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American Lamb Company v. United States: Application of the Reasonable Indication Standard

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NOTE

American Lamb Company v. United States: Application of the Reasonable Indication Standard

I. INTRODUCTION

The utilization of non-tariff barriers in international trade has taken on significant importance in protecting United States industries from unfair trading practices by foreign competitors.[1] Non-tariff barriers such as antidumping and countervailing duty measures are designed to regulate "unfair methods of competition and unfair acts"[2] by foreign concerns. Many United States businesses rely on antidumping and countervailing duty laws to counteract vigorous import competition.[3] Although antidumping and countervailing duty laws have been enacted to ensure fair trade and to benefit domestic industries, strict enforcement seldom occurs because of the economic and political implications of invoking these

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1 *See generally* J. CUNNANE & C. STANBROOK, THE LAW AND PROCEDURES GOVERNING THE IMPOSITION OF ANTI-DUMPING AND COUNTERVAILING DUTIES IN THE EUROPEAN COMMUNITY (1983); R. DALE, ANTI-DUMPING LAW IN A LIBERAL TRADE ORDER (1981); G. WILLIAMSON, MAJOR U.S. LEGAL REMEDIES AGAINST IMPORT COMPETITION (1980); Comment, *Injury Determinations Under United States Antidumping Laws Before and After the Trade Agreements Act of 1979*, 33 RUTGERS L.J. 1076 (1981).

2 Section 337(a) of the Tariff Act of 1930, as amended by the Trade Act of 1974, states:

> UNFAIR METHODS OF COMPETITION DECLARED UNLAWFUL—Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section. 19 U.S.C. § 1337(a) (1987).

3 *See* Bello, *Current Subsidy and Antidumping Issues After the Trade and Tariff Act of 1984*, 21 STAN. J. INT'L. LAW 299, 300 (1985).

laws against the affected foreign traders or governments.[4]

Antidumping and countervailing duty laws provide the principal legal remedies for United States corporations to combat adverse effects from harmful trade practices. "Dumping" describes an international trade practice in which merchandise is sold in a foreign market for less than the price in its own domestic market.[5] Antidumping regulations are designed to discourage the importation of goods sold in the United States at less than fair value[6] by imposing a duty equal to the difference between the foreign market value and the price of the dumped product in the United States.[7] Countervailing duty laws impose a special duty to offset subsidies received by foreign companies from their respective governments on products exported to the United States.[8] A government subsidy is a financial benefit conferred on the production, manufacture, or distribution of a product or service in its home industry. Since goods which are subsidized provide a competitive price advantage over unsubsidized goods from the importing country,[9] countervailing duties are assessed against the imported merchandise in an amount equal to the net subsidy[10] in order to promote fair trade.[11]

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4 *See* Ehrenhaft, *What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act (Can) (Will) (Should) Mean for U.S. Trade Policy*, 11 LAW & POL'Y INT'L BUS. 1361 (1979).

5 *See* J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 3 (1966) (Jacob Viner provides the most widely recognized economic definition of dumping as "price discrimination between national markets"); Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 44, 44-50 (1958); Myerson, *A Review of Current Antidumping Procedures: United States Law and the Case of Japan*, 15 COLUM. J. TRANSNAT'L L. 167, 168-72 (1976); *see also* Zenith Radio Corp. v. Matsushita Electric Industrial Co., 494 F. Supp. 1190, 1194 (E.D. Pa. 1980)(*aff'd* 475 U.S. 574(1984)).

6 Fair market value is defined as "the price at which the product is sold or offered for sale in the principal markets of the country from which it is exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption. 19 U.S.C. § 1677(a)(1)(A) (1987).

7 19 U.S.C. § 1673(2)(B) (1987).

8 19 U.S.C. § 1671e (1987); *see* G. WILLIAMSON, *supra* note 1, at 17; Bello, *supra* note 3, at 303-04. Two different statutory provisions regulate the imposition of countervailing duties. First, the so-called Subsidies Code governs imports from "countries under the Agreement." *See* 19 U.S.C. § 1671(b) (1987). The Subsidies Code refers to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade of 1979. Second, § 1303 of the Trade and Tariff Agreement of 1984 encompasses all nations not under the Subsidies Code. The only major difference between the two statutory provisions is in the injury determination test. Under the Subsidies Code, the International Trade Commission ("ITC") must find a material injury before countervailing duties will be assessed, while under Section 1303 proceedings, the mere evidence of a government subsidy, without resulting injury, will be adequate for an affirmative determination by the ITC. *See* 19 U.S.C. § 1303(a)(2) (1987).

9 Subsidized goods by a foreign government commonly leads to harmful consequences for the domestic enterprises, and can result in an artificial impairment to international trade. *See* G. WILLIAMSON, *supra* note 1, at 17.

10 19 U.S.C. § 1671(e)(a)(1) (1987).

The procedure for initiating antidumping and countervailing duty investigations is contained in Title VII of the Tariff Act of 1930,[12] as substantially amended by the Trade Agreements Act of 1979,[13] and subsequently changed by the Trade and Tariff Act of 1984.[14] In addition, the regulations promulgated by the International Trade Administration ("ITA") of the Department of Commerce[15] and the International Trade Commission ("ITC"),[16] contain the appropriate measures followed by these agencies in their investigations of potential dumping and countervailing duty violations.[17] If the ITA determines that an investigation is warranted after considering information reasonably available to it, then the ITC renders a preliminary injury determination.[18] This preliminary determination is based on the best information available as to whether a "reasonable indication" exists that an United States industry has been materially injured, threatened with material injury, or materially retarded from imports that have been allegedly sold at less than fair value or subsidized.[19]

The administration of the reasonable indication standard by the ITC has conflicted with the interpretation of the United States Court of Inter-

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11 Two findings are required before antidumping and countervailing duties will be assessed. The International Trade Administration ("ITA") must first determine that products were sold in the United States at less than fair value or were subsidized. If a positive determination is rendered, then the ITC must determine if an industry in the United States is materially injured, or is threatened with material injury, or that an establishment of a United States industry is materially retarded as a result from the "dumped" or subsidized imports. However, if the ITC determines that a reasonable indication of injury does not exist, then the antidumping and countervailing duty investigations cease. *See* 19 U.S.C. §§ 1671-1677g (1987); *Bello, supra* note 3, at 301-04.

12 19 U.S.C. §§ 1671-77g (1987).

13 Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified in scattered sections of 19 U.S.C.).

14 Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984)(codified in scattered sections of 19 U.S.C.).

