, 48 Stat. 943 (1934)(codified as amended at 19 U.S.C. §§ 1351-54 (1982)); Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975)(codified as amended in scattered sections of 19 U.S.C.); Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended in scattered sections of 19 U.S.C.); Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (to be codified in scattered sections of 19 U.S.C.); *see also* HOUSE COMM. ON WAYS AND MEANS, *supra* note 3, at 140-43; Bello & Holmer, *Current Developments, The Trade and Tariff Act of 1984: Principal Antidumping and Countervailing Duty Provisions*, 19 INT'L LAW. 639 (1985).

<sup>5</sup> *See* 19 U.S.C. §§ 1671-77 (1982 & Supp. III 1985); *see also* 1985 USITC ANN. REP. ix, 2-4; UNITED STATES TRADE REPRESENTATIVE, A PREFACE TO TRADE 113-14 (1982)[hereinafter PREFACE TO TRADE].

<sup>6</sup> *See* Trade Agreements Act of 1979; Trade and Tariff Act of 1984.

tidumping and countervailing duty<sup>7</sup> law applied in investigations conducted by the Commission.<sup>8</sup>

Since 1980,<sup>9</sup> the "domestic industry" definition has been a main focus by the Commission in determining whether in agricultural investigations an "unfair" import has caused an injury.<sup>10</sup> The Commission is required to determine whether the appropriate domestic industry is comprised solely of the processor *or* the processor and the grower of the agricultural product.<sup>11</sup> The majority of the Commission uses a two-prong test to determine when growers should be included in the industry producing a value-added product.<sup>12</sup> While Congress has debated whether to alter this definition to better compensate the domestic industry for actual injury,<sup>13</sup> the determination often becomes meaningless because of the absence of a causal link between the unfair imports and the injury.<sup>14</sup> Therefore, the attention given to the domestic industry determination is misplaced. The "injury" determination should be the focus.

This Article discusses the Commission's application of the statutory<sup>15</sup> "like product" and "domestic industry" definitions in value-added agricultural investigations.<sup>16</sup> Included is a discussion of *American Grape Growers v. United States*,<sup>17</sup> a recent case reviewing appropriate Commission standards. The Article examines the effect of the domestic industry definition on the material injury and causation determinations.<sup>18</sup> Finally, a summary of recent congressional proposals to amend the "domestic industry" and "like product" definitions is presented.<sup>19</sup>

The Article concludes that the definition of "domestic industry" or "like product" is not the limiting factor in many cases because, under current standards, no causal link can be established between

<sup>7</sup> An antidumping duty is a duty imposed to offset the comparative advantage of imports sold in the United States at less than fair value. A countervailing duty is a duty imposed to offset the competitive advantage of subsidized imports. See 19 U.S.C. §§ 1671, 1673 (1982); see also *infra* notes 23, 36 and accompanying text.

<sup>8</sup> See 19 U.S.C. §§ 1671-77 (1982); see also 1985 USITC ANN. REP. ix, 2-4.

<sup>9</sup> Relevant portions of the Trade Agreements Act of 1979 became effective Jan. 1, 1980. See Trade Agreements Act of 1979; see also Recent Developments, *International Trade GATT Legislation—The Trade Agreements Act of 1979*, Pub. L. No. 96-39, 93 Stat. 144 (1979), 20 HARV. INT'L L.J. 687, 688 (1979).

<sup>10</sup> "Unfair" refers to imported articles which are subsidized or sold at less than fair value (dumped). See PREFACE TO TRADE, *supra* note 5, at 64; 1985 USITC ANN. REP. 2; see also 19 U.S.C. §§ 1671-77 (1982).

<sup>11</sup> See *infra* notes 69-150 and accompanying text.

<sup>12</sup> See *infra* notes 84-118, 138-150 and accompanying text.

<sup>13</sup> See *infra* note 183 and accompanying text.

<sup>14</sup> See *infra* notes 162-84 and accompanying text.

<sup>15</sup> See 19 U.S.C. §§ 1671-77 (1982).

<sup>16</sup> See *infra* notes 41-150 and accompanying text.

<sup>17</sup> 604 F. Supp. 1245 (Ct. Int'l Trade 1985). See also *infra* notes 121-29 and accompanying text.

<sup>18</sup> See *infra* notes 151-85 and accompanying text.

<sup>19</sup> See *infra* note 183 and accompanying text.

the injury to the domestic industry and the imports. Because of the absence of this causal link, the proposed congressional changes would not only be costly to petitioners but ineffective as well. Thus, the emphasis on domestic industry is misplaced.<sup>20</sup>

## II. Administration of Current Law

The International Trade Commission is an independent, six-member, quasi-judicial agency authorized to investigate foreign trade matters affecting domestic production, employment, and consumption.<sup>21</sup> Pursuant to Title VII of the Act,<sup>22</sup> the Commission is empowered to determine whether a domestic industry is harmed, either by subsidized imports or by merchandise sold at less than fair value in the United States (a practice commonly known as “dumping”).<sup>23</sup> A domestic industry is considered to be harmed if it is materially injured, threatened with material injury, or if the establishment of a domestic industry is materially retarded by reason of such imports.<sup>24</sup>

To initiate a Commission investigation, the domestic industry must file a petition requesting relief from allegedly injurious imports simultaneously with the Commission and the United States Department of Commerce (Commerce).<sup>25</sup> Once Commerce determines the industry petition is adequate, or within forty-five days of filing,<sup>26</sup> the Commission makes its preliminary injury determination.<sup>27</sup> For an affirmative preliminary decision, the Commission must find a reasonable indication of material injury, threat, or retardation to a domestic industry by reason of the imports.<sup>28</sup>

If Commerce then preliminarily determines that it is reasonable to suspect that certain imports are being subsidized by a foreign government<sup>29</sup> or “dumped,”<sup>30</sup> Commerce is required to estimate the size of the subsidy<sup>31</sup> or dumping margin.<sup>32</sup> Within seventy-five days of this preliminary estimate, Commerce makes a final determination

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<sup>20</sup> See *infra* note 184 and accompanying text.

<sup>21</sup> 1985 USITC ANN. REP. ix.

<sup>22</sup> See *supra* note 3 and accompanying text.

<sup>23</sup> See 19 U.S.C. §§ 1671, 1673 (1982).

<sup>24</sup> See *id.* §§ 1671(a)(2), 1673(a)(2) (1982 & Supp. III 1985).

<sup>25</sup> See *id.* §§ 1671a(b)(2), 1673a(b)(2), 1677(1) (1982). For a detailed description of the procedure see Silverman, *An Examination of the Antidumping Provisions of the Trade Agreements Act of 1979: United States Implementation of the Antidumping Code Formulated in the Tokyo Round*, 7 SYRACUSE J. INT'L L. & COM. 239, 247-52 (1979-1980); see also Barshefsky & Cunningham, *The Prosecution of Antidumping Actions under the Trade Agreements Act of 1979*, 6 N.C.J. INT'L L. & COM. REG. 307, 330-41 (1981).

<sup>26</sup> 19 U.S.C. §§ 1671a(c), 1673a(c) (1982).

<sup>27</sup> *Id.* §§ 1671a(d), 1673a(d).

<sup>28</sup> *Id.* §§ 1671b(a), 1673b(a).

<sup>29</sup> *Id.* § 1671b(b) (1982 & Supp. III 1985).

<sup>30</sup> *Id.* § 1673b(b) (1982).

<sup>31</sup> *Id.* § 1671b(b)(1) (Supp. III 1985).

<sup>32</sup> *Id.* § 1673b(b) (1982).

of whether imports are actually being subsidized<sup>33</sup> or dumped.<sup>34</sup>

Once Commerce makes these determinations, the Commission decides whether the domestic industry has sustained material injury.<sup>35</sup> If the Commission decides affirmatively, customs officers assess an antidumping or countervailing duty equivalent to the amount of the subsidy or dumping margin.<sup>36</sup> In the course of an investigation, the Commission determines which is the appropriate domestic industry<sup>37</sup> producing the like product,<sup>38</sup> and whether any injury to the domestic industry<sup>39</sup> has resulted from the imports.<sup>40</sup>

### III. Like Product

The Commission's antidumping and countervailing duty investigations begin with a determination of which domestic products are "like" the imported item.<sup>41</sup> This determination helps focus the examination of the domestic industry and facilitates the later injury and causation determinations.<sup>42</sup> Only the domestic industry which actually produces the like product is examined to determine injury and causation.<sup>43</sup> Although parties before the Commission have varied in their interpretation of the expansiveness of the like product definition,<sup>44</sup> statutory language provides the Commission with some guide.<sup>45</sup> Section 1677(10) of Title 19 of the United States Code (U.S.C.) states, "The term 'like product' means a product which is like, or in the absence of like, most similar *in characteristics and uses with*, the article subject to an investigation . . ."<sup>46</sup> The statute offers a pragmatic definition of the domestic like product by focusing on

<sup>33</sup> *Id.* § 1671d(a)(1).

