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The Threat of Material Injury Standard in Countervailing Duty Enforcement

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THE THREAT OF MATERIAL INJURY STANDARD IN COUNTERVAILING DUTY ENFORCEMENT

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One purpose of passage of the Trade Agreements Act of 1979 was to bring U.S. countervailing duty and antidumping law into conformity with the comparable laws of GATT trading partners by raising the standard required for enforcement action by the International Trade Commission. While the "material injury" standard adopted in the Act had its origins in the GATT, the standard was also influenced by other international agreements, as well as the history of U.S. countervailing duty law and its application by the ITC—sources which were often inconsistent, if not contradictory. The "threat of material injury" standard was particularly difficult to interpret because it was not separately defined from material injury in the Act and, unlike the definition of material injury, it did not require a showing of measurable injury to a domestic industry. The statutory vagueness of the threat standard troubled critics who felt it would be an unmanageable and ineffective guideline for enforcement action. The author argues, however, that an examination of ITC decisions under this standard demonstrates not only that the standard is intelligible but also that it provides an adequate guide for a coherent, predictable, and supportable enforcement policy which is consistent with the GATT.

Subtitle IV of the Trade Agreements Act of 1979 (TAA)[1] defines

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1. Trade Agreements Act of 1979, Title I, Pub. L. No. 96-39, 93 Stat. 144 (1979), now codified at 19 U.S.C. § 1671 et seq. (1982). The Trade Agreements Act was enacted to implement the Agreement on Subsidies and Countervailing Measures Reached During the 1979 Tokyo Round of Multilateral Trade Negotiations (MTN), General Agreement on Tariffs and Trade, Interpretations and Applications of Articles VI, XVI, and XXIII, *done* April 12, 1979, 31 U.S.T. 513, T.I.A.S. 9619, U.N.T.S. Reg. No. 814, LXXXVI (July 1, 1980) [hereinafter cited as Subsidies and Countervailing Measures Agreement], *reprinted in*

the enforcement authority of the United States International Trade Commission (Commission) to impose countervailing or antidumping duties upon foreign exporters[2] who are signatories to the Subsidies and Countervailing Duties Code negotiated during the Tokyo Round of Multilateral Trade Negotiations (MTN).[3] The TAA authorizes such duties when the Commission finds that sales in the United States, either aided by foreign subsidies or made at less than fair value (LTFV), materially injure, threaten to materially injure, or materially retard establishment of an industry in the United States.[4]

AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, H.R. Doc. No. 153, 96th Cong., 1st Sess. 257 (1979) [hereinafter cited as MTA].

2. *Id.* "[T]he term 'countervailing duty' shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production, or export of any merchandise." General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187, Art. VI, para. 3 [hereinafter cited as GATT].

3. 19 U.S.C. § 1671(b)(1)-(2)(1982). The countervailing duty provisions under the Trade Agreements Act of 1979 apply as well to certain non-GATT member countries with which the United States exchanges most favored nation preferences. 19 U.S.C. § 1671(b)(3). *See* S. REP. No. 249, 96th Cong., 1st Sess. 45, *reprinted in* 1979 U.S.CODE CONG. & AD. NEWS 381 [hereinafter cited as SENATE REPORT NO. 249]; Barcelo, *Subsidies, Countervailing Duties and Antidumping After the Tokyo Round,* 13 CORNELL INT'L L.J. 257, 269 & n.59 (1980).

4. 19 U.S.C. §§ 1671, 1673 (1982). The pertinent portions of sections 1671 and 1673 provide:

> (a) General rule. If —
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> (1) the administering authority determines that —
>
> (A) a country under the Agreement, or
>
> (B) a person who is a citizen or national of such a country, or a corporation, association, or other organization organized in such a country, is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported into the United States, and
>
> (2) the Commission determines that —
>
> (A) an industry in the United States —
>
> (i) is materially injured, or (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise,
>
> then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy.

19 U.S.C. § 1671(a).

* * *

Of the three possible factual findings of injury, the first, material injury, and the third, material retardation, expressly require current, palpable, and measurable injury to an actual or anticipated domestic industry.[5] The standard for a finding of a threat of material injury, however, is far more difficult to define and thus is the most susceptible to varying interpretation. It has even been suggested by some responsible for administering the countervailing duty laws that the threat of material injury standard is at least opaque and perhaps unintelligible.[6] In fact, a review of the statutory criteria found in the TAA, together with the legislative history and Commission determinations based on this standard,[7] shows that affirmative determination of threat of material injury requires somewhat less factual proof than does a finding of actual material injury, and somewhat more than sheer speculation.

The purpose of this article is to address and attempt to resolve two issues: (1) whether the threat of material injury standard has been the subject of coherent enforcement by the Commission, and (2) whether Commission interpretation and enforcement of the threat of material injury provision can be read consistently with the expressed purpose of U.S. participation in the 1979 Tokyo Round—to reconcile U.S. countervailing duty enforcement with the General Agreement on Tariffs and Trade (GATT) and the Agreement on Subsidies and Countervailing Measures.[8]

If-

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that –

(A) an industry in the United States – (i) is materially injured, or (ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.

Id. § 1673.

5. *See generally* SENATE REPORT NO. 249, *supra* note 3, at 38, 86-87 (discussing the concrete indicia of injury required by the TAA).

6. *See* Greenwald, *U.S. Antidumping and Countervailing Duty Laws: Material Injury,* FED. BAR ASS'N J. 38-40 (Jan. 1982) [hereinafter cited as Greenwald]. Mr. Greenwald was, until May 1981, Deputy Assistant Secretary of Commerce for Import Administration.

7. *See infra* notes 39-73, 76-201 and accompanying text.

8. *See, e.g.,* Note, *Implementing "Tokyo Round" Commitments: The New Injury Standard in*

To this end, the article first will review the pre-TAA antidumping and countervailing duty enforcement prerogatives of the Commission under the Tariff Act of 1930, as amended by the Trade Act of 1974.[9] Next the article briefly will describe U.S. participation in the 1979 Tokyo Round MTN and the agreements which were reached pursuant to the 1979 Trade Act. Comparable antidumping and countervailing duty provisions of the MTN Agreements on Subsidies and Countervailing Measures, together with interpretative statements, then will be discussed. There will follow a description of the provisions and legislative history of the TAA that relate to the evaluation of a threat of material injury under such provisions.

The article will argue that the answer to the questions posed by discussion of the two issues raised above is yes, and that it is possible to identify coordinates that will permit proper definition of the threat standard in Commission antidumping and countervailing duty enforcement. The article will conclude that an examination of Commission countervailing duty and antidumping determinations, relying in whole or in part upon the threat of material injury standard, shows that the Commission's interpretation of the threat of material injury standard has been sufficiently precise and focused so as to provide meaningful guidance to the Commission, domestic producers, and foreign exporters.[10]

BACKGROUND

Pre-TAA Countervailing Duty Enforcement

The dual concepts of material injury and threat of material injury were first enunciated in the GATT, which was opened for signature in 1947, and which stated in pertinent part that no contracting

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Antidumping and Countervailing Duty Laws, 32 STAN. L. REV. 1183, 1192-93 (1980) [hereinafter cited as *Tokyo Round Injury Standard*]; *see supra* note 1.

