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INJURY DETERMINATIONS IN ANTIDUMPING INVESTIGATIONS IN THE UNITED STATES AND THE EUROPEAN COMMUNITY

EDWIN A. VERMULST*

Maybe it is getting into the hands now of men who do have ideas, and these ideas may be protectionist. If such is the case what they can do with that dumping law will make the escape clause look like small potatoes. They can, if they wish, raise the effective tariff barriers more than all the negotiations in Geneva will be able to achieve in the other direction.

Jacob Viner¹

INTRODUCTION

Dumping is traditionally defined as price discrimination between national markets.² Although this definition theoretically encompasses both the situation in which the dumping producer sells at a lower price in his home market than abroad and also the situation in which he sells at a lower price abroad than in his home market, from the beginning it has been accepted that only the latter gives rise to problems in the importing country, and only under certain circumstances. A corollary to this point of view is that protective action against dumping should be admissible only if such dumping causes injury in the import-

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1. R. DALE, *ANTI-DUMPING LAW IN A LIBERAL TRADE ORDER*, 61 (1980).
2. BRYAN, *TAXING UNFAIR TRADE PRACTICES* 3 (1980); DALE, *supra* note 1; SEAVEY, *DUMPING SINCE THE WAR* 2 (1970); VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 3 (1923, 1966).

ing country. We will see that this conclusion was drawn almost from the start of the enactment of the first national antidumping laws.

The ways in which dumping was defined and the degree of injury required for imposition of duties, however, differed substantially among the countries that enacted the laws. This divergence, and the growing realization that antidumping laws had the potential of becoming significant barriers to international trade, created international interest in the problem as early as the 1920's. This was a mere twenty years after entry into force of the first antidumping laws. It was not until after the second world war, however, that binding international rules were developed within the framework of the General Agreement on Tariffs and Trade [GATT].³ It is significant that the international rules were concerned more with the trade-distorting effect of antidumping action than with the effect of dumping itself, and that this one-sided concern has persisted ever since that time. Over the years, existing rules have been refined and additional rules developed. Generally speaking, the common denominator of these rules is that they all limit the freedom of the importing country to take protective action.

Antidumping law can be divided into two parts, namely procedural and substantive. Procedural antidumping law answers questions such as: What institutions administer the law? What determinations are made in the course of an antidumping proceeding? What sorts of investigation techniques do the authorities employ? Are administrative decisions subject to administrative and judicial review? and more generally, What is the degree of discretion the authorities have in the administration of the law? These questions have been answered by the author elsewhere and the answers will not be reviewed here.⁴

Substantive antidumping law falls apart into two fields: first the determination that products are dumped, that is sold at less-than-fair-value, and, second, the determination that the products have caused material injury to the domestic industry of the like product.

This article is exclusively devoted to a comparative analysis of *injury* determinations in United States and European Community antidumping law and practice from January 1, 1980 to approximately October 15, 1984. At the former date the 1979 Antidumping Code entered into force⁵ for the governments which had accepted or acceded to it by

3. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5-6, T.I.A.S. No. 1700, 55-61 U.N.T.S. 194 [hereinafter GATT]. The current version of the GATT is contained in IV GENERAL AGREEMENTS ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969) [hereinafter BISD].

4. See E. VERMULST, *ANTIDUMPING LAW AND PRACTICE IN THE UNITED STATES AND THE EUROPEAN COMMUNITIES* (1987).

5. Agreement on Implementation of Article VI of the General Agreement on the Tar-

that date. Acceptance by both the United States and the European Community led the two systems to bring their national laws into conformity with the international rules for the first time in history.⁶

The detailed character of the 1979 Code provisions, the international obligation on both systems to implement the provisions into domestic law, and the fact that both faithfully did, or at least *tried* to harmonize the two systems,⁷ would seem to warrant the conclusion that the two national antidumping laws and practices have converged, since 1980. Prior to the 1979 Code, the differences between United States and European Community antidumping law were most apparent in the field of injury.⁸ Therefore, it is in this field that convergence, when compared to pre-1980 practice, would be most striking.

This article will show, however, that the convergence has been less than one would expect on the basis of the above observations. Three reasons for this can be given: First, the 1979 Code leaves major loopholes; second, new and unexpected problems have arisen since 1979, and, finally, the two systems have fundamentally different approaches towards dumping. In the United States injurious dumping is considered to be an unfair trade practice, which should be counter-actionable *per se*. The European Community, on the other hand, views antidumping action as a matter of its Common Commercial Policy (CCP), and, at least theoretically, is willing to take the broader interests of that policy into account in its decision whether or not to impose antidumping duties.

The United States seems most stubborn in going its own way to the extent that the 1979 Code permits such an individual path. This conclusion is evidenced by a report of the Senate Finance Committee on the 1979 Trade Agreements Act [TAA].⁹ In this report on an Act,

iffs and Trade, April 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650 [hereinafter 1979 Code].

6. Article VI of the GATT did not bind the United States on the basis of the grandfather right clause in the Protocol of Provisional Application Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187. The 1967 Antidumping Code, see *infra* note 64, was accepted by the United States Executive, but was not implemented into domestic law because of Congressional resistance. Both aspects will be discussed more extensively, *infra*. Cf. Jackson, *United States-EEC Trade Relations: Constitutional Problems of Economic Interdependence*, 16 COMMON MKT. L. REV. 470-71 (1979).

7. SENATE COMM. ON FINANCE, TRADE AGREEMENT ACT OF 1979, S. REP. NO. 249, 96th Cong., 1st Sess. 37-39, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 381, 423-24 [hereinafter SENATE FINANCE COMMITTEE REPORT].

8. Thus, in a broad sense, encompassing like product, industry, materiality and causation.

9. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified at various sections of 19 U.S.C.) [hereinafter TAA]. The TAA, at section 106 of title I, repealed the Antidumping Act of 1921, 19 U.S.C. §§ 160-171 (1986). The TAA, in section 101, replaced the Antidumping Act of 1921 by adding an antidumping and countervailing title

which implemented the results of the Tokyo round into domestic law, the Committee stated that "[t]his bill is drafted with the intent to permit United States practice to be consistent with the obligations of the agreements as the United States understands those obligations."¹⁰ The European Economic Community, on the other hand, is more willing to take the practices of its trading partners into account. This conclusion is supported by the language of the Preamble of the European Economic Community Council Regulation 2176/84 which states: "Whereas in applying these (Code) rules it is essential, in order to maintain the balance of rights and obligations which these agreements sought to establish, that the community take account of their interpretation by the Community's major trading partners, as reflected in legislation or established practice."¹¹ Thus far, the strongest indication of this 'open' attitude has been in the *Allied* case,¹² in which the European Court of Justice granted judicial review to foreign exporters involved in antidumping investigations.¹³ In that case, it seemed to be a major consideration for the Court that European exporters had a similar right under the TAA. In this article, we will find similar, but more implicit, adoptions of American practice by the European Community's authorities.

Economists and lawyers increasingly argue that the antidumping laws should be revised to bring them more into accordance with principles of economic and antitrust theory.¹⁴ This criticism, however, assumes that antidumping laws *should* be economically fair. Although this assumption is valid from a "welfare economics" point of view, it tends to forget that the current antidumping laws might be the least of possible evils from a political point of view. As long as the notion of dumping as an unfair trade practice prevails, a more limited application of antidumping laws, based on economic theory, does not seem

to the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1202-1654 (1986). The new title to the Tariff Act of 1930 is contained in 19 U.S.C. § 1671-77g. (1986).

10. SENATE FINANCE COMMITTEE REPORT, *supra* note 7, at 36 (emphasis added).

11. Council Regulation (EEC) No. 2176/84, 27 O.J. EUR. COMM. (No. L 201) 1 (1984) [hereinafter the Regulation].

12. *Allied Corp. et al v. Commission of the European Communities*, 1984 E. Comm. Ct. J. Rep. 1005.

13. *Id.* at 1029.

14. See, e.g., Barcelo, *The Antidumping Law: Repeal It or Revise It*, 1 MICH. YB. INT'L LEGAL STUDIES 53 (1979) DALE, *supra* note 1; Ehrenhart, *What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act Can, Will, Should Mean for U.S. Trade Policy*, 11 L. & POL'Y INT'L BUS. 1361 (1979); Ordovery, Sykes, Wilig, *Unfair International Trade Practices*, 15 N.Y.U. J. INT'L L. & POL. 323 (1983); Barcelo, *Antidumping Laws as Barriers to Trade—The International Antidumping Code*, 57 CORNELL L. REV. 491 (1972).

politically feasible.

In the injury field, economic criticism centers around the question of: Injury to what? Is it injury to competition (the antitrust theory point of view) or injury to competitors (current antidumping laws)? Although this article will pay occasional attention to this question, its general scope is limited to a description of contemporary American and European law and practice and to a comparison of the two systems with each other, and with the GATT/Code rules.

One of the purposes of this study is to find out whether one of the two trade blocs applied the law in a more protectionist manner than the other. For example, the United States pre-1979 Code "injury" standard and the Congressional admonition that the new "material injury" standard should be interpreted in the same way as the injury standard had been applied before, might be viewed as an important indicator that, at least in this field, American law is more protectionist than its European counterpart. It will be demonstrated, however, that this is not necessarily the case. More generally, the infinite range of different fact patterns makes the drawing of such conclusions extremely difficult, if not impossible.

Nevertheless, examples are found, in both systems, of application of certain standards which facilitate findings of injury, and, thus, are more protectionist than other standards that could have been adopted. Conclusions will have to be limited to each particular standard, however, because the differences in the standards make a quantification of the degree of protectionism which they confer, impossible.

Logically speaking, the investigation into whether the dumping causes injury to the domestic industry of the like product in the importing country is comprised of four sub-investigations. They are: (1) the definition of the like product, (2) the definition of the affected domestic industry, (3) the materiality of the injury, and (4) the causal link between the dumped imports and the injury. This division has been followed in the analysis, though it will become apparent that strict separation is not always possible. Part I gives a brief overview of the history of antidumping, both on the national and on the international level. Parts II, III, IV and V are concerned with the four sub-investigations identified above. Part VI concludes the analysis with a summary of conclusions and recommendations.

The main sources of research have been the antidumping laws of the United States and the European Community, their legislative histories, articles in legal periodicals, and, most importantly, determinations by the International Trade Commission [ITC] and the Commission and Council of the European Communities. Substantial gaps in the former three sources have been filled up by these decisions.

I. THE INTERNATIONAL FRAMEWORK

A. *National Prehistory.*

Excluding the United States Wilson Bill of 1894,¹⁵ the first countries to enact antidumping laws were Canada (1904), New Zealand (1905), Australia (1906), and the Union of South Africa (1914).¹⁶ Section 801 of the American Revenue Act of 1916¹⁷ mandated imposition of fines against foreign producers if it could be proved that those producers sold their products at lower prices in the United States than in their domestic market and had the intent to destroy or injure a United States industry or restrain its development.¹⁸ Section 801 was, therefore, limited to predatory dumping. The common characteristic of these laws was that none of them required actual or potential injury before action could be taken.

In 1921, four countries enacted antidumping legislation. Three of these countries more or less made injury a prerequisite for imposition of duties as well. The British "Safeguarding of Industries Act" provided that employment in a United Kingdom industry had to be or had to be likely to be seriously affected by foreign sold articles below the cost of production.¹⁹ The Australian "Industries Preservation Act" required that detriment might result to an Australian industry by reason of dumped imports.²⁰ The New Zealand antidumping law subjected three kinds of imports to duties. Only for the third kind, applicable to imports to which the Minister of Customs had decided that special concessions were to be granted, was an injury to a New Zealand or other British industry required. It should be noted that there was no requirement that the merchandise had to be produced in New Zealand.²¹ Because this part of the law applied to what we now call subsidization (at the time it was called "bounty dumping"), it is not treated here as injurious dumping. The fourth country was the United States.

As originally presented in the House of Representatives, the American Antidumping Act of 1921²² did not contain an injury standard. An injury standard was included in a Senate proposal and was

15. J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 403 (1969).

16. VINER, *supra* note 2, at 192, 204, 206, 209 and 210.

17. Revenue Act of 1916 § 801, 15 U.S.C. § 72 (1976).

18. J. JACKSON, *supra* note 15, at 403.

19. VINER, *supra* note 2, at 219.

20. VINER, *supra* note 2, at 227-28.

21. VINER, *supra* note 2, at 232.

22. Antidumping Act of 1921, ch. 14, § 201, 42 Stat. 11 (1921) *repealed* by the TAA, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended in scattered sections of 19 U.S.C.). See generally *supra* note 9.

eventually adopted by the House of Representatives.²³ According to Jacob Viner, the law was a "model of draftsmanship"²⁴ and superior to the Canadian law, among others, because

[T]he limitation of antidumping duties to a product which injures or is likely to injure an American industry leaves it open to a wise customs administration to refrain from interference with all dumping whose benefit to the American consumer is not clearly offset in part at least by an injury, actual or prospective, to American Industry.²⁵

On the international level, the League of Nations got interested in dumping in the 1920's.²⁶ In a "Memorandum on Dumping" written for the League in 1926, Viner, often called the intellectual founder of contemporary antidumping law, remarked that dumping duties should be applied only to goods of a kind which were produced on a substantial scale in the importing country, unless there was evidence that the dumped imports were responsible for the lack of development of a domestic industry. Furthermore, he advised that the application of the duties should be contingent upon the existence of a distinct probability that the continuance of dumping would result in substantial injury to domestic industries.²⁷ Viner also expressed doubts as to the feasibility of international controls on dumping,²⁸ and history seems to have proved him right: international organizations have focused their attention on control of *antidumping*.

In 1946, the United Nations Economic and Social Council (ECOSOC) instituted a preparatory committee to prepare an agenda for a United Nations Conference on Trade and Development.²⁹ During the first session of the committee in London, the United States submitted a "Suggested Charter for an International Trade Organization of the United Nations." Article 11 of the Charter dealt with antidumping duties. The Charter provided that "*as a general rule*" each party would undertake not to impose antidumping duties unless it determined first "that the dumping . . . (would be) such as to injure or threaten to injure a domestic industry, or . . . (would be) such as to

23. H. R. REP. NO. 317, 96th Cong., 1st Sess. 11 (1979). See VINER, *supra* note 2, at 260.

24. VINER, *supra* note 2, at 262.

25. *Id.* at 263.

26. J. JACKSON, *supra* note 15, at 403.

27. VINER, *Memorandum on Dumping*, 36 LEAGUE OF NATIONS O.J. 1 (1926).

28. VINER, *supra* note 2, at 368-69.

29. SEAVEY, *supra* note 2, at 16-17.

prevent the establishment of a domestic industry."³⁰

The preparatory committee, in turn established a drafting committee which met at Lake Success in New York and tightened the phrase "like or similar product" to "like product" and added "material" to "injury."³¹ As far as injury was concerned, the terminology remained the same in a subsequent Geneva Draft, which became Article 34 of the Havana Charter and Article VI of the GATT.³² It is doubtful that the drafters, or anybody at the time, realized the future importance of addition of the word "material." Brown, for example, in describing the antidumping and the countervailing duty provisions of the Havana Charter, manages to use "material," "serious," and "substantial" as synonyms in less than fifteen lines.³³

The General Agreement came into force on January 1, 1948 on the basis of the Protocol of Provisional Application. Because Article VI is placed in the second part of the Agreement, contracting parties only committed themselves to apply the Article to the fullest extent not inconsistent with existing legislation. The Protocol, therefore, obviously favored parties who already had antidumping legislation in force by that date, and as a result were not bound by possibly more stringent Article VI provisions.³⁴

B. Article VI of the GATT³⁵

Article VI provides in relevant part:

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country if the price of the product exported from one country to an-

30. *Id.* at 17-18.

31. *Id.* at 18.

32. BROWN, *THE UNITED STATES AND THE RESTORATION OF WORLD TRADE* 257 (1950); SEAVEY, *supra* note 2, at 20. N.B.—The original Article VI of the GATT was later replaced by Article 34 of the Havana Charter, see JACKSON, *supra* note 15, at 405; BROWN, *supra* at 513.

33. BROWN, *supra* note 32, at 214.

34. Barcelo, *Antidumping Laws as Barriers to Trade: The United States and the International Antidumping Code*, 57 CORNELL L. REV. 525 (1972).

35. GATT, *supra* note 3, art VI.

other is (a) less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or, (b) in the absence of such domestic price, is less than either

- (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or,
- (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit

. . .

6(a) No contracting party shall levy any antidumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping . . . , is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry. . . .³⁶

Article VI has been termed "something of an anomaly."³⁷ Essentially an exception to the most-favored-nation clause of article I,³⁸ the conditions which have to be fulfilled in order to invoke the article are so stringent that they de facto impose positive obligations upon GATT contracting parties.³⁹ Four conditions for imposition of antidumping duties are found in Article VI⁴⁰ (1) The injury must involve a domestic industry, (2) there must be a similarity of the products, (3) the domestic industry must suffer a material injury, and (4) the injury must be an effect of the dumping. Yet, unfortunately, none of the four criteria are defined.

It should be noted that the second criterion does not strictly follow from the wording of Article VI. Article VI uses the term "like product" with regard to the comparison between the exported product and the "like product" destined for consumption in the home market of the exporter. This product then has to cause material injury to a domestic industry.⁴¹

A discrepancy exists between the English and the French text in that the former uses the term "*the* like product"⁴² and the latter "un produit similaire," a difference presumably unintended. The term "like

36. *Id.*

37. J. JACKSON, *supra* note 15, at 411.

38. SEAVEY, *supra* note 2, at 24.

39. J. JACKSON, *supra* note 15, at 411.

40. *See generally* DALE, *supra* note 1, at 79.

41. *See infra* part I, § C.

42. Emphasis added.

product" emerges in several other articles of the General Agreement,⁴³ but is nowhere defined. Indeed, a definition in one article would probably be of little value for interpretation of the same term in another article as the preparatory statements of several delegates make it clear that the term was not intended to have a universal meaning.⁴⁴ Nevertheless, a comparison of similar, but not identical, terms in other articles of the General Agreement might serve to indirectly define the term.

In Article XIX of the GATT, for example, the term "like or directly competitive" is used and seems to be "clearly intended to be broader than merely . . . 'like products.'"⁴⁵ It has been argued that this interpretation is in conformity with the purpose of Article XIX, because the broader "similarity" test of that article allows competing products, which can cause injury, to be brought within Article XIX's scope.⁴⁶ One might counter this argument on the ground that, in dumping cases, competing products can cause injury just as easily; and, furthermore, that antidumping measures are imposed against "unfair" imports, whereas safeguard measures are taken against legitimate imports. It would therefore be logical to make the requirements for the taking of measures against *unfair* imports lower than those for acting against *fair* imports.⁴⁷

Despite this logic, the intention of the contracting parties clearly was to limit action against dumped imports to situations in which the injured domestic industry produced the *like* product and to exclude protection of a domestic industry that produced merely *competitive* products.⁴⁸

C. *The GATT Secretariat Study*⁴⁹

As a consequence of a proposal by Norway, a country which until the mid-fifties had never made use of its antidumping law,⁵⁰ the GATT

43. J. JACKSON, *supra* note 15, at 259 n.1.

44. *Id.* at 260.

45. *Id.* at 262.

46. *Id.* at 260.

47. Compare, for example, "material injury" with "serious injury."

48. A narrow definition, however, is a two-edged sword. Although limitation to the like product industry excludes protection of the industry producing competitive, but not like, products, the like product industry at the same time facilitates injury findings because the like product industry will usually be smaller than the industry producing competitive products, which might include like products.

49. Secretariat, *Anti-Dumping and Countervailing Duties: A comparative study of existing legislation and application*, at 5, GATT *supra* note 3, art. VI (July 1958) [hereinafter *Secretariat Study*].

50. *Id.*

secretariat from 1955 through 1957 conducted a study of those national antidumping laws that were actually used.⁵¹

Apart from these studies by country, a general section of the study was devoted to the problems arising from the application of antidumping and countervailing duties. The sections give a fascinating insight into the first years of interpretation of Article VI. With the exception of Sweden none of the eight countries investigated used the term "material injury."⁵² Furthermore, the term "industry" created some difficulty. Did it have to include the whole national industry or only a part of it? Most countries considered only the effect which the imports had on the relevant branch of the industry. Indeed, as the report noted, "a case where the importation of a product would create a danger for the whole national industry is difficult to imagine."⁵³

The report is more interesting in what it does not say, than in what it does say. For example, there seems to be no prerequisite that the injured industry of the importing country has to produce a like product, an interpretation in itself reconcilable with Article VI.⁵⁴ The relevant branch of the industry is obviously the branch affected by the imports. Nevertheless, four countries required that the dumped product had to be of a class or kind of merchandise made in the importing country.⁵⁵ It does not necessarily follow, however, that *that* class or kind of merchandise has to be injured by the imports.

D. *The Report of the Group of Experts*⁵⁶

The 1958 report showed that there were clearly differing interpretations between the GATT signatories with respect to the key terms of Article VI. During the thirteenth session, the Norwegian and Swedish delegations proposed the establishment of a group of governmental experts in order to exchange information with regard to certain technical requirements of their respective legislations, such as the definition of like product and the use of the injury concept in relation to the term industry.⁵⁷ With regard to the "like product" issue, the Group agreed

51. It is noteworthy that of the twenty contracting parties with antidumping laws in force, only the following eight countries actually had used their laws until then: Australia, Belgium, Canada, New Zealand, Union of South Africa, Rhodesia, Sweden and the United States. See *Secretariat Study*, *supra* note 50.

52. *Id.* at 17.

53. *Id.*

54. See *infra* part I, § B.

55. *Secretariat Study*, *supra* note 50, at 55, 69, 78, 93.

56. *Anti-Dumping and Countervailing Duties: Report of Group of Experts*, GATT (L978), BISD (8th Supp.) 145 (1959) [hereinafter 1959 Report].

57. *Anti-Dumping and Countervailing Duties: Report of Group of Experts*, GATT

that the term should be interpreted to mean a product which is identical in physical characteristics subject to, however, such variations in the presentation which are necessary to adapt the product to special conditions in the market of the importing country; that is, to accommodate *different tastes or to meet specific legal or statutory requirements*.⁵⁸ This approach would be in conformity with the preparatory works which, at the time, suggested that the term "like product" in Article VI should mean "same product."⁵⁹

As to the term "industry," the Group agreed that, as a guiding principle, judgments of material injury should be related to total national output of the like commodity concerned or a significant part thereof.⁶⁰ This seems to be the first time that the term "like" is mentioned in relation to "industry" but the Group does not connect it with the term "like product," thereby leaving it open if the term "like commodity" has the same meaning or, perhaps, a broader meaning.

With regard to the injury concept, the experts stressed that action should only be taken "when material injury, i.e. *substantial injury*, is caused or threatens to be caused"⁶¹ and that no precise definitions or set of rules could be given.⁶²

One commentator has concluded that the reports only made a "modest contribution" to the solution of the problems of Article VI because it did not give the experts the authority to issue authoritative interpretations.⁶³ In the author's opinion, this conclusion understates the importance of the report. It should be noted that a group of *governmental* experts was involved, and certainly in those instances in which the group agreed on certain interpretations, it would be hard for one of the countries involved to subsequently deviate from the implicit consensus.

(L908), BISD (8th Supp.) 1 (1958). (November 11, 1958).

58. 1959 Report, *supra* note 56, at 12. Note that this article still addresses the comparison, not injury.

59. *Id.*, cf. JACKSON, *supra* note 15, at 414.

60. 1959 Report, *supra* note 56, at 10.

61. Emphasis added. A 1966 Report of the International Chamber of Commerce stated that material injury meant a "substantial reduction in the returns obtained by the domestic industry" while an OECD report, published in the same year, found that the Group of Experts' definition was too strict, because it unduly limited the number of cases of injurious dumping.

62. 1959 Report, *supra* note 56, at 10.

63. K. DAM, THE GATT LAW AND INTERNATIONAL ORGANIZATION 173 (1970).

E. The Antidumping Code of 1967⁶⁴

When the Kennedy Round negotiations started in 1963, there was a growing realization of the protectionist impact that nontariff barriers had on trade, and the contracting parties agreed that these should be dealt with in the negotiations.⁶⁶ One of the non tariff barriers that received the greatest international attention was that barrier arising from national administration of antidumping laws. Antidumping laws can be non tariff barriers both through their substantive and their procedural provisions.⁶⁶ Although the emphasis differed with each country, national dumping laws often constituted major non tariff barriers in both respects because (1) the substantive terms of Article VI were so opaque, (2) nothing at all regarding antidumping procedures was included in the Article, and (3) many countries' dumping legislation antedated GATT's (and consequently those countries were not bound by the substantive GATT provisions). Canada, for example, was mainly protectionist on the substantive side, because it did not apply an injury standard. The United Kingdom, on the other hand, was chiefly protectionist in procedural respects because of the "Star Chamber" nature of its application of the law.⁶⁷

In 1963, there was a favorable climate for negotiating due to the following reasons.⁶⁸ First, the country most complained of was the United States.⁶⁹ Second, the United States in turn was angry with Canada's lack of an injury requirement and with the large administrative discretion, and resulting uncertainty, of European antidumping laws.⁷⁰ Finally, the European Community was in the process of setting up antidumping legislation of its own.⁷¹

Within the GATT Committee on Non-tariff Barriers, a Special Group on Antidumping Practices was set up, which consisted only of Canada, the European Community, Japan, Norway, Sweden, Switzerland, Great Britain and the United States.⁷² After initially focusing on

64. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, June 30, 1967, 19 U.S.T. 4348, T.I.A.S. No. 6431 [hereinafter 1967 Code].

65. CURTIS & VASTINE, *THE KENNEDY ROUND AND THE FUTURE OF AMERICAN TRADE* 202 (1971); J. EVANS, *THE KENNEDY ROUND IN AMERICAN TRADE POLICY* 86 (1971).

66. Barcelo, *supra* note 34, at 520-24 (comparing the difference between procedural and substantive protectionism).

67. *Id.* at 525 (using the term "Star Chamber" nature).

68. Barcelo, *supra* note 34, at 526.

69. The main criticism, directed at the United States was its practice of withholding appraisement until the final determination.

70. EVANS, *supra* note 65, at 110.

71. K. DAM, *supra* note 63, at 174.

72. CURTIS & VASTINE, *supra* note 65, at 207.

criticism of the law and practice of the United States, the Group eventually took up the United States proposal of an international antidumping code.⁷³ On June 30, 1967, Great Britain, Canada and the United States signed the International Antidumping Code [1967 Code] officially named "Agreement on Implementation of Article VI of the GATT,"⁷⁴ and by July 1, 1968, the date that the Agreement came into force, seventeen countries had signed the document. The 1967 Code tried to curb the protectionist potential, both procedural and substantive, of antidumping laws by imposing detailed requirements on national procedures and by elaborating on, and occasionally defining, substantive provisions of Article VI. With respect to the defining of substantive terms the emphasis was on the injury provisions.⁷⁵ Through all this, it has to be noted that it was the intention of the drafters that the 1967 Code would be an elaboration of, and not an amendment to, Article VI.⁷⁶

Although the 1967 Code did not amend Article VI, it nevertheless changed the legal consequences of that Article for those countries that already had antidumping laws prior to their signature of the GATT, and, therefore, had grandfather rights.⁷⁷ Article 14 of the 1967 Code provided that each signatory⁷⁸ should take all necessary steps to bring its national legislation into conformity with the requirements of the 1967 Code. Because the 1967 Code implemented Article VI of the GATT, a convincing argument can be made that those countries that signed the 1967 Code placed Article VI into full effect.⁷⁹ On the institutional level, the 1967 Code established a Committee on Antidumping Practices to provide a forum for consultation.⁸⁰

Ostensibly influenced by the report of the Group of Experts, Article 2 (b) of the 1967 Code provided, with regard to the like product, that:

Throughout this Code the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. *alike in all respects to the product under consideration or in the absence of such a product, another product*

73. *Id.*

74. *Id.* at 208.

75. Barcelo, *supra* note 34, at 527.

76. Rehm, *Developments in the Law and Institutions of International Economic Relations: The Kennedy Round of Trade Negotiations*, 62 AM. J. INT'L L. 403, 430 (1968).

77. *See infra* part I, § A.

78. 1967 Code, *supra* note 64, art. 13.

79. Dam expresses this idea in a slightly different way: "The Code, insofar as it incorporates the provisions of Article VI . . ." DAM, *supra* note 63, at 175.

80. 1967 Code, *supra* note 64, art. 17.

which, although not alike in all respects, had characteristics closely resembling those of the product under consideration

. . .⁸¹

thus favoring a strict "like product" limitation. Although the definition of "like product" was placed in Article 2, thereby creating the impression that the definition applies to the dumping determination, the phrase "throughout this Code," and the comparison between the product as exported and the product as sold in the home or third markets, made it clear that the Article 2 definition of like product was also relevant to the defining limitation of the industry concerned.

Domestic industry was defined as "the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products."⁸² Two exceptions to this definition were made. First, if producers were also importers of the dumped merchandise, they could be excluded. Second, under exceptional circumstances, a regional industry could be found (a) if the regional producers sold all or almost all of their production in the regional market and (b) if the market was not supplied by outside sources. Such a regional industry could only be considered injured if there was injury to all or almost all of the total regional production.⁸³

Limiting the domestic industry to producing a "like product," as defined above, does not make sense from an antitrust perspective. Indeed, antitrust economists focus on substitutability of goods in both consumption and production as the basis for including or excluding products in the definition of the product market.⁸⁴ If, for example, a small reduction in the price of coffee leads to sharply decreasing sales

81. *Id.* at 25. (Emphasis added).

82. *Id.* art. 4(a), at 27.

83. For a different interpretation of an injury to a regional industry, see SEAVEY, *supra* note 2, at 114.

84. 1967 Code, *supra* note 64, art. 4(a)(ii). The text of article 4(a) (ii) states:

In exceptional circumstances a country may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry, if, because of transport costs, all the producers within such a market sell all or almost all of their production of the product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market or if there exist special regional marketing conditions (for example, traditional patterns of distribution or customer tastes) which result in an equal degree of isolation of the producers in such a market from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined.

See also Barcelo, *supra* note 34, at 528; DALE, *supra* note 1, at 79.

of tea, and coffee producers can easily switch to producing tea, tea and coffee are, depending on the size of the reduction and the increase, substitutable on competitive products, and, therefore, part of the same product market. The limitation in the Code to physically identical products seems to be protectionist because it may result in overstating the injurious impact of the dumped goods by inordinately narrowing the product market.⁸⁵ On the other hand, it might be less protectionist than a test based on competitiveness because it excludes situations in which physically identical products are not injured, but substitute products are.⁸⁶ In its definition of the regional market the Code seems to apply a standard more in conformity to antitrust concepts in that it allows the possibility of finding a regional market.⁸⁷ The essence of the regional market definition is the degree of market isolation, as evidenced by transportation costs, traditional patterns of distribution, or consumer tastes. Furthermore, there has to be an injury to production and not to producers.

The text of the regional market exception was the result of a compromise between the United States, which favored segmentation, Canada, which was strongly opposed (probably because its sales to the United States traditionally are regionally concentrated),⁸⁸ and the European Community, which wanted a restricted exception.

The 1967 Code does not define "material injury," but requires a consideration of all factors relevant to determining the state of the industry in question.⁸⁹ Analysis of these factors leaves one with the impression that the 1967 Code is more concerned with injury to competitors than with injury to competition.⁹⁰ Factors such as market share, profits, employment, and utilization of capacity strongly indicate a "diversion of business" test.⁹¹ On the other hand, the mentioning of re-

85. Barcelo, *supra* note 34, at 528.

86. DALE, *supra* note 1, at 79; Lorenzen, *Technical Analysis of the Antidumping Agreement and the Trade Agreements Act*, 11 LAW & POL'Y IN INT'L BUS. 1424 (1979).

87. DALE, *supra* note 1, at 80.

88. *Id.*

89. 1967 Code, *supra* note 64, art. 3(b). The text of article 3(b) states:

The valuation of injury—that is the evaluation of the effects of the dumped imports on the industry in question—shall be based on examination of all factors having a bearing on the state of the industry in question, such as: development and prospects with regard to turnover, market share, profits, prices (level of undercutting), export performance, employment, volume of dumped and other imports, utilization of capacity of domestic industry, and productivity; and restrictive business practices. No one or several of these factors can necessarily give decisive guidance.

90. *Id.* Barcelo, *supra* note 34, makes the distinction; see also DALE, *supra* note 1, at 56.

91. DALE, *supra* note 1, at 78.

strictive business practices and the price difference between the price of the dumped goods and the price of the goods as sold in the home market hints at a "danger to competition" standard.⁹²

One should note that the 1967 Code defines the valuation of injury as "the evaluation of the effects of the *dumped* imports on the industry."⁹³

Threat of injury has to be based on facts, and not on allegation, conjecture or remote possibility.⁹⁴ If dumping does not currently cause injury but might do so in the future, the required change in circumstances had to obviously be foreseen and the injury had to be imminent; for example, a likelihood of a substantial increase of imports.

If the ground for the petition for relief is the retardation of the establishment of an industry, there has to be proof that such an industry is indeed in the process of being established. Such proof might be that the plans for the new industry have reached such an advanced stage that a factory is being constructed, or that machinery has been ordered.⁹⁵

Injury and the reasons why injury occurred are two concepts that cannot be strictly separated. The factors mentioned in respect to the valuation of injury will at least partly also indicate whether the injury is caused by the dumped imports, or by other factors. These factors include: the value and prices of nondumped imports, the lessening of demand, and changed consumer tastes.⁹⁶ If, for example, the volume of dumped imports is negligible, it seems clear that whatever injury has occurred is not due to the imports. Likewise, dumped imports which are higher-priced than identical domestic products can hardly be said to cause injury.

As far as the strength of the causal link is concerned, the 1967 Code stipulates that the dumped imports demonstrably have to be the principal cause of material injury, and that the administering authorities shall weigh, on the one hand, the effects of the dumping, and, on the other hand, all other factors which, taken together, may cause injury.⁹⁷ Although the 1967 Code does not use the word "outweigh," the combination of "principal cause" and the "weighing" language seem to indicate that dumping should be a more important cause of injury than the aggregate of all other factors which cause injury.⁹⁸ There was no

92. Barcelo, *supra* note 34, at 528; DALE, *supra* note 1, at 78.

93. 1967 Code, *supra* note 64, art. 3(b)(emphasis added).