<sup>34</sup> *Id.* § 1673d(a)(1).

<sup>35</sup> *Id.* §§ 1671d(b)(1),(2), 1673d(b)(1),(2) (1982 & Supp. III 1985).

<sup>36</sup> *Id.* §§ 1671e, 1673e (1982). The amount of a countervailing duty is equal to the amount of the foreign subsidy. *Id.* § 1671e(a)(1). The amount of an antidumping duty is equal to the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise. *Id.* § 1673e(a)(1).

<sup>37</sup> See 19 U.S.C. §§ 1671, 1673, 1677(4) (1982 & Supp. III 1985); see also *infra* notes 69-150 and accompanying text.

<sup>38</sup> 19 U.S.C. §§ 1671, 1673, 1677(10) (1982 & Supp. III 1985); see also *infra* notes 41-68 and accompanying text.

<sup>39</sup> 19 U.S.C. §§ 1671, 1673, 1677(7) (1982 & Supp. III 1985); see also *infra* notes 151-63 and accompanying text.

<sup>40</sup> 19 U.S.C. §§ 1671, 1673, 1677 (1982 & Supp. III 1985); see also *infra* notes 164-83 and accompanying text.

<sup>41</sup> See 19 U.S.C. §§ 1671, 1671b(a), 1671d(a), 1673, 1673b(a), 1673d(a), 1677(10) (1982 & Supp. III 1985).

<sup>42</sup> See *infra* notes 151-83 and accompanying text.

<sup>43</sup> See 19 U.S.C. §§ 1671, 1673, 1677 (1982 & Supp. III 1985).

<sup>44</sup> See, e.g., Certain Table Wine from the Federal Republic of Germany, France, and Italy, USITC Pub. 1771, Inv. Nos. 701-TA-258-260/731-TA-283-285 (Oct. 1985) (preliminary); Live Swine and Pork from Canada, USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985) (final); Lamb Meat from New Zealand, USITC Pub. 1534, Inv. Nos. 701-TA-214/731-TA-188 (June 1984) (preliminary).

<sup>45</sup> 19 U.S.C. § 1677(10) (1982).

<sup>46</sup> *Id.* (emphasis added).

the characteristics and uses of the item.<sup>47</sup> In value-added agricultural investigations, therefore, the Commission has not required that the like product be identical to the imported item.<sup>48</sup>

In animal and animal product cases, the Commission has generally determined that there are two like products:<sup>49</sup> the basically unprocessed animal<sup>50</sup> and the processed carcass.<sup>51</sup> These decisions apparently adhere to the "characteristics and uses" language mentioned in the statute<sup>52</sup> and its legislative history.<sup>53</sup> In fish investigations,<sup>54</sup> for example, the Commission distinguished the eviscerated fish from the boned filets. The latter are fish ready to be sold directly to consumers while the former are fish imported for further processing.<sup>55</sup> The "characteristics and uses" test was also employed

<sup>47</sup> The requirement that a product be "like" the imported article should not be interpreted in such a narrow fashion as to permit minor differences in *physical characteristics or uses* to lead to the conclusion that the product and article are not "like" each other, nor should the definition of "like product" be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under investigation.

S. REP. No. 249, 96th Cong., 1st Sess. 90-91, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 476-77 (emphasis added). *See also* Langer, *The Concepts of Like Product and Domestic Industry Under the United States Trade Agreements Act of 1979*, 17 GEO. WASH. J. INT'L L. & ECON. 495, 498-510 (1983).

<sup>48</sup> The following discussion addresses only those investigations conducted following the enactment of the Trade Agreement Act of 1979, which became effective January 1, 1980. The discussion is further limited to value-added agricultural like product antidumping and countervailing duty investigations where the Commission considered inclusion of growers of the raw agricultural product in determining the domestic industry.

<sup>49</sup> *See* Certain Fresh Atlantic Groundfish from Canada, USITC Pub. 1844, Inv. No. 701-TA-257 (May 1986) (final); Live Swine and Pork from Canada, USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985) (final); Fish, Fresh, Chilled, or Frozen, Whether or Not Whole, But Not Otherwise Prepared or Preserved, from Canada, USITC Pub. 1066, Inv. No. 701-TA-40 (May 1980) (final).

Although in Lamb Meat from New Zealand, USITC Pub. 1191, Inv. No. 701-TA-80 (Nov. 1981) (preliminary), the Commission determined the like product was fresh lamb meat, petitioners had not alleged injurious imports of live sheep or lambs. *Id.* at 3-6. *See also* Lamb meat from New Zealand, USITC Pub. 1534, Inv. Nos. 701-TA- 214/731-TA-188 (June 1984) (preliminary).

<sup>50</sup> *See* Certain Fresh Atlantic Groundfish from Canada, USITC Pub. 1844, Inv. No. 701-TA-257 (May 1986) (final), at 4-5; Live Swine and Pork from Canada, USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985) (final), at 7; Fish, Fresh, Chilled, or Frozen, Whether or Not Whole, But not Otherwise Prepared or Preserved, from Canada, USITC Pub. 1066, Inv. No. 701-TA-40 (May 1980) (final), at 4.

<sup>51</sup> *See* Certain Fresh Atlantic Groundfish from Canada, USITC Pub. 1844, Inv. No. 701-TA-257 (May 1986) (final), at 4-5; Live Swine and Pork from Canada, USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985) (final), at 7; Fish, Fresh, Chilled, or Frozen, Whether or Not Whole, But Not Otherwise Prepared or Preserved, from Canada, USITC Pub. 1066, Inv. No. 701-TA-40 (May 1980) (final), at 4.

<sup>52</sup> *See* 19 U.S.C. § 1677(10) (1982).

<sup>53</sup> *See supra* note 47.

<sup>54</sup> *See* Certain Fresh Atlantic Groundfish from Canada, USITC Pub. 1844, Inv. No. 701-TA-257 (May 1986) (final); Fish, Fresh, Chilled, or Frozen, Whether or Not Whole, But Not Otherwise Prepared or Preserved, from Canada, USITC Pub. 1066, Inv. No. 701-TA-40 (May 1980) (final).

<sup>55</sup> *See* Fish, Fresh, Chilled, or Frozen, Whether or Not Whole, But not Otherwise Prepared or Preserved, from Canada, USITC Pub. 1066, Inv. No. 701-TA-40 (May 1980)

in *Live Swine and Pork from Canada*,<sup>56</sup> a 1984 Commission investigation. The Commission stated that "[s]wine are produced by growers for the purpose of being sold to, and slaughtered by, meat packers."<sup>57</sup> Pork is sold by packers to remanufacturers for further processing into food or by-products or for sale directly to consumers.<sup>58</sup> Pork and live swine have different characteristics and uses and thus are considered two different like products.

Unlike the animal-like product cases, the issue considered most often by the Commission in non-animal agricultural like product cases is how broad the like product determination should be rather than whether there should be more than one like product.<sup>59</sup> In another 1984 investigation, *Table Wine from France and Italy*,<sup>60</sup> there was debate regarding what wines should be included in the like product category of ordinary table wines.<sup>61</sup> The opinion focused on the nature of the wine in question.<sup>62</sup> It did not discuss whether non-processed agricultural products like grapes should be included in the domestic like product of ordinary table wine.<sup>63</sup> In deciding the breadth of non-animal like product determinations, the Commission concentrates on the characteristics and uses of the product.<sup>64</sup>

In most value-added agricultural like product investigations, petitioners allege more than one like product<sup>65</sup> or argue for a broader interpretation of the particular like product.<sup>66</sup> The Commission has

(final), at 4; *id.* at 15 (additional views of Comm'r Moore); *id.* at 22 (additional views of Comm'r Stern).

<sup>56</sup> USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985).

<sup>57</sup> *Id.* at 4.

<sup>58</sup> *Id.*

<sup>59</sup> See *Table Wine from Germany, France, and Italy*, USITC Pub. 1771, Inv. Nos. 701-TA-258-260/731-TA-283-285 (Oct. 1985) (preliminary); *Certain Red Raspberries from Canada*, USITC Pub. 1743, Inv. No. 701-TA-254 (Aug. 1985); *In-Shell Pistachio Nuts from Iran*, USITC Pub. 1777, Inv. No. 731-TA-287 (Nov. 1986) (preliminary); *Certain Red Raspberries from Canada*, USITC Pub. 1707, Inv. No. 731-TA-196 (June 1985) (final); *Frozen Concentrated Orange Juice from Brazil*, USITC Pub. 1406, Inv. No. 701-TA-184 (July 1983); *Table Wine from France and Italy*, USITC Pub. 1502, Inv. Nos. 701-TA-210-211/731-TA-167-168 (Oct. 1982) (preliminary).