15 19 C.F.R. §§ 353-55 (1987).

16 19 C.F.R. §§ 200-13 (1987).

17 *See supra* note 11.

18 19 U.S.C. §§ 1671b, 1673b (1987).

19 19 U.S.C. § 1673(2) (1987) states in relevant part:

(a) Determination by Commission of reasonable indication of injury

Except in the case of a petition dismissed by the administering authority under section 1671a(c)(3) of this title, the Commission, within 45 days after the date on which a petition is filed under section 1671a(b) of this title or on which it receives notice from the administering authority of an investigation commenced under section 1671a(a) of this title, shall make a determination, of whether there is a reasonable indication that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of the merchandise which is the subject of the investigation by the administering authority. If that determination is negative, the investigation shall be terminated.

national Trade.[20] In past cases, the Court of International Trade has interpreted the reasonable indication standard as a low threshold inquiry in which "only the barest clues or signs" were necessary to justify an affirmative preliminary injury determination.[21] As a result, the Court of International Trade ruled conflicting evidence could not be weighed when making a preliminary determination on material injury to an United States industry resulting from imported products.[22] However, in *American Lamb Company v. United States*,[23] the United States Court of Appeals for the Federal Circuit rejected the Court of International Trade's interpretation of the reasonable indication standard. The Court of Appeals for the Federal Circuit held that the ITC's practice of examining conflicting evidence to ascertain the presence or absence of a reasonable indication of injury or threat of injury in its preliminary determination "accords with clearly discernible legislative intent and is sufficiently reasonable."[24]

This Note will discuss the importance of the reasonable indication standard as interpreted by the Court of Appeals for the Federal Circuit in *American Lamb*. The Note first examines previous decisions by the Court of International Trade which prohibited the use of conflicting evidence in preliminary injury determinations. Second, it will analyze the procedural history of the *American Lamb* case and the rationale for its decision in light of the previous rulings by the Court of International Trade. The Note will conclude with reasons for supporting the Court of Appeals for the Federal Circuit's interpretation of the reasonable indication standard.

II. PROCEDURES FOR ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS

Antidumping and countervailing duty investigations may be com-

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[20] The Trade Agreements Act of 1979 confers exclusive jurisdiction on the United States Court of International Trade to review decisions by the ITA and the ITC. 19 U.S.C. § 1516a (1987). Adverse decisions by the Court of International Trade can be appealed to the Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(5) (1987). A party can obtain judicial review for practically any decision rendered in antidumping or countervailing duty proceedings. *See* Horlick, *supra* note 26, at 835. For example, initiation of an investigation, negative preliminary determinations, final determinations, and even decisions not to proceed further can be questioned in the Court of International Trade. 19 U.S.C. § 1516a (1987). The Court of International Trade has heard countless number of cases concerning antidumping and countervailing duty proceedings, and its caseload continues to increase.

[21] *See* Republic Steel Corp. v. United States, 591 F. Supp. 640, 646 (Ct. Int'l Trade 1984).

[22] *See id.*; Jeannette Sheet Glass Co. v. United States, 607 F. Supp. 123 (Ct. Int'l Trade 1983); American Lamb Co. v. United States, 611 F. Supp. 979 (Ct. Int'l Trade 1985).

[23] 785 F.2d 994 (Fed. Cir. 1986).

[24] *Id.* at 1004.

menced either by self-initiation on the part of the ITA or by the filing of a petition by a private, "interested party"[25] on behalf of a domestic industry.[26] Pursuant to the Trade and Tariff Act of 1984, petitions must be filed simultaneously with the ITA and ITC. Within twenty days of receipt of the petition, the ITA must decide: 1) whether the petition alleges the necessary elements for proper relief and "contains information reasonably available to the petitioner supporting the allegations." 2) If the determination is affirmative, the ITA will then initiate an investigation into whether the merchandise in question is being, or is likely to be sold at less than fair value, or is being subsidized. 3) If the determination is negative, then the ITA must terminate further proceedings.[27] If the petition provides a prima facie case to initiate an antidumping or countervailing duty proceeding, then the ITC will be notified immediately.[28]

A critical aspect of antidumping and countervailing duty proceedings is the collection of information by the ITA. The process of gathering data is implemented by sending questionnaires to the relevant importers, manufacturers, or foreign governments.[29] This process is the first step of the formal investigative procedure. The questionnaire usually will request information pertaining to activities which occurred during the six month period directly preceding the prospective investigation. Once the questionnaires are received, the respondent has thirty days in which to answer. This thirty-day period can be extended if the respondent produces evidence of its cooperation, as well as reasons for requesting an extension. The answers to the questionnaires must be meticulously presented, since the completed questionnaires are included in the record of the proceeding.[30] After receipt of the answers, the ITA then must verify the responses by analyzing the thoroughness and completeness of the questionnaires.[31]

The ITC must render a preliminary determination within forty-five days after the filing of an antidumping or countervailing duty petition. This preliminary determination is based on the best information available

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[25] 19 U.S.C. § 1677(9) (1987).

[26] 19 U.S.C. §§ 1671a, 1673a (1987). Although the ITA can self-initiate an antidumping or countervailing duty investigation, practically all proceedings have been initiated through petitions from interested parties. *See* Horlick, *Summary of Procedures Under the United States Antidumping and Countervailing Duty Laws*, 58 ST. JOHN'S L. REV. 828 (1984).

[27] 19 U.S.C. §§ 1671a(c), 1673a(c) (1987).

[28] 19 U.S.C. §§ 1671a(d), 1673a(d) (1987). *See also* United States v. Roses Inc., 706 F.2d 1563, 1568-70 (Fed. Cir. 1983); S. REP. NO. 249, 96th Cong., 1st Sess. 63, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 449.

[29] 19 C.F.R. § 207.8 (1987).

[30] 19 C.F.R. § 207.2(i)(1) (1987).