9. 19 U.S.C. § 1303 (1976), *amended by* 19 U.S.C. § 1303 (1982).

10. Due to the relatively small number of Commission determinations that analyze the countervailing duty threat of material injury standard, this article, by necessity, will also focus upon Commission determinations of the TAA antidumping provisions. The TAA's antidumping and countervailing duty "threat of material injury" standards are identical. *See* 19 U.S.C. §§ 1671, 1673 (1982); see also *infra* notes 36-73 and accompanying text for a comparison of the standards.

party could levy countervailing duties without a determination that the effect of the subsidization "is such as to cause or threaten material injury to an established domestic industry, . . ."[11]

Before the MTN Agreements, U.S. countervailing duty law, which antedated the GATT, was not bound by the GATT material injury requirement by virtue of a grandfather clause in the GATT Protocol of Provisional Application.[12] Accordingly, prior to the Trade Act of 1974, the United States was permitted to countervail foreign exports upon a finding of foreign "subsidy" or "bounty," even if a domestic industry was not threatened with injury.[13] Moreover, prior to 1974, U.S. countervailing duties were applied only to dutiable goods.[14]

The Trade Act of 1974

The 1974 Trade Act was intended to remedy shortcomings in congressional implementation of the Antidumping Code of 1967,[15] providing the then-current interpretation of the antidumping and countervailing duty provisions of GATT Article VI, including the threat of material injury standard of Article VI (6)(a),[16] and to harmonize U.S. countervailing duty law with the GATT. Imperfections in 1968 congressional legislation had directed the Commission to disregard the GATT material injury standard which had been agreed to by U.S. negotiators at the Kennedy Round, and to employ instead a continuation of the prior *de minimis* standard used

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11. GATT, *supra* note 1, Art. VI (6)(a).

12. The GATT Protocol of Provisional Application, signed Oct. 30, 1947, exempts from the GATT rules legislation "existing" at the time of signature. Protocol of Provisional Application of the [GATT], Art. 1, para. (b), 61 Stat. A2051 (1947), T.I.A.S. No. 1700, 55 U.N.T.S. 308. *See* Rivers & Greenwald, *The Negotiation of a Code on Subsidies and Countervailing Duty Measures: Bridging Fundamental Policy Differences,* 11 LAW & POL'Y INT'L BUS. 1447, 1453 & n.29, 1457 & n.52 (1979) [hereinafter cited as Rivers & Greenwald].

13. Tariff Act of 1930, 19 U.S.C. § 1303 (amended by 19 U.S.C. § 1303 (1982)). *See generally* Comment, *United States Countervailing Duty Law: Revised, Revamped, and Revisited,* 17 B.C. INDUS. & COM. L. REV. 832 (1976); Rivers & Greenwald, *supra* note 12, at 1453; Note, *Subsidies and Countervailing Duties Under the Trade Act of 1979,* 1980 N.C.J. INT'L LAW AND COMM. REG. 533, 541-42.

14. Note, *supra* note 13, at 541.

15. Agreement on Implementation of Article VI of GATT, *done* June 30, 1967, 19 U.S.T. 4348, T.I.A.S. No. 6431.

16. GATT, *supra* note 1, Art. VI (6)(a).

to determine injury to domestic industry.[17] In a key U.S. concession considered by U.S. trading partners to be vital to U.S. participation in the then-upcoming Tokyo Round negotiations, Congress bound itself to vote promptly up or down on each MTN agreement reached without proposing amendments.[18]

In an incomplete, but substantial, step towards conforming U.S. countervailing duty law with the GATT, the Trade Act of 1974 extended countervailing duty enforcement to nondutiable and dutiable goods alike, and adopted an "injury" test roughly similar to the GATT standard.[19] The injury test adopted in the 1974 Act required the domestic producer of a like or directly competitive product to show that it was "being or was likely to be injured" by reason of importation of such product.[20] The Senate Report stated, however, that the intent of Congress was that the definition of injury be "unqualified by adjectives such as 'material' or 'serious,'"[21] out of a concern that the term "material" as understood in U.S. law suggested a measurably higher standard of injury than that understood by the GATT signatories or by then-accepted countervailing duty practice of U.S. trading partners.[22]

The 1974 Act did not define the term injury, but the Act nonetheless did require that actual or potential countervailable harm not be "frivolous, inconsequential, insignificant, or immaterial."[23] Economic indicia of such otherwise undefined "injury" included import penetration, price suppression or depression, and domestic employment, profits, and capacity utilization.[24] Under

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17. Renegotiation Amendments Act of 1968, Pub. L. No. 90-634, Title II, § 201, 82 Stat. 1347 (1968) (codified at 19 U.S.C. § 160 (1976)); S. REP. No. 1385, 90th Cong., 2d Sess., 2, 4 (1968); *see* Rivers & Greenwald, *supra* note 12, at 1457.

18. 19 U.S.C. § 2191(d) (1976); S. REP. No. 1298, 93d Cong., 2d Sess. 109 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7255 [hereinafter cited as SENATE REPORT No. 1298]; *see Tokyo Round Injury Standard, supra* note 8, at 1186.

19. 19 U.S.C. § 1303 et seq.; SENATE REPORT No. 1298, *supra* note 18, at 180.

20. 19 U.S.C. § 1303(b)(1)(A); SENATE REPORT No. 1298, *supra* note 18, at 180; *see TAA Material Injury Standard, supra* note 11, at 90-91 & n.31.

21. SENATE REPORT No. 1298, *supra* note 18, at 180.

22. *See* Rivers & Greenwald, *supra* note 12, at 1456; *see also* FELLER, 1 U.S. CUSTOMS AND INTERNATIONAL TRADE GUIDE § 18.06 [2] (1979).

23. *See* SENATE REPORT No. 249, supra note 3, at 90-91.; SENATE REPORT No. 1298, *supra* note 18, at 180.

24. *See* Impression Fabric of Manmade Fiber From Japan, Inv. No. AA1921-176, USITC Pub. No. 872, at 4-6 (1978).

this standard, the Commission was able to find a likelihood or threat of injury in situations where, for example, petitioners showed domestic price suppression and lost sales even in the absence of significant market penetration by the allegedly subsidized goods.[25]

In exchange for entering into the Tokyo Round MTN, the United States received the commitment of its GATT trading partners to exert greater control over export-related subsidies that were perceived to offer foreign exporters an unfair advantage over U.S. industry.[26] The other GATT members further committed themselves to the preparation of a list of those "export" subsidies conceded by all to be most deleterious to industries of the importing nations.[27] The U.S. concomitant obligation was to adopt a "material injury" standard in countervailing duty determinations against dutiable and nondutiable goods alike.[28] With this final undertaking the United States obligated itself to a material injury and threat of material injury countervailing duty enforcement practice that could, at last, be reconciled with the GATT standard set thirty years before.

THE TRADE AGREEMENTS ACT OF 1979

Adoption of the material injury and the threat of material injury standards of the TAA by Congress in 1979 was intended to bring U.S. countervailing duty and antidumping law into conformity with the MTN Agreements successfully concluded earlier that

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25. *Id.; see also* Chromic Acid From Australia, Inv. No. AA 1921-32, T.C. Pub. No. 121 (1964).