<sup>60</sup> USITC Pub. 1502, Inv. Nos. 701-TA-210-211/731-TA-167-168 (March 1984) (preliminary). See *infra* notes 11-29 and accompanying text.

<sup>61</sup> USITC Pub. 1502, Inv. Nos. 701-TA-210-211/731-TA-167-168 (March 1984) (preliminary), at 4-6 (Commission refused to include premium wines in examining domestic industry producing ordinary table wine).

<sup>62</sup> *Id.* at 4-6.

<sup>63</sup> *Id.*

<sup>64</sup> See *Certain Red Raspberries from Canada*, USITC Pub. 1707, Inv. No. 731-TA-196 (June 1985) (final); *Frozen Concentrated Orange Juice from Brazil*, USITC Pub. 1283, Inv. No. 701-TA-184 (Sept. 1985) (preliminary); see also *Certain Red Raspberries from Canada*, USITC Pub. 1743, Inv. No. 701-TA-254 (Aug. 1985) (final).

<sup>65</sup> See *Certain Fresh Atlantic Groundfish from Canada*, USITC Pub. 1844, Inv. No. 701-TA-257 (May 1986) (final); *Live Swine and Pork from Canada*, USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985) (final); *Fish, Fresh, Chilled, or Frozen, Whether or Not Whole, But not Otherwise Prepared or Preserved, from Canada*, USITC Pub. 1066, Inv. No. 701-TA-40 (May 1980) (final).

<sup>66</sup> See *Table Wine from Germany, France, and Italy*, USITC Pub. 1771, Inv. Nos. 701-

had little difficulty in defining the like product for value-added agricultural product antidumping and countervailing duty investigations.<sup>67</sup> The difficult determination has been in defining the appropriate domestic industry producing these products. Commissioners have disagreed as to whether growers of agricultural products should be included in the domestic industry producing the value-added agricultural like product.<sup>68</sup>

#### IV. Domestic Industry

In antidumping<sup>69</sup> and countervailing<sup>70</sup> duty investigations, the Commission must determine the appropriate domestic industry.<sup>71</sup> This finding facilitates injury and causation determinations.<sup>72</sup> Only the Commission defined domestic industry will be examined for injury and causation determinations.<sup>73</sup> Accordingly, the statute provides the Commission with general guidelines for defining domestic industry.

The statute defines domestic industry as follows:

The term "industry" means the domestic producers as a whole

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TA-258-260/731-TA-283-285 (Oct. 1985)(preliminary); Certain Red Raspberries from Canada, USITC Pub. 1743, Inv. No. 701-TA-254 (Aug. 1985) (final); In-Shell Pistachio Nuts from Iran, USITC Pub. 1777, Inv. No. 731-TA-287 (Nov. 1985) (preliminary); Certain Red Raspberries from Canada, USITC Pub. 1707, Inv. No. 731-TA-196 (June 1985) (final); Frozen Concentrated Orange Juice from Brazil, USITC Pub. 1283, Inv. No. 701-TA-184 (Sept. 1982) (preliminary); Table Wine from France and Italy, USITC Pub. 1502, Inv. Nos. 701-TA-210-211/731-TA-167-168 (Oct. 1982) (preliminary).

<sup>67</sup> *But see* investigations with subassembly (an assembled unit that is designed to be incorporated with other units in a finished product) or component (a constituent or essential part or element of a finished product) like products. *Determining When a Component or Subassembly is Like its Finished Product*, ITC Gen. Couns. Mem. GC-J-075 at 1 nn. 3, 4 (April 30, 1986). The General Counsel Commission Office has suggested that the Commission use a factors test to decide when a subassembly or component should be included within the definition of an assembled like product. The suggested factors are 1) the essential characteristics of the final product and the part, 2) the type and extent of operations performed on the part in order to make the final product, and 3) whether the part is dedicated to use versus independent use. *Id.* at 6-9. *See, e.g.*, Erasable Programmable Read Only Memories (EPROM's) from Japan, USITC Pub. 1778, Inv. No. 731-TA-288 (Nov. 1985) (preliminary); Cellular Mobile Telephones and Subassemblies Thereof from Japan, USITC Pub. 1629, Inv. No. 731-TA-207 (Aug. 1985) (preliminary); 64K Dynamic Random Access Memory Components from Japan, USITC Pub. 173, Inv. No. 731-TA-270 (Aug. 1985)(preliminary).

Due to the similarities between the like product determination in subassembly and component investigations and value-added agricultural product investigations, this memorandum could offer assistance to the Commission in agricultural cases. Partly because this memorandum was only recently published, however, it has had no impact on agricultural investigations.

<sup>68</sup> *See infra* text accompanying notes 69-147.

<sup>69</sup> *See* 19 U.S.C. §§ 1673(a), 1673b(a), 1673d(b), 1677(4) (1982 & Supp. III 1985).

<sup>70</sup> *See id.* §§ 1671(a), 1671b(a), 1671d(a).

<sup>71</sup> *See id.* § 1677(4); *see also* Perry, *Administration of Import Trade Laws by the United States International Trade Commission*, 3 B.U. INT'L L.J. 345, 392-99 (1985).

<sup>72</sup> *See* 19 U.S.C. §§ 1671(a), 1671b(a), 1671d(a), 1673(a), 1673b(a), 1673d(a)(b), 1677 (1982 & Supp. III 1985); *see also* Perry, *supra* note 71, at 392-99.

<sup>73</sup> *See* 19 U.S.C. §§ 1671, 1673, 1677 (1982 & Supp. III 1985).



of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product; except that in the case of wine and grape products subject to investigation under this subtitle, the term also means the domestic producers of the principle raw agricultural product (determined on either a volume or value basis) which is included in the like domestic product, if those producers allege material injury or threat of material injury as a result of such wine and grape products.<sup>74</sup>

Much like the definition of like product,<sup>75</sup> the domestic industry definition is relatively vague and does not offer much guidance to the Commission in determining when growers of primary agricultural products should be included in the domestic industry.<sup>76</sup> More significantly, the statute does not indicate how broadly the phrase "domestic producers . . . of a like product" should be read.<sup>77</sup> Congress has offered additional language for the Commission to consider, however, when determining whether growers should be included in the domestic industry:

Because of the special nature of agriculture, including the cyclical nature of agricultural production, special problems exist in determining whether an agricultural industry is materially injured. For example, in the livestock sector, certain factors may appear to indicate a favorable situation for that industry when in fact the opposite is true. Thus, gross sales and employment in the industry producing beef could be increasing at a time when economic loss is occurring, i.e., cattle are being liquidated because prices make the maintenance of the herds unprofitable.<sup>78</sup>

Commissioners have relied upon this statement as grounds for including growers in the domestic industry producing a value-added agricultural like product.<sup>79</sup> A closer reading of the statement in context, however, suggests that Congress intended for the Commission to examine many facets of the agricultural processing industry in determining material injury and did not intend them to include growers and producers in one domestic industry.<sup>80</sup> The Commission's

<sup>74</sup> *Id.* § 1677(4).

<sup>75</sup> *Id.* § 1677(10). See also *supra* notes 41-68 and accompanying text.

<sup>76</sup> See *id.* §§ 1671(a), 1671b(a), 1671d(a), 1673(a), 1673b(a), 1673d(a)(b), 1677; see also Perry, *supra* note 71, at 392-99.

The portion of the statute dealing explicitly with grape growers in wine investigations is temporary and was added by the Trade and Tariff Act of 1984. The effective date was October 30, 1984, and the termination date was September 30, 1986. See Pub. L. No. 98-573, 98 Stat. 3033 (1984) (codified as amended at 19 U.S.C. § 1677(4) (1982 & Supp. III 1985)). This statutory inclusion is an exception to the tests currently used by the Commissioners and is discussed separately. See *infra* notes III-37 and accompanying text.

<sup>77</sup> 19 U.S.C. § 1677(4) (1982 & Supp. III 1985).

<sup>78</sup> S. REP. NO. 249, 96th Cong., 1st Sess. 88, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 474.

<sup>79</sup> See, e.g., Live Swine and Pork from Canada, USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985) (final) (dissenting views of Comm'r Eckes); Certain Red Raspberries from Canada, USITC Pub. 1707, Inv. No. 731-TA-196 (June 1985) (final); Frozen Concentrated Orange Juice from Brazil, USITC Pub. 1283, Inv. No. 701-TA-184 (Sept. 1982) (preliminary).