[31] 19 C.F.R. § 207.4(b) (1987).

as to whether a reasonable indication exists that an industry in the United States has been materially injured, threatened with material injury, or materially retarded by dumped or subsidized imports.[32] This analysis involves surveying the health of the United States industry as well as the impact of imported merchandise on the affected enterprise. All parties have the opportunity to present written statements before a preliminary or final injury determination will be rendered by the ITC. If the ITC's preliminary determination indicates that injury is not likely to occur, then the investigations will terminate. The ITC will enter a final determination on the injury issue only if the ITA also finds that less than fair value sales or subsidization have resulted from the alleged imported merchandise.[33]

The ITA must determine within 160 days of a self-initiated investigation or petition, filed properly by a private domestic interested party, whether a reasonable basis exists to believe or suspect that the alleged dumped products were sold at less than fair value.[34] In countervailing duty cases, preliminary determinations must be rendered within 85 days, but can be extended in certain situations for an additional 65 days if the case is complex, novel, or the number of businesses to be investigated is large.[35] These preliminary determinations are based on the "best information" available to the ITA at the time of its decision.[36] The 160-day period rule for antidumping cases either can be shortened or extended depending on the circumstances. For instance, in most cases the interests of the parties, such as the foreign exporters and the domestic industry, would be enhanced if the preliminary investigation process were rapidly facilitated. As a result, if the ITA obtained sufficient information and the petitioner waived verification, a preliminary determination can be executed within 75 days after the commencement of the investigation.[37] On the other hand, the time period can be extended up to an additional 210 days under extraordinary or necessary situations.[38]

The final determination by the ITA on the issue of whether an imported product was sold at less than fair value or subsidized must be ascertained within seventy-five days of the preliminary investigation.[39] This limitation can be extended to 135 days if requested by the party

32 19 U.S.C. §§ 1671b, 1673b (1987).

33 19 U.S.C. §§ 1671b, 1673b (1987).

34 19 U.S.C. § 1673b(b) (1987).

35 19 U.S.C. § 1671b(b) (1987).

36 19 U.S.C. §§ 1671b(b), 1673b(b) (1987).

37 19 U.S.C. § 1673b(b)(2) (1987).

38 19 U.S.C. § 1673b(c) (1987).

39 19 U.S.C. §§ 1671d(a)(1), 1673d(a)(1) (1987).

adversely affected by the preliminary determination.[40] If the ITA's final determination were negative, it would inform the ITC accordingly, and any further proceedings would be terminated.[41] However, if the final determination were affirmative, then the ITA must await the ITC's final material injury decision.[42]

If the ITC begins its final investigation, the injury decision must be reached between 45 and 75 days after a final affirmative decision from the ITA.[43] This short period of time adds pressure to the ITC because the process of rendering a final determination encompasses evaluation of briefs, pre-hearings, hearings, and testimony from economic and technical experts.[44] The ITC's decision is based on a majority vote by the Commissioners. If the vote is divided evenly as to whether the injury decision should be negative or affirmative, then this would be considered as if an affirmative decision had been rendered. An affirmative determination on any of three issues—1) material injury to an United States industry, 2) threat of material injury to an United States industry, 3) material retardation of the establishment of a domestic industry—will result in a final affirmative determination.[45] Upon finding an injury to an United States industry, the ITC will notify the ITA and all interested parties involved, as well as publish its findings in the *Federal Register*, while the ITA will publish an Antidumping Duty Order.[46]

The ITA must publish an Antidumping or Countervailing Duty Order within seven days of the ITC's affirmative conclusion of injury. A typical Order will describe the dumped or subsidized merchandise, and will instruct the Customs Service pending liquidation, to demand the deposit of antidumping or countervailing duties, equal to the dumping or subsidized margin.[47] Subsequently, the Customs Service will impose antidumping or countervailing duties as determined by the ITA.[48] The Order must be restricted to include only those products which were found to have caused injury, and cannot be extended to items found merely to have been sold at less than fair value or subsidized.[49]

The Order would remain in effect and any subsequent entries of the particular merchandise would be subject to dumping or countervailing

40 19 U.S.C. § 1673d(a)(2) (1987).
41 19 U.S.C. §§ 1671d, 1673d(c)(2) (1987).
42 19 U.S.C. §§ 1671d(b), 1673d(b) (1987).
43 19 U.S.C. §§ 1671d(b)(2)-(3), 1673d(b)(2)-(3) (1987).
44 Horlick, *supra* note 26, at 834.
45 19 U.S.C. §§ 1671d, 1673d (1987).
46 19 U.S.C. § 1671d(d), 1673d(d) (1987).
47 19 U.S.C. §§ 1671e, 1673e (1987).
48 19 U.S.C. § 1673e (1987).
49 *See* Badger-Powhatean v. United States, 608 F. Supp. 653 (Ct. Int'l Trade 1985).

duties until the foreign manufacturer complied with the Order.[50] The ITA will review its determinations once a year to decide whether the dumping or subsidizing practices have ceased.[51]

The ITA has the discretion to suspend an investigation prior to its final determination. This will occur "upon the acceptance of an agreement to revise pieces from exporters of the merchandise which is the subject of the investigation who account for substantially all of the import of that merchandise into the United States."[52] The foreign manufacturer must agree to cease exports of the products for a six month period after the date from which the investigation is suspended, or until their prices are adjusted to completely eliminate the dumping or countervailing margin.[53]

III. Interpretation of the Reasonable Indication of Injury Standard by the Court of International Trade

United States antidumping and countervailing duty laws seek to safeguard domestic industries, while preserving an environment conducive for international trade.[54] Congress realizes that non-tariff barriers, while negating adverse affects of unfair trade practices, can be detrimental to United States trading policies.[55] Consequently, an effort has been made to ensure that the procedures in antidumping and countervailing actions accord parties a fair opportunity to be heard, to challenge and question, present evidence and witnesses, and to appeal adverse decisions through the judicial process.[56] Although advocates of protectionist trade policies favor vigorous and stringent enforcement of antidumping and countervailing duty procedures, rationally and fairly enforced rules will not only protect domestic businesses but will preserve credibility with United States trading partners.

In the recent decision of *American Lamb Company v. United States*, the Court of Appeals for the Federal Circuit interpreted the reasonable indication standard as authorizing the ITC to consider conflicting evidence at the preliminary investigation stage.[57] Accordingly, the ITC can now engage in an expedited and meaningful injury investigation process.

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50 19 U.S.C. § 1675(c) (1987); 19 C.F.R. § 353.53 (1987).

51 19 U.S.C. § 1675(a) (1987).

52 19 U.S.C. § 1673c(c)(1) (1987). *See* 19 U.S.C. § 1671c(c)(1) (1987).

53 19 U.S.C. §§ 1671c(b), 1673c(b) (1987).

54 *See* Note, *The Republic Steel Decision: The Proper Scope of ITC Preliminary Determinations Under Countervailing Duty Law*, 19 GEO. WASH. J. INT'L L. & ECON. 451, 458-59 (1985).

55 *See* H.R. REP. No. 317, 96th Cong., 1st Sess. 7 (1979).

56 *See* 19 U.S.C. §§ 1671-1677g (1987).