26. *See* SENATE REPORT No. 249, *supra* note 3, at 40-41; Rivers & Greenwald, *supra* note 12, at 1454-55.

27. *See* Subsidies and Countervailing Measures Agreement, *supra* note 1, Annex, *reprinted in* MTA at 275 (listing types of export subsidies); *see also Tokyo Round Injury Standard, supra* note 8, at 1192. In committing to enter the Tokyo Round negotiations, the Senate Finance Committee stated its expectation that ". . . any negotiated concession by the United States to extend the injury requirement to dutiable items. . . would be compensated for by concessions of equivalent value by foreign nations." SENATE REPORT No. 1298, *supra* note 18, at 185.

28. SENATE REPORT No. 249, *supra* note 3, at 36, 39 confirms that the "material injury" tests in U.S. trade laws, adopted in the TAA, implement the Subsidies and Countervailing Measures Agreement, *supra* note 1, and the Agreement on Implementation of Article VII of the GATT, *done* April 8, 1979, *reprinted in* MTA, *supra* note 1, at 3. *See Implementation of the Multilateral Trade Negotiations: Hearings Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance,* 96th Cong., 1st Sess. 70 (1979) [hereinafter cited as *1979 MTN Hearings*].

year.[29] The point of departure for congressional consideration of U.S. adherence to a "material injury" test was the GATT definition of the circumstances under which a participating nation may impose countervailing duties.[30] In adopting the material injury and threat of material injury language of GATT Article VI, Congress expressly rejected the assignment of a *de minimis* standard to this language; it spoke clearly that countervailable injury or threat of injury under U.S. law and by implication should be interpreted by U.S. trading partners to mean "harm which is not inconsequential, immaterial, or unimportant." [31]

GATT Provisions

Article VI of the GATT provides that "[n]o contracting party shall levy any . . . countervailing duty upon the importation of any product of the territory of another contracting party unless it determines that the effect of the . . . subsidization . . . 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." [32] By signing the MTN Agreements, the United States expressly bound itself to an interpretation of "injury" consistent with Article VI.[33]

Article 6 of the Subsidies and Countervailing Measures Agreement merges the definitions of injury and threat of injury by stating

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29. *See* Murphy, *Antidumping and Countervailing Duties Under the Trade Agreements Act of 1979: A Preliminary Analysis,* 14 INT'L LAW. 203 (1980); Note, *supra* note 13, at 533-34; Rivers & Greenwald, *supra* note 12, at 1450 & n.11.

30. SENATE REPORT NO. 1298, *supra* note 18, at 74; *see Tokyo Round Injury Standard, supra* note 8, at 1186-87; GATT, *supra* note 1, Art. VI.

31. REPORT OF THE HOUSE COMMITTEE ON WAYS AND MEANS TO ACCOMPANY H.R. 4537, H. R. Rep. No. 317, 96th Cong., 1st Sess. 46 (1979) [hereinafter cited as HOUSE REPORT NO. 317].

32. Subsidies and Countervailing Measures Agreement, *supra* note 1, Art. VI, *reprinted in* MTA, *supra* note 1, at 272.

33. The Subsidies and Countervailing Measures Agreement of the MTN states:

> Under this Agreement, the term injury shall, unless otherwise specified, be taken to mean injury to a domestic industry, threat of 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 [GATT] Article VI.

Subsidies and Countervailing Measures Agreement, *supra* note 1, art. 2 n.6, *reprinted in* MTA at 262 n.1.

that the determinations of injury and threat of injury alike must be made by an "objective examination of both (a) the volume of subsidized exports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."[34] Article 6 further states that threat of material injury determinations contemplate reference to factors identical to those relevant to material injury evaluation, but also may include review of "evidence on the nature of the subsidy in question and the trade effects likely to arise therefrom."[35]

Definition of the Threat of Material Injury Under the TAA

The countervailing duty provisions of the TAA require the Commission to determine whether, by virtue of alleged foreign subsidization, an industry in the United States is materially injured or threatened with material injury, or whether the initiation of an identifiable industry is materially retarded.[36] The TAA defines material injury as harm which is not "inconsequential, immaterial, or unimportant,"[37] and does not provide a separate definition of threat of material injury. The legislative history of these injury definitions states that the material injury and threat of material injury standards are to be interpreted in a manner "consistent with the analogous criterion of the MTN Agreement Relating to Subsidies and Countervailing Measures. . . ."[38]

Threshold for Determination of Threat of Injury

The statute reflects language from the House and Senate Reports, which states that material injury should be defined as "harm which is not inconsequential, immaterial, or unimportant."[39] A Commission finding of threat of material injury must be grounded upon

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34. *Id.*, para. 1.

35. *Id.* at n.17; *see* 19 U.S.C § 1677(7)(E)(i) (1982).

36. 19 U.S.C. §§ 1671(a), 1671d(b) (1982).

37. *Id.* § 1677(7)(A).

38. SENATE REPORT NO. 249, *supra* note 3, at 87.

39. SENATE REPORT NO. 249, *supra* note 3, at 18; HOUSE REPORT NO. 317, *supra* note 31, at 46.

"information showing that the threat is real and injury is imminent, not a mere supposition or conjecture,"[40] adding that the Commission should "consider the likelihood of actual material injury occurring."[41] The Senate authors admitted, however, that some U.S. trading partners might view the "not inconsequential" language as representing a lower injury threshold than is contained in the GATT.[42]

The House Report posits a very low threshold for affirmative Commission preliminary determinations of material injury or threat thereof, stating that " 'a reasonable indication will exist in each case in which the facts reasonably indicate that an industry . . . *could possibly* be suffering material injury, threat thereof, or material retardation."[43]

The prophylactic nature of the threat of material injury standard is evidenced by the Senate Report's statement that the purpose of the statutory language is to permit Commission intercession "before actual injury occurs" with remedies administered "so as to prevent actual injury from occurring."[44] Commission countervailing duty sanctions should not be delayed, the Report adds, where "sufficient evidence exists for concluding that the threat of injury is real and injury is imminent."[45]

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40. *Id.* at 88-89.

41. *Id.* at 88.

42. The 1979 Senate Report states:

> The committee is aware that some major trading partners are concerned that particular elements of this bill do not repeat the precise language of the agreements. This bill is drafted with the intent to permit U.S. [trade] practice to be consistent with the obligations of the agreements, *as the United States understands* those obligations. The bill implements the United States[']] understanding of those obligations.

SENATE REPORT NO. 249, *supra* note 3, at 36 (emphasis added).

43. HOUSE REPORT NO. 317, *supra* note 31, at 52 (emphasis added).

44. SENATE REPORT NO. 249, *supra* note 3, at 88-89.

45. *Id.* at 89. This article will examine both Preliminary Determinations and Final Determinations of the Commission as germane to understanding the threat of material injury standard. The TAA authorizes an affirmative Preliminary Determination upon a showing to the Commission of a "reasonable indication" of such a threat, 19 U.S.C. § 1671b(a), while a Final Determination requires a showing unmodified by such "reasonable indication" language, *id.* § 1671d(b).