94. *Id.* art. 3(e).

95. *Id.* art. 3(a).

96. *Id.* art. 3(c).

97. *Id.* art. 3(c).

98. J.F. BESELER, DIE ABWEHR VON DUMPING UND SUBVENTIONEN DURCH DIE EUROPÄIS-

consensus, however, on this point. The United States delegation, for example, interpreted the language to mean that dumping must be a more important cause than any other substantial cause.⁹⁹ The United States Tariff Commission (now International Trade Commission), on the other hand, was of the opinion that the standard could mean two things. First, the aggregate effect of all injurious factors is material injury and dumping is the principal factor, or, alternatively dumped imports are individually the cause of material injury and such injury is greater than the injury caused by all other factors.¹⁰⁰

During the negotiations, the United States and Japan advocated an alignment defense¹⁰¹ based on the so-called "competitive price" theory¹⁰² and, on the meeting-competition defense, the Robinson-Patman Act.¹⁰³ The argument goes that, if a foreign producer dumps his products in another market at prices which do not undercut the prices of domestic producers or, in other words, merely aligns his prices to those of his competitors in the importing country, such a practice, though constituting dumping, should not be actionable.¹⁰⁴

Advocates of the alignment defense argue that:¹⁰⁵ 1)-alignment is a common business practice; 2)-a meeting-competition defense is in conformity with national price discrimination laws; 3)-imports priced at the prevailing market price do not cause injury; and 4)-in the case of increasing market shares of low-priced, nondumped imports, it does not make sense to forbid other importers to align their prices to those of their competitors, even by engaging in dumping. It might even prevent monopolization of the market by the producers who do not dump.

The last argument has been opposed by Kohn:

It would seem that the German producer should be able to compete with his American competitor, but that an American statute should not allow him to dump to meet other foreign competition, since the purpose of dumping legislation is to protect domestic producers from competition which is unfair as to

CHEN GEMEINSCHAFTEN, 97 (1980).

99. SEAVEY, *supra* note 2, at 109.

100. *Report of the U.S. Tariff Commission to the Senate Finance Committee on S. Con. Res. 38, A Concurrent Resolution Regarding the International Antidumping Code*, 90th Cong. 2d Sess., 12, 13 (1968).

101. SEAVEY, *supra* note 2, at 110.

102. Kohn, *The Antidumping Act: Its Administration and Place in American Trade Policy*, 60 MICH. L. REV. 407, 411 (1962).

103. Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1982).

104. SEAVEY, *supra* note 2, at 110.

105. SEAVEY, *supra* note 2, at 110.

them - no more protection than this, but also no less.¹⁰⁶

Kohn's argument, however, does not consider the pro-competitive effects that an alignment defense in such a situation might have, for example by preventing monopolization of the market by producers of "fair" low-priced imports.

Opponents of the defense rebut these arguments as follows.¹⁰⁷ First, it is very difficult to find out whether the importer had aligned his prices to the domestic price level or the domestic producer had aligned his prices to the level of the imports. This argument does not seem particularly strong because a history of domestic prices in previous years would indicate cause and effect. Second, an aligned price is competitive, and might, *ceteris paribus*, lead to an increased market share of foreign producers. Third, an explicit alignment defense is superfluous, because it is automatically provided for by the injury and the causation requirement. If the foreign producer merely aligns his prices and does not increase his market share or decrease the domestic producer's market share, either no injury will occur or the injury will not be caused by the dumped imports.

Because of European opposition, an express alignment defense was not included. The fact that one of the factors to be taken into account in evaluating injury is the extent to which the export price is higher or lower than the prevailing home market price in the importing country, might be seen as a compromise.¹⁰⁸ On the institutional level, the 1967 Code established a Committee on Antidumping Practices for the purpose of affording signatories the opportunity to consult on matters relating to the administration of antidumping systems in the participating countries. From July, 1968 to June, 1979, the Committee issued eleven reports.¹⁰⁹ The reports are generally very vague, and details of determinations regarding alleged violations are seldom given. Most complaints in the Committee have centered on determinations of injury,¹¹⁰ and the country most often under attack has been the United States.¹¹¹ This is understandable because the United States was the

106. Kohn, *supra* note 102, at 413. (Emphasis added).

107. SEAVEY, *supra* note 2, at 110.

108. *Id.* The alignment defense is also known as technical dumping. See S. REP. NO. 1298, 93d Cong., 2d Sess. 179 (1974).

109. See BIRD, *supra* note 3, Supp. No. 17, at 43 (1970); Supp. No. 18, at 42 (1971); Supp. No. 18, at 45 (1972); Supp. No. 19, at 15 (1972); Supp. No. 20, at 43 (1973); Supp. No. 21, at 30 (1974); Supp. No. 22, at 21 (1975); Supp. No. 23, at 13 (1976); Supp. No. 24, at 17 (1977); Supp. No. 25, at 17 (1978).

110. LLOYD, ANTIDUMPING ACTIONS AND THE GATT SYSTEM 19 (1977).

111. See, e.g., L/3521, BIRD 18th Supp. 47; L/3748, BIRD 19th Supp. 16; L/3794, BIRD 20th Supp. 44; L/4241, BIRD 22d Supp. 25.

only signatory to the 1967 Code that did not implement it into domestic law, a fact which has been called "one of the great fiascos of United States trade policy."¹¹² The main inconsistencies were in the fields of industry, injury and causation, as was well recognized by the United States Tariff Commission.¹¹³

F. *The Tokyo Round Antidumping Code*

During the Tokyo Round of Multilateral Trade Negotiations (MTN), non tariff barriers again were an important issue. Three factors encouraged the participants to revise the 1967 Code. The first factor¹¹⁴ was the negotiation of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT (Subsidies Code).¹¹⁵ Because there are many common characteristics to antidumping and countervailing duty law, especially in the procedural field and in the determination of injury,¹¹⁶ it was decided that the 1967 Code should be revised to conform to the provisions of the Subsidies Code. The second factor¹¹⁷ was the growing irritation in the European Community with the ways in which the United States Tariff Commission interpreted the "causation" and "industry" requirements of the 1921 Act oblivious to the 1967 Code standards.¹¹⁸ Finally, the European Community realized that certain requirements of the 1967 Code, notably the causation standard, might have been a little too stringent and left too little room for administrative discretion.¹¹⁹

The result was a new "Agreement on Implementation of Article VI of the GATT,"¹²⁰ which differed from the 1967 Code primarily in the field of causation, but also slightly changed the language concerning material injury and the definition of the regional industry. The net re-

112. Jackson, *United States-EEC Trade Relations: Constitutional Problems of Economic Interdependence*, 16 COMMON MKT. L. REV. 453, 470 (1979).

113. Long, *United States Law and the International Anti-Dumping Code*, 3 INT'L LAW. 464, 486 (1968).

114. This factor is stressed by DALE, *supra* note 1, at 73.

115. Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, opened for signature April 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, *reprinted in*, Agreements Reached in the Tokyo Round of Multilateral Trade Negotiations, H.R. Doc. No. 153, pt. 1, 96th Cong., 1st Sess. 257 (1979) [hereinafter Subsidies Code].

116. *But see* Easton & Perry, *The Causation of Material Injury: Changes in the Antidumping and Countervailing Duty Investigations of the International Trade Commission*, 2 UCLA PAC. BASIN L.J. 35 (1983).

117. *See* BESELER, *supra* note 98, at 23.

118. *Id.* at 22.

119. *Id.* at 23.

120. 1979 Code, *supra* note 5.

sult seems to be a more protectionist approach to antidumping measures, in that an injury determination is easier to make. Although the definition of "like product" is identical to the definition in the old 1967 Code, the definition of "industry" changed in two important ways. First, the possibility of excluding producers, who are at the same time importers of the dumped merchandise, gave way to the broader possibility of excluding any producers who were "related" to exporters or importers of the dumped goods or who were themselves such importers. The word "related" is vague and a group of experts was established in May, 1980 within the Committee on Antidumping Practices to study the problems involving a definition.¹²¹ The group borrowed some of the language of Article 15 of the Customs Valuation Code¹²² and came up with the following definition:

[P]roducers shall be deemed to be related to the exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person; provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers.¹²³

"Control" is to be considered in a pragmatic way. If a company is legally or operationally in a position to influence the behavior of another company, the former controls the latter.¹²⁴ This definition was subsequently adopted by the Committee in October, 1981.

The second major way the definition of "industry" changed was that the meaning of "regional industry"¹²⁵ was clarified. This change was probably at the insistence of the United States. Although the basic distinguishing aspect of a "regional industry" remained the degree of isolation of such an industry, there were two new requirements; namely: that producers sell all, or almost all, of their production of the product in the regional market and the demand in that market is not to any substantial degree supplied by outside domestic producers. These two added requirements seem less stringent than the parallel provisions in the old Code. The reasons for isolation do not matter anymore, and the phrase "not to any substantial degree" permits more outside supply than the phrase "none or almost none" in the old Code.

121. BISD, *supra* note 3, Supp. No. 27, at 33.

122. BISD, *supra* note 3, Supp. No. 26, at 116.

123. BISD, *supra* note 3, Supp. No. 27, at 33.

124. BISD, *supra* note 3, Supp. No. 27, at 34.

125. R. de C. Grey, *Injury, Damage, Disruption*, UNCTAD INJURY PAPERS 9. (1983).

And although the 1979 Code adds the extra requirement that, in order to find injury in a regional market, there must be a concentration of the dumped imports in that region, the 1967 requirement that there must be injury to all or almost all of the regional *production* is replaced by the condition that there must be injury to the *producers* of all or almost all of the regional production. The change is important because it might signify a new injury-to-competitors-approach, as opposed to the former injury-to-competition-approach in the 1967 Code.¹²⁶

Once again, the term "material injury" is not defined, but the indicia of material injury seems to be more logical and less haphazard than those in the old Code. The 1979 Code states that the administering authorities shall consider:

(a) the volume of the dumped imports [has there been a significant increase in dumped imports, either in absolute terms or relative to production or consumption?]; (b) the effect of the dumped imports on domestic prices [have the imports significantly undercut domestic prices or otherwise significantly depressed prices or prevented price increases which otherwise would have occurred?]; (c) the consequent impact on the domestic producers, to be measured, *inter alia*, by an evaluation of all relevant economic factors which influence the state of the industry concerned such as actual and potential decline in output, sales, profits, productivity, return on investments and utilization of capacity; factors affecting domestic prices; and actual or potential negative effects on cash flow, inventories, employment, wages, growth and the ability to raise capital or investments.¹²⁷

It is obvious that examination of these three factors will at the same time largely indicate whether any injury is a result of the dumped imports. Assume, for example, that all the elements mentioned under the third factor indicate material injury, but that the volume of the dumped imports decreased or remained stable and that such imports did not have any discernible effect on domestic prices. In this situation, it would be difficult to establish a causal link between the dumped imports and the bad state of the industry.

The requirement that dumped imports must be the principal cause of injury, and that the effects of the dumping must be weighed against all the other factors possibly causing injury, is replaced by a

126. DALE, *supra* note 1, at 80-81.

127. 1979 Code, *supra* note 5, art. 3.

much weaker condition; namely that the "dumped imports are, through the effects of dumping, causing injury."¹²⁸ Other factors, which at the same time are injuring the industry, such as the price and volume of nondumped imports, contraction in demand, changes in consumption patterns, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry, must not be attributed to the injury. The footnote in the passage cited above refers to paragraphs 2 and 3 of Article 3, thereby reinforcing the above proposition that volume, price effects and the resulting impact on the domestic industry of the dumped imports are important indicators of causation.

With regard to the enumeration of the injury-causing factors, which should not be attributed to the dumped imports, the following remark should be made.

Restrictive practices of domestic producers that result in stable artificially-high price levels of domestic products would probably result in a higher margin of price undercutting than would be the case if normal conditions of competition prevailed. Suppose, for example, that the price of domestic widgets is \$10.00 per unit, but the price would be \$8.00 if there were no restrictive practices, and that foreign producers sell widgets for \$8.00 while charging \$10.00 in their home market. In this situation, the foreign producers undercut the domestic producers by 20%. In the normal, non-restricted, situation, however, there would be no undercutting at all. If injury resulted, the Code seems to say that it should not be attributed to the dumped imports. This approach is sound from an antitrust, injury-to-competition point of view, but is unlike the injury-to-competition approach of the rest of the Code.

One could theoretically argue that a foreign producer who dumps his merchandise all over the world would affect the export-oriented American producers, and, consequently, cause injury. Nevertheless, the Code prohibits attributing such injury to dumping.

II. THE LIKE PRODUCT

A. Introduction

As has been seen in Part I, the determination of what products constitute like products plays a role in both the dumping investigation and in the injury investigation. In the former, the exported product has to be like the product sold by the exporting producer in the home market. In the latter, the exported product should be like the product sold

128. 1979 Code, *supra* note 5, art. 3.

by domestic producers in the country of importation. In the following discussion we are exclusively concerned with the second type.

The determination of what domestic product is like the dumped product is one of the most important issues in the injury investigation.¹²⁹ To use the words of former ITC Vice-Chairman Michael J. Calhoun:

To me, identification and analysis of what domestic product is like the imported article in characteristics and uses, or, in the absence of like, most similar in characteristics and uses with the imported article is one of the critical questions before us in any Title VII investigation. It is based upon our identification of the like product that we define the industry. Our definition of the industry, in turn, establishes the pool of domestic producers whose health we are to assess.¹³⁰

We have seen that the term "like product" has been defined in GATT as "a product which is identical, alike in all respects to the product under consideration, or, in the absence of such a product, another product, which, although not alike in all respects, [has] characteristics closely resembling those of the product under consideration." Two conclusions can be drawn from this formulation. In the first place, the correct test to apply when comparing products for "likeness" is whether the products are *physically identical*.¹³¹ While physically identical products will normally compete with each other in the market, mere commercial competitiveness is not sufficient to make two physically distinct products alike for the purposes of determining injury.¹³² The 1967 and 1979 Antidumping Codes, in other words, reject a test based on commercial interchangeability. A second consequence of the definition is that, at a minimum, the domestic product has to have characteristics closely resembling those of the imported product. If such a product cannot be found, a negative determination has to follow, even

129. Victor, *Injury Determinations by the International Trade Commission in Antidumping and Countervailing Duty Proceedings*, in THE TRADE AGREEMENTS ACT OF 1979, FOUR YEARS LATER 126 (1983).

130. Truck-Trailer-Axle and Brake Assemblies, and Parts, Thereof from Hungary, USITC Pub. 1135, Inv. No. 731-TA-38 (Preliminary) (1981). Additional views of Vice Chairman Michael J. Calhoun, *id.* at 11.

131. BESELER, *supra* note 98, at 63 and 104; Briët, *Antidumping in de EEC De Kinderschoenen Ontgroeid?*, 30 SEW 145, 150 (1982); Davey, *An Analysis of European Communities Legislation and Practice Relating to Antidumping and Countervailing Duties*, in ANTITRUST AND TRADE POLICIES OF THE EUROPEAN ECONOMIC COMMUNITY (B. Hawk ed. 1983).

132. Compare GATT, *supra* note 3, art. XIX. Article XIX uses the term "like or directly competitive." *Id.*

when an industry is clearly injured. The wording of the definition of like product allows the possibility that there does not necessarily have to be a like domestic product.

This rather narrow definition of like product can be advantageous to domestic producers in some instances and disadvantageous in others. It limits, for example, the scope of the relevant industry, and, therefore, it will make it easier to find if an injury has actually occurred. The definition offers no protection, however, to producers of merely competitive, but not physically identical, products and therefore rejects an antitrust approach.

The following sections of this chapter will explore how American and European laws have defined "like product" and how the institutions concerned have de facto applied the concept.

B. *The United States*

1. In General

The TAA¹³³ defines like product as "a product which is like, or in the absence of like, most similar in characteristics and uses with the article subject to an investigation under this title."¹³⁴ The term, therefore, has the same meaning for the purposes of antidumping and countervailing duty investigations. Consequently, although examples in this article will most often be in the dumping field, occasionally references will be made to countervailing duty cases, as indeed the ITC does.¹³⁵

Two remarks in a Senate Finance Committee Report on the Trade Agreements Act refer to this issue:

*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.*¹³⁶

Under its description of current (now old) law, the Senate Finance Committee furthermore recognized:

133. TAA, *supra* note 9, 19 U.S.C. § 1677(10) (1982).

134. *Id.*

135. See, e.g., Truck-Trailer-Axle- and Brake Assemblies, and Parts Thereof from Hungary, USITC Pub. 1135, Inv. No. 731-TA-38 (Preliminary) (1981). Additional views of Vice-Chairmen Calhoun, *supra* note 130.

136. SENATE FINANCE COMMITTEE REPORT, *supra* note 7, at 90-91.

[T]he ITC has generally considered as relevant industries those composed of domestic producer facilities engaged in the production of articles like the imported articles, although it has considered domestic producer facilities engaged in the production of articles which, although not like the imports concerned, are nevertheless competitive with those imports in U.S. markets.¹³⁷

The report, by not explicitly approving the ITC decisions regarding the definition in the 1979 Code, and by not giving any reasons for the United States deviation from the definition of the 1979 Code, creates the impression that the practice of the United States was intended to be in conformity with the Code. The different and obviously broader United States formulation and the accompanying Senate Finance Committee language refute this impression. When taken together the statutory definition and the legislative history leads to the following conclusions. First, for a domestic product to be found "like" the imported product, it has to be basically, though not perfectly, identical in characteristics and uses. Second, in defining "like product" as being "like or similar",¹³⁸ Congress must have intended to give the term a broader meaning than that provided for by the Codes.¹³⁹ Third, by using the construction "characteristics *and* uses" at least some physical identity seems necessary. Less physical equality, however, could obviously be compensated for by more commercial interchangeability. Fourth, the word "most" in the definition suggests that a "like product" should always be found.¹⁴⁰ Adoption of this conclusion would "change inquiry from whether an appropriate industry exists to which industry should be investigated"¹⁴¹ with only the causation requirement operating as a limit. Fifth, the phrase "or in the absence of like" indicates that a product should either be found "like" or "similar." If, for example, American producers produce red wrapping paper, and Australian producers dump red and green wrapping paper, only the red Australian paper could be considered like.

The most important conclusion from a practical point of view is that Congress clearly intended that a test based on competitiveness be used to determine the similar product.¹⁴² Although more appropriate

137. *Id.*

138. TAA, *supra* note 9, 19 U.S.C. 1677 (10) (emphasis added).

139. 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, 500-01 (1983).

140. BRYAN, *supra* note 2, at 60.

141. *Id.* at 60.

142. E. MCGOVERN, INTERNATIONAL TRADE REGULATIONS § 11.43, at 267 (1982).

from an antitrust point of view, this test violates the 1979 Code.

Analysis of ITC decisions reveals that the Commission has generally followed the legislative history¹⁴³ and, indeed, frequently quotes it. The preliminary negative ITC injury determination in *Portable Electric Nibblers from Switzerland*¹⁴⁴ seems typical: "The concept of likeness does not require exact identity, but it does require that the goods be substantially the same in uses or characteristics. A useful working definition might be that which is found in Webster's 'something similar or of the same kind.'"¹⁴⁵

The cited passage shows the looseness with which the ITC handles the issue. The outcome of the case gives a good example of a situation in which adoption of a broad like product definition disadvantages the domestic producers. The ITC majority, consisting of Commissioners Alberger, Moore and Stern, based their negative determination on a United States Industry encompassing all sizes of nibblers, while Commissioners Calhoun and Bedell found the industry limited to fourteen to eighteen gauge nibblers, and decided in the affirmative.

A somewhat doubtful motivation for the like product definition is found in the preliminary negative determination in *Snow-grooming vehicles from the Federal Republic of Germany*,¹⁴⁶ in which the ITC, after having differentiated between "super" snow-grooming vehicles and transport/utility vehicles, due to different characteristics and uses, excluded snow-grooming parts, because focus on the vehicles themselves gave "petitioners the best possible case."

The ad-hoc character of like product definitions is stressed by Alberger and Stern in a footnote in the *Hungarian Truck Trailer-axle-and-Brake Assemblies* case.¹⁴⁷ In that case they stated that "[i]t is most difficult to establish a detailed, objective, *a priori* standard for 'like product' which can be valid for all fact situations; a case-by-case approach is thus indispensable."¹⁴⁸ In the same footnote, the two commissioners reject an equation of "like" with "virtually identical" by saying "[t]he notion of virtually identical is narrower than, but comprehended within, the term 'like product.'" They emphasize that "[t]he terms 'like' and 'similar' have found wide applicability in

143. Victor, *supra* note 129, at 127.

144. *Portable Electric Nibblers from Switzerland*, USITC Pub. 1108, Inv. No. 731-TA-35 (Preliminary) (1980).

145. *Id.* (emphasis added).

146. *Snow-grooming Vehicles, Parts Thereof, and Accessories Thereof from the Federal Republic of Germany*, USITC Pub. 1117, Inv. No. 731-TA-36 (Preliminary) (1980).

147. *Truck-Trailer-axle-and-Brake Assemblies, and Parts Thereof from Hungary*, USITC Pub. 1135, Inv. No. 731-TA-38 (Preliminary) (1981).

148. *Id.* at 5, note 1.

United States trade laws *without* any distinction between them."¹⁴⁹ By then adding that "had we not been able to find a domestic product like the imported one in this case, section 771(10) [of the TAA] would have required the ITC to examine the domestic product *most* similar to the imported one,"¹⁵⁰ the commissioners seem to contradict themselves. The structure of the decision, however, makes it clear what the commissioners mean: they intend to apply the same standards for the determination of "like" and "similar," notably when the products under consideration are substantially the same in characteristics and uses.

In the author's opinion, this interpretation rests on a wrong reading of the statutory language. "Like" is obviously intended to be stricter than "most similar." The only way this strictness can be expressed is in the degree of identity. As Commissioner Calhoun correctly observes in his additional views in the same case, "[f]or me, the standard for finding a product to be like, continues to be that the products are virtually identical in characteristics and uses for all practical purposes in the market place."¹⁵¹

Furthermore, use of the same standard harbors the danger of insufficient maintenance of the difference between "like" and "similar" and consequent aggregation of the two, a danger that has indeed materialized in some ITC determinations. Thus, in the *Plastic Animal Tags from New Zealand* investigation,¹⁵² the ITC compared imported two-piece tags with both one- and two-piece domestic tags, thereby aggregating like (two-piece) and similar (one-piece) products. Likewise, in the 1980 review of the *Polish Golf Carts* case,¹⁵³ the ITC aggregated domestically produced electric and gas golf carts and compared both to the imported electric golf carts. These decisions seem in contravention of the statute and are furthermore unnecessary. The same result could be reached by declaring the differences between the two domestic products as minor and considering both products as "like" the imported product.¹⁵⁴ This aggregation, however, seems to have occurred only incidentally and, normally, the ITC appropriately differentiates between the two domestic products.¹⁵⁵

149. *Id.*

150. *Id.*

151. *Id.* at 12 (Additional views of Vice Chairman Michael J. Calhoun).

152. *Plastic Animal Identification Tags from New Zealand*, USITC Pub. 1094, Inv. No. 303-TA-14 (Final) (1980).

153. *Electric Golf Cars from Poland*, USITC Pub. 1069, Inv. No. AA1921-147A, (1980).

154. Langer, *supra* note 139, at 504.

155. *Anhydrous Sodium Metasilicate from France*, USITC Pub. 1080, Inv. No. 731-TA-25 (Preliminary) (1980).

The same cannot be said of the use of different standards for the terms "like" and "similar." The correct standard, supported by statutory language and the legislative history, consists of a three-prong test. First, in order for products to be considered "like," they have to be physically identical. Physically identical products will obviously compete in the same market and research into substitutability in the market place is, therefore, superfluous. Second, minor differences in physical characteristics can be compensated by a high degree of substitutability. Products with slightly different physical characteristics can still be considered "like" products if they are commercially competitive. Finally, a lesser degree of physical identity and competitiveness is required for a "most similar" finding. Indeed, the literal meaning suggests that the product which is "most similar" to the imported product should always be found.¹⁵⁶ Suppose that Israel exports oranges to the United States and that the United States does not produce any fruits at all, but that the avocado producers lodge a dumping complaint. The language of the statute then seems to command the ITC to treat the avocado industry as the relevant industry, provided that there is no other, more appropriate industry. This could lead to rather absurd situations. The ITC, however, has not been willing to go that far, and, at least in one case, has terminated the proceeding on the ground that no domestic industry existed that could be injured. That case concerned European exports of certain cheeses, Fiore, Pecorino, (made exclusively from sheep's milk) and feta (made from goats' and sheep's milk). The producers from the United States claiming injury made their cheese from cows' milk.¹⁵⁷ The ITC concluded that the Fiore and Pecorino cheeses were different from, and did not compete with, the United States cheeses. Consequently, there was no domestic like or similar product. In all other cases, however, the ITC has found a domestic product like or most similar to the imported product.

A somewhat strange case is *Sodium Nitrate from Chile*.¹⁵⁸ Chilean exporters produced both natural industrial grade sodium nitrate and agricultural grade sodium nitrate, while the United States producers only produced synthetic sodium nitrate. The ITC determined that the industrial grade imports were like the domestic synthetic grade nitrate and that the agricultural grade imports were most similar to the domestic synthetic grade, because both products had the same chemical

156. BRYAN, *supra* note 2, at 60.

157. Certain Nonquota Cheese from Belgium, Denmark, the Federal Republic of Germany, France, Ireland, Italy, Luxembourg, Netherlands, and the United Kingdom, USITC Pub. 1079, Inv. No. 701-TA-52-60 (1980).

158. Sodium Nitrate from Chile, USITC Pub. 1357, Inv. No. 731-TA-91 (Final) (1983).

composition and were interchangeable.¹⁵⁹ The ITC then concluded that there was one like product, namely, synthetic sodium nitrate.¹⁶⁰ In the subsequent investigation of causation, however, the ITC determined that no injury was caused by the agricultural grade imports because they only minimally competed with the domestic products.¹⁶¹ Although it is unusual that two imported products are compared to one domestic product and that one of them is considered like, and the other most similar, this in itself is not a violation of the 1979 Code. The case notably has to be distinguished from the *Animal Tags* case.¹⁶² In the *Animal Tags* case, there were two domestic products, whereas here there are two imported products. And as the "like, or in the absence of like, most similar" language relates to the domestic product, the provision obviously does not extend to the situation of two imported products. The ITC, however, made a mistake in considering the domestic product most similar to the agricultural grade imports. Commercial interchangeability assumes, of course, that not only are the products theoretically substitutable, but also that they are in fact substituted.¹⁶³ Absent such a finding, there is simply no "most similar" product.

Analysis of the cases from 1980 to 1984 indicates that the factors most often used by the ITC in determining the like product are: (1) characteristics such as quality, quantity, chemical composition, taste and appearance,¹⁶⁴ (2) use in the markets, (3) the production process, and (4) the production stage.

A finding that products have different characteristics¹⁶⁵ or are

159. *Id.* at 5, 6.

160. *Id.* at 6.

161. *Id.* at 8.

162. Plastic Animal Tags from New Zealand, USITC Pub. 1094, Inv. No. 303-TA-14 (Final) (1980).

163. *Cf.* Langer, *supra* note 139, at 505, who assumes the same, basing his assumption on the Shewmaker test. We think that the Shewmaker test is of limited value for purposes of Title VII determinations because it relates to section 201 and 406 investigations.

164. *Id.* at 503.

165. Chemical composition: Menthol from Japan and the People's Republic of China, USITC Pub. 1087, Inv. No. 731-TA-27-28 (Preliminary) (1980); Unrefined Montan Wax from German Democratic Republic, USITC Pub. 1180, Inv. No. 731-TA-30 (Final) (1981); Sodium Nitrate from Chile, USITC Pub. 1357, Inv. No. 731-TA-91 (Final) (1983); Cyanuric Acid and Its Chlorinated Derivatives from Japan, USITC Pub. 1407, Inv. No. 731-TA-136 (Preliminary) (1983); Certain Spindle-Belting from the Federal Republic of Germany, Italy, Japan and Switzerland, USITC No. 1429, Inv. No. 731-TA-141-142-144 (Preliminary) (1983); Barium Chloride and Barium Carbonate (Precipitated) from the People's Republic of China, USITC Pub. 1458, Inv. No. 731-TA-149-150 (Preliminary) (1983).

used for different purposes¹⁶⁶ and, therefore, are not commercially interchangeable, usually precludes a like product finding. The emphasis is normally on substitutability. The production process and the production stage generally play merely supportive roles.

Thus, in *Anhydrous Sodium Metasilicate from France*¹⁶⁷ sodium metasilicate penthydrate was excluded from the market (although it had the same sodium metasilicate basis as anhydrous sodium metasilicate) because it was manufactured by different processes and provided different properties for the users. Likewise, in *Sorbitol from France*,¹⁶⁸ the ITC initially treated liquid and crystalline sorbitol as one like product but later changed its mind and treated them as two like products. Despite an identical chemical formula, liquid and crystalline sorbitol were considered to be two different products because they were produced through separate and distinct processes and sold in different markets for different uses.

The ITC approach was endorsed by the Court of International

166. Substitutability: Unrefined Montan Wax from the German Democratic Republic, USITC Pub. 1180, Inv. No. 731-TA-30 (Final) (1981); Precipitated Barium Carbonate from the Federal Republic of Germany, USITC Pub. 1154, Inv. No. 731-TA-31 (Final) (1981); Truck-Trailer-Axle- and Brake Assemblies and Parts Thereof from Hungary, USITC Pub. 1135, Inv. No. 731-TA-38 (Preliminary) (1981); Bicycles from Taiwan, USITC Pub. 1417, Inv. No. 731-TA-111 (Final) (1983) (in which the ITC stated on page six that distribution channels or marketing techniques did not matter and that variations in style, size, weight, color, features, accessories, quality and the production process did not provide a sufficient basis to find more than one product because those variations did not create a problem other than a bicycle nor did they change the basic use. The ITC here seems to adopt a "common meaning" rule); Carton-closing Staples and Nonautomatic Carton-closing Machines from Sweden, USITC Pub. 1455, Inv. No. 731-TA-116, 117 (Final) (1983); Fall Harvested Round White Potatoes from Canada, USITC Pub. 1463, Inv. No. 731-TA-124 (Final) (1983) (in which the price differentials between long white, round red, russet and round white potatoes were found to clearly illustrate that consumers consistently placed different values on the various end uses and that the distinct characteristics allowed for little substitution); Color Television Receivers from the Republic of Korea and Taiwan, USITC Pub. 1514, Inv. No. 731-TA-134, 135 (Final) (1984) (in which the ITC stated that "different physical attributes do not delineate distinct products as physical differences in size or styling do not lead to a basic difference in the use of the product" which is the reception of a broadcast signal and the reproduction of it in video and audio form, compare the *Bicycles from Taiwan* case); Acrylic Sheet from Taiwan, USITC Pub. 1424, Inv. No. 731-TA-139 (Preliminary) (1983) (in which the ITC on page six concluded that there was one like product, acrylic sheet, despite differences in physical characteristics and different production processes); Choline Chloride from Canada and the United Kingdom, USITC Pub. 1473, Inv. No. 731-TA-155, 156 (Preliminary) (1983); Certain Cell-site Radio Apparatus and Subassemblies Thereof from Japan, USITC Pub. 1488, Inv. No. 731-TA-163 (Preliminary) (1984).

167. *Anhydrous Sodium Metasilicate from France*, USITC Pub. 1080 Inv. No. 731-TA-25 (Preliminary) (1980).

168. *Sorbitol from France*, USITC Pub. 1441, Inv. No. 731-TA-44 (Final) (1983).

Trade (CIT) in *Roquette Freres v. United States*.¹⁶⁹ This case illustrates the importance of the like product determination. The original finding of one like product led to imposition of antidumping duties on both crystalline and liquid sorbitol imports. Differentiation between the two led to an affirmative injury finding for crystalline sorbitol and a negative injury determination for liquid sorbitol. The latter product was therefore excluded from the antidumping order.¹⁷⁰

Although *Anhydrous Sodium Metasilicate* and *Sorbitol*, the cases discussed above, considered the whole production process, the ITC will occasionally look at the production stage of the product. Thus, in *Fireplace Mesh Panels from Taiwan*,¹⁷¹ the ITC excluded fireplace mesh rolls, because they were merely at a preliminary stage in the production of panels and still required a significant amount of labor in order to be transformed into panels. In *Forged Undercarriage Components from Italy*¹⁷² a difference was found between finished and semi-finished articles despite the contentions by petitioners that both kinds were made by the same highly integrated and interdependent industries. The petitioner also argued that the semi-finished articles had no alternative use except to be made into a finished product. The rationale of the ITC was that there were clear differences in the areas of processing, costs and lack of substitutability.¹⁷³ In *Certain Flat-rolled Carbon Steel Products from Brazil*,¹⁷⁴ the ITC separated coiled steel from cut-to-length steel because "[w]hile the coiled products have certain characteristics and end uses with plate, they are semi-finished materials that differ from plate in their coiled configuration and do not

169. 7 Ct. Int'l Trade 88, 583 F. Supp. 599 (1984).

170. For other cases in which the production process is mentioned, see: *Unrefined Montan Wax from German Democratic Republic*, USITC Pub. 1180, Inv. No. 731-TA-30 (Final) (1981); *Precipitated Barium Carbonate from the Federal Republic of Germany*, USITC Pub. 1154, Inv. No. 731-TA-31 (Final) (1981); *Certain Radio-paging and Alerting Receiving Devices from Japan*, USITC Pub. 1295, Inv. No. 731-TA-102 (Preliminary) (1982); *Bicycles from Taiwan*, USITC Pub. 1417, Inv. No. 731-TA-111 (Final) (1983); *Acrylic Sheet from Taiwan*, USITC Pub. 1424, Inv. No. 731-TA-139 (Preliminary) (1983); *Barium Chloride and Barium Carbonate (precipitated) from the People's Republic of China*, USITC Pub. 1458, Inv. No. 731-TA-149, 150 (Preliminary) (1983); *Titanium Sponge from Japan and the United Kingdom*, USITC Pub. 1477, Inv. No. 731-TA-161-162 (Preliminary) (1984); *Tubes for Tires, Other than for Bicycle Tires from Republic of Korea*, USITC Pub. 1416, Inv. No. 731-TA-137 (Preliminary) (1983).