57 785 F.2d at 1001-02.

Furthermore, this decision has meant that preliminary injury determinations will serve a significant purpose in antidumping and countervailing duty proceedings and will eliminate unmeritorious claims before they enter the final investigation stage. As a result, not only will future investigations become more equitable for foreign manufacturers alleged to have sold their products at less than fair value or received a subsidy, but they will comport with past practices of the ITC and the intent of Congress.

However, prior to the Court of Appeal's decision, the Court of International Trade interpreted the reasonable indication standard differently than the ITC.[58] This difference is demonstrated by three important decisions: *Republic Steel Corp. v. United States,*[59] *Jeannette Sheet Glass Corp. v. United States,*[60] and *American Lamb Company v. United States.*[61] In these cases, the ITC found no reasonable indication of injury, which led all three petitioners to appeal that determination to the Court of International Trade. In all three cases, the Court of International Trade held that the purpose of the preliminary investigation was to discern whether a possibility of injury could arise from the evidence in the given situation.[62] Weighing conflicting evidence was not to occur during preliminary injury investigations, but rather reserved for final determination proceedings. Consequently, the Court of International Trade declared that the ITC had imposed an unlawfully stringent reasonable indication standard that closely resembled requirements necessary for final determinations.[63]

The Court of International Trade's first extensive interpretation of the reasonable indication standard arose in the *Republic Steel* case.[64] In *Republic Steel,* several United States steel companies requested a review of negative preliminary determinations by the ITC in countervailing duty proceedings involving steel products from Brazil, Spain and South Korea.[65] The ITC found no reasonable indication of injury or threat of in-

58 *See also* American Grape Growers Alliance v. United States, 615 F. Supp. 603, 607 (Ct. Int'l Trade 1985)(at the preliminary injury determination stage, the investigation must go forward if the petitioner raised the possibility of injury); Armstrong Rubber Co. v. United States, 614 F. Supp. 1252, 1253 (Ct. Int'l Trade 1985)(ITC lawfully looked for the reality of injury, not the possibility of injury).

59 591 F. Supp. 640 (Ct. Int'l Trade 1984).

60 607 F. Supp. 123 (Ct. Int'l Trade 1985).

61 611 F. Supp. 979 (Ct. Int'l Trade 1985); *see infra* notes 89-150 and accompanying text.

62 *See* 591 F. Supp. at 650; 607 F. Supp. at 133; 611 F. Supp. at 981.

63 *Id.*

64 591 F. Supp. at 640. *See also* Bello & Holmer, *U.S. Trade Law and Policy Series* 8: *Recent Developments Regarding Antidumping and Countervailing Duty Injury Determinations,* 20 INT'L LAW. 689, 695-96 (Spring 1986).

65 591 F. Supp. at 642.

jury from the imported products. As a result, the ITC concluded in its preliminary determination that the alleged subsidized products did not materially injure or threaten to injure an United States industry.[66]

In *Republic Steel*, the Court of International Trade held that the statutory language and legislative history indicated a low threshold for finding a reasonable indication of injury during the preliminary determination proceeding.[67] The court concluded that the ITC should not consider conflicting evidence since, "[t]he object of these 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."[68] The court stressed that the interpretation enunciated by the ITC on the reasonable indication standard should actually be the proper standard for final determinations.[69] Consequently, based on the mere possibility that imports were harming United States industries, foreign manufacturers will have to defend their cases to the final determination.[70]

The decision of the Court of International Trade to preclude the ITC from using conflicting evidence was based on several different factors.[71] First, the court found that the threshold for finding a reasonable indication of injury was extremely low since the purpose of the preliminary investigation was only to decide whether a full scale investigation should take place.[72] The court reasoned that "[t]he word 'indication' suggests only the barest clues or signs needed to justify further inquiry. The use of the 'reasonable' standard suggests that, in the case of a multiplicity of allegedly injurious importations, it is too much to expect firm

66 *See Id.*; Carbon Steel Structural Shapes from Brazil, Inv. No. 701-TA-118 (preliminary determination), USITC Pub. No. 1221 (February, 1982), 47 Fed. Reg. 9100 (1982); Hot-Rolled Carbon Steel Bar from Brazil, Inv. No. 701-TA-126 (preliminary determination), USITC Pub. No. 1221 (February, 1982), 47 Fed. Reg. 9104 (1982); Cold-Formed Carbon Steel Bar from Brazil, Inv. No. 701-TA-135 (preliminary determination), USITC Pub. No. 1221 (February, 1982), 47 Fed. Reg. 9110 (1982); Hot-Rolled Carbon Steel Sheet from Spain, Inv. No. 701-TA-156 (preliminary determination), USITC Pub. No. 1255 (June, 1982), 47 Fed. Reg. 26,040 (1982); Hot-Rolled Alloy Steel Bar from Spain, Inv. No. 701-TA-161 (preliminary determination), USITC Pub. No. 1255 (June, 1982), 47 Fed. Reg. 26,043 (1982); Cold-Formed Alloy Steel Bar from Spain, Inv. No. 701-TA-163 (preliminary determination), USITC Pub. No. 1255 (June, 1982), 47 Fed. Reg. 26,045 (1982); Cold-Rolled Carbon Steel Sheet from Korea, Inv. No. 701-TA-172 (preliminary determination), USITC Pub. No. 1261 (June, 1982), 47 Fed. Reg. 28,481 (1982).

67 *See* 591 F. Supp. at 646-47.

68 *Id.* at 650.

69 *Id.*

70 *See id.* at 648.

71 *See* Note, *supra* note 54, at 470-75.

72 591 F. Supp. at 646.

proof with respect to all."[73]

Second, the importance of legislative history was employed to support the court's low threshold rationale. The court relied on an interpretation of the reasonable indication standard by the Ways and Means House Committee, which stated "that a reasonable indication will exist in each case in which the facts reasonably indicate that an industry in the United States could possibly be suffering material injury. . . ."[74] In addition, the court emphasized the importance of the legislative history which indicated that the ITC's decision was "primarily *part of the decision as to whether an investigation should be initiated.* It [was] not intended to have the substantive content of the full investigation itself."[75] Although the court conceded that Congress expected a thorough preliminary determination inquiry, it concluded that the ITC could not conduct an exhaustive investigation within the 45-day statutory limit.[76] At this stage, "the thoroughness is for the purpose of deciding whether a possibility of injury exists, not for the purpose of deciding between alternative possibilities."[77]

Finally, the court noted the significance that in antidumping and countervailing procedures, the ITC's preliminary determination came before the ITA's preliminary investigation. The Senate had declared that the ITC's preliminary determination function was "not stringent" and "intended to be lower than the Treasury's standard for preliminary determinations under current practice."[78] Through this interpretation, the court reasoned that the preliminary determination of the ITC was intended only to delete wholly undeserving petitions.