That the "reasonable indication" language for a Preliminary Determination suggests a lower standard of proof than that required for an affirmative Final Determination is

Statutory Economic Factors

The statute directs that the Commission should advert to identical factors in assessing both the existence and threat of material injury in countervailing duty cases, and instructs the Commission to consider, among other factors, three specific indicia: (1) the volume of imports, (2) the effect of such imports upon prices of "like" domestic products, and (3) the "impact" of such imports upon domestic producers of such products.[46]

With respect to the evaluation of volume of imports, the TAA requires the Commission to consider whether export volume, or increases thereof, "either in absolute terms or relative to production or consumption in the United States" is "significant."[47] Regarding both domestic and imported article prices, the Commission must consider any "significant price undercutting" by the imports, or "significant " depression or stabilizing of domestic prices by virtue of such importation.[48] Lastly, in evaluating the impact on a domestic industry, the TAA further directs the Commission to evaluate "all relevant economic factors which have a bearing on the state of the industry."[49] The House Report includes as relevant economic factors "production, sales, market share, profits, productivity, return on investments, capacity, utilization, cash flow, inventories, employment, wages, growth, ability to raise capital, and investment."[50]

Referencing the volume, price, and impact criteria of the TAA,[51]

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confirmed by the Court of International Trade in Republic Steel Corp. v. United States, No. 82-03-00372 (Slip Op., July 11, 1984), in which the court wrote:

> [T]he Court is persuaded that just as the meaningfulness of the law depends on a low threshold for a reasonable determination of actual material injury, it depends on a low threshold for a reasonable indication of threat of injury. Moreover, because the evidence needed to support the indication of threat is more difficult to obtain than evidence of actual injury, it is reasonable to predicate the need for further investigation of a threat [that is, by an affirmative Preliminary Determination] on the barest indications.

Id.

46. 19 U.S.C. § 1677(7)(B)(i)-(iii).
47. *Id.* § 1677(7)(C)(i).
48. *Id.* § 1677(7)(C)(ii).
49. *Id.* § 1677(7)(C)(iii); *see* SENATE REPORT No. 249, *supra* note 3, at 86-87.
50. HOUSE REPORT No. 317, *supra* note 31, at 47.
51. 19 U.S.C. § 1677(7)(C)(i)-(iii) (1982).

the Senate Report recognizes that for one domestic industry an "apparently small" volume of imports may have a "significant impact" on the domestic market, while for another, the same volume of imports might not be significant.[52] Similarly, in one industry an imported product's subsidy-related small price differential might be inconsequential, while in another industry the identical price difference could be "decisive." [53] The Commission has the discretion to assign significance to any particular economic factor.[54]

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52. SENATE REPORT No. 249, *supra* note 3, at 88.

53. *Id.*

54. *See id.* As this article was in preparation for printing, the Ninety-Eighth Congress passed H.R. 3398. Title VI of this bill amends certain provisions of the countervailing duty laws, including the threat of material injury standard. Trade and Tariff Act of 1984, Conference Report to Accompany H.R. 3398, H.R. REP. No. 98-1156, 98th Cong., 2d Sess. 173-75 (ordered to be printed Oct. 5, 1984)(passed House and Senate on Oct. 9, 1984).

The conference-passed language adds criteria the Commission "must" consider in determining "whether there is a probability the merchandise (whether or not actually being imported at the time) will be the cause of actual injury. . . ." Certain "demonstrable adverse trend[s]" to be examined by the Commission include:

> [1] an increase in production capacity in the exporting country likely to result in a significant increase in exports of the merchandise to the United States;
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> [2] a rapid increase in the U.S. market penetration and the probability such penetration will increase to an injurious level;
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> [3] the probability that imports will enter at prices that will have a depressing or suppressing effect on domestic prices [;]
>
> [4] a substantial increase in inventories in the United States;
>
> [5] the presence of underutilized capacity for producing the merchandise in the exporting country; [or]
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> [6] the potential for product shifting of production facilities owned or controlled by foreign manufacturers which can be used to produce products subject to [antidumping] as [countervailing duty] investigations or final orders are also used to produce the merchandise under investigation.

Id. at 174. The conferees explain the rationale for these amendments with the observation that:

> The projection of future events is necessarily more difficult than the evaluation of current data. Accordingly, a determination of threat will require a careful assessment of identifiable current trends and competitive conditions in the marketplace. This will require the ITC to conduct a thorough, practical, and realistic evaluation of how it operates, the role of imports in the market, the rate of increase of unfairly traded imports, and their probable future impact on the industry.

Id. at 174-75.

Nonstatutory Economic Factors

The Senate and House reports to the 1979 TAA are replete with directives and admonitions to the Commission regarding what additional nonstatutory factors should be considered in determining material injury and threat of material injury cases.

Demonstrable Trends

The 1979 report from the House Committee on Ways and Means states that a positive determination of a threat of material injury requires a finding of a "likelihood of a particular situation developing into actual material injury."[55] This Report also recommends that the Commission examine "demonstrable trends," including (1) "the rate of increase of subsidized exports to the U.S. market," (2) the "capacity in the exporting country to generate exports," (3) "the availability of other export markets," and (4) "the nature of the subsidy in question."[56] With respect to the second factor above, the House Report states that high domestic capacity utilization is not, standing alone, conclusive of threat of a material injury, and adds that the Commission should emphasize evidence of increases in market penetration, "particularly if market penetration is achieved by prices that are below domestic price levels."[57]

Both the House and Senate clearly intended that the nature of an alleged subsidization affect the Commission's evaluation of "threat of material injury."[58] The Commission is directed to consider subsidy-related evidence uncovered in the course of Commerce Department proceedings, "particularly [when] the subsidy is an export subsidy inconsistent with the Subsidies and Countervailing

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55. HOUSE REPORT NO. 317, *supra* note 31, at 47.

56. *Id.* One recent determination of the Commission offers a helpful shorthand reference to the trends the Commission will consider. In Certain Welded Carbon Steel Pipes and Tubes From the Republic of Korea, Inv. No. 701-TA-168 (Final), USITC Pub. No. 1345 (Feb. 1983), *reprinted in* 4 INT'L TRADE REP. DEC. (BNA) 2463, the Commission summarized: "factors which may contribute to a determination of threat of injury . . . include the ability of the foreign producers to increase their exports to the United States, any increase in U.S. importers' inventories of the product, and increasing trends in the quantity of imports and U.S. market penetration." *Id.* at 2479.

57. HOUSE REPORT NO. 317, *supra* note 31, at 47. These factors have been summarized by the Commission in its interpretive regulations at 19 C.F.R. § 207.26 (d)(1)-(3) (1983).

58. *See* 19 U.S.C. § 1677(7)(E)(i); *see also* SENATE REPORT NO. 249, *supra* note 3, at 89.

Measures Agreement."[59] The Senate Report singles out such sub-

59. 19 U.S.C. § 1677(7)(E)(i). The ability of the Commission to take cognizance of foreign domestic subsidies having a pernicious effect upon U.S. industry was an additional part of the bargain by which the United States endorsed the Tokyo Round Agreements. *See* HOUSE REPORT NO. 317, *supra* note 31, at 43; *see also* Subsidies and Countervailing Measures Agreement, *supra* note 1, arts. 2, 6, 8, 11, *reprinted in* MTA at 261, 272, 277, 279.