<sup>80</sup> The "herd liquidation" example in *supra* note 76 is located in the "reasons for the

Office of the General Counsel has recognized this apparent Commission misquote.<sup>81</sup> Thus, Commission citations to the "herd liquidation" language in support of including growers in a domestic industry appear to be unwarranted and inappropriate.<sup>82</sup> In addition, a congressional statement addressing the Trade and Tariff Act of 1984<sup>83</sup> also limits the inclusion of growers in the domestic processing industry.<sup>84</sup>

The "herd liquidation" statement does, however, evidence an awareness by Congress of the unique problems which arise in some agricultural commodity investigations.<sup>85</sup> In response to the difficult issue of when growers are to be included in the processing industry,<sup>86</sup> the Commission has developed a two-prong test. The two prongs are: (1) whether there is a continuous line of production from grower to processor;<sup>87</sup> and (2) whether there is a common economic interest between the growers and processors.<sup>88</sup> This test evolved in the early 1980's from two animal product investigations.<sup>89</sup>

In 1980, the Commission addressed the issue of grower inclu-

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provision" in the Senate report discussion of material injury and not domestic industry. See S. REP. NO. 249, 96th Cong., 1st Sess. 86-88, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 472-74.

<sup>81</sup> *Lamb Meat from New Zealand, Inv. No. 701-TA-80: Standing and the Definition of the Domestic Industry*, ITC Gen. Couns. Mem., GC-E-283, at 8 n.18 (October 27, 1981) [hereinafter *Standing and the Definition of the Domestic Industry*].

<sup>82</sup> See, e.g., *Live Swine and Pork from Canada*, USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985) (dissenting views of Comm'r Eckes); *Frozen Concentrated Orange Juice from Brazil*, USITC Pub. 1283, Inv. No. 701-TA-184 (Sept. 1982) (preliminary), at 4; *Certain Red Raspberries from Canada*, USITC Pub. 1707, Inv. No. 731-TA-196 (June 1985) (final), at 5 n.8.

<sup>83</sup> See Pub. L. No. 98-573, 98 Stat. 3033 (1984).

<sup>84</sup> "[P]roducers of products being incorporated into a processed or manufactured article (i.e. intermediate goods or component parts) are generally not included in the scope of the domestic industry that the ITC analyzes for the purpose of determining injury." H.R. REP. NO. 1156, 98th Cong., 2nd Sess. 188, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4910, 5305.

<sup>85</sup> *Standing and the Definition of the Domestic Industry*, *supra* note 81, at 8 n.18.

<sup>86</sup> See *Legal Issues in Live Swine and Pork from Canada, Inv. No. 701-TA-224 (final)*, ITC Gen. Couns. Mem., GC-1-131 (July 17, 1985); *Standing and the Definition of the Domestic Industry*, *supra* note 81.

<sup>87</sup> See, e.g., *Certain Table Wine from France and Italy*, USITC Pub. 1502, Inv. Nos. 701-TA-210-211/731-TA-167-168 (March 1984) (preliminary); *Frozen Concentrated Orange Juice from Brazil*, USITC Pub. 1283, Inv. No. 701-TA-184 (Sept. 1982) (preliminary); *Lamb Meat from New Zealand*, USITC Pub. 1191, Inv. No. 701-TA-80 (Nov. 1981) (preliminary); *Fresh Fish, Chilled or Frozen, Whether or Not Whole, But Not Otherwise Prepared or Preserved*, from Canada, USITC Pub. 1066, Inv. No. 701-TA-40 (May 1980); see also Bello & Holmer, *supra* note 4, at 663.

<sup>88</sup> See, e.g., *Certain Table Wine from France and Italy*, USITC Pub. 1502, Inv. Nos. 701-TA-210-211/731-TA-167-168 (March 1984) (preliminary); *Frozen Concentrated Orange Juice from Brazil*, USITC Pub. 1283, Inv. No. 701-TA-184 (Sept. 1982) (preliminary); *Lamb Meat from New Zealand*, USITC Pub. 1191, Inv. No. 701-TA-80 (Nov. 1981) (preliminary); see also Bello & Holmer, *supra* note 4, at 663.

<sup>89</sup> See *Lamb Meat from New Zealand*, USITC Pub. 1191, Inv. No. 701-TA-80 (Nov. 1981); *Fresh Fish, Chilled or Frozen, Whether or Not Whole, But Not Otherwise Prepared or Preserved*, from Canada, USITC Pub. 1066, Inv. No. 701-TA-40 (May 1980).

sion in *Fish, Fresh, Chilled, or Frozen, Whether or Not Whole, But Not Otherwise Prepared or Preserved, from Canada*.<sup>90</sup> In that investigation, the Commission determined there were two like products: "whole fish" and "fillets."<sup>91</sup> The Commission also determined that fishermen should be included in the domestic industry producing both like products.<sup>92</sup>

First, the Commission decided that fishermen should be included in the industry producing the whole fish.<sup>93</sup> In addition, although the Commission determined that fishermen did not directly produce fillets,<sup>94</sup> fishermen were to be included in the fillet producing industry because nearly all of their catch was converted into fillets.<sup>95</sup> Focusing on this continuous line of production, the Commission concluded that the fishermen belonged in the industry producing the processed fillets.<sup>96</sup>

The two-prong test was expanded in a 1981 investigation, *Lamb Meat from New Zealand (Lamb Meat I)*.<sup>97</sup> Although the investigation dealt solely with lamb meat and not live lamb, the majority in *Lamb Meat I* concentrated on the apparent inconsistency of omitting the growers from the domestic industry.<sup>98</sup> The majority opinion stated that growers of lamb were highly interdependent with the processors of lamb meat, but the growers were least able to minimize the economic impact of the unfair imports.<sup>99</sup> On the basis of the economic relationship between feeders and processors,<sup>100</sup> the majority chose to include the lamb growers in the domestic industry.<sup>101</sup>

The dissenting Commissioners<sup>102</sup> expounded the test for grower inclusion. Focusing on the parties' common economic interests and the continuous line of production from growers to packers, the dissent included the growers in the domestic industry producing

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<sup>90</sup> USITC Pub. 1066, Inv. No. 701-TA-40 (May 1980) (final).

<sup>91</sup> *Id.* at 4 (views of Comm'rs Alberger and Calhoun); *id.* at 15 (views of Comm'r Moore); *id.* at 22 (views of Comm'r Stern).

<sup>92</sup> *Id.* at 4, 5 (views of Comm'rs Alberger and Calhoun); *id.* at 15, 16 (views of Comm'r Moore); *id.* at 22, 23 (views of Comm'r Stern).

<sup>93</sup> The Commission determined that the fishermen were the sole producers of the whole fish and therefore comprised the domestic industry. *See id.* at 4, 5 (views of Comm'rs Alberger and Calhoun); *id.* at 15, 16 (views of Comm'r Moore); *id.* at 22, 23 (views of Comm'r Stern).

<sup>94</sup> *See id.* at 4-5 (views of Comm'rs Alberger and Calhoun); *id.* at 14-15 (views of Comm'r Moore); *id.* at 22-23 (views of Comm'r Stern).

<sup>95</sup> *Id.* at 5 (views of Comm'rs Alberger and Calhoun); *id.* at 22, 23 (views of Comm'r Stern). Comm'r Moore did not directly address the issue. *Id.* at 15, 16 (views of Comm'r Moore).

<sup>96</sup> *Id.*

<sup>97</sup> USITC Pub. 1191, Inv. No. 701-TA-80 (Nov. 1981) (preliminary).

<sup>98</sup> *Id.* at 6-8.

<sup>99</sup> *Id.* at 6-7.

<sup>100</sup> *Id.* at 7-8.

<sup>101</sup> *Id.* at 10.

<sup>102</sup> *Id.* at 21 (dissenting views of Comm'rs Alberger and Stern) (dissenting on other grounds).

lamb meat.<sup>103</sup> Although *Lamb Meat I* was later terminated upon agreement by the parties,<sup>104</sup> this same domestic industry analysis was used in a 1984 investigation, *Lamb Meat from New Zealand (Lamb Meat II)*.<sup>105</sup>

This two-prong test adopted by the Commission attempts to define the domestic industries which may be harmed by unfair imports.<sup>106</sup> Concentrating on the continuous line of production from grower to processor<sup>107</sup> and the common economic interests of the growers and processors,<sup>108</sup> the Commission considers the domestic industry which may reap some direct benefit from imposition of an antidumping or countervailing duty.<sup>109</sup> If the growers are not in a continuous line of production and have no common economic interests, it is less likely that the growers would directly benefit from the imposition of an antidumping or countervailing duty. In addition, without close economic ties, a causal link between the import and any injury to the industry would be more difficult to find.<sup>110</sup> Since the decision in *Lamb Meat I*, the two-prong test has been used by a majority of the Commissioners in value-added agricultural cases.<sup>111</sup> More importantly, the use of this test to exclude growers from the domestic industry has survived judicial scrutiny.<sup>112</sup>

In a 1984 investigation, *Certain Table Wine from France and Italy*

<sup>103</sup> *Id.* at 19-20 (dissenting views of Comm'rs Alberger and Stern).