Since the ITC had weighed conflicting evidence in its preliminary determination, the Court of International Trade ruled that the ITC's decision was not in accordance with the law.[79] In addition, the court noted that

> [i]f 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 essential points with matters of public record, or does not state

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73 *Id.*

74 *Id.* (quoting H.R. REP. No. 317, 96th Cong. 1st Sess. 52 (1979)).

75 *Id.* at 647 (emphasis in original).

76 *Id.* at 648.

77 *Id.*

78 *Id.* at 647-48 (quoting S. REP. No. 96-249, 96th Cong., 1st Sess. 50, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 436 (1979)). Under the Trade Agreements Act of 1979, the administering body of antidumping and countervailing duty proceedings was changed from the Treasury Department to the ITA. *See* 19 U.S.C. § 1677(1) (1987); Reorg. Plan No. 3 of 1979, 44 Fed.Reg. 69,273 (1979); Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980).

79 591 F. Supp. at 651.

> 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.[80]

Consequently, the court remanded the case and required the ITC to render a preliminary determination on the issue of whether a reasonable indication of injury existed to the hot-rolled alloy steel bars industry and to the cold-formed alloy steel bars industry, without considering conflicting evidence.[81]

In *Jeannette Sheet Glass*, a domestic producer of thin sheet glass challenged the ITC's negative preliminary injury determination. The ITC found there was no reasonable indication that the Jeannette Sheet Glass Corporation, the sole manufacturer of thin sheet glass in the United States, would be injured or was threatened with material injury from imports of such glass from Switzerland, Belgium, and the Federal Republic of Germany.[82] Jeannette Sheet Glass Corporation sought review of the ITC's determination in the Court of International Trade and applied the low threshold of inquiry holding in *Republic Steel* to support its allegations. Consequently, the Court of International Trade was faced again with the issue of whether the ITC had misapplied the reasonable indication standard by weighing conflicting evidence of record.

The ITC's position was that it could weigh evidence during the preliminary injury procedure and could render a negative determination if clear and convincing evidence existed that imports were not possibly materially injuring or threatening material injury to the domestic industry.[83] The ITC continued to maintain that it was properly applying the reasonable indication standard. However, the ITC conceded that its application of the reasonable indication standard was unlawful as compared to the standard enunciated in *Republic Steel*.[84]

The Court of International Trade reaffirmed its earlier decision in *Republic Steel* by holding that the ITC should not have examined conflicting evidence to reach the reasonable indication standard at the preliminary stage of its investigation.[85] The court held that the ITC had erroneously acted by resolving the injury issue by weighing conflicting

80 785 F.2d at 999-1000 (quoting 16 Cust. B. & Dec., No. 14, at 56).

81 591 F.Supp. at 651. The ITC did not appeal the Court of International Trade's decision since the case was resolved after a voluntary restraint agreement was reached between all relevant parties. Bello & Holmer, *supra* note 64, at 696.

82 607 F. Supp. at 127. *See* Thin Sheet Glass from Switzerland, Belguim, and the Federal Republic of Germany, Inv. Nos. 731-TA-127, 128 and 129 (preliminary determination), USITC Pub. No. 1376, 48 Fed. Reg. 21,213 (1983).

83 607 F. Supp. at 129.

84 *Id.*

85 *Id.* at 133.

evidence, rather than only determining whether sufficient information in the record existed to raise the potentiality of injury.[86] The court stated the "[ITC]'s 'preliminary' determination, in effect, constituted a final determination predicated solely upon data submitted in the forty-five day period permitted at the preliminary stage."[87] This case was then remanded to the ITC for reconsideration of its negative preliminary injury determination without taking into account conflicting evidence.[88] Therefore, according to the Court of International Trade, the appropriate standard for preliminary determinations by the ITC was articulated and set forth in the opinion in *Republic Steel.*

IV. THE *AMERICAN LAMB* DECISION

A. Factual Background

On April 18, 1984, American Lamb Company,[89] Denver Lamb Company and Iowa Lamb Company filed petitions with the ITA and the ITC alleging that lamb meat imported from New Zealand was being subsidized and sold at less than fair value in the United States.[90] These plaintiffs supplied evidence of declining prices for lamb, diminishing production of live lambs, and the rising number of lamb and sheep slaughter to indicate the liquidation of herds.[91] Thereby, plaintiffs alleged that lamb imported from New Zealand suppressed prices in the United States. Pursuant to United States antidumping and countervailing duty laws,[92] the ITC initiated investigations[93] to determine if a reasonable indication of material injury, or threat of material injury, or material retardation to

86 *Id.* at 129.

87 *Id.*

88 *Id.* at 133. On remand, the ITC in accordance with the *Republic Steel* case, did not weigh conflicting evidence and as a consequence, rendered an affirmative preliminary injury determination. *See* Thin Sheet Glass from Switzerland, Belgium and the Federal Republic of Germany, USITC Pub. No. 1727 (July 1985).

89 American Lamb Company, located in Chino, California, is a cooperative that packs, processes and sells lamb meat, principally from lambs produced by its constituent members who are sheep ranchers.

90 785 F.2d at 996. The petitions were filed on behalf of sheep ranchers, feed lot operators, and lamb meat packing and processing companies.

91 611 F. Supp. at 980.

92 *See* 19 U.S.C. §§ 1671b, 1673b (1987).