The TAA defines both "export" and "domestic" subsidies. "Domestic" subsidies "provided or required by government action" include:

> (i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations[;] (ii) The provision of goods or services at preferential rates[;] (iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry[; and] (iv) The assumption of any costs or expenses of manufacture, production, or distribution.

19 U.S.C. § 1677(5)(B).

"Export subsidies" are those described in Annex A to the Subsidies and Countervailing Measures Agreement. 19 U.S.C. § 1677(5)(A). Annex A sets out an "Illustrative List of Export Subsidies:"

> (a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.
>
> (b) Currency retention schemes or any similar practices which involve a bonus on exports.
>
> (c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.
>
> (d) The delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or services for use on the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.
>
> (e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.
>
> (f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.
>
> (g) The exemption or remission in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.
>
> (h) The exemption, remission or deferral of prior stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior stage cumulative indirect taxes on

sidies as "inherently more likely to threaten injury than are other subsidies,"[60] while the House Report refers more broadly to appropriate Commission evaluation of whether a particular subsidy is of "the sort that is likely to generate exports to the United States."[61]

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goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior stage cumulative indirect taxes are levied on goods that are physically incorporated (making normal allowance for waste) in the exported product.

(i) The remission or drawback of import charges in excess of those levied on imported goods that are physically incorporated (making normal allowance for waste) in the exported product; provided, however, that in particular cases a firm may use a quantity of home market goods equal to, and having the same quality and characteristics as, the imported goods as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, normally not to exceed two years.

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the costs of exported products or of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a signatory is a party to an international undertaking on official export credits to which at least twelve original signatories to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original signatories), or if in practice a signatory applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the General Agreement.

Subsidies and Countervailing Measures Agreement, *supra* note 1, Annex A, *reprinted in* MTA at 295 (notes omitted).

60. SENATE REPORT No. 249, *supra* note 3, at 89.

61. HOUSE REPORT No. 317, *supra* note 31, at 47; *see generally infra* notes 169-176 and

Special Areas of Concern

The Senate directed the Commission in its investigation of claimed threat of injury to "focus on the conditions of trade and competition and the nature of the particular industry in each case" because rapid increases in market penetration may suggest threat of injury in some instances but not in others.[62] For example, where the affected domestic industry produces a product entailing substantial research and development costs and having a limited market life, increased market penetration by foreign exports "may be a particularly appropriate early warning signal."[63]

The Senate also singled out economic indicators associated with the purchase and sale of agricultural products for special attention by the Commission.[64] Due to the cyclical nature of agricultural production, ordinarily reliable economic indicia may be distorted to suggest the vitality of agricultural industry when in fact the opposite is true. The report cites the livestock industry as an example, where gross sales and employment in beef production may rise as a consequence of poor economic conditions.[65] Further recognition is given to the fact that government agricultural price support programs tend to dislocate ordinary economic measurements because price supports mask domestic price suppression by preventing the imports from "diminishing the amount received by a farmer below a minimum support level."[66]

Causation

Commission enforcement of the TAA has yet to resolve the question of whether a subsidized import must be the "principal" cause of a proven injury, or whether it is sufficient that it be but one of several asserted causes of injury. The historical GATT-based "import relief" causality standard required that proscribed importation be the principal cause of the alleged injury.[67] Since 1921, the

accompanying text.

62. SENATE REPORT No. 249, *supra* note 3, at 89.

63. *Id.*

64. *Id.* at 88.

65. *Id.*

66. *Id.* The TAA accordingly prohibits the Commission from entering a negative determination as to injury, or threat thereof, "merely because the prevailing market price is at or above the minimum support price." 19 U.S.C. § 1677(7)(D)(i) (1982).

67. *See Tokyo Round Injury Standard, supra* note 8, at 1201.

causality standard in U.S. antidumping laws requires that the asserted injury be "by reason of" U.S. sales at less than fair value.[68]

Because the MTN Agreements dropped the principal cause standard, the "by reason of" U.S. standard now comports with the GATT as modified by the MTN Agreements. The 1979 Senate Report states clearly that Congress did not intend for the Commission to decide whether an otherwise countervailable import was the "principal," "substantial" or "significant" cause of the alleged injury.[69] It was sufficient that the import be *one* cause of material injury or threatened material injury. The Commission should not, this report instructs, engage in weighing the effects of proscribed activities of an exporting nation against other benign or noncountervailable causes of injury or threatened injury to a U.S. industry. The TAA did not contemplate "that the effects from the subsidized imports [would] be weighed against the effects associated with other [noncountervailable] factors."[70]

Nonsubsidy Factors

The 1979 Senate Report, however, provides a gloss to all these admonitions regarding export subsidies. In examining the overall injury to a domestic industry, the report directs that the Commission "will consider information which indicates that harm is caused by factors other than subsidized imports."[71] This latter authorization is similar to the Code on Subsidies and Countervailing Duties which permits the enforcement agencies of signatory nations to consider information which "may demonstrate that the harm attributed

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68. 19 U.S.C. § 160(a) (1976) (repealed 1979).

69. SENATE REPORT NO. 249, *supra* note 3, at 57. The Senate Report continues that "[a]ny such requirement would have the undesirable result of making relief more difficult to obtain for industries facing difficulties from a variety of sources; such industries are often the most vulnerable to subsidized imports." *Id.*

70. *Id.* The 1979 Senate Report gives examples of "other factors" such as "the volume and prices of nonsubsidized imports, contraction in demand or 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 the productivity of the domestic industry" which may be contributing to overall injury to an industry, but are not to be weighed against the effect of countervailable subsidized exports. *Id.*

71. *Id.* at 58; *see also id.* at 88-89; HOUSE REPORT NO. 317, *supra* note 31, at 46-47; TRADE AGREEMENTS ACT OF 1979, STATEMENTS OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 153, pt. 2, 96th Cong., 1st Sess. 435 (1979).

. . . to the . . . subsidized imports is attributable to other factors."[72]

As the following discussion will demonstrate, the Commission has interpreted the above guidelines in a manner which has freed it to regularly measure the effect of one or more nonsubsidy factors against noncountervailable causes of asserted injury in determining whether the alleged injury is "by reason of" subsidized imports or is, on balance, "attributable to other factors."[73]

Determinations Illustrative of the Threat of Material Injury Standard

Several years of countervailing duty litigation under the TAA have produced Commission decisions that interpret the threat of material injury standard under the TAA. In many determinations, an affirmative finding of material injury has caused the Commission to suspend further evaluation of whether a threat of material injury also exists.[74] The effect of this procedural practice has been a reduction in the number of Commission decisions that devote specific discussion to the proof required to show the existence of a threat of material injury.

Nevertheless, there are a number of preliminary and final determinations that track the statutory language and legislative history of the threat of material injury, with an analysis distinct from that employed in the material injury evaluation. These cases are described below, in an effort to point out that while the Commission looks at all the statutory and legislative criteria when making each determination, each case before the ITC must be viewed at two levels: the aggregate level that makes a case qualify as a threat of material injury case, and the more specific level that involves a search for the point at which the gravity shifts and some factors

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72. *Id.* Note 2 to article 6, paragraph 4 of the Agreement states that signatory countries may consider nonsubsidy factors such as "the volume and prices of nonsubsidized imports of the products in question, contraction in demand or changes in the pattern 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." Subsidies and Countervailing Measures Agreement, *supra* note 1, art. 6, para. 4 n.2, *reprinted in* MTA at 273 n.2.