<sup>104</sup> 47 Fed. Reg. 1149, 1316, 2392 (1982).

<sup>105</sup> USITC Pub. 1534, Inv. Nos. 701-TA-214/731-TA-188 (June 1984)(preliminary).

<sup>106</sup> *Lamb Meat from New Zealand*, USITC Pub. 1191, Inv. No. 701-TA-80 (Nov. 1980)(preliminary), at 7.

<sup>107</sup> *See, e.g.*, *Certain Table Wine from France and Italy*, USITC Pub. 1502, Inv. Nos. 701-TA-210-211/731-TA-167-168 (March 1984)(preliminary); *Frozen Concentrated Orange Juice from Brazil*, USITC Pub. 1283, Inv. No. 701-TA-184 (Sept. 1982); *Lamb Meat from New Zealand*, USITC Pub. 1191, Inv. No. 701-TA-80 (Nov. 1981)(preliminary); *Fresh Fish, Chilled or Frozen, Whether or Not Whole, But Not Otherwise Prepared or Preserved, from Canada*, USITC Pub. 1066, Inv. No. 701-TA-40 (May 1980).

<sup>108</sup> *See, e.g.*, *Certain Table Wine from France and Italy*, USITC Pub. 1502, Inv. Nos. 701-TA-210-211/731-TA-167-168 (March 1984)(preliminary); *Frozen Concentrated Orange Juice from Brazil*, USITC Pub. 1283, Inv. No. 701-TA-184 (Sept. 1982); *Lamb Meat from New Zealand*, USITC Pub. 1191, Inv. No. 701-TA-80 (Nov. 1981)(preliminary).

<sup>109</sup> *See* *Lamb Meat from New Zealand*, USITC Pub. 1191, Inv. No. 701-TA-80 (Nov. 1981)(preliminary), at 5, 6; *see also* *Lamb Meat from New Zealand, Inv. No. 701-TA-80: Standing and the Definition of the Domestic Industry*, ITC Gen. Couns. Mem. GC-E-283 (Oct. 27, 1981).

<sup>110</sup> *See infra* notes 151-83 and accompanying text.

<sup>111</sup> *See, e.g.*, *Certain Table Wine from France and Italy*, USITC Pub. 1502, Inv. Nos. 701-TA-210-211/731-TA-167-168 (March 1984)(preliminary); *Frozen Concentrated Orange Juice from Brazil*, USITC Pub. 1283, Inv. No. 701-TA-184 (Sept. 1982)(preliminary); *Lamb Meat from New Zealand*, USITC Pub. 1191, Inv. No. 701-TA-80 (Nov. 1981)(preliminary).

<sup>112</sup> *See* *American Grape Growers v. United States*, 604 F. Supp. 1245 (Ct. Int'l Trade 1985); *see also infra* notes 111-37 and accompanying text. For a discussion of judicial review procedure, *see* Hemmendinger & Barringer, *The Defense of Antidumping and Countervailing Duty Investigations Under the Trade Agreements Act of 1979*, 6 N.C.J. INT'L L. & COM. REG. 427, 458-59 (1981); Bello & Holmer, *supra* note 4, at 650-51.

(*Table Wine I*),<sup>113</sup> the Commission defined the like product as ordinary table wine.<sup>114</sup> Applying the two-prong test, the Commission limited the domestic industry definition to wine producers, thereby excluding grape growers.<sup>115</sup> To support its definition, the Commission cited industry statistics indicating that only about one-half of all grapes suitable for use in ordinary wine were so used.<sup>116</sup> Another rationale for excluding grape growers was the existence of alternative markets for grapes: raisin and table grape markets.<sup>117</sup> Therefore, there was no continuous line of production. The Commission was further persuaded by the lack of commonality of economic interest between grape growers and wine producers.<sup>118</sup> In fact, there was some indication that grape growers and wine producers had economically adverse interests.<sup>119</sup> Thus, the grape growers failed the two-prong test for inclusion in the processing industry. As a result, the Commission did not examine the harm to grape growers in determining injury to the industry.<sup>120</sup> Although the preliminary investigation was proved negative due to lack of causation,<sup>121</sup> the grape growers appealed the domestic industry determination to the Court of International Trade.<sup>122</sup>

In *American Grape Growers v. United States*,<sup>123</sup> plaintiffs argued that grape growers should be included in the domestic industry because the requisite economic and production integration had been shown.<sup>124</sup> In upholding the Commission's determination, the court stated that grapes and wine are different products with different characteristics and uses.<sup>125</sup> The court also rejected plaintiff's argument that the congressional "herd liquidation"<sup>126</sup> language promul-

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<sup>113</sup> USITC Pub. 1502, Inv. Nos. 701-TA-210-211/731-TA-167-168 (March 1984)(preliminary).

<sup>114</sup> *Id.* at 6.

<sup>115</sup> *Id.* at 10.

<sup>116</sup> *Id.* at 9-10.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *See id.* at 10 (stating that wineries benefit from low grape prices, while grape growers benefit from high prices).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1.

<sup>122</sup> *American Grape Growers v. United States*, 604 F. Supp. 1245 (Ct. Int'l Trade 1985). Although similar cases have been appealed, they have concerned the issue of injury or causation. *See, e.g., American Grape Growers Alliance for Fair Trade v. United States*, 615 F. Supp. 603 (Ct. Int'l Trade 1985); *American Grape Growers Alliance for Fair Trade v. United States*, 622 F. Supp. 295 (Ct. Int'l Trade 1985); *see also infra* note 121.

*Live Swine and Pork from Canada*, USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985) (final) is being appealed to the Court of International Trade. *See Canadian Meat Council v. United States*, 644 F. Supp. 1125 (Ct. Int'l Trade 1986) (denying motion to dismiss appeal and holding that party may challenge final subsidy determination when final injury determination is the subject of a pending appeal).

<sup>123</sup> 604 F. Supp. 1245 (1985).

<sup>124</sup> *See id.* at 1247.

<sup>125</sup> *Id.* at 1247-48.

<sup>126</sup> *See supra* note 76.

gated a general rule requiring grower inclusion in the domestic industry.<sup>127</sup> The court viewed inclusion of growers in the domestic industry as appropriate only when raw agricultural products were completely devoted to the production of a more advanced like product.<sup>128</sup> As another ground for its decision, the court noted judicial deference to Commission determination of the appropriate breadth of the domestic industry producing a value-added like product.<sup>129</sup> In accordance, the court concluded that grape growers were not a part of the domestic industry producing table wine.<sup>130</sup> Although the Commission's determination in *Table Wine I* was later reversed and remanded on other grounds, the exclusion of grape growers from the domestic industry was upheld.<sup>131</sup>

Subsequent to this adjudication, a statutory provision, which added grape growers to the domestic industry for wine investigations, became effective.<sup>132</sup> This bright line rule ends the inquiry into the presence of economic integration or a continuous line of production in wine cases.<sup>133</sup> After this amendment became effective, another investigation, *Certain Table Wine from the Federal Republic of Germany, France, and Italy (Table Wine II)*,<sup>134</sup> was initiated.

Pursuant to the statute, the Commissioners included grape growers in the domestic industry in *Table Wine II*.<sup>135</sup> Although injury to the industry was found, in *Table Wine II* as in *Table Wine I*,<sup>136</sup> the Commission found no causal link between the injury and imports.<sup>137</sup> Thus, even with the statutory inclusion of grape growers in the do-

<sup>127</sup> See *American Grape Growers v. United States*, 604 F. Supp. 1245, 1247 (Ct. Int'l Trade 1985).

<sup>128</sup> *Id.* at 1247-48.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See *American Grape Growers Alliance for Fair Trade v. United States*, 615 F. Supp. 603 (Ct. Int'l Trade 1985) (stating that Commission erroneously failed to consider imports from France and Italy in a cumulated manner and that Commission applied too stringent an injury standard); see also *American Grape Growers Alliance for Fair Trade v. United States*, 622 F. Supp. 295 (1985) (enforcement order for American Grape Growers Alliance for Fair Trade v. United States, 615 F. Supp. 603 (Ct. Int'l Trade 1985)). The Commission summarily complied with this order. See *Certain Table Wine from France and Italy*, 50 Fed. Reg. 50,853 (1985).