93 New Zealand is not a "country under the Agreement," and is therefore not entitled to an injury determination in countervailing duty proceedings. 611 F. Supp. at 980. The United States had withdrawn recognition of New Zealand as a signatory to the General Agreement on Tariffs and Trade Subsidies Code because New Zealand had failed to remove its main subsidies. *Id.* As a result, issues relating to the ITC's countervailing duty determination were moot. Plaintiffs, therefore, filed a new countervailing duty petition on March 26, 1985; *see id.*; *see also* Lamb Meat from New Zealand: Initiation of Countervailing Duty Investigation, 50 Fed. Reg. 15,949 (1985).

the establishment of an United States industry existed.[94]

During the preliminary investigation, the ITC accepted evidence from the United States Department of Agriculture, lamb meat packers and producers, academic and trade association researchers, and interested parties from New Zealand.[95] Notification that the ITC would be initiating its investigation was given on April 25, 1984.[96] In addition, a public conference was held by the ITC to hear evidence pertaining to New Zealand lamb meat from all parties that requested a presence at the conference.[97]

In its preliminary determination on May 25, 1984, the ITC decided by a 4-2 vote that no reasonable indication arose that imported lamb meat from New Zealand was materially injuring, threatening material injury, or was materially retarding the establishment of the United States lamb industry.[98] The plaintiffs disputed the ITC's use of conflicting evidence in its determination of the reasonable indication standard, and subsequently appealed the ITC's decision to the Court of International Trade.[99] They asserted that the ITC's decision should have been remanded in light of previous decisions by the Court of International Trade, which held that the ITC could not weigh conflicting evidence in arriving at a preliminary determination.[100] The ITC, on the other hand, contended that under 19 U.S.C. § 1673b(a), it was authorized to weigh conflicting evidence in preliminary injury investigations, but conceded that if the previous decisions were upheld, then plaintiffs' motion for remand would be appropriate.[101] This case was another attempt by the ITC to have the Court of International Trade reverse its earlier decisions prohibiting the ITC from considering conflicting evidence during the preliminary injury determination stage.

Judge DiCarlo, as judge in the *American Lamb* case, stated that "stare decisis counsels the Court to follow the prior decisions."[102] Consequently, the action was remanded to the ITC for re-evaluation of the case in conformity with the previous standard of review enunciated in *Republic Steel* and *Jeannette Sheet Glass*. Despite the reaffirmation of

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94 611 F. Supp. at 980; 785 F.2d at 996.

95 785 F.2d at 996. The New Zealand intervenors included the New Zealand Meat Producers Board, the Meat Export Development Company, and the New Zealand Lamb Company.

96 49 Fed. Reg. 17,828 (1984); *see also* 49 Fed. Reg. 24,458 (1984).

97 785 F.2d at 996.

98 Lamb Meat from New Zealand, Inv. Nos. 701-TA-214, and 731-TA-188, USITC Pub. No. 1534; *see also* 49 Fed. Reg. 24,458 (1984).

99 785 F.2d 997; *see also* 611 F. Supp. at 979-81.

100 *See* 591 F. Supp. at 640; 607 F. Supp. at 123.

101 785 F.2d at 997.

102 *Id.*

the reasonable indication standard in these three cases within one year, the ITC appealed to the Court of Appeals for the Federal Circuit in an effort to reverse the *Republic Steel* and *Jeannette Sheet Glass* cases.

B. The Decision by the Court of Appeals for the Federal Circuit

The Court of International Trade, pursuant to 28 U.S.C. § 1292(d)(1), allows the ITC to appeal its decisions to the Court of Appeals for the Federal Circuit. On October 15, 1985, the Court of Appeals for the Federal Circuit granted the ITC's petition for an interlocutory appeal.[103] Thereafter, on February 28, 1986, in one of the most important court decisions concerning the injury issue for preliminary determinations in antidumping and countervailing duty investigations, the Court of Appeals effectively overruled the decision in *Republic Steel* and its progeny.[104] Consequently, the ITC's interpretation of the reasonable indication standard was upheld.

The decision by the appellate court to allow the ITC to weigh conflicting evidence in its preliminary injury determination was predicated on several reasons.[105] First, the essential aspect in the Court of Appeals' decision was the deference and great weight accorded to the ITC in administering and interpreting its own statute.[106] In granting substantial deference to the ITC's interpretation of the reasonable indication standard, the Court stated: "though a court may reject an agency interpretation that contravenes clearly discernible legislative intent, its role when that intent is not contravened is to determine whether the agency's interpretation is 'sufficiently reasonable.'"[107] The ITC had consistently articulated the reasonable indication standard as one mandating that it issue a negative determination only if: 1) the entire record contains clear and convincing evidence that no material injury or threat of material injury occurred, and 2) no contrary evidence would likely arise in a final proceeding.[108] The court determined that this practice applied by the ITC provided "fully adequate protection against unwarranted terminations."[109] In addition, the above guidelines were said to be evenly distributed for possibilities of affirmative or negative determinations. Consequently, the Court of Appeals held that the ITC's "long-standing

103 785 F.2d at 997.
104 *Id.* at 1004.
105 *See* Bello & Holmer, *supra* note 64, at 698.
106 *Id.* at 1001; *see* Zenith Radio Corp. v. United States, 437 U.S. 443, 450-51 (1978).
107 *Id* at 1001; *see also* Fed. Election Comm. v. Democratic Senatorial Campaign Comm., 454 U.S. 27 (1981).
108 *Id.* at 1001.
109 *Id.*

practice must be viewed as permissible within the statutory framework."[110] "One writing on a clean slate might find the [Court of International Trade'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.' "[111]

Second, the Court rejected the Court of International Trade's interpretation which equated the statutory phrase "reasonable indication" with "mere possibility."[112] The Court of Appeals, in relying on the plain meaning of the statute,[113] stated that the standard did not intend a reasonable indication for the need of more inquiry, but only called for a reasonable indication of injury.[114] The Court applied the reasoning in *United States v. Roses, Inc.*,[115] where the Court of Appeals had construed Congress' intent to allow the ITC to evaluate all relevant information in order to avoid unwarranted investigations.[116] Enabling every investigation to reach the final determination stage on the mere possibility of injury would mean that virtually every petition could go beyond the preliminary investigation stage, since some possibility of injury could be shown.[117]

Third, Congressional intent firmly justified that conflicting evidence be weighed, since sections 1671b(a) and 1673b(a) of the Trade Agreements Act of 1979 specifically stated that a preliminary determination must be made from the "best information" available.[118] In *Budd Company Railway Division v. United States*,[119] the Court of International Trade declared that "best information available" meant accessible or obtainable from whatever sources,[120] which would not be limited to the petitioner, but would include information supplied by any interested party to the proceedings.[121] Therefore, if conflicting evidence were available at the time of the preliminary determination, then this would be included as part of the best information in applying the reasonable indi-

110 *Id.*

111 *Id.* at 1001 (quoting Chevron, U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984)).

112 *Id.* at 1001-02.

113 It is an elementary principle of statutory construction that "[the] starting point in every case involving construction of a statute is the language itself." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976)(quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975)).

114 785 F.2d at 1001.

115 706 F.2d 1563 (Fed. Cir. 1983).

116 *Id.* at 1569-71.

117 785 F.2d at 1002.