171. *Fireplace Mesh Panels from Taiwan*, USITC Pub. 1186, Inv. No. 731-TA-49 (Preliminary) (1981); USITC Pub. 1250, Inv. No. 731-TA-49 (Final) (1982).

172. *Forged Undercarriage Components from Italy*, USITC Pub. 1394, Inv. No. 731-TA-133 (Preliminary) (1983).

173. *Id.* at 10.

174. *Certain Flat-rolled Carbon Steel Products from Brazil*, USITC Pub. 1361, Inv. No. 731-TA-123 (Preliminary) (1983).

necessarily compete with plate until they are subjected to further processing."¹⁷⁵

At the preliminary investigation stage the information available to the ITC is often limited and, consequently, situations may arise in which no clear dividing lines can be drawn between different types of products. In those cases the ITC initially adopted the "continuum" principle.¹⁷⁶ Under this principle, the like product may include a continuum of slightly distinguishable products which have no clear delineation.¹⁷⁷ In *Portable Electric Nibblers*,¹⁷⁸ for example, an ITC majority aggregated all nibblers:

The record before us reveals . . . that all nibblers are used in cutting various types of metal sheet and that is a continuum of sizes based on the gauge of the metal to be cut. Thus, they are substantially the same, and there is no logic in segmenting them into separate industries or products.¹⁷⁹

Likewise a unanimous ITC in *Stainless Clad Steel Plate from Japan*¹⁸⁰ held that:

[S]ince this is a case in which the like product candidates consist of a group of products slightly distinguishable from each other, among which no clear dividing lines can be drawn based on characteristics and uses, we find the like product in this preliminary investigation is all members of the group.¹⁸¹

The consequence of this aggregation is that a broader like product analysis will be applied when separate identification of products is impossible, for example, because of lack of relevant data. One commentator has concluded that application of the continuum principle is only

175. See also *Hot-rolled Stainless Steel Bar, Cold-formed Stainless Steel Bar, and Stainless Steel Wire Rod from Spain*, USITC Pub. 1333, Inv. No. 701-TA-176-177-178 (Final) (1982); *Certain Rail Passenger Cars and Parts Thereof from Canada*, USITC Pub. 1277, Inv. No. 701-TA-182 (Preliminary) (1982); *Cyanuric Acid and Its Chlorinated Derivatives from Japan*, USITC Pub. 1513, Inv. No. 731-TA-136 (Preliminary) (1984); but see, *Certain Flat-rolled Carbon Steel Products from Belgium and the Federal Republic of Germany*, USITC Pub. 1451, Inv. No. 731-TA-146, 147 (Preliminary) (1983).

176. Langer, *supra* note 139, at 506.

177. *Id.*

178. *Portable Electric Nibblers from Switzerland*, USITC Pub. 1108, Inv. No. 731-TA-35 (Preliminary) (1980).

179. *Id.*

180. *Stainless Clad Steel Plate from Japan*, USITC Pub. 1196, Inv. No. 731-TA-50 (Preliminary) (1981).

181. *Id.* See also *Certain Steel Wire Nails from Japan, the Republic of Korea and Yugoslavia*, USITC Pub. 1175, Inv. No. 731-TA-45-47 (Preliminary) (1981).

possible in the preliminary investigation because in the final investigation the ITC would be obliged to apply section 771(4)(D).¹⁸² The author does not see the reason for the distinction between the two types of investigations. In cases in which available data do not permit separate identification, section 771(4)(D) should *always* be applicable, whether in the preliminary or in the final phase. Section 771(4)(D) rather narrowly circumscribes these cases in which it can be applied, and non-applicability of section 771(4)(D) in preliminary investigations would circumvent the guarantees established by Congress. With the exception of a different evidentiary standard, all other standards in the TAA have the same meaning for both preliminary and final cases.¹⁸³ The definitions contained in section 771 obviously apply to both preliminary and final decisions.¹⁸⁴ It seems that the ITC has realized this as well because in later cases it applied section 771(4)(D) (the products line provision) in preliminary investigations too, and did not mention the continuum principle at all.¹⁸⁵

2. Conclusions

The following conclusions can be drawn from the above discussion. Commercial competitiveness is the most important factor in the determination whether a United States product is like the imported dumped product. Minor differences in physical characteristics will not prevent an affirmative finding if the products are commercially interchangeable. Conversely, physically identical products will occasionally be found "unlike" if they do not compete with each other. The production process and the stage of production are relevant evidence, but will seldom play a dispositive role. Distribution channels and working techniques are irrelevant. In some instances, the ITC seems to adopt an "eo nomine" principle. Thus, a bicycle is a bicycle and variations in style, size, weight, color, features, accessories, quality and the production process are irrelevant because they do not create a product other than a bicycle. Although this emphasis on commercial competitiveness for the purposes of defining the relevant product market is in accor-

182. Langer, *supra* note 139, at 506-07.

183. Victor, *supra* note 129, at 123.

184. Carbon Steel Wire Rod from Venezuela, USITC Pub. 1230, Inv. No. 701-TA-148 (Preliminary) (1982) (Additional views of Paula Stern, at 21).

185. See Certain Steel Valves and Certain Parts Thereof from Japan, USITC Pub. 1446, Inv. No. 731-TA-145 (Preliminary) (1983); Carbon Steel Wire Rod from Argentina, Mexico, Poland, Spain, USITC Pub. 1476, Inv. Nos. 731-TA-157-160 (Preliminary) (1984); Certain Valves, Nozzles and Connectors of Brass from Italy for Use in Fire Protection Systems, USITC Pub. 1500, Inv. No. 731-TA-165 (Preliminary) (1984).

dance with principles of antitrust law,¹⁸⁶ a field of which antidumping is after all a species, it is nevertheless in violation of the 1979 Code. The 1979 Code clearly contemplates a definition of like product in terms of physical characteristics.¹⁸⁷

Comparison of ITC practice with the conclusions which have been drawn in Part II section B1 regarding the requirements which statutory language and legislative history impose upon the ITC shows that ITC practice in general has been in conformity with those conclusions. The ITC interprets the term "like product" more broadly than the 1979 Code definition and in only one case has terminated the investigation on the basis of a "no like product" finding. The ITC considers both characteristics and uses, but places more emphasis on the latter. On the other hand, the ITC usually does not make a clear distinction between like and similar and on occasion has treated several differing products as one like product. Although this practice seems in violation of the statutory language, the practical importance is limited because there is no difference in the legal effects between a like and a most similar finding.

C. *The European Community*

Article 2, 12 of Council Regulation (EEC) No. 2176/84,¹⁸⁸ the basic statutory framework for imposition of antidumping and countervailing duties in the Community, defines like product as "a product which is identical, i.e. alike in all respects to the product under consideration, or, in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration."¹⁸⁹ This definition is a literal reproduction of the 1979 Code definition. The European Commission has generally construed the phrase narrowly, requiring there has to be a close physical relationship between the exported and the domestic product. Furthermore, domestic producers of merely similar or substitutable merchandise are generally not protected by the Regulation.¹⁹⁰ This does not mean that the European Commission avoids looking at the uses of the products concerned,

186. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); ANTITRUST DIVISION U.S. DEPT. OF JUSTICE, MERGER GUIDELINES 5 (1982).

187. MCGOVERN, *supra* note 142, § 11.42 at 265.

188. Council Regulation 1580/82, 25 O.J. EUR. COMM. (No. L 178) (1982) amended Council Regulation 3017/79, O.J. EUR. COMM. (No. L 339) 1 (1979). Council Regulation 2176/84, 27 O.J. EUR. COMM. (No. L 201) 1 (1984), repealed Council Regulation 3017/79.

189. *Id.*

190. BESELER, *supra* note 98, at 104: *Est ist also eine enge physische Verwandtschaft der Erzeugnisse erforderlich. Die Benachteiligung durch blosse Substitutionswaren genügt nicht.* Cf. Davey, *supra* note 131, at 65; Briet, *supra* note 131, at 150.

but rather that these uses are merely factors in an analysis. If the products are not physically close, they will not be considered like, even if they are commercially interchangeable. If, however, doubts exist whether the physical similarity is sufficient, interchangeability may turn the scale.

In *Magnesite (caustic-burned) from the Peoples Republic of China*,¹⁹¹ a European importer argued that the differences in the exported products, on the one hand, and those used for the establishment of injury, on the other hand, were so great as to prevent them from being considered like products. The European Commission then considered the chemical composition. Despite slight differences in the contents of certain chemical elements, the European Commission concluded that all the products preponderantly consisted of MgO, that the contents of MgO in all the products lay in the same range, and that all the products were mainly used for the same purposes, that is as an ingredient for fertilizers and cattlefeed and in certain industries.¹⁹² The same conclusion, based on the same arguments, was used in *Magnesite (dead-burned) from China and North Korea*.¹⁹³ Likewise, in *Russian Nickel*¹⁹⁴ the European Commission considered Russian nickel and nickel produced by French and British producers to be alike because both types were of a purity of ninety-nine percent plus and each was generally interchangeable in application with the other.¹⁹⁵

In the case *Urea Ammonium Nitrate (UAN) Fertilizer from the United States*,¹⁹⁶ exporters and importers argued that the French producers, which comprised forty-three percent of the European Community production of UAN, could not be considered injured due to a French Ministerial decision requiring a change in the French producers' pricing policy regarding nitrogen based fertilizer. Although this decision concerned both solid and liquid UAN-based fertilizers, this fact did not reduce the relevance of the decision because, in the opinion of the French producers, both types were like products. The European Commission, stated however, that in its investigation it had sought and verified the data relating to production and sales, data which clearly permitted separate identification of the two types of UAN. This stated

191. 25 O.J. EUR. COMM. (No. L 371) 21 (1982).

192. See *Magnesite (dead burned) from the People's Republic of China*, 27 O.J. EUR. COMM. (No. L 66) 33 (1984). The products from Greece and the People's Republic of China were not identical but had characteristics that closely resembled each other.

193. 25 O.J. EUR. COMM. (No. L 371) 25, 28 (1982).

194. 26 O.J. EUR. COMM. (No. L 286) 26 (1983).

195. See *Sodium Carbonate*, 25 O.J. EUR. COMM. (No. L 283) 9 (1982); *Isopropylidenedophenol*, 26 O.J. EUR. COMM. (No. L 199) 4 (1983).

196. 26 O.J. EUR. COMM. (No. L 33) 10-11 (1983).

motivation for the European Commission's decision is tenuous, but creates the impression that the Commission in this case determined the range of the like products on the basis of available data. This does not seem to be a very strong basis for the decision. If certain products are physically identical, they should be considered alike even though available data might permit separate identification. As has been stated above, however, the motivation is weak and it is therefore quite possible that the products were not physically identical. The European Commission simply did not explicitly address the issue.

The wording of the definition of like products theoretically opens the possibility that an investigation may be terminated on the basis of the non-existence of a like product. Only two cases bear on this issue. In *Decabromodiphenylether from the United States*¹⁹⁷ the European Council of Chemical Manufacturers Federations (CEFIC) lodged a complaint on behalf of a German company alleged to be the major European Community producer. During the investigation, it appeared that the German producer was not in fact producing decabromodiphenylether, but rather nonabromodiphenyl, which was claimed to be a like product. In the meantime, a French producer of decabromodiphenylether had materialized who submitted a complimentary complaint. The European Commission then decided to continue the investigation on the basis of the second, French complaint. The fact that the European Commission did not aggregate the two complaints, in the author's opinion, amounted to an implicit refusal to consider nonabromodiphenyl a like product.¹⁹⁸ In *Outboard Motors from Japan*¹⁹⁹ the European Commission excluded Japanese outboard motors above eighty-five horse power from the investigation because there were no European producers of that type of motor, nor was there a sufficiently convincing factual indication that such production would soon be established.

The exclusion has been criticized by Davey on the ground that the European Commission did not focus on "the real question of whether Community industry could be injured by dumping a wide range of models of a product, including models not produced by Community industry."²⁰⁰ This criticism seems unfounded because Davey poses the wrong question. The determination of like product is an independent, separate decision that has to be made on the basis of the definition in Article 2, 12 of the Regulation. In a case such as this, it is indeed possi-

197. 26 O.J. EUR. COMM. (No. L 229) 3 (1983).

198. Davey, *supra* note 131, at 66.

199. 26 O.J. EUR. COMM. (No. L 152) 18-19 (1983).

200. Davey, *supra* note 131, at 66-67.

ble that a product which is not produced in the European Community can nevertheless cause injury, but that does not make it a like product. The like product issue operates as a limit on the injury determination and should not be viewed as a function of injury.

The European Commission sometimes, but less often than the ITC, concludes that there are two like products in an investigation, and, consequently, proceeds to consider the impact of the product on two industries. Thus, in *Glass Textile Fibres from Czechoslovakia*,²⁰¹ the European Commission imposed a provisional duty on imported rovings, although reaching a no injury finding with respect to mats. Likewise, in *Sodium Carbonate from the USSR*,²⁰² the European Commission reached a no injury finding for dense sodium carbonate, although imposing a definitive duty on imports of light sodium carbonate.²⁰³

The above overview might create the impression that the European Commission pays extensive attention to the like product question. This impression, however, would be incorrect. In the large majority of cases the European Commission does not even discuss the issue. It seems that, so long as none of the interested parties raises the problem, the European Commission takes it for granted that the imported product and the domestic product are alike.

III. THE DOMESTIC INDUSTRY

A. Introduction

The dumped imports have to cause or threaten to cause material injury to the industry of the like product in the importing country or materially retard the establishment of such an industry in order to trigger the imposition of duties. The 1979 Code defines the term industry as "the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products,"²⁰⁴ and thereby treats the scope of the industry as a function of the scope of

201. 26 O.J. EUR. COMM. (No. L 160) 18, 20 (1983).

202. 23 O.J. EUR. COMM. (No. L 48) 2-3 (1980).

203. In *Fibre Building Board from Czechoslovakia, Finland, Norway, Poland, Romania, Spain, Sweden, and the USSR*, 23 O.J. EUR. COMM. (No. L 145) 40 (1980), the Commission differentiated between hard board and insulating board. Dead-burned and caustic-burned magnesite, respectively from the People's Republic of China and Korea, were the subject of two different investigations and, therefore, were obviously also different products, 25 O.J. EUR. COMM. (No. L 371) 21, 25 (1982).

204. 1979 Code, *supra* note 5, Article 4.

the like product.²⁰⁵ The Code also mentions at least two exceptions to this rule. The first exception involves related parties²⁰⁶ and the second exception involves regional industry.²⁰⁷ In the author's opinion, it is appropriate to treat article 3,5 of the 1979 Code as a third exception.²⁰⁸ Article 3,5 provides that when information identifying the domestic production of the like product is insufficient, the effect of the dumped imports shall be assessed by an examination of the production of the narrowest group or range of products (which includes the like product) for which the necessary information is available (product line exception). Although this provision extends the scope of the domestic industry and although the other two exceptions narrow it down, all three situations are deviations from the standard definition.

B. The United States

1. The Standard Situation

Section 771(4) of the TAA defines the term industry as "the domestic producers as a whole 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."²⁰⁹ Whereas the 1979 Code uses the plural term "like products," the TAA uses the singular term, thereby implying that an industry can never comprise more than one like product. Although the legislative history uses the singular and the plural term interchangeably,²¹⁰ ITC practice has always made the one like product-one industry link.²¹¹ This does not prevent consideration of several industries in one investigation,²¹² nor does it preclude aggregation of several like products for purposes of the exceptions provided for in section 771(4)(D) of the TAA. The second part of the definition regarding producers of a major proportion of the output²¹³ may

205. Cf. Victor, *supra* note 129, at 125.

206. 1979 Code, *supra* note 5, Article 4.

207. *Id.*

208. Note, *Injury Determinations Under United States Antidumping Laws Before and After the Trade Agreements Act of 1979*, 33 RUTGERS L. REV. 1076, 1098 (1981).

209. 19 U.S.C. § 1677(4)(a) (1982).

210. SENATE FINANCE COMMITTEE REPORT, *supra* note 7, at 84, 85.

211. See, e.g., Cyanuric Acid, USITC Pub. 1407, Inv. No. 731-TA-136 (Preliminary) (1983); Certain Steel Valves, USITC Pub. 1446, Inv. No. 731-TA-145 (Preliminary) (1983); Barium Chloride, USITC Pub. 1458, Inv. Nos. 731-TA-149-150 (Preliminary) (1983); Carbon Steel Wire Rod, USITC Pub. 1476, Inv. No. 731-TA-157-160 (Preliminary) (1984); Valves, Nozzles and Connectors, USITC Pub. 1500, Inv. No. 731-TA-165 (Preliminary) (1984). Cf. BRYAN, *supra* note 2, at 59.

212. See *id.*

213. This second part is a major part of the definition.

also be useful. The Senate Finance Committee Report provides that "(w)hat constitutes a major proportion of total domestic production will vary from case to case depending on the facts, and no standard minimum proportion is required in each case."²¹⁴ The House Ways and Means Committee Report employs similar language.²¹⁵ It has been suggested that the ITC "would not likely accept as sufficient data from producers constituting less than fifty percent of the total production of the like or similar product."²¹⁶ This suggestion seems contrary to the statutory language which uses "a major proportion"²¹⁷ rather than "the major proportion."²¹⁸ Indeed, in *Swedish Carton Closing Staples*,²¹⁹ Chairman Eckes noted that neither the statute nor the legislative history required that all, or even a majority, of the domestic firms join in a petition or become interested parties.²²⁰

A related problem is that information supplied by domestic producers will often be incomplete in certain respects. It seems clear that if a majority of the domestic producers answer most of the questions with regard to their economic performance, but omit other aspects of their performance because of, for example, accounting difficulties, such omissions should not prevent continuation of the investigation.²²¹

In a few cases²²² there has been only one domestic producer of the like product. In such a case, the monopolist represents 100% of the total United States production and will constitute the domestic industry. ITC rules then prevent the disclosure of any commercial or financial data which would reveal the industry's operations.²²³ Though understandable, this non-disclosure requirement is regrettable because in such a situation there seems to be a danger of monopoly profits and inflated domestic price levels. In other words, the extent of domestic price undercutting by the dumped imports might have been less if

214. SENATE FINANCE COMMITTEE REPORT, *supra* note 7, at 83.

215. *Id.* at 73.

216. Langer, *supra* note 139, at 511.

217. TAA, 19 U.S.C. § 1677(4) (emphasis added).

218. *Id.* (emphasis added).

219. Carton-closing Staples and Nonautomatic Carton-closing Staple Machines from Sweden, USITC Pub. 1454, Inv. No. 731-TA-116 (Final) (1983).

220. *Cf.* H. KAY, P. PLAIA, JR., M. HERTZBERG, INTERNATIONAL TRADE PRACTICE 18-7 (1986).

221. Langer gives the example cited in Textile And Textile Products of Cotton from Pakistan, USITC Pub. 1086, Inv. Nos. 701-TA-62-63 (Final) (1980). In this 1980 determination, only 10% of United States production gave information with regard to their capital expenditures. Langer, *supra* note 139, at 511 n.108.

222. Portable Electric Typewriters from Japan, USITC Pub. 1062, Inv. No. 731-TA-12 (Final) (1980).

223. *Id.* at 4.

there was domestic competition.

The definition of industry in section 771(4) of the TAA refers to the domestic producers of the like product, and, therefore, limits the scope of the affected industry in three ways. First, the industry is limited to *producers*. This excludes importers, distributors and advertisers.²²⁴ Second, the producers have to produce in the United States.²²⁵ This excludes industries that have their headquarters in the United States, but manufacture the merchandise abroad. Finally, if a manufacturer produces a whole range of products, the ITC should, in principle, look at those production facilities that are used to produce the like product.²²⁶

Apart from the available data exception in section 771(4)(D) of the TAA, another exception to this limitation might be justified on the basis of the special nature of the industry. The following example, derived from the Senate Finance Committee Report, might clarify this.²²⁷ Suppose that European manufacturers dump beef in the United States market. The dumped imports might adversely affect United States farmers by forcing them to slaughter their cows, while at the same time the beef industry is operating at full capacity with increased profits and employment. It seems that in such a situation the total production process should be included in the injury analysis.²²⁸

With regard to the limitation that the producers must be domestic producers, an interesting question arises if a substantial part of production-related activity occurs abroad. The ITC addressed this issue in *Certain Radio Paging and Alerting Receiving Devices from Japan*.²²⁹ One of the domestic manufacturers, Motorola, assembled and soldered certain of the models under investigation in Malaysia and Korea and incorporated components from the United States and abroad. Although the ITC admitted that these activities constituted Motorola's most obvious production-related activities, it decided to include the respective models in the investigation because significant production-related activity, involving considerable technical expertise and capital investment, occurred in the United States both before and after foreign assembly. The significant value that the latter activities added to the end product was measurable because Motorola, in its Florida-based facilities, employed a substantial number of workers whose research, de-

224. BRYAN, *supra* note 2, at 61.

225. *Id.*

226. *Cf.* Langer, *supra* note 139, at 513.

227. SENATE FINANCE COMMITTEE REPORT, *supra* note 7, at 88.

228. *Cf.* Langer, *supra* note 139, at 513.

229. *Certain Radio Paging and Alerting Receiving Devices from Japan*, USITC Pub. 1410, Inv. No. 731-TA-102 (Final) (1983).

velopment and production activities specifically related to production of the two models under investigation.

This approach, while leading to satisfactory results in the present case, might create difficulties in cases in which United States and foreign production-related activities are not as easily distinguishable.

2. Regional Industries

In appropriate circumstances, the ITC can limit the geographic market to a part of the United States if: (1) producers within the region sell all or almost all of their production in that region, and (2) the demand in that part is not to any substantial degree supplied by domestic producers from outside the region.²³⁰ Whereas the 1979 Code used the term "exceptional circumstances," the TAA uses "appropriate circumstances," thereby suggesting at least a slightly lower standard.²³¹ The crux of the exception is the relative market isolation of the producers in the regional area.²³²

Once a regional industry has been found to exist, injury to such an industry can only be found if (a) there is a concentration of dumped imports in the regional market, and (b) if the producers of all or almost all of the production within that market are materially injured.²³³ With regard to the first condition the legislative history states that:

[T]he requisite degree of concentration will be found to exist on at least those cases where the ratio of the . . . less-than-fair-value imports to consumption of the imports and domestically produced like product is clearly higher in the relevant regional market than in the rest of the U.S. market.²³⁴ The second condition makes it clear that injury to a major part of the producers is not sufficient in the case of a regional industry. Rather, all or almost all of the regional producers must be injured.²³⁵

Although not always recognized either by commentators or the commissioners of the ITC, a distinction should be drawn between the conditions required for finding a regional industry and the conditions necessary for finding an injury to such an industry.²³⁶

230. TAA, 19 U.S.C. § 1677(4)(c) (1982).

231. Langer, *supra* note 139, at 518.

232. Barcelo, *supra* note 34, at 528.

233. TAA, 19 U.S.C. § 1677(4)(c) (1982).

234. SENATE FINANCE COMMITTEE REPORT, *supra* note 7, at 83.

235. See also *Atlantic Sugar v. United States*, 2 CIT 295, 301 (1981). For the citations of the other four Atlantic Sugar cases, see *infra* note 243.

236. BRYAN, *supra* note 2, at 63. See also Note, *Implementing "Tokyo Round" Com-*

The restrictions are particularly appropriate in the case of the European Community and the United States because the Treaty of Rome²³⁷ and the United States Constitution²³⁸ prevent the levying of customs (antidumping) duties on a regional scale. In these two systems, a finding of dumping and resulting injury to a regional industry will lead to imposition of antidumping duties on a territory-wide scale.

The regional industry issue has had a long and troublesome history in United States law.²³⁹ Indeed, Judge Restani of the CIT recently remarked:

Until 1979, the confusion caused by views expressed by the Senate Finance Committee in 1975 . . . coupled with at least two and one-half decades of so many different views expressed by various Commissioners . . . facilitated the support of almost any position which might have seemed appropriate in any particular situation.²⁴⁰

The following section of this article analyzes to what extent Commission determinations²⁴¹ and court decisions have brought more clarity to this area of the law.

mitments, the New Injury Standard in Antidumping and Countervailing Duty Laws, 32 STAN. L. REV. 1183 (1980). Frozen French Fried Potatoes from Canada, USITC Pub. 1259, Inv. No. 731-TA-93 (Preliminary) (1982).

237. Treaty of Rome, *infra* note 335, art. 9. "The Community shall be based upon . . . the adoption of a common customs tariff in their relations with third countries." *Id.*

238. U.S. CONST. art. I, § 8, cl. 1: "[A]ll Duties, Imposts and Excises shall be uniform throughout the United States . . ." *Id.*

239. Wasserman, *Injury from Dumping: The Problem of the "Regional Industry,"* 9 GA. J. INT'L & COMP. L. 469 (1979).

240. Rhone Poulenc v. United States, 8 C.I.T. 47, 60, 592 F. Supp. 1318, 1330 (1984).

241. Sugars and Sirups from Canada, USITC Pub. 1047, Inv. No. 731-TA-3 (Final) (1980); Sugars and Sirups from Canada, USITC Pub. 1189, Inv. No. 731-TA-3 (Final) (1981); Sugars and Sirups from Canada, USITC Pub. 1243, Inv. No. 731-TA-3 (Final) (1982); Sodium Hydroxide in Solution (Liquid Caustic Soda) from the Federal Republic of Germany, France, Italy, and the United Kingdom, USITC Pub. 1040, Inv. No. 731-TA-8 (Preliminary) (1980); Anhydrous Sodium Metasilicate from France, USITC Pub. 1118, Inv. No. 731-TA-25 (Preliminary) (1980); Steel Wire Nails from the Republic of Korea, USITC Pub. 1088, Inv. No. 731-TA-26 (Final) (1980); Asphalt Roofing Shingles from Canada, USITC Pub. 1100, Inv. No. 731-TA-29 (Preliminary) (1981); Secondary Aluminum Alloy in Unwrought Form from the United Kingdom, USITC Pub. 1143, Inv. No. 731-TA-40 (Preliminary) (1981); Frozen French Fried Potatoes from Canada, USITC Pub. 1259, Inv. No. 731-TA-93 (Preliminary) (1982); Portland Hydraulic Cement from Australia and Japan, USITC Pub. 1440, Inv. No. 731-TA-108, 109 (Final) (1983); Fall-Harvested Round White Potatoes from Canada, USITC Pub. 1463, Inv. No. 731-TA-124 (Final) (1984).

a. *Do the regional producers sell all or almost all of their production in the region?*

In *Sugar and Syrups from Canada*,²⁴² local sales constituted ninety-six percent of total sales and were held to fulfill the requirement of all, or almost all, production in the region. This percentage was upheld by the Court of International Trade in *Atlantic Sugar I*.²⁴³ In *Certain Steel Wire Nails from Korea*²⁴⁴ the ITC found eighty percent sufficient. In *Portland Hydraulic Cement*,²⁴⁵ an average of ninety-two percent was considered sufficient. In *Canadian Fall-Harvested Round-White Potatoes*,²⁴⁶ the percentage was 84.7. On the other hand, in *Frozen French Fried Potatoes from Canada*,²⁴⁷ the two largest producers shipped a third of their total sales to buyers located outside the region, and the ITC determined that this situation did not fulfill the requirement.

b. *Is the regional demand not to any substantial degree supplied by domestic producers outside the region?*

After basing its original affirmative injury finding on an outside supply of 5.5%²⁴⁸ the ITC subsequently realized in *Sugar and Syrups from Canada* that the percentage, if calculated as a percentage of all sales within the region, rose from twelve to sixteen percent.²⁴⁹ The

242. *Sugar and Syrups from Canada*, USITC Pub. 1189, Inv. No. 731-TA-3 (Final) (1981).

243. 2 Ct. Int'l Trade 18, 23, 519 F. Supp. 916, 921 (1981). There are at least 5 Atlantic Sugar cases. For reasons of readability and clarity, the following cases are denominated as follows: *Atlantic Sugar v. United States*, 85 Cust. Ct. 133 (1980); *Atlantic Sugar v. United States*, 2 Ct. Int'l Trade 18, 519 F. Supp. 916 (1981) [hereinafter "*Atlantic Sugar I*"]; *Atlantic Sugar v. United States*, 2 Ct. Int'l Trade 295 (1981) [hereinafter "*Atlantic Sugar II*"]; *Atlantic Sugar v. United States*, 4 Ct. Int'l Trade 248, 553 F. Supp. 1055 (Ct. Int'l Trade 1982) [hereinafter "*Atlantic Sugar III*"]; *Atlantic Sugar v. United States*, 6 Ct. Int'l Trade 190, 573 F. Supp. 1142 (1983), [hereinafter "*Atlantic Sugar IV*"].

244. *Steel Wire Nails from the Republic of Korea*, USITC Pub. 1088, Inv. No. 731-TA-40 (Final) (1980).

245. *Portland Hydraulic Cement from Australia and Japan*, USITC Pub. 1440, Inv. Nos. 731-TA-108-109 (Final) (1983).

246. *Fall-Harvested Round White Potatoes from Canada*, USITC Pub. 1463, Inv. No. 731-TA-124 (Final) (1984).

247. *Frozen French Fried Potatoes from Canada*, USITC Pub. 1259, Inv. No. 731-TA-40 (Preliminary) (1982).

248. *Sugars and Syrups from Canada*, USITC Pub. 1189, Inv. No. 731-TA-3 (Final) (1981), at 3.

249. *Atlantic Sugar v. United States*, 2 Ct. Int'l Trade 18, 21, 519 F. Supp. 916, 920 (Ct. Int'l Trade 1981).

ITC was of the opinion that this percentage was still not substantial, both as a matter of law (the sales represented by the imports being three to four times as high) and in an ordinary, arithmetical sense. The Court of International Trade expressed doubts with regard to the correctness of the standards, but refrained from "stating the limits of the phrase 'to any substantial degree' in this formative stage of the administration of the new law, and at this juncture of the action."²⁵⁰ The court remanded the case to the ITC, which held to its original determination, but gave a clearer explanation for doing so.²⁵¹ The Court of International Trade decided that both in an empirical sense (using the dictionary definition of "substantial" as "considerable in amount") and in view of the particular character of the region in question, twelve percent was not substantial. With regard to the second criterion of regional characteristics the ITC focused on the facts that producers outside the region had significant transportation cost disadvantages; second, the bulk of the outside supply went into the perimeter of the region; and finally, current and historical patterns of distribution supported the analysis.

In *Atlantic Sugar II*, Judge Watson disagreed with the first argument, noting that use of the word "any" rather than "a" indicated that "[t]he statute . . . forbids any degree of supply from elsewhere beyond that which can be termed insubstantial under the circumstances."²⁵² He agreed, however, with the ITC that the particular character of the region indicated a truly isolated market.

In other affirmative injury cases, the percentages were far less and therefore did not constitute a problem.²⁵³ On the other hand, in the *Sodium Hydroxide* case, the ITC refused to find a regional market because the market was served to a large extent by domestic producers whose production facilities were located primarily in Gulf Coast states. Likewise, in *Anhydrous Sodium Metasilicate [ASM]*, the fact that two out of three plants which supplied the Northeastern area were located outside the regional market, and shipped significant quantities of ASM into that market, prevented a regional market finding. An outside

250. *Id.*

251. Sugars and Syrups from Canada, USITC Pub. 1243, Inv. No. 731-TA-3 (Final) (1982).

252. *Atlantic Sugar v. United States*, 2 Ct. Int'l Trade 295, 297 (1981).

253. In *Steel Wire Nails from the Republic of Korea*, USITC Pub. 1088, Inv. No. 731-TA-26 (Final) (1980) it was 1.5%; In *Portland Hydraulic Cement from Australia and Japan*, USITC Pub. 1440, Inv. No. 731-TA-108-109 (Final) (1983) it was 5%; In *Fall-Harvested Round White Potatoes from Canada*, USITC Pub. 1463, Inv. No. 731-TA-124 (Final) (1984) it was 1.3%.

thirty percent supply was held substantial in *Frozen French Fries*.²⁵⁴

In *Certain Steel Wire Nails from Korea*,²⁵⁵ an ITC majority construed the phrase "in appropriate circumstances" as requiring two additional factors which would warrant the treatment of regional producers as a separate industry.²⁵⁶ First, a particular region should account for a significant share of domestic consumption and production and second, the condition of producers of the like product should be worse than that of the industry at large. The Court of International Trade in *Atlantic Sugar I* ridiculed the second condition in considering it "superfluous and of questionable logical validity," because other reasons could account for differences between the economic health of the industry in a particular region and industry elsewhere.²⁵⁷ The second condition has also been criticized on the ground that it should be considered in the determination of injury, not in the determination of whether a regional industry exists.²⁵⁸ Because of *Certain Steel Wire Nails from Korea*, the ITC has no longer considered these two additional requirements and seems to have found a regional industry in each case in which the two statutory requirements were fulfilled.

It is striking that four out of the nine cases in which existence of a regional industry was examined involved imports from Canada. The explanation might be that a regional industry will usually exist because the nature of the product hampers transportation over long distance if, for example, it is highly fungible or has a low value-to-weight ratio. This argument is buttressed by the fact that in those four cases, the regional market consisted of the northeastern states.

c. *Once a regional industry has been found to exist, is there a concentration of the dumped imports in that market?*²⁵⁹

In *Sugar and Syrups from Canada*, ninety-four percent of Canadian imports entered the northeastern states; in *Asphalt Roofing Shingles* the percentage was 99.95; in *Portland Hydraulic Cement* ninety-

254. Sodium Hydroxide, in Solution (Liquid Caustic Soda), from the Federal Republic of Germany, France, Italy, and the United Kingdom, USITC Pub. 1040, Inv. No. 731-TA-8-11 (Preliminary) (1980). Anhydrous Sodium Metasilicate from France, USITC Pub. 1118, Inv. No. &31-TA-25 (Preliminary) (1980). Frozen French Fried Potatoes from Canada, USITC Pub. 1259, Inv. No. 731-TA-40 (Preliminary) (1982).