<sup>132</sup> Pub. L. No. 98-573, 98 Stat. 3033 (1984) (codified at 19 U.S.C. § 1677(4)(A) (1982 & Supp. III 1985)). See also *Bello & Holmer*, *supra* note 4, at 663-65.

<sup>133</sup> [I]n the case of wine and grape products subject to investigations under this subtitle, the term [industry] also means the domestic producers of the principle raw agricultural product (determined on either a volume or value basis) which is included in the like domestic product, if those producers allege material injury or threat of material injury of such wine and grape products.

19 U.S.C. § 1677(4)(A) (1982 & Supp. III 1985). See also *supra* note 72 and accompanying text.

<sup>134</sup> USITC Pub. 1771, Inv. No. 701-TA-258-260/731-TA-283-285 (Oct. 1985) (preliminary).

<sup>135</sup> *Id.* at 5.

<sup>136</sup> *Certain Table Wine from France and Italy*, USITC Pub. 1502, Inv. Nos. 701-TA-210-211/731-TA-167-168 (March 1984) (preliminary), at 3.

<sup>137</sup> *Certain Table Wine from the Federal Republic of Germany, France, and Italy*,

mestic wine producing industry, the grape growers' appeal failed due to a lack of causation.<sup>138</sup> This finding suggests that the emphasis on the parameters of the domestic industry may be misplaced and that more attention should be directed toward causation standards.<sup>139</sup>

The appropriateness of the current two-prong test has been questioned by two Commissioners. In *Live Swine and Pork from Canada*,<sup>140</sup> it was suggested that neither the statute nor its legislative history allows the Commission to define the domestic industry more expansively by including growers in the domestic industry in agricultural cases.<sup>141</sup> Criticizing the Commission's examination of the relationship between the growers and the processors, Commissioner Liebler suggested that the domestic industry determination should depend upon the share of the grower's product that goes into the like product and the processor's elasticity of supply.<sup>142</sup> Over the course of several investigations, Commissioner Liebler has chosen to abandon the economic integration prong of the two-prong test;<sup>143</sup> instead, he looks only for a continuous line of production in defining the appropriate domestic industry.<sup>144</sup> Commissioner Brunsdale also appears to have adopted the continuous line of production test in place of the majority's two-prong analysis.<sup>145</sup>

Although the continuous line of production test is statutorily acceptable, the two-prong test may also be appropriate. Significantly, the vague statutory language is open to a relatively broad interpretation.<sup>146</sup> Further, in *American Grape Growers*,<sup>147</sup> the Court of International Trade endorsed current Commission procedures<sup>148</sup> and a congressional proposal appears to codify the two-prong test.<sup>149</sup> Regardless of its appropriateness, the two-prong test is used by a ma-

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USITC Pub. 1771, Inv. Nos. 701-TA-258-260/731-TA-283-285 (Oct. 1985) (preliminary), at 15-28. See also *id.* at 29-36 (additional views of Comm'r Liebler).

<sup>138</sup> *Id.* at 1-2.

<sup>139</sup> See *infra* notes 164-83 and accompanying text.

<sup>140</sup> USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985)(final).

<sup>141</sup> *Id.* at 19 (additional and dissenting views of Comm'r Liebler).

<sup>142</sup> *Id.* at 21 (additional and dissenting views of Comm'r Liebler).

<sup>143</sup> See *Certain Fresh Atlantic Groundfish from Canada*, USITC Pub. 1844, Inv. No. 701-TA-257 (May 1986)(final); *Certain Red Raspberries from Canada*, USITC Pub. 1743, Inv. No. 701-TA-254 (Aug. 1985)(preliminary) (views of Comm'r Liebler); *In-Shell Pistachio Nuts from Iran*, USITC Pub. 1777, Inv. No. 731-TA-287 (Nov. 1985)(preliminary) (views of Comm'r Liebler).

<sup>144</sup> See *In-Shell Pistachio Nuts from Iran*, USITC Pub. 1777, Inv. No. 731-TA-287 (Nov. 1985)(preliminary), at 13-14 n.1 (views of Comm'r Liebler).

<sup>145</sup> See *Certain Fresh Atlantic Groundfish from Canada*, USITC Pub. 1844, Inv. No. 701-TA-257 (May 1986)(final), at 5 n.11; *In-Shell Pistachio Nuts from Iran*, USITC Pub. 1777, Inv. No. 731-TA-287 (Nov. 1985)(preliminary), at 28 (views of Comm'r Brunsdale).

<sup>146</sup> See 19 U.S.C. § 1677(4) (1982 & Supp. III 1985); see also *supra* notes 72-75 and accompanying text.

<sup>147</sup> 604 F. Supp. 1245 (1985).

<sup>148</sup> See *id.* at 1248.

<sup>149</sup> See *infra* note 184.

majority of the Commissioners,<sup>150</sup> although two Commissioners look only for a continuous line of production in ruling on grower inclusion.<sup>151</sup> While the focus in these investigations has been the domestic industry determination, the definition of the domestic industry is not determinative in many instances due to the lack of a causal link between the imports and injury to the domestic industry.<sup>152</sup>

## V. Injury

In antidumping and countervailing duty petitions, the Commission must determine whether the domestic industry is materially injured, threatened with material injury, or materially retarded.<sup>153</sup> This decision must be made before the subsequent causation determination.<sup>154</sup> As in like product and domestic industry determinations, there are relatively broad statutory guidelines for the Commission to use in determining the presence of injury.<sup>155</sup> The statutory definition of material injury is harm which "is not inconsequential, immaterial, or unimportant."<sup>156</sup> The Commission is required to consider volume, effects of imports on domestic prices, and the impact of imports on domestic producers.<sup>157</sup> The statute offers guidance in evaluating the volume, price, and impact of the imports in relation to the domestic industry.<sup>158</sup> The standard remains vague, however, because of the numerous factors which must be taken into account. Thus, Commissioners have differed in deciding whether an industry is materially injured<sup>159</sup> and whether injury and causation should be determined separately.<sup>160</sup>

<sup>150</sup> See *supra* notes 85-110 and accompanying text.

<sup>151</sup> See *supra* notes 138-43 and accompanying text.

<sup>152</sup> See *infra* notes 164-83 and accompanying text.

<sup>153</sup> See 19 U.S.C. §§ 1671(a)(2), 1671b(a), 1671d(b), 1673(2), 1673b(a), 1673d(b) (1982 & Supp. III 1985); see also § 1677(7) (1982 & Supp. III 1985). For a detailed discussion of injury determination see Note, *International Trade Commission Injury Determination In Countervailing Duty Investigations*, 15 L. & POL'Y INT'L BUS. 987 (1983); Perry, *supra* note 69, at 402-06; Victor, *Injury Determinations by the United States International Trade Commission in Antidumping and Countervailing Duty Proceedings*, 16 N.Y.U.J. INT'L L. & POL. 749, 756-65 (1983-84).

<sup>154</sup> See 19 U.S.C. §§ 1671(a)(2), 1671b(a), 1671d(b), 1673(2), 1673b(a), 1673d(b) (1982 & Supp. III 1985).

<sup>155</sup> *Id.* § 1677(7).

<sup>156</sup> *Id.* § 1677(7)(A) (1982).

<sup>157</sup> *Id.* § 1677(7)(E)(ii).

<sup>158</sup> *Id.* §§ 1677(7)(B), 1677(7)(C), 1677(7)(D)(i) (1982 & Supp. III 1985).

<sup>159</sup> Compare *Lamb Meat from New Zealand*, USITC Pub. 1534, Inv. Nos. 701-TA-214/731-TA-188 (June 1984)(preliminary), at 3 (three Commissioners determined no reasonable indication of material injury) with *id.* at 17 (views of Comm'rs Haggart and Lodwick stating that there was reasonable indication of material injury).

<sup>160</sup> See *Certain Red Raspberries from Canada*, USITC Pub. 1743, Inv. No. 701-TA-254 (Aug. 1985)(preliminary) (majority opinion discussed injury and causation separately). Comm'r Stern, however, stated it was not necessary or desirable to make a separate determination and thus did not. *Id.* at 4 n.11. *Accord Certain Table Wine from the Federal Republic of Germany, France, and Italy*, USITC Pub. 1771, Inv. Nos. 701-TA-258-60/731-TA-283-85 (Oct. 1985)(preliminary), at 3 n.3; *Certain Fresh Atlantic Groundfish from Canada*, USITC Pub. 1750, Inv. No. 701-TA-257 (Sept. 1985)(preliminary), at 11 n.25. Further, 19



By definition, all affirmative cases evidence either injury, threat of injury, or retardation of the domestic industry.<sup>161</sup> In agricultural investigations, the Commission has almost always found injury. In seventeen of the twenty decisions examined,<sup>162</sup> the Commission found injury to a domestic industry.<sup>163</sup> Because of the lack of causation, however, compensatory duties were imposed in far fewer cases.<sup>164</sup>

## VI. Causation

For an affirmative finding in an antidumping or countervailing duty case, the Commission must conclude that injury is caused by the imports.<sup>165</sup> In appropriate cases,<sup>166</sup> the Commission must decide whether the domestic industry is materially injured, threatened with material injury, or retarded by reason of imports competing with the

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U.S.C. §§ 1671-1677 (1982 & Supp. III 1985) does not appear to require a separate determination for causation and injury.