73. *See generally infra* notes 177-201 and accompanying text.

74. *See, e.g.*, Cotton Shop Towels From Pakistan, Inv. No. 701-TA-202 (Preliminary), USITC Pub. No. 1425 at 3 n.1 (Sept. 1983).

become more important than others.

Due to the relatively small number of Commission countervailing duty determinations that serve to illustrate the threat standard, however, several Commission decisions involving the identical threat standard of the TAA's antidumping provisions also will be reviewed to better illustrate the factors considered by the Commission in determining threat of material injury.[75]

Negative Commission Determinations

Snow Grooming Vehicles from the Federal Republic of Germany

Snow Grooming Vehicles,[76] an antidumping investigation, provides a succinct analysis of the nature and amount of proof necessary for a showing of threat of material injury under the TAA. This determination also provides an instructive example of how the Commission will weigh nonimport related causes of a claimed injury to a domestic industry to permit, where appropriate, the conclusion that the harm suffered by a domestic industry is not "by reason of" the importation of assertedly subsidized foreign products.[77]

In this case, a petition filed by the Logan Division of DeLorean Manufacturing Company alleged that snow grooming vehicles imported from the Federal Republic of Germany were being or were likely to be sold at LTFV.[78] Upon review of the evidence, the Commission observed that the relevant period of poor skiing conditions had obligated U.S. ski area operators to "postpone or forego

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75. See 19 U.S.C. §§ 1671, 1673 (1982) for the codification of the TAA antidumping provisions. The TAA prescribes a "reasonable indication" standard for making preliminary determinations in both countervailing duty and antidumping duty cases. The 1979 Senate Report states that the "committee intends the 'reasonable indication' standard to be applied in essentially the same manner as the 'reasonable indication' standard under section 201(c)(2) of the Antidumping Act [of] 1921." SENATE REPORT NO. 249, *supra* note 3, at 49. The ITC has adopted identical factors for consideration in both countervailing duty and antidumping duty proceedings. *See supra* note 57 and accompanying text.

76. No. 731-TA-36 (Preliminary), USITC Pub. No. 1117 (Dec. 1980), *reprinted in* 2 INTL. TRADE REP. DEC. (BNA) 5344 (1980). On the basis of its finding that, during the relevant time period, there were three domestic producers of the imported article subject to investigation, the Commission determined that there was no issue of "material retardation of the establishment of an industry in the United States." *Id.* at 5345 n.1.

77. *Id.* at 5345.

78. *Id.*

purchases of snow grooming equipment."[79] The Commission found further that overall recessionary influences, and the relatively "recent creation" and introduction to the same market of an improved "super snow grooming vehicle" constituted measurable factors in the absence of "a substantial replacement market" for the earlier generation of snow-grooming products.[80]

Taking these factors together, the Commission found that the decrease in the U.S. manufacturers' sales was due, in part, to "a sharp rise in selling and administrative expenses... [that occasioned] the drop in profitability."[81] The Commission also received evidence that tended to establish qualitative differences between the DeLorean product and the foreign product, and gave weight to the testimony of purchasers of foreign products who cited "differences in quality, service, reliability, or operating cost" of the foreign product as their primary purchasing motivation.[82] Reviewing the evidence as a whole, the Commission concluded that "the margin of LTFV sales, if any, is a 'technical dumping' not proscribed by the statute, and that any decline in the [U.S.] industry's position must be the result of other causes."[83]

Noting that a finding of threat of material injury requires a "showing that the threat is real and injury is imminent,"[84] the Commission also concluded that projections of anticipated U.S. and foreign demand, together with the absence of demonstrable exporter excess capacity, precluded a finding of imminent harm to domestic manufacturers. Instead, the Commission found that static import levels, absence of standing exporter inventory, long leadtime for obtaining engines and other parts, and a "strong demand" for such parts by European purchasers should "prevent any significant increases in imports from West Germany."[85] In these latter respects, *Snow Grooming Vehicles* represents a superior example of the Commission's analysis of the augury of increased import penetration, concluding in this instance that the prospect was small.

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79. *Id.* at 5347.
80. *Id.*
81. *Id.* at 5347-48.
82. *Id.* at 5348.
83. *Id.*
84. *Id.*
85. *Id.* at 5348-49.

Tantalum Electrolytic Fixed Capacitors From Japan

In *Tantalum Capacitors*,[86] a 1980 redetermination of an antidumping case, the Commission concluded that a Japanese company's plans to increase its productive capacity for these capacitors did not constitute a threat of material injury to U.S. manufacturers of like products.[87] U.S. manufacturers asserted that Japanese sales at LTFV, combined with a planned increase in Japanese production and attendant exports to the United States, represented an unfair trade practice under the TAA.[88]

Upon review of the evidence, the Commission noted that fourteen U.S. firms operating out of seventeen facilities produced tantalum capacitors during 1975.[89] From January to June 1976, the U.S. industry experienced a degree of recovery in which production and shipments improved 37 percent over 1975 levels. This raised the level of U.S. production to those of earlier years which the Commission described as "showing high capacity, utilization, sales, production, shipments, and net profit to sales ratios of 109 percent."[90] The Commission further found that in recent instances of head-to-head competition between United States and Japanese sellers, U.S. sellers secured almost 57 percent of the sales, even in a majority of the situations where the Japanese-made capacitor was priced lower.[91]

Cognizant of evidence that Japanese producers intended to increase production, with a commensurate rise in exports to the United States, the Commission nevertheless determined that a foreign concern's plans to increase production and exports was not in and of itself sufficient under the antidumping law to constitute a threat of material injury to a domestic industry:

> Consideration of Nippon Electric Company's *plans* to increase productive capacity for, and exportation to the United States of, epoxy dipped tantalum capacitors in and of itself does not establish grounds for determination of likelihood

86. Inv. No. AA 1921-159, USITC Pub. No. 1092 (Aug. 1980), *reprinted in* 2 INT'L TRADE REP. DEC. (BNA) 5137 (1980).
87. *Id.* at 5137-38.
88. *Id.* at 5139-40.
89. *Id.* at 5139.
90. *Id.*
91. *Id.*

> of injury by reason of LTFV sales. We do not believe that an increase in the capacity of Japanese producers to manufacture tantalum electrolytic fixed capacitors portended a threat to a strong and growing industry in the United States. The evidence gathered by the Commission regarding any increased exports from Japan did not show real and imminent threat to the domestic industry.[92]

Tantalum Capacitors, it is seen, represents a successful defense by respondents able to persuade the Commission that, far from being imperiled, the U.S. industry was, in fact, in a resurgence permitting it to preserve, and even enlarge, its domestic market share.