255. Steel Wire Nails from the Republic of Korea, USITC Pub. 1088, Inv. No. 731-TA-26 (Final) (1980).

256. *Id.*

257. See also Langer, *supra* note 139, at 519.

258. *Id.*

259. This article addresses the concentration of dumped imports in this section, although the subject could be treated under "injury," see *infra* part IV.

nine; in *Fall-Harvested Round White Potatoes* sixty-eight; while in *Certain Steel Wire Nails* only forty-three percent of the imports entered the ten western states comprising the regional market. In the last case the ITC relied on the legislative history²⁶⁰ and considered forty-three percent to be a concentration because the western region consumed only twenty percent of the total United States consumption and there was evidence that the forty-three percent was actually sold in the area.

d. Are the producers of all, or almost all of the production within the area injured?

Although the statutory language seems to direct the ITC to answer this question in relation to each producer, the ITC in *Sugar and Syrups from Canada*²⁶¹ averaged the data of the seven firms within the regional market and concluded that, in the aggregate, all seven firms had declining profits, even though the second largest producer had made a net profit. According to the ITC, "(t)he statute is concerned with determining whether a regional industry is being materially injured not whether particular producers are injured."²⁶²

The court in *Atlantic Sugar II* criticized this approach and determined that the ITC must consider injury to individual firms in determining whether there is material injury to a regional industry:

The only aggregation permitted by the law is that of the production of those who have been injured individually It is incorrect to nullify the profitable operation of one producer by blending it with the loss of another and presenting the result as an "aggregate" indication of injury to both.²⁶³

According to Judge Watson, the correct approach was to determine first which producers were injured and which were not, and then determine whether the total of the injured producers constituted all, or almost all, of the total regional production.

In the third final investigation,²⁶⁴ the ITC followed the two-step test, but not without expressing reservations with regard to the Court of International Trade's methodology:

Indeed, in our view, the court's reading of section 771(4)(C)

260. See *supra* text accompanying note 227.

261. See *supra* note 241.

262. *Id.*

263. *Atlantic Sugar v. United States*, 2 Ct. Int'l Trade 295, 300 (1981).

264. *Sugar and Syrups from Canada*, USITC Pub. 1243, Inv. No. 731-TA-3 (Final) (1982).

presents three serious problems. First, all of our determinations prior to the 1979 TAA relied on aggregate data. Second, the court's analysis poses a substantial administrative burden on the Commission and on the public. Third, it has a serious adverse impact on the Commission's mandate to undertake an open decisionmaking process.²⁶⁵

As a result, Judge Watson in *Atlantic Sugar III* modified his views somewhat by allowing an exception for cases in which numerous producers were involved. In such a case, aggregation would be permitted, provided that methods of analysis insured an accurate finding.²⁶⁶

The finding with regard to Revere, the second largest producer, was held unlawful because it included information of a plant that was located outside the region. The defense of the ITC that it had no way to separate Revere's data²⁶⁷ was held without merit in *Atlantic Sugar IV*.²⁶⁸ Because removal of Revere from the group of injured producers reduced the level of injured production to seventy-five percent of total production, the "all, or almost all" requirement could not be considered fulfilled. Therefore, the final injury finding was vacated.²⁶⁹

The *Atlantic Sugar* cases are important in two respects. First, they clarify substantive problems of antidumping provisions, and, second, these cases give a good insight into the court's in-depth probing of the ITC's injury determinations.

In cases in which the producers in a certain region produce a major part of total United States production, an injury finding can be based on the existence of either a regional industry or a national industry.²⁷⁰ Because of the stringent limitations upon the regional industry concept, it seems advisable for petitioners to demand a national industry finding. Moreover, it has been suggested that the ITC might adopt an antitrust approach in defining the relevant geographic market.²⁷¹ As of yet, neither the ITC nor the Court of International Trade have formally adopted such an approach.²⁷²

265. *Id.* at 12.

266. *See supra* note 239.

267. *See supra* note 236.

268. *See supra* note 243.

269. The Court of Appeals for the Federal Circuit recently overturned the "Atlantic Sugar IV" decision, *Atlantic Sugar v. United States*, 744 F.2d 1556 (Fed. Cir. 1984).

270. SENATE FINANCE COMMITTEE REPORT, *supra* note 7, at 83.

271. Wasserman, *supra* note 239, at 491.

272. "[The Ct. Int'l Trade] also refrains from judging whether analogies may be drawn, as suggested by plaintiffs, between the substantiality of the lessening of competition required by S3 of the Clayton Act . . ." Cf. *Atlantic Sugar v. United States*, 2 Ct. Int'l Trade 18, 21, 519 F. Supp. 916, 920 (Ct. Int'l Trade 1981), *supra* note 243.

3. Related Parties

When United States producers are related to the exporters or importers, or are themselves importers of the product under investigation, the ITC *may* exclude such producers from the domestic industry.²⁷³ Exclusion is discretionary, but the Senate Finance Committee Report gives as an example of a proper exclusion, a situation in which a United States producer is related to a foreign exporter and the foreign exporter directs his exports to the United States so as not to compete with his related United States producer.²⁷⁴

It should be noted that the TAA provision on related parties encompasses two situations. In the first situation, a domestic producer may be related to the foreign producer by, for example, being a subsidiary of the same parent corporation. The Senate Finance Committee Report's hypothetical is an example of this situation. The second situation is one in which the domestic producer is also the importer. The test in determining whether the parties are related is the degree of control one party can, or in fact does, exert over the other. This interpretation is consistent with the understanding developed among the 1979 Code signatories.²⁷⁵ A good example of a case in which exclusion of a producer/importer might be warranted, is given by Bryan. Because an importer/producer is likely to refrain from selling the dumped product in competition with his own product, the importer/producer will generally import the product for a captive market.²⁷⁶ This would give him an unfair competitive advantage both in relation to fellow-producers of the like product, and to fellow-producers of the final product. It should be noted, however, that Bryan's assumption does not necessarily have to be present in all cases. In the author's opinion, it is conceivable that a producer might import merchandise at dumped, and usually low, prices, and, consequently, sell it at a competitive price level. Thus, the producer/importer would benefit from the margin between the import price and the sales price. Alternatively, he might sell it below the price of his own product, thereby losing profits on sales of his own product, but gaining profits, once again, from the margin.

In *Color Television Receivers from the Republic of Korea and Taiwan*,²⁷⁷ petitioners asserted that certain firms, which operated in

273. 19 U.S.C. § 1677(4)(b) (1982).

274. SENATE FINANCE COMMITTEE REPORT, *supra* note 7, at 83.

275. See also *infra* part I, § F. For a different "related parties" test, see BRYAN, *supra* note 2, at 63.

276. *Id.*

277. *Color Television Receivers from the Republic of Korea and Taiwan*, USITC Pub. 1514, Inv. No. 731-TA-134, 135 (Final) (1984).

the United States but were owned by interests in Korea, Taiwan and Japan, should be excluded from the definition of industry on the basis of section 771(4)(B) of the 1979 TAA (the first situation).²⁷⁸ The ITC adopted a three-step analysis for applying the provision.²⁷⁹ First, do the companies really qualify as domestic producers? With regard to the first step, the ITC found that the companies did qualify as domestic producers. The ITC based this finding on an examination of the data on United States production activity. The data considered concerned the amount and type of domestic-made parts, the number of employees in the United States, the amount of capital invested in the United States, and whether the facilities in the United States merely assembled the end product, or actually engaged in processing and manufacturing. Second, is the firm related within the meaning of section 771(4)(B)? Third, are there appropriate circumstances for excluding the company? The main concern of this third step was the possibility of a distortion in the injury analysis. To include a protected firm would make the industry appear healthier than it actually was. Conversely, if exclusion would skew the ITC's analysis, it would be inappropriate to apply the related party provision. In the case under consideration, inclusion did not distort the analysis.²⁸⁰

The second situation, in which a related party issue may exist, is a producer who is at the same time an importer. This situation arose in *Melamine from Austria and Italy*.²⁸¹ There, one of the two United States producers, American Cyanamid, was also an importer of the dumped melamine. The other producer, MCI, suggested that the ITC exclude American Cyanamid's production for its captive market, but include production for the merchant market. The ITC did not explicitly address this issue. In her additional views, however, Commissioner Stern noted that MCI's argument raised two very distinct questions.²⁸² The first question was whether it was appropriate to exclude American Cyanamid from the domestic industry under section 771(4)(B) because it both produced and imported melamine. The second question was "whether to exclude from [ITC] calculations of the domestic industry that portion of American Cyanamid's production which was for captive consumption."²⁸³ Regarding whether it was appropriate to exclude

278. *Id.* at 6-7.

279. *Id.* at 7.

280. *Id.* at 10. *Cf.* *Television Receiving Sets from Japan*, USITC Pub. 1153, Inv. No. 751-TA-2 (Review) (1981).

281. *Melamine in Crystal Form from Austria and Italy*, USITC Pub. 1065, Inv. No. 731-TA-13, 14 (Final) (1980).

282. *Id.* at 6, 7.

283. *Id.* at 11.

American Cyanamid on the basis of the producer/importer link, Commissioner Stern determined that it was not "since American Cyanamid is one of only two surviving domestic producers of melamine and has significant merchant market sales. Excluding American Cyanamid would severely distort perception of the domestic industry."²⁸⁴ With regard to whether American Cyanamid's production for its captive market should be included, Commissioner Stern noted that this question in no way pertained to the fact that American Cyanamid was both a producer and an importer.²⁸⁵

In *Snow-grooming Vehicles from West Germany*,²⁸⁶ the ITC opinion merely mentioned the exclusion of one producer, Valley Engineering, without stating any reasons for doing so. Once again, Commissioner Stern's separate views are helpful. The situation was special because Valley Engineering was the importer of the allegedly dumped merchandise and a wholly-owned subsidiary of the dumping exporter. Thus, Valley Engineering could be classified under both situations. Whether Valley Engineering could qualify as an American company was doubtful. Commissioner Stern remarked that the ITC had not had the opportunity to verify Valley Engineering's claim that fifty percent of the value of the machines was added in the United States. Commissioner Stern, however, found that this was not necessary. Appropriate circumstances existed for exclusion because "[i]t would be counterproductive to include Valley Engineering in the domestic industry, since its inclusion would decrease the impact of the alleged dumping on the domestic industry."²⁸⁷

In *Certain Iron-metal Castings from India*,²⁸⁸ a subsidies case, Commissioner Stern decided to include eleven producers/importers, who were responsible for thirty-one percent of United States capacity, because they had made a convincing case that their sole motivation was to remain in the market in the face of stiff competition from other importers. Their fundamental interests, however, clearly remained in domestic production. Thus, exclusion would have been inappropriate. Likewise, it could be argued that producers who imported out of a desire to develop an alternative source of supply also should be included.

284. *Id.*

285. See also *Unlasted Leather Footwear from India*, USITC Pub. 1045, Inv. No. 701-TA-1 (Final) (1980).

286. *Snow-Grooming Vehicles from FRG*, USITC Pub. 1117, Inv. No. 731-TA-36 (Preliminary) (1984).

287. *Id.* at 13.

288. 45 Fed. Reg. 66,915 (1980).

4. Product Lines²⁸⁹

Section 771(4)(D) of the TAA provides that:

The effect of . . . the dumped imports shall be assessed in relation to the United States production of a like product if available data permit the separate identification of production in terms of such criteria as the production process or the producers' profits. If the domestic production of the like product has no separate identity in terms of such criteria then the effect of the . . . dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes a like product, for which the necessary information can be provided.²⁹⁰

Although the exceptions, discussed in Part III, sections B 2 and 3 of this article, narrow the scope of the domestic industry generally, the product lines exception expands that scope, thereby making affirmative injury determinations more difficult. That is, the impact of the dumped product will be more diffused if more domestic products are considered. Another difference is that the former two exceptions relate to the domestic industry, while the product lines exception basically expands the industry indirectly by not limiting it to production of the like product.

Whether the impact of the imports will be considered in relation to the like product or in relation to the product line (the narrowest group or range of products, including the like product) depends on the availability of data. The provision quoted above, reflects a realization by Congress (and the 1979 Code drafters), that the same factors of production will often be used to manufacture several similar products.²⁹¹

The Senate Finance Committee Report²⁹² elaborates upon the statutory provision in two respects. The Report extensively details the factors which require separate data, namely: profits, productivity, employment, and cash flow. In addition, the report suggests possible reasons why separation might not be possible. For example, accounting procedures in use, or practical problems in distinguishing or separating the operation of product lines, may make it necessary to assess the imported product's effect on a narrow range of domestic products.

It should be noted that the availability of data depends solely

289. The continuum principle has been discussed *supra* part I, § B and will not be discussed here.

290. TAA, *supra* note 9, 19 U.S.C.

291. Victor, *supra* note 129, at 129.

292. SENATE FINANCE COMMITTEE REPORT, *supra* note 7, at 83, 84.

upon the domestic producers who might not be able, or might not be willing, to supply the ITC with the relevant data. That domestic producers may not want to provide data was clearly not considered by Congress. It has been argued that in such a case "the result might turn on equitable considerations."²⁹³ If the domestic industry was in fact able to provide relevant information but preferred not to (perhaps because members of the industry thought imposition of antidumping duties on a product-line basis might be more profitable), the disadvantaged parties should have a right of appeal.²⁹⁴

The standard case in this respect is *Babcock & Wilcox v. United States*,²⁹⁵ initiated by Babcock & Wilcox, a domestic producer of steel pipes and boiler tubes, against a negative ITC preliminary determination.²⁹⁶ Petitioner had originally complained of Japanese dumping of four products: (1) welded carbon steel boiler tubes; (2) seamless carbon steel boiler tubes; (3) seamless stainless and heat resisting steel boiler tubes and process pipes; and (4) seamless alloy steel tubes for bearings. Only the petitioner, however, was able to provide separate profit and loss data for each of the four products. The ITC, on the other hand, did not make any effort to solicit such information from the rest of the industry. Rather, the ITC aggregated the three seamless products into one product line, and gave a negative determination. After initially rendering a positive determination with regard to the welded variant, the ITC later reopened the investigation and changed its mind.

The court criticized the ITC on three points. First, it had wrongfully reopened the investigation. Second, it had adhered too strictly to "a preference for isolation of all production factors supporting a product as predicate for ascertaining the scope of an industry."²⁹⁷ The key to section 771(4)(D) of the TAA was considered to be "profit accountability."²⁹⁸ Third, in view of the foregoing, it should have sought profit and loss information from other producers.²⁹⁹ Since the admonition of the court in *Babcock and Wilcox*, the ITC has indeed focused on the availability of profit and loss data.³⁰⁰

293. Langer, *supra* note 139, at 508.

294. *Id.* at 509.

295. *Babcock and Wilcox v. United States*, 2 Ct. Int'l Trade 74, 521 F. Supp. 479 (1981), *vacated as moot* 4 Ct. Int'l Trade 3 (1982).

296. *Pipes and Tubes from Japan*, USITC Pub. 1058, Inv. No. 731-TA-15 (Preliminary) (1980).

297. 521 F. Supp. at 485.

298. *Id.*

299. *Id.* at 487.

300. *Compare* *Menthol from Japan*, USITC Pub. 1058, Inv. No. 731-TA-27 (Preliminary) (1980) *and* *Secondary Aluminum Alloy in Unwrought Form from the United Kingdom*, USITC Pub. 1143, Inv. No. 731-TA-40 (Preliminary) (1981) *with* *Fireplace Mesh*

Whether the ITC considers the impact of the dumped merchandise on the industry producing the like product or on the industry producing a product line, it is possible that during the investigation several like products or product lines are found. It is obvious that in such a case there should be as many industries as there are like products or product lines. Though an argument could be made that each antidumping investigation should be limited to consideration of one industry, we have seen that this would make matters unnecessarily impractical. However, a ITC majority in *Certain Carbon Steel Products from Certain European Countries*³⁰¹ concluded that there was one industry consisting of five product lines.³⁰² Likewise, in *Certain Steel Wire Nails from Korea*,³⁰³ one industry was found consisting of seven like products.

After these early cases, the ITC seems to have applied a one product line/one industry approach. Thus, in *Barium Carbonate and Strontium Carbonate from West Germany and Strontium Nitrate from Italy*,³⁰⁴ for example, each like product was treated as one industry.³⁰⁵

A noteworthy case is *Cyanuric Acid from Japan*³⁰⁶ in which the ITC, after initially determining that there were two like products and, consequently, two domestic industries, and after analyzing material injury and causation separately for both industries, decided in the final

Panels from Taiwan, USITC Pub. 1186, Inv. No. 731-TA-49 (Preliminary), (1981); Bicycle Tires and Tubes from Taiwan, USITC Pub. 1258, Inv. No. 731-TA-94 (Preliminary) (1982); Carbon Steel Wire Rod, USITC Pub. 1444, Inv. No. 731-TA-113, 114 (Preliminary) (1983); Certain Steel Valves from Japan, USITC Pub. 1446, Inv. No. 731-TA-145 (Preliminary) (1983); Carbon Steel Wire Rod, USITC Pub. 1476, Inv. No. 731-TA-160 (Preliminary) (1984); Valves, Nozzles and Connectors of Brass from Italy, USITC Pub. 1500, Inv. No. 731-TA-165 (Preliminary) (1984).

301. *Certain Carbon Steel Products from Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands and the United Kingdom*, USITC Pub. 1064, Inv. Nos. 731-TA-18-24 (Preliminary) (1980).

302. *Id.* The five product lines were: 1. hot-rolled sheet, 2. cold-rolled sheet, 3. galvanized sheet, 4. carbon steel plate, 5. angles, shapes and sections.

303. *Certain Steel Wire Nails from Korea*, USITC Pub. 1088, Inv. No. 731-TA-26 (Final) (1980).

304. *Barium Carbonate and Strontium Carbonate from the Federal Republic of Germany and Strontium Nitrate from Italy*, USITC Pub. 1105, Inv. No. 731-TA-31-33 (Preliminary) (1980).

305. *See also* *Certain Steel Valves from Japan*, USITC Pub. 1446, Inv. No. 731-TA-145 (Preliminary) (1983) and *Certain Valves, Nozzles and Connectors of Brass from Italy*, USITC Pub. 1500, Inv. No. 731-TA-165 (Preliminary) (1984) in which respectively 9 and 7 like products and 9 and 7 industries were found, although the several like products were aggregated into one product line because of lack of available data.

306. *Cyanuric Acid from Japan*, USITC Pub. 1407, Inv. No. 731-TA-136 (Preliminary) (1982), USITC Pub. 1407, Inv. No. 731-TA-136 (Final) (1982).

determination that there was one product after all and that "even if we had found that there were two or more like products, it would still be necessary to make our assessment of the impacts of these imports on the same basis using a product line approach."³⁰⁷ Did the preliminary data, which evidently permitted separate identification, disappear?

5. Conclusion

The American "domestic industry" provisions closely track those of the 1979 Code. The only deviation is treatment of the "product line" issue as an aspect of industry rather than of injury.³⁰⁸ The ITC generally applies the regional industry, the related parties, and the product line exceptions in an internationally correct and appropriate manner. The extensive discussion and judicial review in a number of cases have, furthermore, helped interpretation of certain vague terms and ambiguities in those exceptions. Despite the case-by-case variability,³⁰⁹ the ITC seems to be developing a certain number of rules, a development which should be applauded.

C. *The European Community*

1. The Standard Situation

In 1979, van Bael for the first time urged that the administration of the dumping regulation be carried out in a transparent manner.³¹⁰ Although the analysis used by the European Community authorities has become less summary since 1980 and new improvements have been made by adoption of a more conveniently arranged case description and motivation since the end of 1982,³¹¹ it is still very hard for the outsider to get a good overview of the issues by analyzing the cases.

The definition of industry is the same as that of the 1979 Code and need not be repeated here.³¹² Noteworthy is that the Regulation does not devote a separate article to the definition, but treats it as an aspect of injury. The practical importance of this seems limited. Furthermore, it is clear from statements by European Commission officials, speaking *ex officio*, that "a major part" need not necessarily be

307. *Id.*

308. 1979 Code, *supra* note 5, Articles 3 and 5.

309. Calhoun, *Determining Injury Under United States Trade Laws*, UNCTAD Injury Papers 3 (1983).

310. Van Bael, *Ten Years of EEC Anti-Dumping Enforcement*, 13 J. WORLD TRADE L. 395, 408 (1979).

311. This approach was first used in Barium Chloride from China and the German Democratic Republic, 26 O.J. EUR. COMM. (No. L 110) 11 (1983).

312. 1979 Code, *supra* note 5, Articles 4 and 5.

more than fifty-nine percent.³¹³ The minimum, though, seems to be twenty-five percent.³¹⁴

In *Cylinder Vacuum Cleaners from Czechoslovakia*,³¹⁵ the main community producer located in the Netherlands did not support the complaint while the German producers did not consider themselves injured. The European Commission decided, however, that the rest of the European Community industry constituted a major part. No percentage was given. In *Chinese Paracetamol*,³¹⁶ the main paracetamol producer in Germany who had originally supported the complaint later withdrew as a complainant but the European Commission determined that the rest of the industry constituted a major part, again without giving any statistics. In *Monochrome Portable Television Sets from Korea*,³¹⁷ a complaint was lodged by the European Association of Consumer Electronics Manufacturers. The European Commission opened an investigation and sent questionnaires to the twenty-nine European Community producers on whose behalf the complaint was made. Fourteen firms replied and of those, only six considered themselves injured. Although the European Commission seemed to conclude that there was no injury due to a lack of a causal link, it would have been more appropriate to conclude simply that a major part of the industry was not injured.

In a number of cases the European Commission concluded that the European Community industry consisted of a single producer.³¹⁸ In other cases the European Commission has based injury findings on the existence of injury to the industry of only one member state of the European Community. Because the industry concerned in the latter cases produced a major part of the total European Community production, use of the regional industry exception was not necessary.³¹⁹

A combination of the two situations occurred in the *Russian Mechanical Watches* case.³²⁰ The European Commission concentrated on the situation of one firm, Timex, which on its own accounted for a major part of the total European Community production, and on the

313. BESELER, *supra* note 98, at 105.

314. J. CUNNANE & C. STANBROOK, *DUMPING AND SUBSIDIES* 69 (1983).

315. 25 O.J. EUR. COMM. (No. L 172) 48 (1982).

316. 25 O.J. EUR. COMM. (No. L 236) 24 (1982).

317. 25 O.J. EUR. COMM. (No. L 364) 49 (1981).

318. 25 O.J. EUR. COMM. (No. L. 236) 23 (1982).

319. *E.g.*, *Edible and Pharmaceutical Gelatine from Sweden*, 23 O.J. EUR. COMM. (No. C 219) 2 (1980); *Louvre Doors from Malayasia and Singapore*, 23 O.J. EUR. COMM. (No. C 286) 4 (1980); *Mechanical Watches from the USSR*, 23 O.J. EUR. COMM. (No. C 181) 3 (1980); *Potato Granules from Canada*, 24 O.J. EUR. COMM. (No. L 116) 11 (1981); *Louvre Doors from Taiwan*, 24 O.J. EUR. COMM. (No. L 158) 5 (1981).

320. 25 O.J. EUR. COMM. (No. L 11) 16 (1982).

U.K. market, because exports were concentrated there and other Community producers sold only a very small part of their production in the British market. Although the European Commission has mentioned concentration of the dumped imports in other decisions where it based its findings on injury to a national industry, this condition of a concentration of dumped products in a single nation does not seem to be a necessary prerequisite.

An interesting problem arose in *Stereo Cassette Tape Heads from Japan*,³²¹ where the complaint was lodged by the only *non-integrated* company in the Community that produced the like product. The fact that the European Commission investigated the case amounts to implicit exclusion of all integrated producers who produce for their own captive market. The same "implicit exclusion" occurred in the *Hermetic Compressors* case.³²² In both cases, the integrated producers constituted a majority of all producers.³²³ The rationale for this exclusion is not clear. One reason might be that the dumped imports competed only in the merchant market.³²⁴ It is also possible that the integrated producers used the dumped imports in the production of their end products. It has been argued that exclusion or inclusion in such a case falls within the discretion of the European Community authorities because neither the 1979 Code nor the European Community Regulation treat the subject.³²⁵ The author disagrees. The fact that the 1979 Code and the Regulation require the European Commission and the European Council to investigate the impact of the dumped imports on the Community industry of the like product means that the only justifiable basis for exclusion is the nature of the product.³²⁶ "*La destination commerciale du produit (marché libre ou marché captif) n'est en aucune maniere prise en consideration.*"³²⁷

2. Regional Industries

Article 4, 5 of the Regulation provides that:

In exceptional circumstances, the Community may, for the production in question, be divided into two or more competitive markets and the producers in each market regarded as a Com-

321. 23 O.J. EUR. COMM. (No. L 69) 64 (1980).

322. 24 O.J. EUR. COMM. (No. L 113) 53 (1981).

323. Didier, *Deaux Annees d'Application du Nouveau Reglement Antidumping de la CEE*, in 21 *CAHIERS DE DROIT EUROPEEN* 44 (1982).

324. BESELER, *supra* note 98, at 105.

325. *Id.*

326. *Cf.* Didier, *supra* note 323, at 44.

327. *Id.*

munity industry if (a) the producers within such market sell all or almost all their production of the product in question in that market, and, (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the Community.³²⁸

If those conditions are fulfilled, material injury can only be found if there is a concentration of the dumped imports in the regional market, and if the regional producers of all or almost all of the production are injured.

The European Commission, however, has never relied on this provision.³²⁹ An interesting reason for this apparent reluctance is advanced in a memo, offered to the European Commission by the Union of European Community Industries, (UNICE).³³⁰ European Community doctrine would abhor the cutting up of the precious common market into national markets: "(1) *a doctrine communautaire a horreur d'un decoupage des marches nationaux.*"³³¹ UNICE apparently criticizes the reluctant attitude of the European Commission rendering appropriate a regional market finding. First, imports are often concentrated in national markets. Second, there are still many national import quotas. Outside competition thus presses unequally on the different national markets.³³² It would, therefore, be appropriate to analyze the situation of each nation individually.

In the absence of any case law, it is unclear how the European Commission will interpret the criteria. The following is, therefore, based on an analysis of what the various commentators have argued. A regional market could consist of either a group of member states, one member state, or part of a member state.³³³ The necessary degree of isolation and of concentration would make it likely that in practice such a region could only be found in the periphery of the European Community.³³⁴ It is also probable that the European Commission would inquire why the regional market is isolated. This inquiry would be relevant in order to avoid conflict with the competition rules embodied in articles 85 and 86 of the Treaty of Rome.³³⁵ It has been sug-

328. The Regulation, *supra* note 11, art. 4, 5.

329. *But see infra* part III, § C, 1.

330. Note de l'UNICE, Procédures Anti-dumping de la Communauté 4 Décembre (1980).

331. *Id.* at 6.

332. *Id.*

333. CUNNANE & STANBROOK, *supra* note 314, at 71.

334. *Id.*

335. Treaty Establishing the European Economic Community, art. 113, *entered into force* Jan. 1, 1958, 298 U.N.T.S.11 [hereinafter Treaty of Rome].

gested that the regional producers would have to sell at least eighty percent of their total production within the region in order to be protected on the basis of Article 4, 5 of the Regulation.³³⁶

3. Related Parties

The same Article 4, 5 of the Regulation mentions the related parties exception.³³⁷ The provision is taken from the 1979 Code and need not be repeated here. In *Textured Polyester Fabrics From the United States*,³³⁸ the European Commission excluded two producers stating: "that the other two complainant producers were at the same time importers of the products in question; whereas they were therefore excluded from the examination of the injury suffered by the complainant industry."³³⁹

In *Caravans from Yugoslavia*,³⁴⁰ the European Commission briefly stated that "the Community industry in respect of which the impact of the dumped imports must be assessed is the entire Community manufacturing industry producing rigid caravans for camping, excluding the exporter's subsidiary in Belgium."³⁴¹ These flat statements lend support to the conclusion that the mere producer/importer connection, as in the *Textured Polyester Fabrics* case,³⁴² or the mere relationship between an exporter and a European Community producer, as in the *Caravans* case,³⁴³ are sufficient grounds for exclusion.³⁴⁴ Moreover, it is not necessary to show that the related party, or the importer in fact, profits from the relationship, a condition that is necessary in the United States. The profit is obviously presumed on the basis of his status. Such an approach, however, is unfair towards the excluded parties. It might also distort the injury analysis. As far as the related party exception in the narrow sense is concerned, it is also in violation of the 1980 Understanding, which states in relevant part that a party shall be deemed to be related "provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from unrelated producers."³⁴⁵ Therefore, there should be more than mere relatedness in order to in-

336. *Id.*

337. The Regulation, *supra* note 11, art. 4, 5.

338. 24 O.J. EUR. COMM. (No. L 133) 17 (1981).

339. *Id.*

340. 26 O.J. EUR. COMM. (No. L 240) 14 (1983).

341. *Id.*

342. 24 O.J. EUR. COMM. (No. L 133) 17 (1981).

343. 26 O.J. EUR. COMM. (No. L 240) 14 (1983).

344. *Cf. BESELER, supra* note 98, at 106.

345. *See infra* part I, § F.

voke the provision.

4. Product Lines³⁴⁶

The Regulation merely provides that the impact of the dumped imports shall be assessed in relation to the Community production of the like product when available data permit its separate identification. The provision thereby does not indicate what type of information has to be available. In a number of cases, the European Commission encountered the problem of lack of available data with respect to the like product.³⁴⁷ Nevertheless, it did not go on to investigate the narrowest group or range of products for which the necessary information could be obtained, but rather investigated the condition of the producers of the like product on the basis of the best information available. An example of the standard formula used in such situations is found in *Louvre Doors from Malaysia and Singapore*:

Whereas, in the absence of separate production and import figures relating to Louvre doors alone, it is difficult to gauge exactly the size of the Community market for such units; whereas, nevertheless, the best information available suggests that the total Community market has remained relatively static from 1978 to 1980; . . .³⁴⁸

However, this practice of using only "the best information available" seems to be in violation of both the 1979 Code and the Regulation. Neither statute gives the European Commission any discretion in this respect. If available data do not permit separate identification, the European Commission must consider the information regarding the product line. The European Commission's use of the best information available gives the domestic producers an unfair advantage in that it prevents the dilution of the relative impact of the dumped imports, which could have occurred if a product line analysis had been used. And, because all the available information is in the hands of exactly the same producers, this practice of the European Commission might take away the stimulus on their part to provide certain disadvantageous data with regard to the like product.

346. 1979 Code, *supra* note 5, art. 4.

347. *E.g.*, Cylinder Vacuum Cleaners from Czechoslovakia, German Democratic Republic and Poland, 25 O.J. EUR. COMM. (No. L 172) 47 (1982); Electric Multiphase Motors from Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Poland, Romania and the Soviet Union, 23 O.J. EUR. COMM. (No. L 53) 16 (1980); Louvre Doors from Malaysia and Singapore, 24 O.J. EUR. COMM. (No. L 135) 34 (1981).

348. Louvre Doors from Malaysia and Singapore, 24 O.J. EUR. COMM. (No. L. 135) 34 (1981).

5. Conclusions

Very little attention is paid to definition of the domestic industry in European Commission and European Council decisions. This is regrettable because such a definition is one of the four pillars on which each injury finding is based. This does not necessarily mean that the European Commission does not extensively consider the issue. It merely means that such consideration is not reflected in the decisions. Mere constataions that the complainants constitute 'a majority,' that certain producers are excluded, or that separate production and imports figures are not available, are hardly in conformity with the wish of the 1979 Code signatories to provide for equitable and open procedures as the basis for a full examination of dumping cases.³⁴⁹

IV. MATERIAL INJURY

A. Introduction

One of the most difficult issues in an injury determination is the requirement that the injury should be material. This requirement qualifies the term injury and is, therefore, concerned with the degree of injury required to impose antidumping duties. Not only is materiality not defined, determinations are made on an ad hoc basis. Small margins of price-undercutting may have disastrous results in some industries while having no or only *de minimis* influence on others. Despite these problems, during the Tokyo Round acceptance by all countries of the *material* injury standard was considered to be the crux of the negotiations for a number of countries.³⁵⁰

The main controversy in this field was between the European Community and the United States. The latter was exempted from application of a *material* injury standard because of existing legislation at the moment of signing of the GATT. On the basis of the Protocol of Provisional Application, the United States therefore had a grandfather right.

During the Tokyo Round it was agreed that the word "material" should not be used too conspicuously in order to avoid controversy in the United States.³⁵¹ The word was therefore relegated to a footnote,³⁵²

349. 1979 Code, *supra* note 5, Preamble.

350. AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, H.R. DOC. No. 153, 96th Cong., 1st Sess., pt. 1 (1979). The negotiations, which were completed with the signing of the Agreements in Geneva, were referred to as the Tokyo Round. They were the seventh round of trade negotiations since 1948 under the auspices of the GATT.

351. Grey, *supra* note 125.

352. 1979 Code, *supra* note 5, art. 3 n.2. The text reads:

while the injury article confined itself to a non-exhaustive enumeration of factors which might play a role in the determination of injury.

Despite this inconspicuous relegation, during the drafting of the TAA it nevertheless appeared that the word material would not be used. The European Commission noticed this and exerted heavy pressure on the United States, particularly by Ambassador Strauss.³⁵³ The result was inclusion of the word in the TAA and the controversial definition of it.

Two further remarks need to be made. In the first place, here and above the term "material" injury has been used to include three situations: (i) material injury in a narrow sense; (ii) threat of material injury; and (iii) material retardation of the establishment of an industry. If any of these three situations occurs, material injury in the broad sense can be found to exist.