*But see* Cellular Mobile Telephones and Subassemblies Thereof from Japan, USITC Pub. 1786, 731-TA-207 (Dec. 1985)(final), at 20-21 (additional views of Comm'r Eckes) (stating Commission is required to make injury and causation determinations in each investigation); *see also* American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984), *aff'd sub nom.*, Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985).

<sup>161</sup> For an affirmative decision, the statute requires a majority of the Commissioners to determine that a domestic industry is injured, threatened with material injury, or retarded; or that there is a reasonable indication of injury, threat, or retardation. *See* 19 U.S.C. §§ 1671(a)(2), 1671b(a), 1671d(b), 1673(2), 1673b(a), 1673d(b) (1982 & Supp. III 1985).

<sup>162</sup> For purposes of this discussion, a decision is defined as a terminal decision for each country in each petition.

<sup>163</sup> The Commission determined that the domestic industry was injured in Certain Fresh Atlantic Groundfish from Canada, USITC Pub. 1844, Inv. No. 701-TA-257 (May 1986)(final); In-Shell Pistachio Nuts from Iran, USITC Pub. 1777, Inv. No. 731-TA-287 (Nov. 1986)(preliminary); Certain Red Raspberries from Canada, USITC Pub. 1743, Inv. No. 701-TA-254 (Aug. 1985)(preliminary); Certain Table Wine from the Federal Republic of Germany, France, and Italy, USITC Pub. 1771 Inv. Nos. 701-TA-258-260/731-TA-283-285 (Oct. 1985)(preliminary); Certain Red Raspberries from Canada, USITC Pub. 1707, Inv. No. 731-TA-196 (June 1985); Frozen Concentrated Orange Juice from Brazil, USITC Pub. 1283, Inv. No. 701-TA-184 (Sept. 1982)(preliminary); Lamb Meat from New Zealand, USITC Pub. 1191, Inv. Nos. 701-TA-80 (Nov. 1981)(preliminary). In a split determination, a majority of the Commissioners determined that the domestic industries producing pork and producing swine were injured in Live Swine and Pork from Canada, USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985)(final). In Certain Table Wine from France and Italy, USITC Pub. 1502, Inv. Nos. 701-TA-210-211/731-TA-167-168 (March 1984)(preliminary), the Commission determined that a domestic industry was not injured. This determination was overruled, however, in American Grape Growers Alliance for Fair Trade v. United States, 615 F. Supp. 603 (Ct. Int'l Trade 1985). The Commission determined that the domestic industry was not injured in Lamb Meat from New Zealand, USITC Pub. 1534, Inv. Nos. 701-TA-214/731-TA-188 (June 1984)(preliminary); Fish, Fresh, Chilled, or Frozen, Whether or Not Whole, But Not Otherwise Prepared or Preserved, from Canada, USITC Pub. 1060, Inv. No. 701-TA-40 (May 1980).

<sup>164</sup> *See infra* notes 164-83 and accompanying text.

<sup>165</sup> *See* 19 U.S.C. §§ 1671(a)(2), 1671b(a), 1671(b), 1673(2), 1673b(a), 1673d(b) (1982); *see also* Perry, *supra* note 69, at 406-23.

<sup>166</sup> If there is no injury, the causation determination is not required. *See* 19 U.S.C. §§ 1671(a)(2), 1673(2).

domestic like product.<sup>167</sup> The injury caused by the imports may be *de minimus* and the imports do not have to be the sole cause of the injury.<sup>168</sup> Commissioners have differed, however, in their causation findings,<sup>169</sup> on which causation test they utilize,<sup>170</sup> and on whether causation and injury should be determined separately.<sup>171</sup>

Of the cases examined in this Article, fifty percent resulted in positive findings.<sup>172</sup> Nine and one-half of the nineteen investigations, however, did not impose an antidumping or countervailing duty.<sup>173</sup> In six and one-half of these negative cases, a majority of the Commissioners found injury or threat of injury but no causal link

<sup>167</sup> See *id.* §§ 1671(a)(2), 1671b(a), 1671(b), 1673, 1673b(a), 1673d(b) (1982 & Supp. III 1985).

<sup>168</sup> See *British Steel Corp. v. United States*, 593 F. Supp. 405, 413 (Ct. Int'l Trade 1984); see also Silverman, *supra* note 25, at 246. But see Barshefsky & Cunningham, *supra* note 25, at 353-54.

<sup>169</sup> See, e.g., Certain Fresh Atlantic Groundfish from Canada, USITC Pub. 1844, Inv. No. 701-TA-257, at 13-17, 20-22 (May 1986); Live Swine and Pork From Canada, USITC Pub. 1733, Inv. No. 701-TA-224, at 12, 23 (July 1985)(final); Lamb Meat from New Zealand, USITC Pub. 1191, Inv. No. 701-TA-80, at 13, 20 (Nov. 1981)(preliminary).

<sup>170</sup> Compare Certain Red Raspberries from Canada, USITC Pub. 1707, Inv. No. 731-TA-196 (June 1985), at 8 (majority of Commissioners, in determining causation, considered import volume, effect of imports on prices, and impact of imports on domestic industry) with *id.* at 16 (additional views of Comm'r Liebler) (five factors whose presence increases the likelihood of an affirmative determination: "1) large and increasing market share, 2) high dumping margins, 3) homogeneous products, 4) declining prices, and 5) barriers to entry to other foreign producers. . . .")

<sup>171</sup> See *supra* note 158.

<sup>172</sup> Of the twenty investigations listed *supra* note 161, nine and one-half were affirmative. See Lamb Meat from New Zealand, USITC Pub. 1191, Inv. No. 701-TA-80 (Nov. 1981)(preliminary); In-Shell Pistachio Nuts from Iran, USITC Pub. 1777, Inv. No. 731-TA-287 (Nov. 1986)(preliminary); Certain Fresh Atlantic Groundfish from Canada, USITC Pub. 1844, Inv. No. 701-TA-257 (May 1986)(final)(split determination); Certain Red Raspberries from Canada, USITC Pub. 1743, Inv. No. 701-TA-254 (Aug. 1985)(preliminary); Live Swine and Pork from Canada, USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985)(final)(split determination)(domestic swine industry injured by reason of imported swine); Certain Red Raspberries from Canada, USITC Pub. 1707, Inv. No. 731-TA-196 (June 1985)(final); Frozen Concentrated Orange Juice from Brazil, USITC Pub. 1283 and 1406, Inv. No. 701-TA-184 (Sept. 1982 and July 1983).

For the nine and one-half negative cases, see Certain Table Wine from France and Italy, USITC Pub. 1502, Inv. Nos. 701-TA-210-211/731-TA-167-168 (March 1984)(preliminary)(Commission determination that industry experiencing difficulties, but that there was no causation); Certain Table Wine from the Federal Republic of Germany, France, and Italy, USITC Pub. 1771, Inv. Nos. 701-TA-258-260/731-TA-283-285 (Oct. 1985)(preliminary)(Commission determined that the industry was materially injured, but that there was no causation); Live Swine and Pork from Canada, Inv. No. 701-TA-224 (July 1985)(domestic pork industry injured, but by reason of imports); Lamb Meat from New Zealand, USITC Pub. 1191, Inv. No. 701-TA-80 (Nov. 1981)(preliminary)(terminated by agreement of the parties in 47 Fed. Reg. 1149 (1982)); Fish, Fresh, Chilled, or Frozen, Whether or not Whole, but not Otherwise Prepared or Preserved, from Canada, USITC Pub. 1066, Inv. No. 701-TA-40 (May 1980)(final). Thus, the decisions were negative sixty-five percent of the time.

<sup>173</sup> As with portions of Live Swine and Pork from Canada, USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985)(final), a majority of the Commission voted in the negative in Certain Table Wine from the Federal Republic of Germany, France, and Italy, USITC Pub. 1771, Inv. Nos. 701-TA-258-260/731-TA-283-285 (Oct. 1985) (preliminary); Lamb Meat from New Zealand, USITC Pub. 1534, Inv. Nos. 701-TA-214/731-TA-188 (June 1984);

between the imports and the injury.<sup>174</sup> Thus, more than one-third of all cases or sixty-eight percent of the negative cases were negative as a result of a lack of causation and *not* because of a lack of injury to the domestic industry.<sup>175</sup> This suggests that the focus on the domestic industry determination is misplaced.