Prestressed Concrete Steel Wire Strand From Brazil

In the final determination of *Prestressed Concrete Steel Wire Strand from Brazil*,[93] the Commission concluded that even if the U.S. steel industry was suffering from economic injury, such injury, or threat thereof, was not a result of allegedly subsidized exports from Brazil.[94] For investigative purposes, the Commission found that the pertinent "domestic industry" consisted of all U.S. producers manufacturing prestressed concrete steel wire strand (PC strand).[95] In reviewing the economic health of that industry, the Commission

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92. *Id.* at 5140. In dissenting statements, Commissioners Moore and Bedell disagreed with the Commission's finding of no threat of injury to the stable and growing domestic production of the subject capacitors, stating:

> The projected increase in Japanese productive capacity was believed to be far in excess of home-market demand. NEC's increased exports to the United States were scheduled to come at a time when price competition in the U.S. market for tantalum capacitors was intensifying, and when the domestic industry was still struggling to recover fully from the economic recession of 1975. In our judgment, the prospect of sharply increased exports to the United States of tantalum electrolytic fixed capacitors posed a likelihood of injury to the domestic industry in October, 1976.

Id. at 5142.

It would be correct to question the dissenter's focus on Japanese intent to expand production "in excess of home-market demand," in recognition that such excess production is the *sine qua non* of any exporting nation.

93. Inv. No. 701-TA-152 (Final), USITC Pub. No. 1358 (Mar. 1983), *reprinted in* 5 INT'L TRADE REP. DEC. (BNA) 1115 (1983).

94. *Id.* at 1116, 1120.

95. *Id.*

concluded that producers of PC strand generally were healthy and enjoying increased productivity, some increased capacity, relatively high domestic capacity utilization, increased worker compensation, and no important changes in the number of persons employed.[96] The Commission attributed a showing of recent decline in domestic capacity utilization to the noted increased domestic productive capacity.[97] Importantly, the Commission was persuaded that the U.S. producers competing most directly with Brazilian imports were, in fact, "expanding vigorously."[98]

The Commission staff could not verify the petitioners' allegations of price suppression or depression, and only two claims of domestic sales lost to Brazilian imports appeared to be due to a lower cost of the Brazilian product.[99] As to the market penetration of Brazilian PC strand, the market had declined slightly during the period under investigation, and there was no showing of aggressive pricing by Brazilian exporters intent upon increasing such market share.[100] The Commission also found the absence of a showing that Brazilian imports were increasing in either absolute or relative terms. Coupled with an insignificant level of domestic importer inventories and lack of evidence that Brazilian producers probably would use existing excess capacity to increase exports of PC strand, the Commission concluded that the Brazilian exports posed no threat of material injury to the U.S. industry.[101]

Certain Commuter Airplanes From Brazil

The Commission conducted a similar examination of export trends in *Certain Commuter Airplanes*.[102] In that action, the Commission concluded that although it was likely that the exporter in question would continue to rely substantially upon exports to the lucrative U.S. market, "deliveries of imports from Brazil [had] not increased."[103] As to exporter capacity, the Commission observed that the petitioner had not presented "information on Brazilian

96. *Id.* at 1118.
97. *Id.*
98. *Id.* at 1120.
99. *Id.* at 1119.
100. *Id.*
101. *Id.* at 1120.
102. Inv. No. 701-TA-188 (Preliminary), USITC Pub. No. 1291 (Sept. 1982), *reprinted in* 4 INT'L TRADE REP. DEC. (BNA) 1956 (1983).
103. *Id.* at 1962.

[manufacturing] capacity [or] sufficient information with respect to the likelihood that Brazilian exports will be increasingly directed to the United States."[104]

Together, *Snow Grooming Vehicles*, *Tantalum Capacitors*, and *Certain Commuter Airplanes* show a Commission willingness to credit respondents' evidence that the import trends were sufficiently static so as not to support a conclusion that they would expand significantly, or that the putative injured party was, contrary to its claims, able to compete successfully with the imports.

Affirmative Commission Determinations

Alberta Gas Chemicals, Inc. v. United States

In contrast to these negative determinations, the Commission made an affirmative determination of threat to material injury in *Alberta Gas Chemicals*,[105] a methyl alchohol antidumping proceeding. In this case, a Canadian importer of methyl alcohol contested a Commission antidumping order in which the Commission held that domestic producers of methyl alchohol were likely to be injured by increased LTFV imports from Canada.[106] Key to the Commission's finding below was its belief that Alberta would expand its productivity at some point.[107] Cognizant that the pendency of Commission enforcement proceedings and the possibility of an adverse outcome could affect the level of future imports, the Commission majority predicted that "the outcome of this investigation conceivably may be a factor in the final decision of the foreign firm's expansion plans."[108] In its final determination, the Commission concluded that "if [Alberta Gas] 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 market is apparent."[109]

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104. *Id.*

105. Alberta Gas Chemicals, Inc. v. United States, 515 F. Supp. 780, 791 (Ct. Int'l Trade 1981), 2 INT'L TRADE REP. DEC. (BNA) 1481, 1489 (1981).

106. 515 F. Supp. at 783, 2 INT'L TRADE REP. DEC. (BNA) at 1482 (citing Methyl Alcohol from Canada, Inv. No. AA 1921-202, 44 Fed. Reg. 40734 (July 12, 1979)).

107. 515 F. Supp. at 784 (citing 44 Fed. Reg. at 40735).

108. *Id.*

109. *Id.*

Court of International Trade's Reversal

The Commission's affirmative Final Determination was reversed, however, by the Court of International Trade.[110] Contrary to the Commission's finding, the court decided that Alberta Gas' expansion plans were "uncertain," and dependent upon "several contingencies," among which was included financing.[111] The court held that the Commission had departed impermissibly from the 1979 Senate Report standard which required a showing that "the threat is real and injury is imminent, not mere supposition or conjecture."[112]

> [E]ven if AGCI has immediately decided to expand its production facilities, production in such facilities could not commence until 1982 at the earliest, assuming there were no unforeseen delays. . . . In summary, the record before the Commission shows simply a mere *possibility* that injury might occur at some remote future time.[113]

Thus, another important factor for reversal was the court's assessment that any increase in imports would only take effect at some indefinite point in the future.[114]

Frozen Concentrated Orange Juice from Brazil

The Commission's most complete treatment of the threat of material injury standard in a countervailing duty proceeding was set forth in *Frozen Concentrated Orange Juice*,[115] a distinctive decision in that the Commission found that the subject imports posed a threat of material injury without a concommitant finding of present material injury.[116] The Commission proceeding on frozen concentrated orange juice (FCOJ) commenced in December, 1982 following

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110. 515 F. Supp. at 791, 2 INT'L TRADE REP. DEC. (BNA) at 1489.

111. *Id.*, 2 INT'L TRADE REP. DEC. (BNA) at 1488.

112. 515 F. Supp. at 790, 2 INT'L TRADE REP. DEC. (BNA) at 1488.

113. 515 F. Supp. at 791, 2 INT'L TRADE REP. DEC. (BNA) at 1488-89.

114. 515 F. Supp. at 791, 2 INT'L TRADE REP. DEC. (BNA) at 1488.

115. Inv. No. 701-TA-184 (Final), USITC Pub. No. 1406 (July 1983), *summarized in* 5 INT'L TRADE REP. DEC. (BNA) 1391 (1983).