B. *The United States*

1. Prior Practice

Prior to the signing of the 1979 Code, the United States had, at least formally, an unqualified "injury" standard. Both the Department of the Treasury and later the Tariff Commission, however, interpreted this standard as having a de facto material injury requirement. This attitude was well summarized in *Titanium Dioxide from France*:³⁵⁴

In the Congressional hearings that took place before the transfer (from the Treasury to the Tariff Commission) was made, representatives of Treasury reported that the term "injury" as employed in the Act, had been interpreted to mean "material injury;" and the Tariff Commission indicated that it would continue to follow that interpretation unless Congress decided otherwise, which it has not done. Thus an affirmative finding by the ITC under the antidumping Act must be based upon material injury to a domestic industry resulting from sales at less than fair value.³⁵⁵

Under this Code the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

Id.

353. Grey, *supra* note 125, at 6.

354. *Titanium Dioxide from France*, TC Pub. No. 109, Inv. No. AA-1921-31, 28 Fed. Reg 10467 (1983).

355. *Id.*

The United States arguably relied on this previous practice when it signed the 1967 Code, implementation of which in the law of the United States would have established a material injury standard. This reliance might have been a little bit misplaced in view of the fate of a 1951 administration sponsored bill which would have changed the Antidumping Act of 1921 from making it necessary to find that a domestic industry was merely injured to a finding that it was materially injured.³⁵⁶ The House Ways and Means Committee at the time explicitly refused to adopt the material injury standard because it "might be interpreted to require proof of a greater degree of injury than is required under the existing law."³⁵⁷ Misplaced or not, shortly after the United States signing of the Code, the Tariff Commission altered course radically in the historic case *Cast Iron Soil Pipe from Poland*:³⁵⁸

The word "injury" in the Antidumping Act has been construed by the Commission as meaning "material injury." Any injury which is more than de minimis is material injury. When the Congress used the word injury in the Act without qualification of degree, the only exception that one might reasonably apply is the old legal maxim that "the law does not concern itself with trifles."³⁵⁹

In a concurring opinion, Commissioner Clubb gave a dubious interpretation of the 1921 Act. According to Commissioner Clubb, the only reason why Congress included the injury requirement in the Act was to relieve the Customs Bureau of the necessity of examining every importation of a product for a possible violation of the Act.³⁶⁰ Until 1975, the de minimis test was upheld in a number of cases.³⁶¹

The distinction between determinations made before and after 1975 is made here because of the statement in the legislative history accompanying the TAA that the decisions of the ITC from 1975 to 1979 have, on the whole, been consistent with the material injury standards as established by the TAA. This statement seems to assume that the ITC has been less 'protectionist' during the period from 1975 to

356. Long, *supra* note 115, at 473.

357. H.R. REP. No. 1089, 82d Cong., 1st Sess. 7 (1951).

358. USTC 214 (AA1921-50) (1967).

359. *Id.* at 6.

360. USTC 214, 18, 19 (AA1921-50) (1967).

361. *E.g.*, Pig Iron from GDR, USTC 23 (AA1921-52) (1968); Potassium Chloride from Canada, USTC (AA1921-58-60) (1969); Dried Eggs from Netherlands, USTC (AA1921-63) (1970); Ferrite Cores from Japan, USTC 12 (AA1921-65) (1971); Clear Sheet Glass from Japan, USTC 10 (AA1921-69-70) (1971); Clear Sheet Glass from Taiwan, USTC 7 (AA1921-76) (1971); Tempered Glass from Japan, USTC 8 (AA1921-77) (1971); Elemental Sulphur from Mexico, USTC (AA1921-92) (1972).

1979 than during the period before 1975.

This assumption is difficult to accept at least with regard to the required degree of injury. Although it is true that from 1975 on the ITC has more clearly articulated the standards on which it has based its injury findings,³⁶² and that in most cases these standards are the same as those used in the 1979 Code and the TAA, there are at least six cases, decided between 1975 and 1979, which adopted the more than de minimis test.³⁶³ In *Melamine from Japan*,³⁶⁴ for example, the ITC coupled the "contributory cause" standard³⁶⁵ with a de minimis standard:

However, it is not necessary that importation of LTFV merchandise be a principal cause, a major cause, or a substantial cause of injury to an industry. Even when several factors that may cause injury, other than LTFV sales, are present, all that is required for an affirmative determination is that the merchandise sold at LTFV contributed to *more than an inconsequential injury*.³⁶⁶

The 1979 House Report, however, explicitly rejected use of the term "de minimis." In the author's opinion, there remain some doubts as to whether the injury standard, applied by the ITC during the 1975-79 period, really was a *material* injury standard. Since the adoption of the the 1979 TAA, the ITC has applied a fairly rigorous injury standard. There can be little doubt that from 1979 on, the ITC de facto requires injury to be material in the GATT sense.

2. Material Injury Since 1980

a. *Material injury in the narrow sense*

Contrary to the 1979 Code, which does not define material injury, the TAA defines the term as "harm which is not inconsequential, immaterial or unimportant."³⁶⁷ The TAA then goes on to mention a number of factors which should be considered by the ITC in its investigations. The legislative history of the TAA provides useful information on both points. Concerning the definition, the Senate Finance Commit-

362. Note, *supra* note 208, at 1087.

363. Railway Track Maintenance Equipment from Austria, USITC Pub. 844, Inv. No. AA-1921-173, (1977); Silicon Metal from Canada, USITC Pub. 954, Inv. No. AA-1921-192, (1979); Rayon Staple Fiber from Italy, Pub. 976, Inv. No. AA-1921-201, (1979).

364. USTC 6 (AA1921-162) (1976).

365. See *infra* Part V, § B, 1, and accompanying notes.

366. USTC 6 (AA1921-162) (1976).

367. 19 U.S.C. § 1677(7)(a) (1982).

tee Report states that:

The ITC determinations . . . from January 3, 1975 to July 2, 1979, have been, on the whole, consistent with the material injury criterion of this bill [TAA] and the Agreements. The material injury criterion of this bill should be interpreted in this manner. This statement does not indicate approval of each affirmative or negative decision of the Commission with respect to the injury criterion, because judgments whether the facts in a particular case actually support a finding of injury are for the Commission to determine, subject to judicial review for substantive evidence on the record.³⁶⁸

The Report of the the House Ways and Means Committee basically repeats this language, but added that use of the *de minimis* term was specifically rejected by that Committee. Rather, it was agreed that the statute should define "material injury" to mean "harm which is not inconsequential, immaterial or unimportant."³⁶⁹

With regard to the factors to be considered, the Senate Finance Committee stresses that the importance of each factor depends on the facts of the case and the nature of the industry involved:

For one industry, an apparently small volume of imports may have a significant impact on the market; for another, the same volume might not be significant. Similarly, for one type of product, price may be the key factor in making a decision as to what product to purchase and a small price differential resulting from the margin of dumping can be decisive.³⁷⁰

The Act mentions explicitly that the following factors should be investigated: (1) the volume of the imports (market penetration); (2) the effect of the imports on United States prices; and (3) the impact of the imports on the domestic producers of like products.³⁷¹

In evaluating the volume of imports, the ITC considers whether the volume of the imports, or any increase therein, either in absolute terms or relative to production or consumption in the United States, is significant.³⁷² This provision consists of four elements: (a) significant volume, (b) significant absolute increase in volume, (c) significant increase, relative to production, and (d) significant increase in relation to

368. SENATE FINANCE COMMITTEE REPORT, *supra* note 7, at 87.

369. *Id.* at 46.

370. *Id.* at 88. See also H.R. REP. No. 317, 96th Cong., 1st Sess. 46 (1979); Calhoun, *supra* note 309.

371. 19 U.S.C. § 1677(7)(b) (1982).

372. 19 U.S.C. § 1677(7)(c)(i) (1982).

consumption in the importing country. Element (b) would occur, for example, if the volume of the imports increased from 100 to 200 widgets. With regard to element (c), a stable amount of imports may nevertheless increase in relation to the domestic production if, for example, domestic plants are closed. Element (d) is the situation in which a stable level of imports nevertheless increase its market share,³⁷³ for example, when more people buy the imported product because of that product's low price.³⁷⁴

It should be noted that element (a) is not mentioned in the 1979 Code. It seems to follow that the 1979 Code would not permit an injury finding in a case in which neither an absolute nor a relative increase occurred. The counterargument might be that the 1979 Code explicitly states that none of the factors mentioned can necessarily give decisive guidance.³⁷⁵ The implication is that even a decrease in the volume of imports might result in an injury finding if such a finding was supported by other evidence. This interpretation is supported by logic as well as the administrative practice of both the United States and the European Community. In times of recession, for example, imports might decline, both in absolute terms and in relative terms, and nevertheless injury might occur. The question remains, of course, whether in such a situation the injury would have been caused by the imports.

In evaluating the effect on prices, the ITC considers whether the imports have (1) significantly undercut domestic prices (2) otherwise significantly depressed prices, or (3) have prevented price increases which would have occurred otherwise.³⁷⁶

With regard to the impact on the affected industry, the ITC has to consider, *inter alia*, first, the actual and potential decline in output, sales, market share, profits, productivity, return on investments, and capacity utilization; second, the factors affecting domestic prices; and third, the actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital and investment.³⁷⁷

The provisions on price effects and industry impact are taken directly from the relevant 1979 Code provisions.³⁷⁸ Analysis of ITC determinations between 1980 and 1984 confirms the highly factual char-

373. Bellis, *Injury Determinations Under EEC Import Relief Laws*, in UNCTAD INJURY PAPERS, (1983).

374. Certain Hot-rolled Carbon Steel Plate from the Republic of Korea, USITC Pub. No. 1459,7, Inv. No. 731-TA-151 (Preliminary) (1983).

375. 1979 Code, *supra* note 5, art. 3 n.2.

376. 19 U.S.C. § 1677(7)(c)(ii) (1982).

377. 19 U.S.C. § 1677(c)(iii) (1982).

378. 1979 Code, *supra* note 5, articles 3, (2) and 3 (3).

acter of injury determinations and the truth of the Senate Finance Committee Report statement that neither the presence nor the absence of any factors are of decisive importance. Nevertheless, certain general conclusions might be drawn:

(1) Volume

Significant market penetration is not by itself sufficient for an affirmative injury finding.³⁷⁹ Also, low levels of import penetration or declining levels will generally preclude an injury finding.³⁸⁰ However, low levels of import penetration or declining levels may nevertheless cause injury, if price effects and injury impact support an affirmative finding.³⁸¹ Finally, the ITC generally considers whether imports have in-

379. *SCM Corp. v. United States*, 84 Cust. Ct. 227 C.R.D. 80-2 (1980), *aff'd*, 2 Ct. Int'l Trade 1, 519 F. Supp. 911 (1981), *reaff'd*, 4 Ct. Int'l Trade 7, 544 F. Supp. 194 (1982); *Portable Electric Typewriters from Japan*, USITC Pub. 732, Inv. No. AA1921-145 (1975).

380. *Rail Passenger Cars*, USITC Pub. 1034, Inv. No. 731-TA-5,6 (Preliminary) (1980) (no injury because no imports); *Sodium Hydroxide*, USITC Pub. 1040, Inv. No. 731-TA-8,11 (Preliminary) (1980) (total volume of imports very low, never more than 1.8% of domestic consumption.); *Melamine*, USITC Pub. 1065, Inv. No. 731-TA-13,14 (Final) (1980) (imports rose in 1978, decreased in 1979, in 1979 they were less than 4.05% of domestic consumption. This percentage was insignificant in light of other factors); *Canned Clams from Canada*, USITC Pub. 1060, Inv. No. 731-TA-17 (Preliminary) (1980) (imports only 0.1% of domestic consumption); *Secondary Aluminum Alloy from United Kingdom*, USITC Pub. 1143, Inv. No. 731-TA-40 (Preliminary) (1981) (extremely low level of import penetration, only 0.2% of domestic consumption); *Chlorine from Canada*, USITC Pub. 1249, Inv. No. 731-TA-90 (Preliminary) (1982) (imports rose but market penetration was minimal, 1.1% in 1979, 1.7% in 1981); *Frozen French Fried Potatoes from Canada*, USITC Pub. 1259, Inv. No. 731-TA-93 (Preliminary) (1982) (market penetration was less than 1%); *Bicycles from Tawain*, USITC Pub. 1417, Inv. No. 731-TA- (Final) (1983) (market share was only 4% and declining); *Certain Lightweight Polyester Filament Fabric from Korea*, USITC Pub. 1457, Inv. No. 731-TA-119 (Final) (1983) (imports were never more than 5% of domestic consumption).

381. *Spun Acrylic Yarn*, USITC Pub. 1046, Inv. No. 731-TA-1,2 (Final) (1980); *Sugar and Syrups from Canada*, USITC Pub. 1189, Inv. No. 731-TA-3 (Final) (1980) (market share of the imports rose only from negligible to 4.46%, then declined); *Portable Electric Typewriters*, USITC Pub. 1062, Inv. No. 731-TA-12 (Final) (1980) (although actual imports as a share of consumption declined in 1979, importers maintained their effective strength in the market by selling stocks on hand); *Certain Flat Rolled Carbon Steel from Brazil*, USITC Pub. 1499, Inv. No. 731-TA-123 (Final) (1984) (imports as share of domestic consumption declined from 1980 to 1982 and rose from 3 to 4.9% from Jan. through Sept. 1983); *Cyanuric Acid*, USITC Pub. 1407, Inv. No. 731-TA-136 (Preliminary) (1983) (imports as a share of United States consumption decreased); *Steel Valves from Japan*, USITC Pub. 1446, Inv. No. 731-TA-135 (Preliminary) (1983) (imports decreased from 4% in 1980, to 2% in 1982); *Certain Carbon Steel Products*, USITC Pub. 1064, Inv. No. 731-TA-18,24 (Preliminary) (1980) (imports rose in 1978, decreased in 1979 but were, nevertheless, held insignificant).

creased absolutely or whether they have increased as a percentage of domestic consumption or both.³⁸²

(2) Price Effects

Selling the imported product at a price lower than that of the domestic product is a strong indicator of both material injury and of causation.³⁸³ The ITC always examines the difference in the prices of the domestic and imported products and will seldom reach a no injury finding if substantial underselling occurs. Conversely, the ITC will seldom conclude that injury exists if there is no underselling or otherwise price depressing or suppressing effects.³⁸⁴ Underselling will also play an important role in price-sensitive industries. Such industries are characterized by a high cross-elasticity of demand: small changes in price will lead to major shifts in demand. Small margins of undercutting may therefore cause heavy injury to the domestic industry. Price-sensitivity has been a factor in the spun acrylic yarn industry,³⁸⁵ the unrefined montan wax industry,³⁸⁶ the nitrocellulose industry,³⁸⁷ the potassium

382. Unrefined Montan Wax from East Germany, USITC Pub. 1180, Inv. No. 731-TA-30 (Final) (1981); Iron Metal Castings from India, USITC Pub. 1122, Inv. No. 731-TA-37 (Preliminary) (1981); Sheet Piling from Canada, USITC Pub. 1212, Inv. No. 731-TA-52 (Preliminary) (1982); Carton Closing Staples from Sweden, USITC Pub. 1454, Inv. No. 731-TA-116,117 (Preliminary) (1983); Potassium Permanganate from Spain, USITC Pub. 1474, Inv. No. 731-TA-126 (Final) (1984) (increase in Spanish imports and Spain's increased share of domestic consumption were coincident with domestic industry's declining profits and its decrease in market share); Tubes for Tires from Korea, USITC Pub. 1416, Inv. No. 731-TA-137 (Preliminary) (1983) (imports rose, and as a share of domestic consumption, quadrupled from 1980 to 1982 (10%); Barium Chloride from China, USITC Pub. No. 1458, Inv. No. 731-TA-149,150 (Preliminary) (1983); Fresh Cut Roses from Columbia, USITC Pub. 1450, Inv. No. 731-TA-148 (Preliminary) (1983); Hot Rolled Carbon Steel Plate from Korea, USITC Pub. 1459, Inv. No. 731-TA-151 (Preliminary) (1983) (imports decreased, but went up as a percentage of United States consumption); Brass Valves from Italy, USITC Pub. 1500, Inv. No. 731-TA-165 (Preliminary) (1984) (imports decreased, but went up as a percentage of United States consumption).

383. Calhoun, *supra* note 309, at 18.

384. Presentation on injury determinations under the AD and CVD laws. Alberger speaks to the Commerce Department on dumping and countervailing duties. (1982). Strictly speaking, such a finding should be based on a "no causation" determination. The ITC, however, seldom separates the grounds for a "no injury" finding in such a case.

385. Spun Acrylic Yarn from Japan and Italy, USITC 1046, Inv. No. 731-TA-1, 2 (Final) (1980).

386. Unrefined Montan Wax from East Germany, USITC Pub. 1180, Inv. No. 731-TA-30 (Final) (1981).

387. Nitrocellulose from France, USITC Pub. 1409, Inv. No. 731-TA-96 (Final) (1983).

permanganate industry,³⁸⁸ and the fresh cut roses industry.³⁸⁹

(3) Impact on The Domestic Industry

The impact on a domestic industry of an allegedly dumped product is probably the most important factor in any injury analysis. An insider's view has it that the ITC will rely heavily on two factors in determining this effect.³⁹⁰ First, the industry must be in a distressed or a stagnant condition. Second, heavy emphasis is placed on the determination whether low domestic price levels are a factor in the industry's bad shape, and particularly whether the low prices are causing low profits.

The above conclusions were individual-factor oriented. Most injury determinations, however, are based on a combination of volume and price effects and the resulting impact on the United States industry.

C. Threat of Material Injury

Like the term "material injury," the term "threat of material injury" is not defined in the TAA. The 1984 Trade and Tarriff Act for the first time provided detailed provisions which seem more of a codification of existing ITC practice, than an attempt to change it. Like the provision on cumulation, however, it limits the discretion of the ITC by requiring it to consider at least a number of expressly mentioned factors. It does not seem likely that the bill will make "threat findings" easier or harder. In that respect, it can be said to be trade-neutral.

The Senate Finance Committee Report on the TAA makes the following statement:

The ITC will consider the likelihood of actual material injury occurring. It will consider any economic factors it deems relevant, and consider the existing and potential situation with respect to such factors. An ITC affirmative determination . . . must be based upon information showing that the threat is real and injury is imminent, not a mere supposition or conjecture Economic factors which may indicate that a threat of material injury is present vary from case to case and industry to industry. The ITC will continue to focus on the conditions

388. Potassium Permanganate from the People's Republic of China, USITC Pub. 1480, Inv. No. 731-TA-125 (Final) (1984).

389. Fresh Cut Roses from Columbia, USITC Pub. 1450, Inv. No. 731-TA-148 (Preliminary) (1983).

390. Calhoun, *supra* note 309, at 18.

of trade and competition and the nature of the particular industry in each case. For example, in some cases, *e.g.* an industry producing a product which has a relatively short market life and significant research and development costs associated with it, a rapid increase in market penetration can quickly result in material injury to that industry.³⁹¹

Although the Senate Finance Committee clarifies the circumstances in which threat might be found, it carefully abstains from giving any specific factors which the ITC is required to consider. This gap is filled by the House Report which mentions three, though by no means conclusive, trend factors. These three factors are: the rate of increase of the dumped imports to the U.S. market; capacity in the exporting country to generate exports; and the likelihood that such exports will be directed to the United States market taking into account the availability of other export markets.³⁹² The language of the TAA and its legislative history gives the impression that an affirmative injury finding should be based on either occurring injury, injury likely to occur in the future, or material retardation. Nevertheless, thus far, all the Commissioners seem to have adopted the approach that preliminary findings can be based on a finding that there is a reasonable indication of injury or threat.³⁹³

From a logical point of view, this approach seems wrong. There is either present injury or no present injury. Only if there is no present injury one should start to consider what the chances are that injury might happen in the future. In practice, however, the ITC will often miss relevant data in the preliminary stage.³⁹⁴ In addition, if injury is only beginning to occur, it might often be questionable whether the injury reaches the required degree of materiality. A finding of injury or threat provides a solution to these problems.

The ITC in its "threat" determinations routinely considers three to four factors: (1) the rate of the increase; (2) the condition of the domestic industry (sometimes); (3) the capacity of producers in the exporting country to generate export; and (4) the likelihood that such factors will be directed to the United States market.³⁹⁵ The statute, as

391. SENATE FINANCE COMMITTEE REPORT, *supra* note 7, at 88-89.

392. H.R. REP. NO. 317, 96th Cong., 1st. Sess. 63 (1979). *Cf.* BRYAN, *supra* note 2, at 67.

393. *E.g.*, Anhydrous Sodium Metasilicate from France, USITC Pub. 1118,20, Inv. No. 731-Ta-25 (1980); Truck Trailer Axle-and-Brake Assemblies, and Parts Thereof from Hungary, USITC Pub. 1135, 1, Inv. No. 731-TA-38 (Preliminary) (1981).

394. See additional views, Calhoun in Certain Amplifier Assemblies from Japan, USITC Pub. 1182, Inv. No. 731-TA-48 (Preliminary) (1981).

395. 19 C.F.R. § 207.26(d) (1986).

amended by the 1984 Act, requires the Commission to consider the following additional economic factors: (5) probability that imports will depress or suppress United States prices; (6) growing United States inventories; (7) under-utilized production capacity; (8) potential of product-shifting; and (9) other demonstrable adverse trends.

Although normal injury findings are usually completely dependent upon information provided by the domestic industry, factors (3) and (4) require data concerning the condition of the foreign producers. Such information may be difficult to obtain and, consequently, findings are sometimes based on the best, but often limited information available. Thus, in *Bicycle Tires and Tubes from Taiwan*,³⁹⁶ the ITC based its preliminary finding that there was a threat of material injury on the facts that capacity utilization of the Taiwanese industry went down and that the United States was a major market for that industry. These facts offered an indication of a present Taiwanese ability to increase imports to the United States by either increasing total Taiwanese production or shifting exports. The ITC noted that:

A number of questions relating to Taiwan's potential role in the U.S. market were unanswered here. In the final, we hope to have more data such as the number of producers in Taiwan, the facility of entering the Taiwan market for new firms, Taiwan's other foreign markets and import restrictions in those markets.³⁹⁷

The same lack of data posed a problem for the ITC in *Greige Polyester and Cotton Print Cloth from China*.³⁹⁸ There, the ITC based its affirmative determination on the very general information that

China, as part of its current overall economic development plan, is emphasizing development of export-oriented light industry as a means of earning foreign currency and has taken a number of actions to promote the expansion of exports. Textile products are expected to be one of the key product areas in China's effort to achieve growth in exports. In addition, the U.S. is a major market for textile imports from China. Furthermore, recent import volumes demonstrate China's ability to direct large volumes of printcloth to the U.S. in a short period of

396. *Bicycle Tires and Tubes from Taiwan*, USITC Pub. 1258, Inv. No. 731-TA-94 (Preliminary) (1982).

397. *Id.*

398. *Greig Polyester/Cotton Print Cloth from the People's Republic of China*, USITC Pub. 1289, Inv. No. 731-TA-101 (Preliminary) (1980), USITC Pub. 1421, Inv. No. 731-TA-101 (Final) (1983).

time.³⁹⁹

In a footnote, the ITC paid attention to the possible effect of an existing quota agreement between the United States and China. Because the agreement limited imports of all cotton and polyester-cotton print cloth, the ITC concluded that it left China free to alter the distribution of the overall quota between all-cotton and polyester-cotton print cloth, and, consequently, did not operate as a limitation on future imports of the specific product under investigation.⁴⁰⁰

The above observations indicate how difficult it is to draw the line between "real and imminent"⁴⁰¹ threat and "mere supposition or conjecture."⁴⁰² Indeed, "the concept of 'threat of material injury' arises in an area of the law which is, needless to say, far from 'cut and dry.'"⁴⁰³ It is not surprising, therefore, that the correctness of ITC "threat findings" has been an issue before the Court of International Trade several times.⁴⁰⁴

The first, and standard, case on threat was *Alberta Gas Chemicals v. United States*,⁴⁰⁵ which followed an affirmative threat finding by the ITC in *Methyl Alcohol from Canada*.⁴⁰⁶ Despite the vigorous dissents of Commissioners Alberger and Stern, a majority based its determination upon the possibility that ACGL (the Canadian producer) might, at some future time, construct new production facilities. "If ACGL has increased capacity and additional product availability and is able to continue to sell at LTFV to the U.S. Market, the likelihood of increased penetration and injury to the domestic industry is apparent."⁴⁰⁷ The Court of International Trade held this analysis to be patently flawed with supposition and conjecture, particularly in view of the following factors: (1) the exporter was producing at virtually full capacity; (2) nearly all production was committed under contractual

399. *Id.*

400. For a view of the ITC on the effect of quotas on threat determinations in general, see *Sugar from the European Community*, USITC Pub. 1247, Inv. No. (Final) (1982).

401. *Rhone Poulenc v. United States*, 592 F. Supp. 1318, 1325 (Ct. Int'l Trade 1984).

402. *Id.*

403. *Id.* at 1321.

404. *Alberta Gas Chemicals, Inc., v. United States*, 515 F. Supp. 780 (Ct. Int'l Trade 1981); *Matsushita Electric Industrial Co., Ltd., v. United States*, 569 F. Supp. 853 (Ct. Int'l Trade 1983); *Republic Steel Corp., v. United States*, 591 F. Supp. 640 (Ct. Int'l Trade 1984); *Rhone Poulenc, S.A., v. United States*, 592 F. Supp. 1318 (Ct. Int'l Trade 1984).

405. *Alberta Gas Chemicals, Inc., v. United States*, 515 F. Supp. 780 (Ct. Int'l Trade 1981).

406. 44 Fed. Reg. 40,734 (1979).

407. *Id.*

agreements; (3) the exporters' other markets were expanding, and selling prices in those markets were higher than in the United States; (4) even if the producer had diverted its entire inventory to the United States, there could have been no significant increase in the penetration of the United States market; and (5) even if the Canadian producer would have started to expand its production facilities right away, production could not have commenced for a year at the earliest. The record merely showed a possibility that injury might occur at some time in the distant future and, in view of the "real and imminent" standard, enunciated by Congress, the record lacked substantial evidence of a likelihood of injury.

A second case, *Matsushita Electric Industrial Co.*⁴⁰⁸ involved a section 751 review⁴⁰⁹ of an antidumping order issued in 1971.⁴¹⁰ The difference of opinion between the ITC and the CIT centered partly on different views regarding the function of a review procedure. The ITC believed it had to honor the basic protective intent of the antidumping law, that is, it had to treat the continuing validity of the existing antidumping order as a premise of the review. This point of view effectively established a presumption that injury would occur, and, therefore, placed the burden of proof on the proponents of the revocation. The CIT rejected this purpose of a review investigation because such an understanding would put the review investigation beyond the bounds of "its neutrally stated objective."⁴¹¹ The court stated:

In order for the review provision to operate consistently within the structure of this law [TAA] and in order for it to function in harmony with one of the international agreements [1979 Antidumping Code] which the law was intended to implement, *the review must establish the continuing need for the injury determination.*⁴¹²

The statutory prerequisite to administrative review, that is, changed circumstances, if fulfilled, meant that there is some evidence to support the view that the existing order is no longer valid. Application of this different standard led the CIT to conclude that the ITC could not derive present Japanese intent to increase imports if the order were revoked or modified. The court held that the ITC could not

408. *Matsushita Electric Industrial Co., Ltd., v. United States*, 569 F. Supp. 853 (Ct. Int'l Trade 1983).

409. *Television Receiving Sets from Japan*, USITC Pub. 153, Inv. No. 751-TA-2 (Final) (1981).

410. *Id.*

411. *Id.* at 859.

412. *Id.* at 857 (emphasis added).

derive present Japanese intent to increase exports if the order were revoked or modified from failure by the Japanese to offer evidence of lack of intent, or solely from a disbelief in the evidence offered. "The determination, although disarming in its candor, went beyond all the limits of administrative fact-finding." The CIT, therefore, decided that the ITC's conclusion that imports would increase was not supported by evidence of production capacity alone. Though cloaked in general terms, the court's conclusion in this case was supported by the fact that the Japanese had tremendously increased the capacity of the Japanese production facilities in the United States. Any increase in the level of imports would obviously have the effect of making those imports compete with the Japanese-owned televisions produced in the United States. And, although the CIT admitted that a threat finding in a review determination may have to be somewhat more predictive than the threat finding in the original investigation, in the instant case, verifiable, substantiating evidence was clearly lacking. The ITC could not "engage in . . . 'better to be safe than sorry' reasoning."⁴¹³In a third case, *Republic Steel Co. v. United States*,⁴¹⁴ an American producer attacked, among other things, negative ITC threat determinations in countervailing duty investigations. In those preliminary determinations, the ITC mainly relied on data regarding the volume and trend of the imports. The CIT held that:

This information is not the logical focus of an investigation into threat of injury. The essence of a threat lies in the ability and incentive to act imminently. This can be investigated by objective measurements of production capacity, available inventory, export markets and recognizable factors of economic motivation. Most of this information is normally within the knowledge of the [foreign] producers and it is unfair to penalize the petitioners for the absence of this information, particularly if it has been requested of foreign respondents and has not been supplied.⁴¹⁵

The CIT concluded that the "low threshold" standard for preliminary material injury investigations applied to threat of injury investigations just as well, and maybe even more so, because information with regard to threat will normally be more difficult to obtain than information regarding actual injury. Therefore, "it is reasonable to predicate the need for further investigation of a threat on the barest indications."

413. *Id.* at 864.

414. *Republic Steel Corp., v. United States*, 591 F. Supp. 640 (Ct. Int'l Trade 1984).

415. *Id.* at 650.

The cases discussed above warrant two conclusions. One, threat determinations are even more fact-determined than 'normal' injury cases, and two, different standards apply for findings of threat in preliminary, final, and review cases. The standard for a finding of threat in a preliminary investigation is extremely low and may be based on the different evidentiary standards generally employed for preliminary and final determinations.⁴¹⁶ Although probably in conformity with section 733(a) of the TAA,⁴¹⁷ it may be questioned whether this low standard is not too low when compared with the 1979 Code, which requires a finding of dumping and sufficient evidence of injury. In administrative review cases, a threat finding may be slightly more predictive.

D. *Material Retardation of the Establishment of a United States Industry*

Neither the TAA nor its legislative history provide any guidance for interpretation of the term "material retardation of the establishment of a United States industry." There are, furthermore, relatively few dumping and countervailing duty determinations in which material retardation has been an issue.⁴¹⁸

In all the cases that do address the issue, the ITC has taken the position that, when a domestic industry has not yet undertaken production, it must first show that it has made a substantial commitment to commence production in order to show material retardation. In three out of five relevant decisions, the ITC concluded that such a commitment had not been made.⁴¹⁹ In *Thin Sheet Glass from Switzer-*

416. Cf. Victor, *supra* note 129, at 123.

417. 19 U.S.C. § 1671b(a). Section 1671b(a) states in pertinent part "The Commission . . . shall make a determination, based upon the best information available to it at the time of the determination, of whether there is a reasonable indication [of threat of material injury to a domestic industry] . . . by reason of imports." *Id.*

418. Synthetic L-Methionime from Japan, USITC Pub. 1167, Inv. No. 751-TA-4 (Final) (1981); Salmon Gill Fish Netting of Manmade Fibers from Japan, USITC Pub. 1234, Inv. No. 751-TA-5 (Final) (1983); Motorcycle Batteries from Taiwan, USITC Pub. 1228, Inv. No. 731-TA-42 (Final) (1982); Thin Sheet Glass from Switzerland, Belgium and the Federal Republic of Germany, USITC Pub. 1376, Inv. No. 731-TA-127-129 (Preliminary) (1983); Certain Commuter Airplanes from France and Italy, USITC Pub. 1269, Inv. No. 701-TA-174-175 (Preliminary) (1982).

419. Synthetic L-Methionime from Japan, USITC Pub. 1167, Inv. No. 751-TA-4 (Final) (1981); Salmon Gill Fish Netting of Manmade Fibers from Japan, USITC Pub. 1234, Inv. No. 751-TA-5 (Final) (1983); Motorcycle Batteries from Taiwan, USITC Pub. 1228, Inv. No. 731-TA-42 (Final) (1982); Thin Sheet Glass from Switzerland, Belgium and the Federal Republic of Germany, USITC Pub. 1376, Inv. No. 731-TA-127-129 (Preliminary) (1983); Certain Commuter Airplanes from France and Italy, USITC Pub. 1269, Inv. No. 701-TA-174-175 (Preliminary) (1982).

land, Belgium and West Germany,⁴²⁰ for example, this condition was not fulfilled because the American producer had not obtained \$250,000 worth of testing equipment which would have allowed it to separate regular quality from high quality glass. Moreover, acquisition of the equipment would not have affected the quality of the glass because, the producer had had difficulties meeting customer specifications. Finally, the condition was not met because the producer had been unsuccessful in marketing high quality glass.⁴²¹

These facts wrongfully mix elements showing a substantial commitment with those showing causation. Notably, the latter two facts seem to indicate that the producer had tried, albeit unsuccessfully, to sell his product. A more correct inquiry, therefore, would have been a finding that there was retardation, but that the retardation was caused by factors other than the dumped imports.

In *Salmon Gill Fish Netting from Japan*,⁴²² a section 751 review case, the ITC concluded that modification or revocation of the outstanding antidumping order could materially retard the establishment of a United States industry. The producer in question had made significant investments in the development of a marketable crystal netting, thereby substantially committing itself. Likewise, in *Commuter Airplanes from France and Italy*,⁴²³ there was evidence that the United States producer, CAC, had obtained substantial loans and loan guarantees from private lenders, as well as federal, state and local government agencies. Although these facts evidenced the producer's substantial commitment, any injury he had incurred was not by reason of the dumped imports. On the contrary, the limited nature of CAC's sales efforts, particularly the unavailability of specification documents, had seriously restricted its access to the market and had prevented it from competing for sales.

E. The European Community

1. Introduction

The findings were necessarily based in large part on the confidential information supplied to the Commission by the European industry, which the Commission was precluded from dis-

420. See *supra*, note 418.

421. *Id.* at 14-17.

422. *Salmon Gill Fish Netting of Manmade Fibers from Japan*, USITC Pub. 1234, Inv. No. 751-TA-5 (Final) (1983).