118 *See* 19 U.S.C. §§ 1671b, 1673b (1987). *See also* 19 U.S.C. §§ 1671a, 1673a (1987).

119 507 F. Supp. 997 (Ct. Int'l Trade 1980).

120 *Id.* at 1000.

121 *Id.* at 1003-04.

cation standard. "It is . . . intended that the ITC will investigate the allegations in the petition in as thorough a manner as possible using the information available within that time period, and will provide interested parties a reasonable opportunity to present their views."[122] By requiring a thorough investigation, "Congress intended the *application of agency expertise*, not only to examine the petition and supporting data for internal inconsistencies, but also to evaluate it in light of a wide body of other information, to the end that, so far as possible, the commencement of unwarranted investigations should be avoided."[123] Furthermore, the Court of Appeals reasoned that if the ITC were forced to disregard all evidence which tended not to support an antidumping or countervailing duty petition, then respondents or other petitioners would have no reason or incentive to submit any evidence to the ITC during preliminary determinations.

Finally, the Court of Appeals discussed judicial reviewability of the ITC's preliminary decisions. The Court stated that finding it more difficult to reverse a negative preliminary determination merely because the ITC weighed conflicting evidence should not be a basis for prohibiting the ITC from interpreting its method of implementing the reasonable indication standard.[124] However, the Court declared that since any negative preliminary determination could be reviewed by a court, the ITC's decision could not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[125] If a negative injury determination did not violate these standards, then the court cautioned against overturning ITC's decisions. Congress "has entrusted the decision-making authority in a specialized, complex economic situation to [ITC] . . . . Thus, review . . . would be to ascertain whether there was a rational basis in fact for the determination . . . ."[126]

V. *AMERICAN LAMB* AND THE REASONABLE INDICATION STANDARD

The decision by the Court of Appeals for the Federal Circuit in *American Lamb* is widely considered the most significant case pertaining to preliminary injury determinations in antidumping and countervailing duty investigations. As a direct result of this decision, the ITC is more capable of rendering negative preliminary findings. Furthermore, the

122 H.R. REP. No. 317, 96th Cong., 1st Sess. 61 (1979).
123 785 F.2d at 1002 (quoting United States v. Roses Inc., 706 F.2d at 1569)(emphasis in original).
124 *Id.* at 1004.
125 *Id*; *see also* 19 U.S.C. § 1516a(b)(1)(a) (1987).
126 785 F.2d at 1004 (quoting S. REP. No. 249, 96th Cong., 1st Sess. 252, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS at 638).

American Lamb decision has conferred great weight to the ITC's interpretation of the antidumping and countervailing duty statutes that it administers.

The ITC should be granted great weight in both the interpretation of its statutory mandate and the methods it decides to employ in administering antidumping and countervailing duty laws.[127] The courts have recognized that interpretations of statutes that an agency is charged with administering are entitled to substantial deference.[128] The agency's interpretation will be "sustained unless unreasonable and plainly inconsistent with the statute, and [is] to be held valid unless weighty reasons require otherwise."[129] Furthermore, the "court need not conclude that the agency construction [is] the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[130]

In reviewing ITC preliminary determinations, Congress has determined that courts should overturn the agency's decision if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[131] This high standard of review indicates that Congress intended to accord the ITC great deference in preliminary injury determinations. Accordingly, Congress wanted the ITC decisions terminating unmeritorious claims to be reviewed only under the arbitrary and capricious standard. Even if the ITC should have rendered an affirmative preliminary determination, a court could not overturn the ITC decision unless the finding was arbitrary or capricious.[132] Thus, Congress intended that the ITC's preliminary hearing would entail more than a finding of a mere possibility of injury. However, the Court of International Trade held that the ITC's responsibility in a preliminary determination proceeding was simply to find whether any facts reasonably raise a mere

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127 *See* Luciano Pisoni Fabrica Accessori Instrumenti Musicali v. United States, 640 F. Supp. 255 (Ct. Int'l Trade 1986)(decision by the Department of Commerce to initiate an investigation was a sufficiently reasonable interpretation of the statute); Smith-Corona Group v. United States, 713 F.2d 1568 (Fed. Cir. 1983); Chemical Products Corp. v. United States, 650 F. Supp. 178 (Ct. Int'l Trade 1986). *See generally* 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.16 (1978).

128 *See* Zenith Radio Corp. v. United States, 437 U.S. 443 (1978); Udall v. Tallman, 380 U.S. 1 (1965).

129 Melamine Chemicals, Inc. v. United States, 732 F.2d 924, 928 (1984).

130 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n. 11 (1984); *see* Consumer Products Div., SCM Corp. v. Silver Reed America, Inc., 753 F.2d 1033, 1039 (1985).

131 19 U.S.C. § 1516a(b)(1)(A) (1987). For final determinations, the proper standard of review is based on whether the decision can be supported by substantial evidence, or was not in accordance with law. *See* 19 U.S.C. § 1516(b)(1)(B) (1987).

132 *See* 19 U.S.C. § 1516a(b)(1)(A) (1987).

possibility of injury. Consequently, the Court of Appeals' overruling of the Court of International Trade's decisions was consistent with Congressional intent.

Deference can be is heightened further when an agency has interpreted its statute consistently over a long period of time and the legislature has acquiesced in that interpretation.[133] According to the Senate Finance Committee Report, "the 'reasonable indication' standard [is] to be applied in essentially the same manner as the 'reasonable indication' standard under section 201(c)(2) of the Antidumping Act [of 1921]."[134] Historically, under the Antidumping Act of 1921, the ITC has considered conflicting evidence in applying the reasonable indication standard to its preliminary injury determinations.[135] For example, although the ITC found that fish imported to the United States from Canada increased by 42 million pounds over two years, it concluded that no injury resulted since the increase was likely to distress other exporters rather than harm United States fisheries.[136] Also, in *Coke from West Germany*,[137] the ITC rendered a negative preliminary determination since no reasonable indication was found that domestic coke producers were injured or were threatened with injury by coke imports from West Germany. This determination was made even though evidence existed that underselling by foreign importers had occurred.[138] Clearly, then, the ITC has in the past weighed all the evidence bearing on the issue of injury. Therefore, the ITC's use of conflicting evidence in rendering a negative preliminary decision was in conformity with its past practices.

The experience of the ITC in implementing antidumping and countervailing duty laws is an additional reason for granting substantial deference to the agency. As the Supreme Court explained in a leading case:

> We consider that the rulings, interpretations and opinions of the [administrative agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it

[133] *See* United States v. Clark, 454 U.S. 555, 556 (1982); Smith-Corona Group v. United States, 713 F.2d 1568 (1983).