The reason for this frequency of cases involving injury but no causation is not clear. One suggestion is that excessive stocks of agricultural products and large quantities of imports might injure a domestic industry even though economic indicators used to show causation in non-agricultural value-added products might not be present.<sup>176</sup> Moreover, agricultural investigations often have as petitioners a large number of relatively low output growers.<sup>177</sup> This presence may cloud the decision making process because petitions from such domestic industries for information about the industry are difficult to obtain and analyze and are often useless.<sup>178</sup>

The impact of government agricultural support programs is uncertain and varies from year to year.<sup>179</sup> Such programs may alter supply or quantity demanded by limiting production or buoying prices.<sup>180</sup> Although amendments have been offered to compensate

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Fish, Fresh, Chilled, or Frozen, Whether or not Whole, But not Otherwise Prepared or Preserved, from Canada, USITC Pub. 1066, Inv. No. 701-TA-40 (May 1980) (final).

Although the Commission preliminarily voted in the negative in Certain Table Wine from France and Italy, USITC Pub. 1502, Inv. Nos. 701-TA-210-211/731-TA-167-168 (March 1984) (preliminary), this decision was overturned in American Grape Growers Alliance for Fair Trade v. United States, 615 F. Supp. 603 (Ct. Int'l Trade 1985) and therefore is not included in this number.

<sup>174</sup> Certain Table Wine from the Federal Republic of Germany, France, and Italy, USITC Pub. 1771, Inv. Nos. 701-TA-258-260/731-TA-283-285 (Oct. 1985) (preliminary)(pork industry injured by reason of imports); Live Swine and Pork from Canada, USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985) (pork industry injured but injury not caused by imports).

<sup>175</sup> Of the nine and one-half cases listed *supra* note 173, six and one-half indicated that a domestic industry was injured. These six and one-half still were negative cases, however, because of a lack of causation. Consequently, this yields a negative ratio of fifty-two percent in all negative cases or thirty-four percent in all cases studied.

<sup>176</sup> Berregard, *An Analysis of Success of Agricultural Countervailing Duty and Antidumping Cases January 1975-August 1985* 42, 43 (1985) (unpublished manuscript).

<sup>177</sup> *See, e.g.*, Live Swine and Pork from Canada, USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985) (final), at A-11 (estimated 431,680 United States swine enterprises in 1984); Lamb Meat from New Zealand, USITC Pub. 1534, Inv. Nos. 701-TA-214/731-TA-188 (June 1984) (preliminary), at A-9 (estimated 126,500 United States sheep enterprises in 1983); Fish, Fresh, Chilled, or Frozen, Whether or Not Whole, But Not Otherwise Prepared or Preserved, from Canada, USITC Pub. 1066, Inv. No. 701-TA-40 (May 1980) (preliminary), at A-16 (estimated 1,000 United States groundfish fishing vessels in 1980).

<sup>178</sup> *See* Live Swine and Pork from Canada, USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985) (final), at A-11, A-21 (of 431,680 estimated United States swine enterprises in 1984, thirteen domestic producers returned questionnaires).

<sup>179</sup> *See generally* B. GARDNER, *THE GOVERNING OF AGRICULTURE* (1981) (profiling recent history of agricultural support programs).

<sup>180</sup> *Id.* at 18, 21-35 (discussing various methods of government intervention in the "farm commodity market"). For example, a domestic price support system that increases the price of feed grains has a secondary impact on the livestock industry by increasing

for agricultural support programs,<sup>181</sup> because of the complexity of the support mechanisms it is not clear whether such amendments are or could be effective. Further, many of the penetration ratios of the agricultural imports are extremely small, making the causal link more difficult to find.<sup>182</sup>

Regardless of the reasons, causation is often the limiting factor in value-added agricultural investigations. Thus, even if the domestic industry was statutorily defined to include growers of the raw agricultural product, as has been suggested,<sup>183</sup> there is little assurance that Commission investigations would more accurately reflect actual injury in the form of more affirmative investigations.

## VII. Conclusion

A large majority of the value-added agricultural product investigations discussed in this Article resulted in affirmative injury determinations. In large part because of the absence of a causal link between the injury and the imports, however, the Commission found a *compensable* injury in only half of these cases. Proving causation has been the most significant problem of petitioners seeking imposition of duties in value-added agricultural product cases. Past and present congressional proposals attempting to change the definition of "like product" and "domestic industry" appear, therefore, to be misguided.<sup>184</sup> Rather, revision of the requisite elements of causation should be the emphasis of any change.

Further, legislation expanding the Commission's economically based domestic industry determination may be a disservice to the growers it is designed to help. Such legislation would lead to ex-

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input costs due to higher feed grain prices. This arguably injures the beef industry. *See id.* at 74.

<sup>181</sup> See 19 U.S.C. §§ 1677(7)(D), 1677-1 (1982 & Supp. III 1985).

<sup>182</sup> See Live Swine and Pork from Canada, USITC Pub. 1733, Inv. No. 701-TA-224 (1985) (final) at 12, 14-15 (market penetration for live swine from Canada was less than two percent for fresh, chilled, or frozen pork from Canada); Lamb Meat from New Zealand, USITC Pub. 1534, Inv. Nos. 701-TA-214/731-TA-188 (June 1984)(preliminary), at 15 (market penetration for lamb meat from New Zealand was less than five percent).

<sup>183</sup> See *Conference Report on the Trade and Tariff Act of 1984*, H.R. Rep. No. 1156, 98th Cong., 2d Sess., 188-89, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 4910, 5305-06 (including growers in domestic industry if they alleged injury); see also *infra* note 184.

<sup>184</sup> One pending bill appears to codify the current Commission two-prong test. See Trade and International Economic Policy Reform Act of 1986, H.R. 4800, 99th Cong., 2d Sess., 132 CONG. REC. H3024-79 (1986). Another proposal would statutorily apply the current two-prong test to define the like product rather than the domestic industry. S. Rep. No. 1629, 99th Cong., 1st Sess., 131 CONG. REC. S11, 279 (1985) (proposed amendment to Tariff Act of 1930 establishing a "single continuous line of Production" test to determine whether "raw initially processed agricultural products" are in the same industry as raw products).

A 1984 Senate proposal would have included in the domestic industry any producers of agricultural products if they merely alleged material injury or threat of material injury. See *Conference Report on the Trade and Tariff Act of 1984*, S. Rep. No. 1156, 98th Cong., 2d Sess. 188-89, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 4910, 5305-06.

tremely expensive petitions<sup>185</sup> which have little chance of success as no causal link can be established between the injury and the import of processed items. Thus, to aid growers, future legislation should focus on the definition of causation and injury rather than the definition of domestic industry or like product. In sum, United States International Trade Commission investigations are a valuable forum for *processors* of agricultural products seeking antidumping and countervailing duties. Because of statutory inadequacies, however, *growers* of primary agricultural products often find the Commission environment less hospitable.

SAMUEL A. THUMMA

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<sup>185</sup> See letter from Marv Cronberg, Executive Vice President, National Wool Growers Association, to Samuel A. Thumma (August 5, 1986) (stating that National Wool Growers Association spent \$94,000 on Lamb Meat from New Zealand, USITC Pub. 1191, Inv. No. 701-TA-80 (Nov. 1981) (preliminary), and indicating costs for Lamb Meat from New Zealand, USITC Pub. 1534, Inv. Nos. 701-TA-214/731-TA-188 (June 1984) (preliminary), were much higher); see also letter from Orville K. Sweet, Executive Vice President, National Pork Producers Council to Samuel A. Thumma (August 1, 1986) (estimating petition fees for Live Swine and Pork from Canada, USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985) (final) totaled \$189,460 as of June 30, 1986).

It is not known how much the American Grape Growers spent in lobbying and petition fees in order to enable the organization to participate in Certain Table Wine from France and Italy, USITC Pub. 1502, Inv. Nos. 701-TA-210-211/731-TA-167-168 (March 1984) (preliminary); American Grape Growers v. United States, 604 F. Supp. 1245 (Ct. Int'l Trade 1985); American Grape Growers Alliance for Fair Trade v. United States, 615 F. Supp. 603 (Ct. Int'l Trade 1985); American Grape Growers Alliance for Fair Trade v. United States, 622 F. Supp. 295 (Ct. Int'l Trade 1985); Certain Table Wine from the Federal Republic of Germany, France, and Italy, USITC Pub. 1771, Inv. Nos. 701-TA-258-260/731-TA-283-285 (Oct. 1985) (preliminary). At no time was an antidumping or countervailing duty on wine imposed.