423. *Certain Commuter Airplanes from France and Italy*, USITC Pub. 1269, Inv. No. 701-TA-174-175 (Preliminary) (1982).

closing. Moreover, they were by their very nature findings that could only be based on an assesment of complex economic facts, not readily open to judicial review.⁴²⁴

This quote, taken from the opinion of Advocate General Warner in the 1979 *Ballbearings* cases, is still relevant because it illustrates the large discretion of the Commission in its assessment of injury. The following analysis is based on the often sketchy information that the Commission and the Council provide in the official Journal, and may, therefore, not always cover all aspects, covered by the Commission internally.

2. Material Injury in the Narrow Sense

Article 4 of the Regulation specifies that: an examination of injury shall involve the following factors, no one or several of which can necessarily give decisive guidance:

(a) volume of the . . . dumped imports, in particular whether there has been a significant increase, either in absolute terms or relative to production or consumption. (b) the prices of dumped . . . imports, in particular whether there has been a significant price undercutting as compared with the price of a like product in the Community; (c) the consequent impact on the industry concerned as indicated by actual or potential trends in the relevant economic factors such as:

[P]roduction, utilization of capacity, stocks, -sales, market share, prices (i.e. depression of prices or prevention of prices which otherwise would have occurred), profits, return on investment, cash flow, employment.⁴²⁵

One aspect of this provision should be noted. It is noteworthy that several of the economic factors and indices mentioned in the 1979 Code (article 3, 3), have not been explicitly incorporated into the Regulation. For example, productivity, wages, growth, and the ability to raise capital or investment are not mentioned. This does not mean that the European Commission will never consider these factors, as the list is not intended to be exhaustive.⁴²⁶ It might indicate, however, the European

424. Opinion of Advocate-General Warner in the Japanese Ballbearings, No. 113/77, ECR 1212, 1266 (1979).

425. The Regulation, *supra* note 11, art. 4.

426. In *Pears from Australia*, 26 O.J. EUR. COMM. (No. L 196) 24-25 (1983), the European Commission argued that the dumped imports resulted in increased payments of production subsidies by the European Community to European Community producers and that those increases could be viewed as injury. The decision has been criticized by

Community's view that these factors are not among the most important indicators of injury.

Like the ITC, the European Commission makes injury determinations on an ad hoc basis which makes the formulation of general rules difficult. Such formulation is furthermore hampered by the summary analysis prevalent in most cases. A European Commission or European Council determination is seldom more than three pages long and includes both fair value and injury findings. Nevertheless, the mere fact that certain criteria are always mentioned, while others are seldom mentioned, provides an indication of their weight.

(1) Volume

The European Commission attaches most importance to absolute increases and increases in the market share of the imports. Proof of either will be a strong indicator of injury.⁴²⁷ Note, however, that it is the increase in dumped imports that is relevant. If, for example, the volume of imports was 100 tons in 1979 and 100 tons in 1982, an increase could still be found if the 1979 imports were sold at normal prices and the 1982 imports at dumped prices.⁴²⁸ Absolute decreases of imports might nevertheless lead to an affirmative injury finding if the market share of the imports increases.⁴²⁹

Davey, *supra* note 131, at 74.

427. *E.g.*, Textured Polyester Fabrics from the United States, 24 O.J. EUR. COMM. (No. L 133) 17 (1981). Malleable Case from Tube Fittings from Brazil, 24 O.J. EUR. COMM. (No. L 145) 29 (1981). Seamless Steel Tubes from Spain, 24 O.J. EUR. COMM. (No. L 145) 29 (1981). Seamless Steel Tubes from Spain, 24 O.J. EUR. COMM. (No. L 165) 27 (1981). Certain Car Tyres, 23 O.J. EUR. COMM. (No. L 113) 70 (1980). Stainless Steel Bars from Brazil, 23 O.J. EUR. COMM. (No. L 131) 18 (1980). (N.B. 3 tonnes - 1975; 1267 tonnes - 1979). Chemical Fertilizer from United States, 23 O.J. EUR. COMM. (No. L 212) 43 (1980). Polyester Yarn, 23 O.J. EUR. COMM. (No. L 231) 5 (1980). Studded Welded-link Chain from Spain and Sweden, 23 O.J. EUR. COMM. (No. L 231) 10 (1980). Styrene Monomer United States, 24 O.J. EUR. COMM. (No. L 42) 14 (1981). Mechanical Watches from the Soviet Union, 25 O.J. EUR. COMM. (No. L 11) 14 (1982). Fluid Cracking Catalysts from the United States, 25 O.J. EUR. COMM. (No. L 11) 25 (1982). Paracetamol from the People's Republic of China, 25 O.J. EUR. COMM. (No. L 236) 23 (1982). Broad-flanged Beams, from Spain, 25 O.J. EUR. COMM. (No. L 238) 32 (1982). Methylamine from German Democratic Republic and Romania, 25 O.J. EUR. COMM. (No. L 238) 35 (1982). Magnesite from People's Republic of China, 25 O.J. EUR. COMM. (No. L 371) 21 (1982).

428. *Cf.* Vinyl Acetate Monomer, 24 O.J. EUR. COMM. (No. L 129) 1 (1981).

429. Mechanical Alarm Clocks from People's Republic of China, 23 O.J. EUR. COMM. (No. L 158) 5 (1980). Potato Granules from Canada, 24 O.J. EUR. COMM. (No. L 116) 11 (1981). Motor Car Tyres from Czechoslovakia, et al., 23 O.J. EUR. COMM. (No. L 113) 70 (1980). Photographic Enlargers from Czechoslovakia, et al., 25 O.J. EUR. COMM. (No. L 212) 32 (1982). Magnesite from People's Republic of China, 25 O.J. EUR. COMM. (No. L 371) 25 (1982).

A minimal market share (under one percent), or a minimal increase therein, will usually preclude an injury finding.⁴³⁰ The European Commission generally looks at the total volume of dumped imports. This issue will be discussed more extensively in Part V. The European Commission sometimes takes expected imports into account. Although this may be justifiable for a threat finding, this practice might distort a material injury analysis.⁴³¹

(2) Prices

In most of the affirmative findings made thus far, price undercutting has been ascertained. The exceptions to this rule concern two types of cases. The variant occurred when the importers of the dumped merchandise were unwilling to provide information regarding their resale prices. The European Commission, consequently, concluded that the resale prices of Community producers had steadily fallen and that there was evidence that customers had cancelled contracts with the latter to buy dumped products, thus further depressing European Community producer's prices.⁴³² The second type of case is one in which price undercutting is not mentioned but rather one in which the prices of the dumped products have depressed European Community prices

430. Fibre Building Board from Czechoslovakia et al., 23 O.J. EUR. COMM. (No. L 145) 39 (1980). (Bulgarian exporters excluded because their market share was never more than 0.7%. Romanian exporters with a market share of 0.8%, however, were included). Mounted Piezo Electric Quartz Crystals from Korea, 23 O.J. EUR. COMM. (No. L 162) 62 (1980). (Market share 2.47% can cause injury). Oxalic Acid from German Democratic Republic, Hungary, Czechoslovakia and People's Republic of China, 25 O.J. EUR. COMM. (No. L 148) 36 (1982). (Minimal market shares excluded). Welded Iron or Steel Tubes from Romania, 25 O.J. EUR. COMM. (No. L 26) 5 (1982). (Coated pipe excluded because only very small quantities imported). *But see* Iron or Steel Coils for Re-rolling from Argentina et al., 26 O.J. EUR. COMM. (No. L 210) 5 (1983). (The European Commission did not directly answer the Argentinian complaint that it imported only minimal quantities, but nevertheless included it because to act otherwise would be discriminatory). Glass Textile Fibre Mats from Czechoslovakia et al., (imports went up from 1.5% to 3%. No material injury because the decrease in consumption and the increase in the volume of other imports far outweigh the relatively limited effects of the dumping).

431. Quartz Crystals from Japan, et al., 23 O.J. EUR. COMM. (No. L 162) 62 (1980). Louvre Doors from Singapore, 24 O.J. EUR. COMM. (No. L 135) 33 (1981). ("[T]here is sufficient evidence of consequent material injury, which could worsen in view of unlimited quantities that this company was prepared to export at dumped prices"). *But see* Methylamine from the German Democratic Republic, et al., 25 O.J. EUR. COMM. (No. L 238) 35 (1982). (Correct as to threat). Vinyl Acetate Monomer, 27 O.J. EUR. COMM. (No. L 58) 17 (1984).

432. Orthoxylene, United States 24 O.J. EUR. COMM. (No. L 141) 29 (1981); Paraxylene, United States 24 O.J. EUR. COMM. (No. L 158) 7 (1981).

or prevented 'necessary' price increases.⁴³³

This approach, if true, is not necessarily in contravention of the 1979 Code, which uses the formula "price undercutting or otherwise price depressing or preventing price increases." In situations such as these, however, claims of price depression or suppression by domestic producers will be easy to make and hard to refute. The European Commission should be very careful in granting relief on this basis. On the other hand, it should be noted that in at least four cases, the European Commission issued a no injury finding because the foreign products were priced higher than the European Community like products, or higher than non-dumped imports.⁴³⁴

(3) Consequent Impact

The factors most often mentioned in the determinations are price depression or suppression, or both; decreases in production, capacity utilization, and employment levels; and the existence of lost market shares and sales. Although not mentioned in the regulation, the European Commission occasionally considers the general condition of the domestic industry. In *Acrylic Fibre from the United States*,⁴³⁵ for example, the European Commission noted that the European Community industry had been making strenuous efforts to recover from the effects of production and consumption stagnation accompanied by considerable overcapacity and extremely high losses. The European Commission further noted that the domestic industry had experienced these effects over many years and that the dumped imports were undermining the process of recovery of the European Community producers.

In a number of recent determinations involving steel products, it apparently has become customary to point out that the European Community industry is in a state of crisis, and that the dumped imports may jeopardize the objectives of the European Community steel

433. Fibre Building Board, 23 O.J. EUR. COMM. (No. L 145) 39 (1980); Phenol, United States 24 O.J. EUR. COMM. (No. L 195) 22 (1981); Fluid Cracking Catalysts, 25 O.J. EUR. COMM. (No. L 11) 25 (1981); Methylamine, 25 O.J. EUR. COMM. (No. L 238) 35 (1982); Thiopen United States 25 O.J. EUR. COMM. (No. L 295) 35 (1982); Sodium Carbonate, 25 O.J. EUR. COMM. (No. L 317) 5 (1982); Decarbomodiphenylether, 25 O.J. EUR. COMM. (No. L 319) 16 (1982).

434. Aluminum Foil from German Democratic Republic, et al., 25 O.J. EUR. COMM. (No. L 339) 58 (1982). Xanthan Gum from United States 26 O.J. EUR. COMM. (No. L 268) 60 (1983). Nickel from the Soviet Union, 26 O.J. EUR. COMM. (No. L 286) 29 (1983). Saccharin from People's Republic of China, et al., 26 O.J. EUR. COMM. (No. L 352) 49 (1983).

435. 23 O.J. EUR. COMM. (No L 114) 37 (1980).

policy. The relevant portions of *Sheets and Plates of Iron and Steel from Brazil* are reproduced integrally, because they review the policy considerations that occasionally enter European Commission injury determinations.

Whereas the Commission also took into account the fact that the Community Steel industry is in a state of crisis: whereas the overall steel output has been cut considerably and numbers employed fell . . . ; whereas the situation of Community producers continues to be one of extremely low capacity utilization levels and seriously reduced profits or of losses. Whereas, in order to remedy this situation, the Community's steel policy seeks to ensure sufficient price levels for products concerned sold in the Community through the use of internal and external measures; whereas the internal measures consist of production quotas for ECSC companies and the obligation to respect certain price levels; whereas, in order to keep imports within reasonable limits, the Commission has concluded steel arrangements with a large number of supplying countries which involve quantitative limitations on exports to the Community and the observance of arrangement prices which are closely linked to development of internal price levels in the Community. Whereas production quotas for Community producers are adopted periodically on the basis of a forecast of supply and demand for products concerned, taking into account the development of imports from third countries including those whose exports are not covered by a bilateral arrangement with the Community; whereas any sharp increase in imports from these countries, such as Brazil, requires a downward adjustment of the quotas of Community producers and thereby increases their indirect costs and further reduces their margins. Whereas imports of significant quantities of dumped products into the Community also put into question the objectives sought by the external measures adopted within the framework of the Community steel policy; whereas third countries which have concluded steel trade arrangements with the Community will only respect and renew these agreements if they see a reasonable chance of selling quantities provided for at the price levels agreed; whereas significant imports of dumped products from sources not covered by an arrangement jeopardize the equilibrium not only of the internal quantity and pricing system but also of the quantities and prices agreed with most of the sup-

plying countries.⁴³⁶

It seems doubtful that such a broad interpretation of injury is permitted by the 1979 Code. Although policy considerations may operate as a reason for not imposing antidumping duties despite the existence of dumping and resulting injury,⁴³⁷ the converse of these considerations (imposition of duties to fulfill or to prevent distortion of policy objectives even though there is no injury) is clearly illegal. Of course, the situation in the steel cases was not that clear cut. The European Commission did not rely exclusively on the language quoted above to issue an affirmative finding, and it is indeed possible that the other factors sufficiently established the materiality of injury. Use of such policy considerations distracts from the real issue however, and seems irrelevant in the context of dumping investigations. Policies designed to support an industry, whether governmentally or privately sponsored, are a voluntary choice on the part of the importing country, and injury determinations cannot be used to support those policies.

3. Threat of Material Injury

The basic Regulation lays down the following guidelines for threat determinations: A determination of threat . . . may only be made where a particular situation is likely to develop into actual injury. Account may be taken of factors such as: (a) rate of increase of the dumped imports to the Community; (b) export capacity in the country of origin or export, already in existence or which will be operated in the foreseeable future, and (c) the likelihood that the resulting exports will be to the Community. As of the moment of writing the European Commission has never based an injury finding on threat alone. In a few cases, however, the affirmative determination was based on "injury or threat."⁴³⁸

For someone used to the standards set by the CIT, in for example *Alberta Gas*,⁴³⁹ the motivation for such a finding in these cases will come as a surprise. In *Quartz Crystals*,⁴⁴⁰ the European Commission

436. See also *Broad-flanged Beams from Spain*, 25 O.J. EUR. COMM. (No. L 238) 32 (1982); *Iron or Steel Coils for Re-rolling from Argentina, et al.*, 26 O.J. EUR. COMM. (No. L 82) 9 (1982); *Concrete Reinforcing Bars from Spain*, 26 O.J. EUR. COMM. (No. L 303) 13 (1983).

437. 1979 Code, *supra* note 5, art 8(1). "It is desirable that the imposition is permissive." *Id.*

438. *Methylamines*, 25 O.J. EUR. COMM. (No. L 238) 35 (1982); *Vinyl Acetate Monomer from Canada*, 27 O.J. EUR. COMM. (No. L 58) 17 (1984); *Quartz Crystals from Korea*, 23 O.J. EUR. COMM. (No. L 162) 62 (1982).

439. 515 F. Supp. 780 (Ct. Int'l Trade 1981).

440. *Quartz Crystals, Korea*, 23 O.J. EUR. COMM. (No. L 162) 62 (1982).

determined that there was injury, or at least a threat thereof, because exports had increased 300% over the last two years and there was evidence that exports would double again during the next year. In *Vinyl Acetate Monomer*,⁴⁴¹ the European Commission decided that

In addition to the already existing injury, a considerable threat of injury . . . exists due to the high rate at which dumped imports into the Community have increased since 1982, the ability of producers to increase the existing capacity in Canada without substantial adjustments and the likelihood that the resulting exports will be directed to the Community because of the high import and antidumping duties applied by the Community to other exporting countries.⁴⁴²

Similarly, in *Methylamines from the GDR and Romania*,⁴⁴³ the European Commission based its injury or threat determination on "the high rate of increase of imports in the last few months, high production capacity in the GDR and Romania, and the likelihood that the resulting exports will be to the Community countries because of difficulties in transporting methylamine by sea."

Analysis reveals that the *Methylamines* decision is based at least on four assumptions. They are: (1) the increase will continue; (2) the high production capacity is not fully used; (3) the exports will not be made to European countries not included in the European Community; and (4) the difficulties in transporting methylamines by sea are insurmountable. Apart from the lack of motivation, it seems doubtful whether these decisions conform to the 1979 Code requirement that threat determinations should be based on facts and not merely on allegations, conjecture or remote possibilities. In *Sodium Carbonate from the U.S.S.R.*,⁴⁴⁴ on the other hand, the European Commission refused to base its injury finding on threat, despite recently built and planned production facilities in some countries, because it could not be determined that such increased production capacity would lead to a significant increase in exports to the European Community.

441. *Vinyl Acetate Monomer from Canada*, 27 O.J. EUR. COMM. (No. L 58) 17 (1984).

442. *Id.*

443. *Id.*

444. 23 O.J. EUR. COMM. (No. L 48) 1 (1980).

4. Material Retardation of the Establishment of a European Community Industry.

In *Outboard Motors from Japan*,⁴⁴⁵ the European manufacturers argued that the low prices of Japanese motors above eighty five horse power had prevented any European production of such motors. The European Commission refused, however, to issue a finding of material retardation. Instead, the European Commission excluded these types of motors from the scope of the investigation because there had been no production of this type in the European Community and there was not a sufficiently convincing factual indication that the establishment in the European Community of such production was envisaged. This approach is in conformity with the view of Cunnane that such a claim should only be honored if the industry comes forward with convincing evidence that the industry is at an advanced stage of planning.⁴⁴⁶ Evidence of such planning could be derived from availability or acquisition of premises, investment capital and technology.

F. Conclusions and Comparison

Analysis of the decisions discussed in this article shows little that we did not already know before. It is impossible to say which system requires a higher degree of injury or which system is less protectionist.

Initially, the relatively scarce number of no injury findings in the European Community might seem indicative of a more lenient standard. Indeed, only twenty out of 226 analyzed cases were terminated on the basis of a no injury finding, a number which contrasts sharply with the United States ratio of sixty six out of 245. The counter-argument might be that the European Commission screens complaints more thoroughly before it opens the investigation. Another explanation for the difference might be that European Community producers are less willing to start an investigation if they are not completely sure of affirmative findings. A third explanation is offered by Davey:⁴⁴⁷

It is relatively rare for a finding of dumping to be made but a conclusion reached that such dumping caused no material injury. This result is not difficult to understand- if no dumping had occurred, the price level in the Community would normally

445. 26 O.J. EUR. COMM. (No. L 152) 18 (1983).

446. CUNNANE & STANBROOK, *supra* note 314, at 68.

447. The number of investigations is based on a country-by-country approach. Although United States investigations involving several countries have different investigation numbers, investigations in the European Community are not numbered and often involve numerous countries. *See also* Part V.

be higher and Community industry would have had a better opportunity to make a sale or to make a profit on the sales it made. The lack of that opportunity inevitably results in some detriment to Community industry, and to convince the Commission that such detriment is immaterial is difficult.⁴⁴⁸

Both the European Community and the United States attach particular weight to absolute increases in volume or increases in market share, to price depressing or suppressing affects, and to the consequent adverse impact on the domestic industry. The impact on the domestic industry is measured particularly in such terms as lost sales, lost profits, decrease in production and decrease in market share. Wages, growth, cash flow and the ability to raise capital or investments are seldom mentioned. Neither system clearly distinguishes injury from causation, and, as this article argues, such a distinction would indeed be hard to make.

Both the ITC and the European Commission seem to be willing to "find material injury on a lower showing of import impact, if the industry is in a particularly vulnerable situation."⁴⁴⁹ Although this policy has been rather explicitly adopted in a few European Commission determinations, at least one former commissioner of the ITC has admitted that it also applies to United States injury determinations.⁴⁵⁰

It is doubtful whether such a practice is admitted under the 1979 Code. The 1979 Code does not contain any special provisions for times of recession, and, therefore, is neutral in that respect. It is obvious that domestic producers will become more active in filing for import relief during a recession (antidumping complaints have sky-rocketed during the last four years in both the United States and the European Community) and that the least competitive industries will cry "foul" loudest. Although these complaints are permitted, they should be subject to the same test found in other cases.

V. CAUSATION

A. *The United States*

1. Introduction

The only language in the TAA, pertaining to causation are the brief statements in Sections 731 (imposition),⁴⁵¹ 733(a) (prelimi-

448. Davey, *supra* note 131, at 73.

449. Calhoun, *supra* note 309, at 17.

450. *Id.* at 17.

451. 19 U.S.C. § 1673 (1982).

nary),⁴⁵² and 735(b)(1) (final),⁴⁵³ that the ITC shall determine whether a United States industry is materially injured (in a broad sense) "by reason of" the dumped imports.

The Senate Finance Committee Report and the House Ways and Means Committee Report, however, treat this issue quite extensively.⁴⁵⁴ The main conclusions that can be drawn from the legislative history are the following:

- (1) current (pre-1980) ITC practice will continue with respect to causation;
- (2) the ITC has considerable discretion;
- (3) the statute does not contemplate a weighing of the effects of the dumped imports against other factors which may have caused injury;
- (4) these other factors include the volume and price of non-dumped imports, contraction in demand, changes in patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry;⁴⁵⁵
- (5) the petitioner is not required to prove that injury is not caused by those other factors; and
- (6) it is not important whether the dumped imports are the principal, substantial, or significant cause of injury.

Three of the most important causation issues are: first, whether the injury should be caused through the effects of dumping or through the effects of the imports per se; second, in the case of imports from several countries, whether the imports should be cumulated or considered on a country-by-country basis; and finally, whether competitively-priced imports can cause injury at all. Because of the importance of these issues and the current interest in them, they will be treated separately in the following sections. The remainder of this section will analyze the standard of causation that the ITC applies and the other factors the ITC has considered relevant.

The statement in the Senate Finance Committee Report that the imports need not be the principal, substantial, or significant cause has been interpreted to mean that the imports need only be a contributory cause of injury to the domestic industry.⁴⁵⁶ It should be mentioned that

452. 19 U.S.C. § 1673(b)(a) (1982).

453. 19 U.S.C. § 1673(d)(b)(i) (1982).

454. SENATE FINANCE COMMITTEE REPORT, *supra* note 7, at 74-75.

455. 19 C.F.R. § 207.27 (1986).

456. Victor, *supra* note 129, at 147; Dale, *supra* note 1, at 113.

the ITC traditionally has interpreted the causation standard in this way,⁴⁵⁷ and that it is supported both by case law⁴⁵⁸ and by the legislative history of the 1974 Trade Act.⁴⁵⁹ It was clear that this standard did not comply with the "principal cause" language of the 1967 Code,⁴⁶⁰ and, until adoption of the new 1979 Code, the United States was repeatedly criticized on this point by other Code signatories.⁴⁶¹ Despite defaulting international obligations,⁴⁶² however, the hands of the United States President were bound in view of Congressional will that the 1979 Code was to be implemented only insofar as its provisions were consistent with those of the 1921 Act. Any conflict between the executive and legislative branches had to be resolved in favor of the 1921 Act as it has been administratively interpreted.⁴⁶³ In the area of causation there was clearly a conflict.⁴⁶⁴

As it is also clear that the United States did not intend to change its causation standard with the adoption of the TAA, the question is whether the contributory cause standard is in violation of the 1979 Code. In the author's view, there is no violation. This article has demonstrated in Part I, section F that one of the main reasons for revision of the 1979 Code during the Tokyo Round was irritation on the part of the European Commission that different standards applied with respect to the causal link in the European Community and the United States. This irritation, coupled with the European Commission's realization that the "principal cause" standard was too stringent, leads to the conclusion that it was the intention of the 1979 Code drafters to lower the causation standard to the United States level. Omission of both "principal cause" and the "weighing" language amounts to implicit revocation of the "principal cause" standard.

457. See, e.g., Pig Iron from Canada, USTC 6 (AA1921-72-74) (1971); Ferrite Cores from Japan, USTC 9 (AA1921-72-74) (1971); Elemental Sulphur from Mexico, USTC 9 (AA1921-72-74) (1971); Melamine Crystal Imports from Japan USTC 6 (AA1921-162) (1976) Certain Railway Track Maintenance Equipment From Austria, USTC 4 (AA1921-73) (1977).

458. See, e.g., *Rasco Terminals, Inc. v. United States*, 83 Cust. Ct. 65 (1965), 477 F. Supp. 201 (Cust. Ct. 1979).

459. Trade Act of 1974, Pub. L. No. 93-618, § 521, 88 Stat. 1978 (1975) (codified at 19 U.S.C. § 2341 (1976)).

460. DALE, *supra* note 1, at 113.

461. BISD, *supra* note 3, Supp. No. 20, at 43 (1974); cf. E. MCGOVERN, *supra* note 142, § 12.132 at 284.

462. Cf. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 135 comment e (1980) [hereinafter REVISED RESTATEMENT].

463. Renegotiation Amendments Act, Pub. L. No. 90-634, S 201, 82 stat. 1347 (codified at 19 U.S.C. § 160 (1982)); cf. J. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (1977).

464. Long, *supra* note 113, at 464.

An overview of ITC determinations supports the conclusion that the standard in the United States has remained the same. Unless it is clear that there is no causal relationship between the dumped imports and the injury to the domestic industry, the ITC will seldom terminate the investigation. In *Cyanuric Acid from Japan*,⁴⁶⁵ for example, the ITC admitted that several factors, in addition to the imports, might have caused the economic problems of the United States industry. Those other factors included quality problems experienced by one domestic producer, and reduced demand resulting from poor weather. The court added, however, that the ITC does not weigh causes, but rather looks to see whether imports are a cause of injury.⁴⁶⁶

In *Carton Closing Staples from Sweden*,⁴⁶⁷ the respondents argued that the injury was caused not by dumping, but by the devaluation of the Swedish krona. Although admitting that in many cases exchange rates might be a more important cause of underselling than unfair trade practices, Commissioners Lodwick and Eckes admonished the respondents that the ITC was not required to weigh causes of injury.⁴⁶⁸ The Commissioners added that it was not their responsibility to examine and weigh the causes of underselling.⁴⁶⁹ This latter argument will be discussed more extensively in the next section.

Affirmative injury findings rely strongly on proof of price depressing or suppressing effects and on evidence of lost sales because of price considerations.⁴⁷⁰ These factors are indeed the most direct indicators imaginable of both injury and causation. Conversely, it can be safely argued that an absence of both of these factors will make a causation finding impossible.

More interesting are the negative causation and injury findings. These can be grouped under six headings: (1) No underselling, price

465. U.S. INT'L TRADE COMM'N, PUB. NO. 1407, *Cyanuric Acid And Its Chlorinated Derivatives From Japan* (1983) (preliminary determination).

466. *But see* strong dissent of U.S. International Trade Commissioner Stern in *Cyanuric Acid and its Chlorinated Derivatives From Japan*, USITC Pub. 1407, Inv. No. 731-TA-136 (Preliminary) (1983). *See also* *Carbon Steel Products from Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands and the United Kingdom*, USITC Pub. 1064, Inv. No. 731-TA-18, 19, 20 21, 22, 23 (Preliminary) (1980); *Sheet Piling from Canada*, USITC Pub. 1212, Inv. No. 731-TA-52 (Preliminary) (1982); *Sodium Nitrate from Chile*, USITC Pub. 1357, Inv. No. 731-TA-91 (Final) (1983).

467. *Carton-Closing Staples and Non-Automatic Carton-Closing Staple Machines from Sweden*, USITC Pub. 454, Inv. No. 731-TA-116, 117 (Final) (1983).

468. *Id.* at 10 n.36.

469. *But see* dissent of Commissioner Stern in *id.*, who took exchange rates into account in reaching a no injury finding.

470. *Chloropicrin from People's Republic of China*, USITC Pub. 1505, Inv. No. 731-TA-130 (Final) (1984).

depressing or suppressing effect;⁴⁷¹ (2) Lost sales because of perceived quality or service differences;⁴⁷² (3) Lost sales because of a desire for an alternative source of supply;⁴⁷³ (4) Decline in demand and consumption;⁴⁷⁴ (5) Increase in expenses of the domestic industry;⁴⁷⁵ and (6) Competition among domestic producers.⁴⁷⁶ With regard to factors (2) through (6), it should be noted that the ITC has never based a negative finding on any one of them separately, but generally uses them to support each other.

A factor curiously absent from the list is the volume and the price of nondumped imports.⁴⁷⁷ This absence is curious because nondumped imports can influence the causation analysis in a number of ways. Low-priced nondumped imports might force other foreign producers to resort to dumping in order to meet the competition. Although this is not a justification under the antidumping law, equitable considerations might influence the injury analysis. Furthermore, in such a situation it is unlikely that imposition of antidumping duties would remove or alle-

471. See *infra* Part V, § A, 4.

472. Certain Tapered Roller Bearings and Parts Thereof from Japan, The Federal Republic of Germany, and Italy, USITC Pub. 1359, Inv. Nos. 731-TA-120, 731-TA-121, and 731-TA-122 (Preliminary) (1983), USITC Pub. 1497 Inv. Nos. 731-TA-120 and 122 (Final) (1984); Snow-Grooming Vehicles from Federal Republic of Germany, USITC Pub. 1117, Inv. No. 731-TA-36 (Preliminary) (1980); Melamine from Austria Italy, USITC Pub. 1065, Inv. Nos. 731-TA-13 and 731-TA-14 (Final) (1980).

473. See, e.g., Certain Tapered Roller Bearings and Parts Thereof from Japan, The Federal Republic of Germany, and Italy, USITC Pub. 1359, Inv. Nos. 731-TA-120, 731-TA-121, and 731-TA-122 (Preliminary) (1983), USITC Pub. 1497, Inv. Nos. 731-TA-120 and 731-TA-122 (Final) (1984); Melamine Austria from Italy USITC Pub. 1065, Inv. No. 731-TA-13 and 731-TA-14 (Final) (1980).

474. See Melamine from Brazil, USITC Pub. 1303, Inv. No. 731-TA-107 (Preliminary) (1982); Chlorine from Canada, USITC Pub. 1249, Inv. No. 731-TA-90 (Preliminary) (1982); Secondary Aluminum Alloy in Unwrought Form from The United Kingdom, USITC Pub. 1143, Inv. No. 731-TA-40 (Preliminary) (1981); Snow-Grooming Vehicles, USITC Pub. 1117, Inv. No. 731-TA-36 (Preliminary) (1980).

475. Snow-Grooming Vehicles, USITC Pub. 1040, Inv. No. 731-TA-36 (Preliminary) (1980).

476. See Sodium Hydroxide, USITC Pub. 1040, Inv. No. 731-TA-11 (Preliminary) (1980).

477. BRYAN, *supra* note 2, at 70, also mentions (2) contraction in demand; (3) trade restrictive practices; (4) export performances of domestic industries; (5) increasing production costs; (6) climate changes; (7) energy shortages; (8) decreasing government spendings; (9) domestic competition; (10) domestic economic depression; (11) strikes; (12) U.S. pollution control; (13) high price of supplies; and (14) aging plant and equipment. This article has not adopted this type of classification partly because some of the factors (3 and 4) have never played a role yet, and partly because some of the factors seem to overlap. Contraction in demand, for example, might be caused by climatic changes, decreasing government spendings or a domestic depression. High prices of supply will result in increasing production costs.

viate the injury suffered by the domestic industry, especially if the volume of the nondumped imports significantly exceeds that of the dumped imports.⁴⁷⁸

2. By Reason of Imports: Imports or Dumped Imports?

a. Introduction

One of the most hotly debated issues in current United States antidumping and countervailing duty law is the question whether injury should be caused by imports which are the subject of an antidumping investigation or whether it should be caused through the effects of dumped imports.⁴⁷⁹

The approach that is chosen can be of decisive importance for the outcome of an investigation and the subject, therefore each approach, merits comprehensive attention. An example will show the difference. Let's assume that Dutch producers sell wooden shoes for ten dollars a pair in the Dutch market and for nine dollars a pair in the United States market. In that case the dumping margin is one or ten percent. Let's assume further that the sole United States producer sells identical shoes for forty dollars a pair and suffers material injury. Under the first or "imports" analysis, the ITC would not look at the dumping margin, but would only consider whether the imports are a contributing cause to the injury, which they probably are. The second or "margins" analysis, on the other hand, would investigate whether the dumping margin is a contributing cause. In the hypothetical, the likely conclusion is that when the Dutch shoes undersell their United States counterparts by 310% and when only ten percent of the margin of underselling can be accounted for by the dumping margin, any injury is a result of the margin of underselling. The injury is only minimally, if at all, caused by the margin of dumping. The ITC would be likely to conclude that any injury which is suffered is not by reason of the lower-than-fair-value imports. The imports analysis seems protectionist in that it affords protection to industries which are only marginally injured by reason of the unfair imports. Although the CIT has recently ruled that the margins analysis is not required by the Act,⁴⁸⁰ it is still

478. Cf. the EEC practice is discussed *infra* in Part V, § B, 1.

479. Victor, *supra* note 129, at 149, Speaks about the "import" test as opposed to the "unfair trade" test. See Carbon Steel Wire Rod from Brazil, Trinidad and Tobago, USITC Pub. 1316, Inv. No. 731-TA-113-114 (Preliminary) (1982); Carbon Steel Wire Rod from Brazil, Belgium, France and Venezuela, USITC Pub. 1230, Inv. No. 731-TA-148-149-150 (Preliminary) (1982).