[134] S. REP. No. 249, 96th Cong., 1st Sess. 66, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 452.

[135] *See* Uncoated Free Sheet Offset Paper from Canada, USITC Pub. No. 869 (1978).

[136] *See* Certain Fish from Canada, USITC Pub. No. 919 (1978).

[137] *See* 44 Fed. Reg. 67,544 (1979).

[138] *See id.* at 67, 545-46; Note, *supra* note 54, at 460.

power to persuade, if lacking power to control.[139]

Although an agency cannot contravene or ignore the intent of the legislature or the guiding purpose of the statute, the Supreme Court has recognized that "expert discretion is the lifeblood of the administrative process."[140] The deference granted or extended to the agency's interpretation of its statutory mandate also applies to the methodology that the agency utilizes in fulfilling its lawfully delegated duties. In order for the ITC to effectively administer antidumping and countervailing duty laws, it is essential to allow methodological flexibility. As long as the agency's methodology and procedures are reasonable means of implementing its statutory purpose, the courts should not impose their own views as to the sufficiency of the agency's investigation, or question the agency's methodology. Granting due deference to the expertise of the ITC will allow the administering agency to competently implement antidumping and countervailing duty laws and serve to promote the uniform application of its statutes.[141]

Although a low threshold of inquiry may exist in terms of assessing the adequacy of antidumping or countervailing duty petitions, legislative history supports the view that the reasonable indication standard was meant to be an extremely flexible concept.[142] If the ITC could not weigh conflicting evidence in its preliminary determination, then there would be no reason to separate a preliminary and final investigation process. An antidumping or countervailing duty investigation should not be allowed to proceed merely because a petitioner simply raises the issue of injury. In other words, without the ability to consider conflicting evidence, the ITC could not eliminate petitions which clearly lack substantive merit, since practically all petitions would evidence some possibility of injury. Thus, by prohibiting the use of conflicting evidence, the ITC's enforcement procedure clearly would be undermined.

Congress' mandate that the ITC must attempt every effort to conduct a thorough inquiry based on the best information available further supports the argument that the ITC should be allowed to consider conflicting evidence in order to engage in an intensive preliminary injury determination.[143] Under antidumping and countervailing duty laws, the ITC is directed to determine, based on the best information available at

139 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

140 Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 48 (1983)(quoting New York v. United States, 342 U.S. 882, 884 (dissenting opinion)).

141 *See* Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966).

142 *See* 591 F. Supp. at 646.

143 *See* S. REP. No. 249, 96th Cong., 1st Sess. 49, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 435.

the time of its decision, whether a reasonable indication exists that dumped or subsidized products caused injury, threatened material injury, or materially retarded the establishment of an United States industry. In rendering a preliminary injury determination, the ITC must "make every effort to conduct a thorough inquiry,"[144] which encompasses the obligation to permit all interested parties an opportunity to present evidence on their behalf.[145] The thoroughness requirement not only rebuts the "mere possibility" standard enunciated by the Court of International Trade, but demonstrates that Congress intended the ITC to undertake substantial fact-finding procedures during the preliminary determination stage. If the ITC adhered to the decision in *Republic Steel* and its progeny, then the ITC could not possibly conduct a thorough investigation only by considering evidence that tended to support the petitioner. In addition, the ITC has an affirmative responsibility to acquire information from whatever sources are available.[146]

The most significant effect of the *American Lamb* decision for foreign exporters, especially smaller ones, will be the elimination of unnecessary and costly investigations, which lead to impediments in trade and unwarranted impositions of provisional remedies.[147] Defending antidumping and countervailing duty investigations can become expensive and involve time-consuming activities unrelated to fair trade, and create burdens on the administrative procedure. As a consequence, many smaller exporters cannot afford to embroil themselves in lengthy proceedings.[148] One of the reasons the Senate reduced the time limitation for preliminary determinations to forty-five days was due to the finding that lengthy investigations do not necessarily produce more accurate results.[149] In addition, some United States corporations have been accused of filing antidumping or countervailing duty petitions without any support for their contentions whenever they feel threatened by a foreign manufacturer.[150] The *American Lamb* decision will reduce the incentive for this kind of activity since the respondent can quickly present evidence to prove that no injury to an United States industry has resulted, and thereby effectively end any further proceedings.

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144 *Id.* 1979 U.S. CODE CONG. & ADM. NEWS at 435.

145 *See id.*

146 *See* 507 F. Supp. at 1003-04.

147 *See* S. REP. NO. 1298, 93rd Cong., 2d Sess. 171, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS, 7186.

148 *See* Legal Times, Sept. 9, 1985, at 4-5, col. 1.

149 *See* S. REP. NO. 249, *supra* note 143, at 49.

150 *See* Legal Times, *supra* note 148; R. DALE, *supra* note 1, at 71.

V. Conclusion

The Court of Appeals for the Federal Circuit correctly premised its decision on four major factors: 1) the plain meaning of the antidumping and countervailing duty statutes, 2) Congress' directive that the ITC conduct its preliminary investigation as thoroughly as possible and with the best information available, 3) Congress' underlying intent to provide a forum for opposing parties to present their views, and 4) rejection of the mere possibility standard advocated in *Republic Steel*. In addition, by granting substantial deference to the ITC, the Court of Appeals for the Federal Circuit has followed the Congressional aim of ensuring that the ITC conduct an effective and efficient preliminary determination. As a result of the *American Lamb* decision, the ITC can take into account evidence which firmly and conclusively rejects allegations in an antidumping or countervailing duty petition.

If the Court of Appeals had not overturned the Court of International Trade's interpretation of the reasonable indication standard in *American Lamb*, then United States foreign trade would have potentially suffered serious setbacks. According to the Court of International Trade, the slightest possibility of injury to an United States industry would have forced the imposition of temporary relief measures. This would occur even before actual injury from alleged dumped or subsidized imports was fairly demonstrated. If United States trading partners had retaliated and imposed similar procedures, then this would have impaired international trade substantially.

Congress has correctly committed itself to protect United States industries against unfair trading practices. However, in attaining this goal, Congress has been mindful of not only respecting United States obligations with its international trading partners, but also of promoting a system of free world trade. Whether or not the United States can attain these two divergent goals will depend on future policies and reactions, but at least the Court of Appeals for the Federal Circuit's decision in *American Lamb* has provided a step towards those goals, rather than impeding that progress.

Nam H. Paik