480. See *Maine Potatoe Counsel v. United States*, 613 F. Supp. 1237 (Ct. Int'l Trade 1985).

open whether the ITC *may* apply a margin analysis.

b. History

Until December 1982, the dumping margin was one, but certainly not a dispositive,⁴⁸¹ factor which the ITC considered in its causation analysis. The ITC "compared the weighted-average-lower-than-fair-value margin with average national prices of U.S. producers and average national resale prices of the imports."⁴⁸² If the LTFV margin was substantially lower than the margin of underselling, this would be an indicator that the injury was not caused by the dumped imports.⁴⁸³ If conversely it was the margin of dumping which enables the foreign exporters to undersell United States producers, material injury caused by the dumping seemed evident.⁴⁸⁴

In either situation, however, positive or negative injury determinations were supported by other evidence, and the statement that "if the dumped merchandise undersold the United States (*sic*; price) by greater than 20 percent (the dumping margin), the Commission would conclude that the less-than-fair-value margin did not have a causal relationship to the injury,"⁴⁸⁵ seems too sweeping. Indeed one commentator⁴⁸⁶ gives examples of situations in which the ITC found injury despite the fact that the margins of dumping were a relatively small part of the margins of underselling,⁴⁸⁷ and also examples in which the ITC found no injury despite high dumping margins.⁴⁸⁸ The same commentator estimates that under the 1921 Act at least in fifty-three (no) injury determinations the dumping margins were a factor under consideration.⁴⁸⁹ Indeed, it seems generally acknowledged, that such consideration was a consistent and uniform practice under the old law

481. *But see Easton, Administration of the Import Trade Statutes: Possibilities for Harmonizing the Investigative Techniques and Standards of the International Trade Commission*, 10 GA. J. INT'L & COMP. L. 78 (1980).

482. Easton & Perry, *The Causation of Material Injury: Changes in the Antidumping and Countervailing Duty Investigations of the International Trade Commission*, 2 UCLA PAC. BASIN L.J. 43 (1983).

483. *E.g.*, Vital Wheat Gluten from Canada, USTC 126 (AA1921-37) (1964).

484. *E.g.*, Television Receiving Sets from Japan, USTC 367 (AA1921-66) (1971).

485. Easton, *supra* note 481, at 79.

486. For an excellent article, see Palmeter, *Countervailing Subsidized Imports: The International Trade Commission Goes Astray*, 2 UCLA PAC. BASIN L. J. 1, 9 n.20 (1983).

487. *Id.* See also Fishnets and Netting of Manmade Fibers from Japan, USTC 477 (AA1921-85) (1972), investigated because the dumping margins nevertheless enabled the domestic producers to gain market share.

488. Saccharin from Japan and Republic of Korea, USITC Pub. 846, Inv. No. AA1921-174,175, (1977). Palmeter, *supra* note 486, at 10.

489. Palmeter, *supra* note 486, at 7. For enumeration of these cases, *id.* at n.18.

and the first decisions under the TAA.⁴⁹⁰

The first argument for adoption of an imports analysis seems to have been advanced by Easton in a 1980 law review article.⁴⁹¹ Since then it has been a recurring theme in General Counsel memoranda to the ITC,⁴⁹² until it was adopted by an ITC majority in December, 1982.⁴⁹³

Although these cases involved countervailing duty investigations, arguments for and against adoption of the imports analysis principle apply equally to both dumping and countervailing cases, and it is presently assumed that the ITC majority uses the imports analysis in both types of investigations.⁴⁹⁴ Whether subsequent changes in the composition of the ITC will affect this assumption remains to be seen. Analysis of recent ITC cases reveals only that the ITC frequently mentions margins of underselling and resulting lost sales as an indication of causation, but seldom mentions the dumping margins.

c. Arguments For and Against a Margins Analysis⁴⁹⁵

The arguments that have been made for and against a margins analysis, can be divided into six categories: (1) Structural arguments; (2) Economic and public policy arguments; (3) Prior agency practice arguments; (4) Legislative history arguments; (5) International arguments; and (6) Pragmatic arguments.

The lines which separate these categories are not crystal clear and

490. Easton, *supra* note 481, at 80.

491. *Id.*

492. *See, e.g.*, General Counsel Memorandum, GC-E-065 (3/17/81), Memo from General Counsel to Commissioner Stern whether the ITC needs a final determination from the Department of Commerce on lower-than-fair-value margins and the related issue of the causation standard in § 7; General Counsel Memorandum, GC-F-345 (10/8/82), Memo from General Counsel to the ITC of analysis of the causation and cumulation issue briefed in the countervailing duty investigations concerning carbon steel products investigations 701-TA-86 et. al. (Final) (LEXIS, Itrade library, GCM file).

493. Certain Carbon Steel Products from Spain, USITC Pub. 1331, Inv. Nos. 701-TA-155, 157-160 and 162 (Final) (1982); Hot-rolled Stainless Steel Bar, Cold-Formed Stainless Steel Bar, and Stainless Steel Wire Rod from Spain, USITC Pub. 1333, Inv. No. 701-TA-176,177,178 (Final) (1982).

494. Victor, *supra* note 129, at 150; Easton, *supra* note 481; Easton & Perry, *supra* note 482, at 44.

495. EASTON, *supra* note 481; EASTON & PERRY, *supra* note 482; GRANET, *ITC Injury Determinations in Countervailing Duty Investigations*, 15 L. POL'Y INT'L BUS. (1983) at 987; PALMETER, *supra* note 486; *see also* General Counsel Memoranda GC-E-065 (3/17/81), GC-F-341 (10/6/82), GC-F-345 (10/8/82) and the opinions of Commissioner Stern in Carbon Steel Wire Rod from Venezuela and Trinidad and Tobago, *supra* note 479, and of Commissioner Haggart in Certain Steel Products from Spain, USITC Pub. 1331, Inv. Nos. 701-TA-155, 157-160 and 162 (Final) (1982).

indeed arguments from one category are sometimes countered by arguments from another category. Nevertheless, the division seems useful for purposes of analysis.

(1) Structural Arguments

Advocates of the margins analysis contend that Title VII of the Tariff Act is aimed at subsidies and dumping, and not at imports *per se*. The purpose of the statute is to prevent or remedy injury caused by allegedly unfair practices. Consequently, common sense dictates that one should consider whether the unfair practice (the dumping) causes injury. The measure of unfairness is not only relevant to the lower-than-fair-value determination, but also to the injury determination. If a dumping margin is too high for exclusion as “*de minimis*,” it might nevertheless not be a cause of injury.

Opponents argue that the purpose of the antidumping law is “merely to tax the amount of dumping and force foreign exporters to raise their prices to the United States or lower their foreign prices, thus reducing or eliminating dumping.”⁴⁹⁶ They invoke the “plain meaning” rule in support of their position. The problem is that the meaning of the statute is not all that plain.

The TAA three times uses the phrase “by reason of imports.”⁴⁹⁷ With regard to an injury finding to a regional industry, the TAA requires injury “by reason of the dumped or subsidized imports,”⁴⁹⁸ while in the products lines paragraph, the TAA requires assessment of “the effect of subsidized or dumped imports” in relation to the United States production of the like product.⁴⁹⁹ It seems improbable that Congress wanted regional industries to be treated differently in this respect. Furthermore, the rather explicit provision that the ITC should consider the effects of the dumped imports on the production of the like product in section 771(4)(D) of the TAA contradicts the imports analysis interpretation of the “by reason of the imports” language. Therefore, the plain meaning of the statute is hard to defend. Analysis of the legislative history leaves one with the impression that Congress did not pay much attention to the differences in the mentioned phrases but rather equated their meaning.

Furthermore opponents stress the statutory bifurcation of functions between the ITA and the ITC,⁵⁰⁰ and invoke judicial precedent to

496. Easton & Perry, *supra* note 482, at 36.

497. 19 U.S.C. § 1673 (1982).

498. 19 U.S.C. § 1677 (1982).

499. *Id.*

500. Easton & Perry, *supra* note 482, at 35.

support their argument.⁵⁰¹ Thus, the ITA is exclusively qualified to look into the dumping margin. Consequently, the ITA has to determine whether that margin is sufficient or not; that is, whether it is de minimis. Once the Commerce Department makes this determination, the ITC has to consider whether the imports that have been qualified by the Commerce Department as being lower-than-fair-value (or by petitioner in the preliminary phase of the investigation), cause injury.

Thus, in *Sprague Electric Co. v. United States*,⁵⁰² in which a domestic producer appealed from the ITC's negative determination in *Tantalum Electrolytic Fixed Capacitors from Japan*,⁵⁰³ the CIT held "that the Commission has no authority to refine or modify the class or kind of merchandise found to be, or likely to be sold at LTFV."⁵⁰⁴ In *Republic Steel Corp. v. United States*,⁵⁰⁵ the CIT ruled that the ITA had acted improperly in dismissing countervailing duties and antidumping investigations because there had been no or only minimal importation of the products in recent years. "According to the court, [b]y reaching a conclusion that a given level of importation was de minimis, the ITA usurped the role of the ITC whose duty it is to gauge whether the levels of importation have any meaningful effect."

The argument goes that this implies that the ITC should not determine the valuation of a subsidy.⁵⁰⁶ In the author's opinion, the statutory bifurcation argument does not support the position of opponents of the margins analysis. It is of course clear that the ITA determines the dumping margin, but this does not preclude the ITC's using the established margin in its causation analysis, nor do the *Sprague Electric* and *Republic Steel* cases compel that conclusion because their scope is limited. If the propriety of a margins analysis can be proved on other grounds, neither the statutory bifurcation of functions nor the few court decisions, which bear on this issue, should stand in the way of such interpretation.

A structural argument in favor of the margins analysis has been made out of the timing provisions of the TAA.⁵⁰⁷ After the initial ITC preliminary determination, all subsequent deadlines for the ITC are determined by referring to Commerce Department decisions. Furthermore, the ITC cannot terminate the investigation before the Commerce

501. Cf. GC-F-341, *supra* note 495.

502. 84 Cust. Ct. 243 488 F. Supp. 910 (Cust. Ct. 1980).

503. USTC 789 (AA1921-159) (1976), cited in GC-F-341, *supra* note 495, at 1.

504. Quoted in GC-F-341, *supra* note 495, at 1.

505. *Republic Steel Corp. v. United States*, No. 82-2-00207, Slip Op. 82-58 (Ct. Int'l Trade July 22, 1982).

506. GC-F-341, *supra* note 495, at 5.

507. GRANET, *supra* note 495, at 996.

Department makes its preliminary LTFV determination.⁵⁰⁸ It might follow from this scheme that Congress wanted the ITC to consider the information, that is the preliminary dumping margins, gathered by the Commerce Department. This interpretation is further supported⁵⁰⁹ by the TAA requirement that the ITA must make available to the ITC all information upon which its affirmative preliminary determination is based and which the ITC considers relevant to its injury determination.⁵¹⁰

This argument is not altogether convincing. First, if Congress wanted the ITC to consider the dumping margins, why did it time the preliminary ITC decision before the preliminary ITA decision? The only information with respect to dumping margins that the Commission has at the time of its preliminary investigation usually consists of allegations by the petitioner.⁵¹¹ Second, the information that the ITA has to make available to the ITC does not necessarily have to concern the dumping margins, but might be information regarding the United States price of the dumped imports.

(2) Economic and public policy arguments

In cases in which the dumping margin is insignificant in relation to the margin of underselling, imposition of duties on the basis of the imports test would, on the one hand, not alleviate the injury suffered by domestic producers, and, on the other hand, impose burdens both on United States consumers and international trade relations.⁵¹² The economic usefulness of the margins analysis, however, has been subjected to criticism too. Indeed, the weighted-average margin has been described as having "no probative usefulness whatsoever for the purposes of the Commission's import-injury determinations."⁵¹³ The margins analysis assumes that there is a logical relationship between the dumping margin (weighted-average of the difference between foreign producers' export prices and their home market prices) and the prices at which United States importers or subsequent distributors sell the

508. 19 U.S.C. § 1673 (1982).

509. GRANET, *supra* note 495, at 1000.

510. 19 U.S.C. § 1673 (1982).

511. See United States International Trade Commissioner Stern's opinion in Carbon Steel Wire Rod from Brazil, Belgium, France and Venezuela, USITC Pub. 1230, Inv. Nos. 731-TA-148, 731-TA-149 and 731-TA-150 (Preliminary) (1982).

512. Victor, *supra* note 129, at 151.

513. See *Hearings on Trade Remedies Legislation Before the House Ways and Means Trade Subcomm.*, 98th Cong., 1st Sess. 1119, 1143 and 1179 (1983) (statement of Russell N. Shewmaker). Cited in Easton, *supra* note 482, at 44.

merchandise.⁵¹⁴ For one thing, this assumption neglects distributors' profits. For another, reliance on the *Weighted-average Masks* cases in which importers deliberately undersold their competitors. In either case, these arguments merely come into play once the question has been answered whether use of an imports analysis (the alternative) is permitted under United States and international law.

(3) Prior agency practice

It is generally acknowledged that use of the margins analysis was a consistent ITC practice under the 1921 Act and in the first decisions under the TAA.⁵¹⁵ Also, because consistent prior agency practice is a factor which the courts consider in interpretation of statutes, this argument seems strong.⁵¹⁶ Opponents, however, submit that this practice was in fact inconsistent with the 1921 Act and is even more out of step with the 1979 Act.⁵¹⁷ Both section 160(a) of the 1921 Act⁵¹⁸ and Section 735 of the TAA⁵¹⁹ merely mention "injury by reason of imports." The TAA, furthermore, requires the ITC to look into volume⁵²⁰ and price effects⁵²¹ in making its preliminary and final investigations. It is contended that "[a]s long as the dumped imports have a general downward effect on market price, therefore, there is price suppression even though the price of the dumped product may not actually reflect the exact lower than fair value margin.⁵²² Indeed, the volume language would permit affirmative injury findings with regard to imports which do not have any discernible effect on prices at all. This logic cannot be accepted and can be attacked on two grounds. First, it may be argued that the relevant section of the TAA deals exclusively with material

514. Easton, *supra* note 482, at 43.

515. Palmeter, *supra* note 480, at 6-14; Easton, *supra* note 481, at 78; Easton, *supra* note 482, at 39-44; Victor, *supra* note 129, at 152.

516. *Id.* at 540. Cf. *Udal v. Tallman*, 380 U.S. 1, 16 (1965) (quoting *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153 (1946); *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978):

"When faced with a problem of statutory construction this Court shows great deference to the interpretation given the Statute by the officers or agency charged with its interpretation. "To sustain (an agency's) application of (a) statutory term we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings."

517. Easton, *supra* note 481, at 80.

518. 19 U.S.C. § 160(a) (1982).

519. 19 U.S.C. § 1673(d)(1) (1982).

520. 19 U.S.C. § 1677(c)(i) (1982).

521. 19 U.S.C. § 1677(c)(ii) (1982).

522. GC-F-065, *supra* note 492.

injury and does not concern the causation requirement. This counter-argument is weak, however, because, as already discussed the factors of material injury usually indicate a causal link.

Second, assuming that the section applies to both, it is explicitly mentioned that the list is not exhaustive. The statement that the margins analysis is inconsistent with the pricing and volume effects of the imports is, therefore, not supported by the statutory language. The most that might be concluded is that the statutory language does not require a margins analysis.

(4) Legislative history arguments

The strongest arguments in support of a margins analysis fall into the category of legislative history. The Senate Finance Committee Report⁵²³ uses the term "by reason of dumped imports" fifteen times,⁵²⁴ the term "by reason of imports" five times,⁵²⁵ and the term "injury caused by dumping" four times.⁵²⁶ Not only did the Senate acknowledge the requirements of GATT and the 1979 Code,⁵²⁷ it also approved prior ITC practice and intended this practice to continue. As the Senate Finance Committee Report states:

Section 735(b) contains the same causation standard as is in current law, i.e., an industry must be materially injured "by reason of" less-than-fair-value imports. The current practice by the ITC with respect to causation will continue under Section 735. In determining whether injury is by reason of less-than-fair value imports, the ITC now looks at the effects of such imports on the domestic industry. The ITC investigates the conditions of trade and competition and the general condition and structure of the relevant industry. It also considers . . . how *the effects of the margin of dumping* relate to the injury Current ITC practice with respect to which imports will be considered in determining the impact on the U.S. industry is continued under the bill.⁵²⁸

Further on in relation to material injury, the Senate Finance Commit-

523. SENATE FINANCE COMMITTEE REPORT, *supra* note 7.

524. *Id.*

525. *Id.* at 16, 18, 37, 38, 60, 74, 75, 80, 82 and 87.

526. *Id.* at 37, 38, 39 and 41.

527. *Id.* The Senate stated: "[under the rules of the GATT, neither antidumping nor countervailing duties may be imposed unless subsidization or dumping of the imported merchandise causes or threatens to cause material injury. *Id.* at 37-38, *cf. id.* at 41: "a 'causal' link between the . . . dumping and the injury." *Id.*

528. *Id.* at 74. (Emphasis added).

tee Report states:

For one type of product, price may be the key factor in making a decision as to which product to purchase and a small price differential resulting from the amount of . . . the margin of dumping can be decisive; for others the size of the differential may be of lesser significance.⁵²⁹

The House Report three times mentions "imports,"⁵³⁰ four times "dumped imports,"⁵³¹ and repeats the language quoted directly above one time.⁵³² Five conclusions can be drawn from the legislative history. One, neither the Senate nor the House make a clear distinction between "imports," "dumped imports" and "dumping." Two, the Senate acknowledges that both GATT and the 1979 Code require a causal link between the dumping and the injury. Three, both the Senate and the House knew that the ITC considered dumping margins as one of the factors in determining material injury. Four, the Senate knew that the ITC used dumping margins in its causation analysis. Finally, both the House and the Senate intended the ITC to continue its causation analysis in the same way.

The only argument against these conclusions is the reference in the Senate Finance Committee Report that "[t]he determination of the ITC with respect to causation is, under current law, and will be, under section 735, complex and difficult, and is a matter for the judgment of the ITC."⁵³³ One might argue that this language permits the ITC to change its mind whenever it wants to.

It cannot be accepted that the Senate and the House did not know what they were talking about.⁵³⁴ Nor does it seem likely that Congress was intentionally vague in order to placate both United States producers and importers.⁵³⁵ Congress knew the international agreements, it knew that past ITC practice conformed, and it intended things to stay that way.

(5) International obligations

Article 3, paragraph 4 of the 1979 Code⁵³⁶ provides that "[i]t must be demonstrated that the dumped imports are, through the effects⁴ of

529. *Id.* at 88.

530. H.R. REP. NO. 317, 96th Cong., 1st. Sess. 44, 73 (1979).

531. *Id.* at 45, 46, 47.

532. *Id.* at 538.

533. SENATE FINANCE COMMITTEE REPORT, *supra* note 7, at 75.

534. Easton, *supra* note 482, at 48.

535. *Id.* at 49.

536. 1979 Code, *supra* note 5, art. 3, para. 4.

dumping, causing injury within the meaning of this Code." The footnote within the quote refers to paragraphs 2 and 3 of the same article dealing with volume and price effects of the imports and their consequent impact on the United States industry. The provision clearly supports a margins analysis, and is, furthermore, buttressed by Article VI of the GATT, which requires that the *dumping* cause the injury. Supporters of the imports analysis argue, however, that the note refers us to paragraphs 2 and 3 which nowhere mention the effects of dumping.⁵³⁷

Perhaps an even stronger argument is the fact that the drafters used the terms "dumped imports" and "effects of dumping" interchangeably.⁵³⁸ This argument, however, is unacceptable, because if this were the case, the phrase "through the effects of dumping," in the sentence quoted above, would be completely superfluous. The fact that the drafters used both terms in the same sentence is persuasive proof of an intended distinction and of the drafters' intention that dumping margins should be taken into account in the causation investigation.

The question then remains whether the United States statute is in conformity with the 1979 Code, because section 3(a) of the TAA⁵³⁹ provides that in the case of a conflict between United States law and the 1979 Code, the United States law prevails. As has already been seen, legislative history strongly supports use of a margins analysis. Even without this support, however, the statute should be interpreted in a way which makes it consistent with the 1979 Code. As the Senate Finance Committee Report emphasized, "[t]his bill is drafted with the intent to permit U.S. practice to be consistent with the obligations of the Agreements, as the United States understands those obligations. The bill implements the U.S. understanding of those obligations."⁵⁴⁰

If there is a potential conflict between United States law and an international agreement, that conflict should be explicitly addressed and dealt with in the TAA and its legislative history. Absent such discussion, a conflict should not be found.

(6) Practical arguments

The margins analysis might create administrative problems.⁵⁴¹ Reliance on less-than-fair-value margins, as established by the Commerce Department, would create difficulties if the CIT subsequently found

537. Easton, *supra* note 482, at 47. Cf. GC-F-345, *supra* note 492, at 14.

538. GATT, *supra* note 4, art. VI, paras. 2 and 3.

539. 19 U.S.C. § 2504(a) (1982).

540. SENATE FINANCE COMMITTEE REPORT, *supra* note 7, at 36.

541. GC-F-345, *supra* note 492, at 11.

those margins to be incorrect while judicially reviewing the ITA determination. This objection is valid, but exaggerated. In the first place, it would depend on the role the less-than-fair-value margin played in the ITC decision. As has been seen above, the relationship of the dumping margin to the margin of underselling was one, but seldom the dispositive, consideration in the ITC causation analysis, prior to 1982. In most cases, a change in the dumping margin would not necessarily affect the value of the ITC's determination. In the second place, the problem is not unique for the dumping margin. The ITC also uses pricing information supplied by the Commerce Department, and similar problems can arise there. To summarize, even though judicial review might create a problem in certain cases, these problems are inherent in the United States system of bifurcated functions and should be taken for granted.

Although there are some economic and practical difficulties with applying a margins analysis, these difficulties should not divert us from the basic issue whether such analysis is contemplated by international and United States law. In the author's opinion, use of a margins analysis is supported, if not mandated, by the language of the 1979 Code, the legislative history of the TAA and prior agency practice.

3. Cumulation

In this section we are concerned with the question whether the ITC should consider all imports of a certain class or kind of merchandise alleged to have entered the United States market in an unfair way or whether the ITC should investigate those imports on a country by country basis. This question raises several other questions such as the following. Can the ITC combine dumped imports from one source with subsidized imports from another source in its injury (causation) analysis? Should complaints against unfair imports from several countries be filed simultaneously if petitioner wishes an aggregate determination? Does the ITC have discretion in its decision not to cumulate or not? Furthermore, one should obviously distinguish international obligations from national obligations.

An example may clarify the importance of the decision to cumulate or not. Assume that countries A, B and C export respectively 100, 400 and 500 widgets to country D at dumped prices and that the total volume of the imports accounts for twenty percent of domestic consumption in country D. Assuming further that material injury occurs, cumulation of the exports might result in a finding that such exports are the cause of the injury. A determination on a country-by-country basis, on the other hand, would be faced with the problem that A's exports account for only two percent of domestic consumption. It

might be hard to defend the argument that such a small percentage could cause material injury to the domestic industry with a market share of eighty percent.

This section will investigate obligations which GATT and the 1979 Code impose. In addition, it will analyze how Congress, the ITC and the CIT have answered the questions raised above.

Neither GATT nor the 1979 Code explicitly address the propriety of cumulation. GATT Article VI, however, seems to contemplate a country-by-country approach in that it repeatedly uses the singular term "country."⁵⁴² The 1979 Code, on the other hand, uses the term "dumped imports," thereby seeming to permit an aggregate approach.⁵⁴³ The fact that both the European Community and the United States have on occasion cumulated dumped imports in the past, and that this practice has never been criticized by the Committee on Antidumping practices,⁵⁴⁴ is further evidence that the practice of cumulation has been accepted by the signatories to the 1979 Code.

The legislative history of the TAA makes no explicit reference to cumulation, but the general observation with respect to causation, that current ITC practice will continue, might encompass cumulation. The Senate Finance Committee Report on the 1974 Trade Act contained the following relevant language:

A number of cases before the Commission have been concerned with the question of whether imports of comparable articles from different countries should be considered together or cumulated in making injury determinations. The issue arises in several different contexts, viz.: (1) when Treasury determinations involving comparable imports from two or more different countries are simultaneously submitted to the Commission; (2) when Treasury determinations comparable imports are submitted to the Commission at different times. Under consistent practice . . . the Commission has considered the combined impact of lower than fair value import when the factors and economic conditions so warrant. Such result does not flow as a matter of law; it follows on a case-by-case basis, only when the factors and conditions of trade show its relevance to the deter-

542. GATT, *supra* note 4, article VI, 1. "The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another . . ." Article VI, 6 provides: "No contracting party shall levy any antidumping duty on the importation of any product of the territory of another contracting party unless . . ." *Id.*

543. 1979 Code, *supra* note 5, arts. 3(1), 3(2), 3(4), 3(5) and 3(7).

544. See Reports of the Committee on Antidumping Practices, *supra* note 110.

mination of injury.⁵⁴⁵

It should also be noted that in 1968 the Customs Court explicitly upheld a decision of the Tariff Commission to cumulate imports of Portland grey cement with cement imports from other countries, with regard to which, injury determinations had earlier been made.⁵⁴⁶

Considering both the Senate Finance Committee Report on the 1974 Trade Act and the 1968 Customs Court decision, three conclusions may be drawn concerning pre-1980 antidumping law. First, the ITC Commission had discretion to determine whether or not to cumulate imports from different sources. Second, the fact that imports from different sources were not the subject of the same investigation, or that petitions were not filed simultaneously, did not preclude aggregation. Finally, the question whether imports that were the subject of an antidumping investigation could be cumulated with imports that were the subject of another type of unfair trade investigation (countervailing, Section 301 or 337) never arose before 1980.

One of the first and most extensive discussion of cumulation in ITC injury determinations can be found in the 1982 *Steel Countervailing Duty* cases.⁵⁴⁷ In these cases Commissioners Alberger, Stern and Eckes stated that, in their opinion, cumulation would be proper if the factors and conditions of trade in the particular case showed its relevance to the determinations of injury. Especially important would be factors and conditions of trade that could combine to create a *collective hammering effect* on the domestic industry. The commissioners then gave a non-exhaustive list of such factors. The list included the volume of imports, the trend of import volume; the fungibility of imports, competition in the markets for the same end users, common channels of distribution, pricing similarity, simultaneous impact, and any coordinated action by importers.

In the *Steel Countervailing Duty* cases, the ITC considered the imports on a case-by-case basis. The ITC noted, however, that it might cumulate in the final. In these cases producers in the six European countries involved in the investigation agreed to impose quantitative restraints on steel exports to the United States in exchange for the domestic industry's withdrawal of the antidumping and countervailing

545. Senate Finance Committee Report on the Trade Act of 1974, S. REP. No. 1298, 93rd Cong., 2d Sess. reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7186, 7316 (1974).

546. *City Lumber Co. v. United States*, 61 Cust. Ct. 448, 290 F. Supp. 385 (Cust. Ct. 1968), *aff'd*, 64 Cust. Ct. 826, 311 F. Supp. 340 (Cust. Ct. 1970).

547. Certain Steel Products from Belgium, Brazil, France, Italy, Luxembourg, the Netherlands, Romania, the United Kingdom, and West Germany, USITC Pub. 1221, Inv. No. 701-TA-86-144 (February 1986).

duty petitions. As a result, the cases never returned for a final determination.

Although the ITC majority cumulated on several occasions,⁵⁴⁸ in other cases it has declined to do so because either (1) there was no need for cumulation as the volume of imports from the individual countries was sufficient in each case to warrant individual affirmative determinations;⁵⁴⁹ (2) the factors and conditions of trade did not require cumulation;⁵⁵⁰ or (3) the petitions were not filed at the same time.⁵⁵¹

Furthermore, in *Stainless Steel and Strip from West Germany*,⁵⁵² the ITC refused to cumulate those dumped imports with imports of the same product which were the subject of a Section 301 investigation, because there was no material injury requirement in a Section 301 investigation and the practice complained of did not necessarily fall within the purview of Title VII.⁵⁵³ It is important to note that this logic does not necessarily preclude cumulation of dumped imports with subsidized imports (cross-cumulation). A Commission majority, however, has consistently refused to cumulate dumped and subsidized imports.⁵⁵⁴ In view of the recent decision of the CIT in *Bingham & Taylor*,⁵⁵⁵ holding that the statute requires cross-cumulation, it remains to be seen what future developments will bring. The careful attitude of the ITC must be applauded because cumulation presents difficulties if looked at from a business point of view. It does not take into account that small countries with small market shares will generally be forced by larger countries/exporters to follow the latter's lead, by adopting a similar pricing level. The counterargument would be that the same pressure occurs to individual firms within one country, and that the

548. *E.g.*, Certain Tapered Roller Bearings and Parts Thereof from Japan and Italy, USITC Pub. 1497, Inv. No. 731-TA-86-144 (February 1984); Carbon Steel Wire Rod from Argentina, Mexico, Poland, and Spain, USITC Pub. 1476, Inv. No. 731-TA-157-160 (January 1984).

549. Thin Sheet Glass from Switzerland, Belgium, and the Federal Republic of Germany, USITC Pub. 1727, Inv. No. 731-TA-127-129 (July 1985).

550. Menthol from Japan and the People's Republic of China, USITC Pub. 1087, Inv. No. 731-TA-27 (July 1980).

551. Stainless Steel Sheet and Strip from West Germany, USITC Pub. 1252, Inv. No. 731-TA-92 (June 1982). The ITC noted that cumulation in such a case would not only present procedural and administrative problems, but also risked running afoul of the basic statutory framework within which the ITC must operate. *Id.*

552. *Id.*

553. *Id.*

554. *See, e.g.*, Iron Construction Castings from Brazil, Canada, India, and the People's Republic of China, USITC Pub. 1720, Inv. No. 701-TA-249-252, 731-TA-262-265 (Preliminary) (1985).

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

GATT and United States dumping provisions allow cumulation in such cases. In other words, if cumulation is deemed appropriate on an intra-country level, why should it be prohibited on an inter-country level?

Antitrust lawyers object to cumulation because it does not rest on collusive or interdependent behavior.⁵⁵⁶ They argue that cumulation would only be appropriate if there were evidence that the dumpers acted collusively in order to gain control over the market as a group. The argument against this point of view is that, no matter what one thinks of it, present antidumping law simply does not take intent into account, although, as already discussed, one factor that the ITC considers is evidence of coordinated action by importers.

The CIT initially seemed to agree with the ITC's careful reasoning. Thus in *U.S. Steel Corp. v. United States*,⁵⁵⁷ Judge Watson stated that the suggestion that the ITA and the ITC should deal with the products under investigation in a more unified manner through the observation that the "statutes are directed to the injurious effect of a "class or kind of merchandise" and the assertion that all plate and coiled rolled sheet imports at issue are fungible with like products still under investigation," does not establish a statutory duty to aggregate.⁵⁵⁸ In 1984, the CIT seemed to change direction. *Republic Steel v. United States*⁵⁵⁹ concerned seven negative preliminary countervailing duty determinations.⁵⁶⁰ The CIT differentiated between preliminary and final investigations, and held that, for preliminary determinations, the proper test for cumulation is whether subsidized imports are competing with the product of the domestic industry during the period under investigation when the effect of these imports is being felt by the domestic industry. The CIT explicitly rejected the standard used by the ITC; that standard being whether the importations could conceivably have contributed to material injury, as being too stringent. The CIT also rejected the "factors and conditions of trade" test. After rejecting these tests the CIT gratuitously remarked that in final determinations cumulation cannot completely eliminate the need for a causal connection between importations from a country and injury to a do-

556. *Id.*

557. *U.S. Steel Corp. v. United States*, 3 Ct. Int'l Trade 106 (1982).

558. *Id.*

559. *Republic Steel v. United States*, 8 C.I.T. 29, 591 F. Supp. 640 (Ct. Int'l Trade July 11, 1984).

560. *Steel Products from the Republic of Korea*, USITC Pub. 1261, Inv. No. 701-TA-170-173 (Preliminary) (1982); *Steel Products from Belgium, Brazil, France, Italy, Luxembourg, The Netherlands, Romania, The United Kingdom, and West Germany*, USITC Pub. 1221, Inv. No. 701-TA-86-v. 1,2; (1982); *Steel Products from Spain*, USITC Pub. 1331, Inv. No. 701-TA-155-163 (Preliminary) (1982).

mestic industry.

Cumulation operates on its own terms at the preliminary determination to require the consideration of the combined effect of all competitive, subsidized or allegedly subsidized importations of a particular product. It operates at the final determination only in conjunction with findings of contribution to injury from the products of particular countries. This vital distinction is grounded in the statutory language, and in the extensive legislative history both of which indicate an extremely low threshold for finding a reasonable indication of injury.⁵⁶¹

The CIT decision can be criticized on several grounds. In the first place, as has been argued above, cumulation seems permitted on the international level both by the language of the 1979 Code and by tacit approval of the international community. Second, and more important, the only difference that the 1979 Code makes between preliminary and final investigations is in evidentiary standards. If anything, the low threshold standard for preliminary investigations in the United States is a violation of the 1979 Code. Third, even in the United States it seems acknowledged that the different evidentiary standards are the only allowable difference: "[w]ith the exception of the different evidentiary standards, all of the other standards in the Act (e.g. the definition of industry, material injury and causation) have the same meaning for both preliminary and final cases."⁵⁶²

Without seeming to realize it, the CIT in the *Republic Steel* case has used the "low threshold" language in the legislative history to expand the different evidentiary standard, basically a procedural issue, to the field of substantive antidumping law by applying it to causation. The holding established a lower causal link in the preliminary investigation than in the final investigation. It is doubtful, to say the least, whether this is permitted by either the 1979 Code or the legislative history of the 1974 Trade Act and the TAA. Though the CIT can theoretically exchange its own standard for cumulation for that of the ITC, it cannot establish different substantive law for preliminary and final investigations. The court's decision is presumably overruled by the 1984 Trade and Tariff Act, which enacted a special provision on cumulation:⁵⁶³

The Commission shall cumulatively assess the volume and ef-

561. *Republic Steel*, 591 F. Supp. at 646.

562. Victor, *supra* note 129, at 123.

563. H.R. 3398, 98th Cong., 2d Sess. (1984).

fect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market.⁵⁶⁴

In its first decisions on cumulation after entry into force of the Tariff and Trade Act, the ITC does not seem particularly perturbed by this legislative mandated. In addition to the two factors already mentioned, the Commission requires that the marketing of the products is reasonably coincident. The ITC finds support for this position in the Conference Agreement on the House and Senate versions of the bill, which provides in part:

The provision requires cumulation of imports from various countries that each account for a small percentage of total market penetration but when combined may cause material injury. The conferees do intend, however, that the marketing of imports that are cumulated be reasonably coincident.⁵⁶⁵

4. Technical Dumping

We have seen in Part IV section B 2(a) that the ITC will normally refuse to make an affirmative injury finding if the United States price of the dumped imports does not undercut the domestic price levels.⁵⁶⁶ This long-standing practice was explicitly authorized in the Senate Report on the 1974 Trade Act:

The Antidumping Act does not proscribe transactions which involve selling an imported product at a price which is not lower than that needed to make the product competitive in the United States Market, even though the price of the imported product is lower than its home market price. Such so-called

564. 19 U.S.C. § 1677(7)(c)(iv) (1984).

565. H.R. REP. No. 1156, 98th Cong., 2d Sess., 173 (1984).

566. *E.g.*, Countertop Microwave Ovens from Japan, USITC Pub. 1033, Inv. No. 731-TA-4 (Preliminary) (1980); Melamine In Crystal Form from Austria and Italy, USITC Pub. 1065, Inv. No. 731-TA-13-14 (Final) (1980); Canned Clams from Canada, USITC Pub. 1060, Inv. No. 731-TA-17 (Preliminary) (1980); Asphalt Roofing Shingles from Canada, USITC Pub. 1100, Inv. No. 731-TA-29 (Preliminary) (1980); Nitrocellulose from France, USITC Pub. 1409, Inv. No. 731-TA-96 (Final) (1983); Chlorine from Canada, USITC Pub. 1249, Inv. No. 731-TA-90 (Preliminary) (1982); Portland Hydraulic Cement from Australia and Japan, USITC Pub. 1440, Inv. No. 731-TA-108 (Preliminary) (1982); Bicycles from the Republic of Korea and Taiwan, USITC Pub. 1311, Inv. No. 731-TA-110 (Preliminary) (1982); Certain Lightweight Polyester Filament Fabric from the Republic of Korea, USITC Pub. 1457, Pub. No. 731-TA-119 (Final) (1983).

technical dumping is not anti-competitive, hence, not unfair; it is pro-competitive in effect.⁵⁶⁷

In adopting this position, the ITC goes further than the 1979 Code, because the 1979 Code recognizes that dumped imports can have a price depressing or suppressing effect even in the absence of underselling. Suppose, for example, that in January, 1984 prices of both United States and foreign-produced widgets were ten dollars, and that in May, 1984 the prices of raw materials, needed for the production of widgets in the United States, increased. The competitively-priced imports would prevent the American producers from increasing the prices of their widgets, and thus cause injury. The 1979 Code allows relief in such a situation, whereas the ITC would not.

Although the ITC still seems to consider absence of underselling as dispositive evidence of technical dumping, this position has been criticized by the General Counsel of the ITC on the basis of the arguments mentioned earlier. The General Counsel would like to see absence of underselling as merely a rebuttable indicator of the possible presence of technical dumping.⁵⁶⁸ It is likely that the ITC will concede to the General Counsel's view in the near future if an example similar to the widgets hypothetical materializes.

B. *The European Community*

1. Introduction

The original antidumping regulation 459/68 of the European Community provided that a determination of injury could only be made when the dumped imports were demonstrably the principal cause of such injury. Further, the consequences of dumping had to be weighed against all other factors which, when taken together, might adversely affect the European Community industry. This language was a direct result of the signing of the 1967 Code by the European Community.

As we have seen, however, the 1967 Code was replaced by the 1979 Code, which substantially watered down the causal link between dumping and injury. Consequently, the European Community adopted the 1979 Code language with respect to causation. Article 4, 1 of Regulation 1276/84 (and of the old regulation 3017/79) now provides in relevant part:

567. Senate Report on Trade Act, *supra* note 545.

568. See Memo from the General Counsel to Commissioner Stern. For a discussion of the ITC's requirement of a final determination, see *supra* note 495 and Memorandum from the General Counsel to the ITC, Precipitated Barium Carbonate from the Federal Republic of Germany, USITC Pub. 1154, Inv. No. 731-TA-31 (Final) (1981).

(a) determination of injury shall be made only, if the dumped . . . imports are, through the effects of dumping . . . , causing injury Injuries caused by other factors, such as volume and prices of imports which are not dumped . . . , or contraction in demand, which, individually or in combination, also adversely affect the Community industry, must not be attributed to the dumped . . . imports.⁵⁶⁹

Although the language basically follows the 1979 Code, it should be noted that the 1979 Code footnote reference of Article 3, 4 after "effects" to volume and price effects has been omitted. Relevant to the issue of causation is also Article 13, 5 of the old regulation which provides that, if a product is dumped into the European Community from more than one country, duties shall be levied on a non-discriminatory basis on all imports of such products. The scope of this provision is not entirely clear. It could be read to mean that if products of several countries are dumped and cause injury, antidumping duties have to be imposed on all such imports. Thus, there would notably be no discretion for the European Community authorities not to impose duties on the imports from country X on the basis that imposition in that case would not be in the European Community's interest. This issue will be explored more fully in Part V, section B, 3. Such an interpretation would seem to run afoul of the basic character of the regulation as a *policy* instrument. The policy character of the regulation is most evident in the general requirement that imposition of antidumping duties has to be in the interest of the European Community.⁵⁷⁰ At least theoretically, this additional requirement, for which support can be found in article 8, 1 of the 1979 Code, is the most important difference between European Community and United States antidumping law. It will be recalled, that in the United States imposition is mandatory once dumping, and injury caused thereby, are found. It occasionally happens that European Community consumers of the dumped product fulminate against protective measures because such action would result in higher prices of the product under consideration or because these consumers desire an alternative source of supply. Although duly considering such lamentations, as of yet the European Commission has always given priority to the interest of the European Community producers who suffer material injury from the dumped imports, thereby for all practical purposes equating European Community interests with producers' interests.

The European Community interest criterion has been used, how-

569. The Regulation, *supra* note 11, art. 4, 1.

570. 1979 Code, *supra* note 5, arts. 11(1) 12(1).

ever, to support a negative or doubtful injury determination. In *Furfural from the Dominican Republic, Spain and the PRC*,⁵⁷¹ the European Commission, after considering that the imports from the Dominican Republic (which accounted for sixty percent of European Community consumption) were not dumped, decided that the nondumped Dominican imports had been the principal cause of injury, and that the interests of the European Community did not call for protective measures on imports from China and Spain because, inter alia, such imposition would only lead to a decrease in consumption of furfural and replacement by other products. In other words, any injury suffered by domestic producers would not be alleviated by the imposition of such measures.

Likewise, in the decision *Codeine from Czechoslovakia*,⁵⁷² imports from member States into Germany were considered to be the principal cause of injury. The European Commission noted that it was difficult to establish whether the dumped import taken in isolation, had caused material injury. It decided, however, that protective action would not be in the European Community's interest as long as the other member States, while maintaining import restrictions, continued to export to Germany. Imposition of antidumping duties under these circumstances would merely result in the dumped imports being replaced by low-priced imports from the rest of the European Community.

Both the *Furfural* and the *Codeine* cases reinforce the conclusion arrived at above, namely, that the interests of the domestic producers play a predominant role with regard to the European Community interest criterion. In both cases, it was evident that imposition would not alleviate the difficult situation of the domestic industry. It seems clear that, had imposition of antidumping duties helped the domestic industry and had the dumped imports caused injury, the European Community interest criterion would not have formed an impediment to action by the European Commission. It can be concluded that, although at least one influential commentator has argued that the criterion could be used to take into account the interests of users of the dumped product, trade policy considerations, and the special situation of the less-developed-countries,⁵⁷³ in practice, the European Community interest criterion has played a very limited independent role and has virtually been equated with the interests of the affected domestic industry.

It should be noted that the European Community authorities in

571. 24 O.J. EUR. COMM. (No. L 189) 57 (1981).

572. *Codeine from Czechoslovakia, et al.*, 26 O.J. EUR. COMM. (No. L 16) 30 (1983).

573. BESELER, *supra* note 98, at 110, 111. Cf. CUNNANE & STANBROOK, *supra* note 314, at 72, 73.

the two cases referred to above used the term "principal cause." Despite the fact that this phrase has been used in other determinations as well, it should be concluded that the European Commission still uses the 1967 Code standard. It seems more a standard phrase than a phrase with substantive content. Since 1980, the European Commission has never weighed the causes of injury and usually states that

The injurious effects attributed solely to dumping together represent material injury; whereas injuries, caused by other factors which could adversely affect the Community industry, such as the volume and prices of other imports, or stagnation in demand, have been examined, and any adverse effects, caused by these factors have not been attributed to the imports under consideration.⁵⁷⁴

Analysis of determinations after the entry into force of Regulation 3017/79,⁵⁷⁵ reveals that the following factors have been deemed relevant by the European Commission for purposes of its causation investigation: (1) the volume, price and impact of nondumped imports; (2) minimal dumping margins;⁵⁷⁶ (3) demand and consumption within the European Community;⁵⁷⁷ (4) overcapacity in general, but especially within the European Community;⁵⁷⁸ (5) competition, or lack thereof, among European Community producers;⁵⁷⁹ (6) no price undercutting;⁵⁸⁰ (7) lack of interest on the part of the domestic industry;⁵⁸¹ and

574. In *Russian Nickel*, 26 O.J. EUR. COMM. (No. L 159) 44,45 (1983), the European Community interest criterion was used to impose a duty (7%) lower than the dumping margin (40%).

575. Regulation, *supra* note 11.

576. See *Stainless Steel Bars*, 23 O.J. EUR. COMM. (No. L 131) 18 (1980); *Hermetic Compressors* (9.15-0.2%), 24 O.J. EUR. COMM. (No. L 113) 54 (1981); *Textured Polyester Fabrics* (0.7%), 24 O.J. EUR. COMM. (No. L 133) 18 (1981); *Non-alloyed Aluminium* (0.3%), 26 O.J. EUR. COMM. (No. L 161) 14 (1983); *But see, Paraxylene* (2.37%), 24 O.J. EUR. COMM. (No. L 158) 7 (1981).

577. See *Acrylonitrile*, 26 O.J. EUR. COMM. (No. L 101) 29 (1983); *Mechanical Alarm Clocks*, 23 O.J. EUR. COMM. (No. L 158) 5 (1980); *Textured Polyester Fabrics* 24 O.J. EUR. COMM. (No. L 133) 17 (1981); *Vinyl Acetate Monomer*, 23 O.J. EUR. COMM. (No. L 311) 13 (1980); *Polyester Yarn*, 23 O.J. EUR. COMM. (No. L 231) 5 (1980); *Studded-welded Link Chain*, 23 O.J. EUR. COMM. (No. L 231) 10 (1980); *Mechanical Watches*, 25 O.J. EUR. COMM. (No. L 11) 14 (1982).

578. See *Polyvinyl Chloride*, 25 O.J. EUR. COMM. (No. L 274) 15 (1982); *Studded-welded Link Chain*, 23 O.J. EUR. COMM. (No. L 231) 10 (1980); *Polyethylene*, 26 O.J. EUR. COMM. (No. L 138) 65 (1983); *Glass Textile Fibres*, 26 O.J. EUR. COMM. (No. L 160) 18 (1983).

579. *Lack: Dense Sodium Carbonate*, 23 O.J. EUR. COMM. (No. L 48) 2 (1980); *Textured Polyester Fabrics*, 24 O.J. EUR. COMM. (No. L 133) 18 (1981); *Polyester Yarn*, 23 O.J. EUR. COMM. (No. 231) 5 (1980).

580. See *Saccharin*, 26 O.J. EUR. COMM. (No. L 352) 49 (1983); *Xanthan Gum*, 26 O.J.

(8) low volumes of dumped imports.⁵⁸²

As this article has already discussed, only twenty-two cases have been terminated on the basis of a no injury finding.⁵⁸³ In the majority of those cases, the European Commission relied on a combination of the factors mentioned above, notably factors (1), (2), (6) and (8). Factors (1), (3), (4) and (5) are often mentioned in affirmative injury findings.

Like the ITC, the European Commission does not always separate material injury from causation. Unlike the ITC, however, the European Commission routinely investigates the volume, prices and consequent impact of nondumped imports. In a number of cases, this investigation has led the European Commission to conclude that the injury was not caused by the dumped imports, but by the far more important non-dumped imports. This has especially been the case in situations in which the volume of the non-dumped imports was significantly higher than that of the dumped imports and/or in which the prices of the non-dumped imports were lower than or competitive with the prices of the dumped imports.

2. Through the Effects of Dumping: Imports or Dumped Imports?

As discussed in Part V, section B, 2, the issue of "imports or dumped imports" has received a lot of attention in ITC publications and scholarly writings. Amazingly enough, however, only one European commentator seems to have noticed that there is a potential problem here.⁵⁸⁴ This seems understandable, first, because the regulation adopts the phrase "through the effects of dumping," thereby implying that the European Commission must look at the dumping, and not at the imports per se. Second, the same persons in the Commercial Defense Division of Directorate-General I (External Relations) of the European Commission will usually investigate both dumping and resulting injury, and, consequently, it will be easier from a structural point of view to compare the dumping margins with the level of price undercutting. Third, the Easton argument, that the footnote after "effects" allows

EUR. COMM. (No. L 268) 60 (1983); Nickel, 26 O.J. EUR. COMM. (No. L 286) 29 (1983); Sodium Carbonate, 25 O.J. EUR. COMM. (No. L 317) 5 (1982).

581. See Canned Peaches, 23 O.J. EUR. COMM. (No. L 110) 35 (1980); Monochrome Portable T.V. Sets, 24 O.J. EUR. COMM. (No. L 364) 49 (1981).

582. See Pressure Sensitive Paper Masking Tape, 23 O.J. EUR. COMM. (No. L 344) 58 (1980); Glass Textile Fibres, 26 O.J. EUR. COMM. (No. L 160) 19-20 (1983); Oxalic Acid, 25 O.J. EUR. COMM. (No. L 19) 27 (1982); Fibre building Board, 23 O.J. EUR. COMM. (No. L 145) 39 (1980).

583. As of April 26, 1984.

584. Didier, *supra* note 323, at 41-43.

the signatories merely to look at the prices and volume of the imports, once dumping is established, and notably does not require them to conduct a margins analysis, does not seem applicable to European Community law (as opposed to GATT/Code law), simply because the regulation has omitted that footnote.⁵⁸⁵ Thus, all indicators seem to lead to the conclusion that the issue has not received extensive attention, simply because there is no problem. The European Commission always investigates whether there is a causal link between the dumping margin and the injury "[i]f the imported goods significantly undercut the prices of Community producers and *if the undercutting is caused either entirely or to a significant degree by dumping . . .* and if it has an adverse effect on the Community industry, a finding of injury may be made."⁵⁸⁶ This conclusion, however, is not buttressed by the injury determinations of the European Commission. From the outset, two problems in this respect should be noted. In the first place, the determinations do not always mention the margins of undercutting. In a number of cases, the European Commission has merely noted that the European Community prices of the dumped products were so low that they did not even permit European Community producers to cover their costs of production. In these cases, it is obviously impossible for the outsider to know whether or not there was a significant difference between the dumping margins and the levels of undercutting. Second, in a majority of cases the dumping margin was clearly higher than the margin of undercutting. Therefore, it was clear that the unfair practices enabled the foreign producers to undercut prices of European Community producers, and, consequently, cause them injury.

Other cases do not permit such a clear conclusion. In *Seamless Tubes from Spain*,⁵⁸⁷ for example, the European Commission concluded that, as the margin of Spanish undercutting was 12.6-17.36%, and as a countervailing duty of 11.75% already had been imposed, dumping, as distinct from subsidization, was not in itself a source of material injury. On the other hand, in *Potato Granules from Canada*,⁵⁸⁸ the European Commission reached an affirmative injury finding despite the fact that the level of price undercutting was 26%, while the dumping margin was only 6.9%. In *Malleable Cast Iron Tube Fittings from Brazil*,⁵⁸⁹ the level of price undercutting was 20%, the dumping

585. This article attacks the validity of the argument in that footnote in Part V, § A, 2(b), *infra*.

586. Cf. CUNNANE & STANBROOK, *supra* note 314, at 65 (emphasis added).

587. 24 O.J. EUR. COMM. (No. L 165) 27 (1981).

588. 24 O.J. EUR. COMM. (No. L 116) 11 (1981).

589. 24 O.J. EUR. COMM. (No. L 145) 29 (1981).

margin 5.8%.⁵⁹⁰

These decisions have been justly criticized on the ground that they lead to higher prices for consumers without improving the situation of the domestic industry.⁵⁹¹ That is, the question becomes whether fewer consumers buy a product that is nineteen percent cheaper than a product that is twenty-six percent cheaper. One should be careful, however, to draw the conclusion that the European Commission in these cases does not conduct a margins analysis. As has been discussed in Part V section A, 2, a dumping margin that is significantly lower than the margin of undercutting is not necessarily dispositive evidence of no causation. It is merely an important indicator thereof, which can be rebutted by evidence to the contrary. Nevertheless it would be helpful if the European Commission in such cases paid attention to the difference and explained why it nevertheless concluded that the dumping resulted in injury.

3. Cumulation

We have concluded that the international regime probably admits cumulation.

Contrary to United States practice, in which cumulation is more of an exception than the rule (at least until now), the European Community authorities routinely seem to cumulate in cases in which imports come from different sources, whether from different producers within one country or from several countries. The fact that imports of a certain product were the subject of different investigations has not formed an impediment to the proceedings of the European Commission.⁵⁹²

In 1980, Beseler advanced the following arguments for this position. First, it is logical to cumulate, because the position of the domestic industry depends on the total of the dumped imports. Second, cumulation is mandatory under the 1979 Code, article 8, 2, which provides that "when an antidumping duty is imposed in respect of any product, such antidumping duty shall be collected in the appropriate amounts in each case, on a nondiscriminatory basis of imports of such product from all sources found to be dumped and causing injury." Third, cumulation is mandatory under Article 13, 5 of the Regulation

590. See also *Styrene Monomer*, 24 O.J. EUR. COMM. (No. L 42) 14 (1981) (dumping margin 4%-undercutting 10%; Upright pianos dumping margin 42%-undercutting 69%).

591. Didier, *supra* note 323, at 42.

592. *Saccharin from People's Republic of China and United States*, 23 O.J. EUR. COMM. (No. L 331) 41 (1980). *Saccharin from Korea*, 23 O.J. EUR. COMM. (No. L 331) 25 (1980). *Fibre Building Board from Brazil*, 26 O.J. EUR. COMM. (No. L 47) 30 (1983). *Copper Sulphate from Czechoslovakia and the Soviet Union*, 26 O.J. EUR. COMM. (No. L 274) 1 (1983).

which provides that antidumping duties shall be levied in a nondiscriminatory way.⁵⁹³

In the author's opinion, the second and third arguments misstate the issue. Cumulation is an aspect of causation. Causation, in turn, is an aspect of injury (in a broad sense). Article 8, 2 of the 1979 Code and 13, 5 of the Regulation, however, relate to collection and levying of antidumping duties once all the conditions for imposition are fulfilled and duties are imposed. The language of both explicitly mentions "dumping" and "causing injury." In other words, first there have to be determinations that a product is dumped and that those dumped products cause injury to the domestic industry of the like product. Only after these determinations are made does the GATT and the European Community obligation arise to treat on a nondiscriminatory basis those producers subject to the determinations. Indeed, the cumulation argument based on article 13, 5 of the Regulation, would *require* signatories to cumulate.

This seems to be contrary to the whole meaning of nondiscrimination. Nondiscrimination is a species of the international economic principle of equality. This principle has two components: (1) treat equal cases equally (formal equality); and (2) treat unequal cases unequally in proportion to their inequality (substantive equality).⁵⁹⁴ Mandatory cumulation, in each case in which imports come from different sources, would run afoul of this principle in that it would require the European Commission to treat cases equally which are not substantively equal.⁵⁹⁵ Therefore, it can be concluded that those provisions of the 1979 Code and the Regulation simply do not address the propriety of cumulation.⁵⁹⁶

A third and related argument, which supports this article's position can be found in those determinations in which the European Commission decided to exclude certain countries from the scope of the investigation because their market shares were minimal and could not be causing injury. Thus in *Fibre Building Board from a Number of East-European Countries*,⁵⁹⁷ the European Commission excluded Bulgaria

593. BESELER, *supra* note 98, at 95.

594. VERLOREN VAN THEMATT, *THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW* 193 (1981).

595. How can it be argued, for example, that country A which dumps 1000 products in the market of country B, thereby obtaining a market share of 30%, is equal to country C which dumps 100 products?

596. *But see infra* Part V § A, 3. Cf. Davey, *supra* note 131, at 78, who concludes that Articles 13, 2, and 3 seem to require a country by country approach.

597. O.J. EUR. COMM. (No. L 181) 19 (1982).

because its market share of 0.2. to 0.7% could not cause injury.⁵⁹⁸ This indicates a country-by-country approach, at least for the analysis of injury. If cumulation were mandatory, such exclusion would not be permitted.

Until recently, the European Commission simply cumulated in most cases,⁵⁹⁹ thereby creating the impression that whenever imports came from different sources, it would consider their impact as a whole. Under this theory, certain exceptional cases referred to above might be seen as an application of the "de minimis" rule.

Recent cases, however, suggest a shift in this approach.⁶⁰⁰ In *Iron or Steel Coils for Re-rolling from Argentina, Brazil, Canada and Venezuela*,⁶⁰¹ for example, the European Commission stated that

In analyzing whether cumulation was appropriate in each case, the Commission considered whether the dumped imports were a contributory factor to material injury sustained by the Community industry. In reaching its conclusions, factors considered were comparability of imported products, total volume of imports, the increase in the volume of the imports, from previous comparable period and the low level of prices attributable to products of all supplying countries. Therefore, the Commission took the view that exports by the countries concerned . . . were under such conditions that, should the Commission treat any country in isolation, it would be acting in a discriminatory manner against the rest.⁶⁰²

The quoted language is interesting for several reasons. First, it indicates that cumulation is not an automatic matter anymore, but rather depends on fulfillment of a number of conditions. Second, the conditions mentioned show a striking similarity to the conditions the ITC usually considers, and it is not unreasonable to assume that the ITC's

598. In the same case, however, an antidumping duty was imposed on imports from Romania which accounted for only 0.8% of the market. *Cf.*, *Oxalic Acid, Czechoslovakia*, 25 O.J. EUR. COMM. (No. L 148) 51 (1982), in which the German Democratic Republic and Hungary exports were very small and any injury resulting therefrom was considered minimal.

599. *Sodium Carbonate*, 25 O.J. EUR. COMM. (No. L 283) 9 (1982). *Electric Multi-phase Motors*, 23 O.J. EUR. COMM. (No. L 53) 21 (1980). *Upright Pianos*, 25 O.J. EUR. COMM. (No. L 101) 45 (1982). *Perchloroethylene*, 25 O.J. EUR. COMM. (No. L 371) 47 (1982). *Hexamethylene Tetramine*, 26 O.J. EUR. COMM. (No. L 40) 24 (1983). *Fiber Building Board*, 26 O.J. EUR. COMM. (No. L 47) 30 (1983).

600. This is not certain because the European Commission might have applied the same criteria before, but internally.

601. 26 O.J. EUR. COMM. (No. L 210) 5 (1983).

602. *Id.*

conditions have been a model for the European Commission. Third, careful reading of the last two sentences of the quote gives the impression that the European Commission was trying to reconcile the *language* of Article 13, 5 (if the reference to discrimination is indeed an implicit reference to Article 13, 5) with the *meaning* of the nondiscrimination principle, as advocated by this article above. In this case, isolation of Argentina would discriminate against the other countries involved in the investigation because Argentina was in *substantially* the same position as those other countries. On the other hand, it should be noted, that the European Commission did admit that of the four countries concerned, Argentina exported the smallest quantity of the steel coils, without, however, explaining why this fact did not affect its conclusion that Argentina was in the same position as Brazil, Canada and Venezuela.

In summary, it is important to remember the following points. (1) It is not exactly clear whether the GATT permits cumulation, but articles 3, 1, 2, 4, 5, and 7 of 1979 Code all mention "dumped imports," and therefore could be interpreted that way. (2) If that interpretation is right, cumulation is discretionary, rather than mandatory. (3) Article 8, 2 (non-discriminatory basis for collection)⁶⁰³ of the 1979 Code and article 13, 5⁶⁰⁴ of the Regulation require previous findings of dumping and injury. As cumulation is an aspect of causation, and causation an aspect of injury (or, perhaps better, a bridge between dumping and injury), these provisions cannot be used to support the necessity of cumulation. (4) Even if articles 8, 2 and 13, 5 of the 1979 Code apply, they should be interpreted in accordance with the underlying rationale of the principle of nondiscrimination, or equal treatment of equal cases. (5) The mere fact that several countries produce the same product, and that they dump it in the same market, does not make them equal for the purposes of an injury analysis. (6) Equality (in a substantive sense) might, nevertheless, be inferred from additional data such as the same volume of exports or the same prices.⁶⁰⁵

4. Technical Dumping

An alignment defense, otherwise known as technical dumping, could be applied to three situations: (1) foreign producers align their prices to the prevailing price level in the market of the importing country; (2) foreign producers align their prices to the prices of other low-priced, but non-dumped imports; and (3) foreign producers align their

603. 1979 Code, *supra* note 5, art. 8, 2.

604. The Regulation, *supra* note 11, art. 13, 5.

605. See 26 O.J. EUR. COMM. (No. L 210) 6 (1983).

prices to other, dumped imports.

From the aligning producers' point of view, there seems to be no reason why an alignment defense should not apply to all three situations if they can prove that they merely followed existing prices and that they did not act in a concerted manner. In all three cases, it would be a suicidal business technique to maintain higher prices than the competition. For purposes of the injury analysis or from the importing country's point of view, however, there is a difference between the three situations.

In the first situation one can argue that products priced competitively at the level of domestic producers' prices cannot cause injury without more (the United States view), or, more moderately, cannot cause injury unless they have a price depressing or suppressing effect (European Community point of view). In the second situation, if the volume of non-dumped imports is clearly higher and the prices lower than the volume and the prices of the dumped imports, it is not the dumped imports which cause injury, but the non-dumped imports. Furthermore, in such a case imposition of antidumping duties would not alleviate the injury, but simply increase the market share of the non-dumping producers at the expense of the dumping producer.

With regard to the third situation, although it might be true that smaller producers are forced to follow the unfair practices of their more powerful competitors, this does not make any difference from the importing country's point of view. Both types of imports hurt as much as the other. Furthermore, antidumping law in general does not consider motive.

As discussed in Part V, Section A, 4 both the Senate Report on the 1974 Trade Act and ITC practice indicate that dumped imports at prices which make the foreign product competitive with the United States product are not considered to be unfair. It is not clear, however, if this practice extends to the first two situations mentioned above or only to the first. European scholarly communis opinio seems to be that competitively-priced dumped imports can nevertheless cause injury because they may depress prices or prevent needed price increases, which otherwise would have occurred.⁶⁰⁶ This conclusion is supported by European Commission determinations. In *Studded-welded Link Chain from Spain and Sweden*,⁶⁰⁷ the European Commission noted that "whereas prices at which these imports were sold, were very low, thus

606. CUNNANE & STANBROOK, *supra* note 314, at 66; BESELER, *supra* note 98, at 100, 101; Didier, *supra* note 323, at 41; Bellis, *supra* note 373, at 13.

607. 23 O.J. EUR. COMM. (No. L 231) 10 (1980).

forcing all Community producers to align their prices downwards."⁶⁰⁸ Even clearer is *Sodium Carbonate from the USA*.⁶⁰⁹ "whereas resale prices of imported sodium carbonate in general were below those prevailing in the market concerned, albeit in part only marginally . . . they nevertheless prevented intended price increases and led to price depression."⁶¹⁰ The author's research reveals that the only two cases ever terminated by the European Commission on the basis that the dumped imports did not undercut European Community prices (and in fact were priced even higher) were *American Xanthan Gum*⁶¹¹ and *Codeine*.⁶¹²

On the other hand, in at least four cases the European Commission has issued either a "no injury" or a "not in the Community interest" determination or both, because the prices of the dumped imports did not undercut those of a substantially larger volume of non-dumped imports.⁶¹³ The rationale was that dumping was caused predominantly by the non-dumped imports (as opposed to the dumped imports) and that imposition of a duty would not alleviate the plight of the European Community industry, but would merely lead to a shift in market share from the dumping producers to the non-dumping producers. An additional argument in these cases may have been that the prices of the dumped products were in fact higher than those of the non-dumped imports. The resulting shift in market share, therefore, could have had the effect of injuring the European Community producers even more.

VI. CONCLUSIONS AND RECOMMENDATIONS.

Antidumping law has grown up. After a long period of hesitant and often groping application, the last four years have witnessed the development of a relatively uniform, consistent body of rules. Although administering authorities in both the United States and the European Community stress a case-by-case approach and warn against the drawing of general conclusions, the more than 200 determinations in each

608. It should be noted that the European Commission did not explicitly admit that no price undercutting occurred in this matter. The latter conclusion can be inferred, however, from the fact that the commission usually mentions if price undercutting occurs. *Id.* at 11.

609. 25 O.J. EUR. COMM. (No. L 317) 5 (1982).

610. *Id.*

611. 26 O.J. EUR. COMM. (No. L 268) 60 (1983).

612. 23 O.J. EUR. COMM. (No. L 313) 70 (1980).

613. 25 O.J. EUR. COMM. (No. L 339) 58 (1982); 26 O.J. EUR. COMM. (No. L 352) 49 (1983); 26 O.J. EUR. COMM. (No. L 286) 29 (1983); 24 O.J. EUR. COMM. (No. L 189) 57 (1981).

system that have been made from 1980 to 1984 reveal consistent practice in numerous ways.

The 1979 Code, negotiated during the Tokyo Round under GATT auspices and implemented by both the United States and the European Community by legislation, effective January 1, 1980, has been a potent stimulus for this consistency.

Another stimulus, at least as far as the United States is concerned, has been the establishment of an extensive system of judicial review. The CIT's thorough review of ITC injury determinations has been an invaluable source of statutory interpretation and, although occasionally overstepping its boundaries, the CIT on the whole has corrected the ITC in an appropriate manner.

Thus far, this development has not had an equivalent in European practice. There, antidumping is still considered to be policy-oriented and the European Court of Justice has acted accordingly by leaving the European Council and the European Commission considerable margins of discretion. The *Allied Feidiol* and *Timex* cases, although breakthroughs in the procedural field, as yet have not changed this attitude in the field of substantive antidumping law.

The policy-oriented approach is also apparent in the rather summary character of European Commission determinations. Final determinations are often merely updated replicas of preliminaries and determinations in general sometimes largely consist of the language of the regulation without specifically explaining why the facts of the case warrant such application.

There are, however, strong indications that change is at hand, and that the European Community is slowly moving towards a more adjudicatory approach. The new design of antidumping determinations, coupled with a more explanatory and less summary motivation is a good example. No longer do the authorities automatically cumulate, but they give their reasons for doing so. Likewise, the European Commission occasionally discusses why they considered a like product a like product. These developments should be applauded. Not only do they create precedent to a certain extent, thereby improving predictability, they might also form a basis for judicial review in that they lay down standards which could be attacked before the European Court of Justice.

In the author's opinion, there is no reason for a reserved judicial attitude in the field of antidumping law. Antidumping is highly technical with a number of well-developed, detailed rules. The judiciary should assume the task of testing whether application of these rules has been in accordance with their purpose and their wording. And although policy considerations might be injected into a determination

via the "Community interest" criterion, they should arguably be confined to that place. Determinations whether dumping occurs, and whether such dumping causes injury, are relatively technical and objective.

The determinations also show that antidumping law is a fast-moving field. Notably in the field of causation, issues such as cumulation, margins analysis and technical dumping with a potentially decisive impact on the outcome of an investigation, have arisen in recent years. As the 1979 Code does not directly address these issues, the propriety of an analysis using cumulation, margins analysis, or a technical dumping based determination hinges on interpretation of vague 1979 Code provisions and the purpose of those provisions.

Powerful arguments have been advanced in favor of a more anti-trust like approach to the problem of dumping. The central notion of these arguments is that dumping will practically always improve the overall economic welfare of the importing country, simply because it leads to cheaper prices of products. The only exception to this rule would be the case of predatory dumping, that is, dumping practiced with the intent to drive domestic competitors out of the market and to subsequently raise the prices to monopoly levels. Therefore, it is argued, only this form of dumping should be acted against. A weaker variation of this theory advocates an injury-to-competition approach as opposed to an injury-to-competitors approach.

No matter how sympathetic these arguments sound, especially to consumers of low priced imports, this article has shown that current antidumping laws are extremely producer-oriented and they take the position that if domestic producers are materially injured by reason of dumping, the interests of those producers prevail above those of consumers and society in general. From an economic point of view, such laws are undoubtedly protectionist. Politically speaking, they possibly represent the best of two evils. Abolition of antidumping laws would lead to a proliferation of escape clause actions and voluntary restraint agreements. The antidumping laws arguably restrain clamors for such actions. Even if the administering authorities decide not to take action, for example because there is no causation, at least the petitioning industry has had its "day in court" and might temporarily refrain from exploring other avenues of obtaining import relief. This view, however cynical, seems the most realistic. It is no accident that "weak" industries such as steel are disproportionately active in filing antidumping complaints.

A last remark that remains to be made concerns United States and European Community compliance with international obligations. Parts II through V detailed to what extent the law and practice in both sys-

tems are in accordance with international rules. Although the European Community Regulation basically reproduces the language of the 1979 Code, the TAA deviates from it in several important respects. This is most clear in the definition of "like product." The United States definition of "material injury," although not in a strict sense a deviation because the 1979 Code does not define the term, potentially could be interpreted as requiring a very low degree of materiality. Analysis of and comparison between United States and European Community determinations, however, does not show any significant difference in that degree. Furthermore, minor deviations are apparent in the United States definition of regional industries and potentially in the causation language "by reason of imports."

Both systems occasionally seem willing to allow a lower degree of materiality of injury or causation, if the industry concerned is in a particularly vulnerable situation. Such practice does not seem permitted by the 1979 Code, but reinforces the view that antidumping laws are basically protectionist devices.

Other areas in which the United States and the European Community seem to be converging include cumulation and use of an imports analysis as opposed to a margins analysis. The recent trend toward a convergence of the two systems is a good one and will probably continue.