116. *Id.* at 9.

a preliminary determination by the Department of Commerce that it had a reasonable basis to believe that the Brazilian government was offering subsidies to Brazilian FCOJ producers and exporters.[117]

In reviewing the condition of the U.S. industry, Chairman Eckes recited the losses sustained by U.S. growers in "unprecedented back-to-back freezes in 1980/81 and 1981/82."[118] Recent peak Florida production of 206.7 million boxes in 1979-80 had declined to 172.4 million boxes in 1980-81 and to 125.8 million boxes in 1981-82.[119] Domestic production of FCOJ from Florida oranges tracked these downward trends.[120] The Commission established that the pertinent "domestic industry" included all United States growers and processors.[121]

Chairman Eckes conceded that the economic indicia of threatened injury presented multiple impediments to the ordinary assessment of pricing data, including recognition that as many U.S. processors used Brazilian FCOJ in blends with Florida FCOJ, no means existed for relating price differentials to difference in quality. Further, there existed in the retail orange juice market substantial "consumer brand loyalties and competition from other juice products."[122] "For these reasons," Chairman Eckes wrote, "it is difficult to trace either the present or future impact of these subsidized imports on domestic pricing, which would normally be a key indicator in an injury analysis of agricultural commodities."[123]

While putting aside the above pricing factors, Chairman Eckes nevertheless reached conclusions which permitted the finding that the "threat of injury is real and injury is imminent."[124] Specifically, he found that (1) past import trends indicated that Brazil could increase its FCOJ exports to the United States by 115 percent from 1978-79 through 1981-82; (2) as of the time of the investigation,

117. *Id.*; Prelim. Determination, Int'l Trade Admin., U.S. Dep't of Commerce, 47 Fed. Reg. 56,528 (1982).

118. *Id.* at 5.

119. *Id.*

120. *Id.*

121. *Id.* at 3. Florida growers produce "almost all" round oranges used in producing FCOJ, and approximately 85 percent of the Florida round orange crop is used to produce FCOJ. *Id.* at 5 (views of Chmn. Eckes).

122. *Id.* at 9.

123. *Id.*

124. *Id.* at 9-11.

significant amounts of Brazilian FCOJ remained in U.S. warehouses; (3) Brazilian FCOJ 1983-84 production probably would fill Brazilian storage facilities by July 1984, the beginning of the 1984 processing cycle; (4) Brazil's FCOJ exports demonstrated an "increasing reliance on the U.S. market," with the U.S. share of Brazilian exports reaching 57 percent in 1982; and (5) it was likely that Brazil's domestic consumption of its FCOJ production would remain "flat," at about 5 percent of Brazilian production.[125] Taken in the aggregate, U.S. consumption trends and Brazilian export capacity, Chairman Eckes determined, required a finding that the Brazilian exports posed a "threat of material injury."[126] Chairman Eckes concluded:

> Given the constraints imposed by the cost and physical limitations of storage facilities, as well as limited export markets, the incentive is present and real to export at least historical if not increased amounts to the United States. Exports to the United States at past levels will be injurious, as domestic production continues to recover to pre-freeze levels. Such imports will no longer supplement short-fall in production, but will begin to displace recovering domestic production. The impact of this displacement will be magnified by the fact that U.S. consumption trends have essentially been flat for the past four crop years and there is nothing in the record which would argue any significant change in those trends.[127]

Frozen Concentrated Orange Juice offers additional insight into the weight which the Commission will give to the nature of the alleged foreign subsidy in reaching its conclusions on threat of material injury. Chairman Eckes highlighted the Department of Commerce's conclusion that the subsidies at issue—"preferential working capital financing for exports and income tax exemption for export earnings"—were both programs "designed to promote exports and tied to export performance,"[128] and, in a reading consistent with the TAA, the legislative history, and the Agreement on Subsidies and

125. *Id.* at 10-11.
126. *Id.* at 3.
127. *Id.* at 12.
128. *Id.* at 13; 47 Fed. Reg. 56,528 (1982).

Countervailing Measures, "inherently more likely to threaten injury than are other subsidies."[129]

Choline Chloride From Canada and the United Kingdom

Excess capacity of the foreign exporter and declining "key indicators" of the domestic industry again were determinative to the Commission's affirmative preliminary determination of unlawful dumping in *Choline Chloride*.[130] Viewing the markets for liquid and dry choline chloride as essentially interchangeable, the Commission concluded that there was one domestic industry comprised of five producers.[131] Domestic shipments had fallen consistently from 1980 to 1982, with an additional decline in the first three quarters of 1983.[132] The petitioner offered additional evidence of two domestic producers' lowered gross profit margins and operating profit margins during the same period.[133]

Canadian exports to the United States expanded substantially during this same period, and nearly doubled in the first three-quarters of 1983, periods during which U.S. consumption declined or showed only slight increases.[134] Imports from the United Kingdom which began in 1982 showed commensurate gains, with much of the imported product still in U.S. inventory at the time of the Commission investigations.[135]

Of particular importance to the Commission was the fact that the most significant Canadian producer of choline chloride recently had made capital improvements which increased its capacity by 60 percent.[136] Similarly, the United Kingdom producer was producing at "less than full capacity."[137] Both foreign concerns produced choline

129. *Id.* at 13; *see* Certain Tool Steels from Brazil, Inv. No. 701-TA-187, USITC Pub. No. 1403 (July 1983).

130. Inv. Nos. 731-TA-155 and 731-TA-156 (Preliminary), USITC Pub. No. 1473 (Dec. 1983). Choline chloride is a synthetic nutritive supplement added to poultry and swine feed to promote growth. *Id.* at 3.

131. *Id.* at 5.

132. *Id.* at 6.

133. *Id.*

134. *Id.* at 7.

135. *Id.* at 9-10. The ratio of imports from the United Kingdom to U.S. consumption nearly doubled from the first half of 1982 to the first half of 1983. *Id.*

136. *Id.* at 9.

137. *Id.* at 10.

chloride principally for export. This "orientation toward imports," taken together with the accumulated inventory of exports and the unused capacity of both exporting nations, led Chairman Eckes and Commissioner Stern to find "a reasonable indication of threat of material injury."[138]

Hot-Rolled Stainless Steel Bar from Brazil

The Commission's preliminary determination in *Hot-Rolled Stainless Steel Bar from Brazil*[139] affirmatively found threat of material injury from Brazilian exports of both hot-rolled and cold-formed bar.[140] The decision is an instructive example of how the Commission merges its evaluation of the threat of material injury criteria with the criteria for material injury to permit a more thorough assessment of all pertinent economic indicia in measuring threat of injury. It is also a good example of the Commission's use of the ratio of U.S. imports to U.S. consumption to weigh the effect of such imports on the domestic industry.[141]

The Commission determined that U.S. producers of hot-rolled bar and cold-formed bar constituted two distinct domestic industries.[142] Evidence before the Commission showed that the economic condition of the U.S. hot-rolled bar industry deteriorated in the 1979-81 period under investigation, with domestic shipments down markedly and a showing of measurable negative employment trends.[143] "Hours paid" to employees—a factor the Commission found to be "a more informative indicator" of lost employment in an industry experiencing reduced hours and furloughs—dropped for many responding producers, while sales, gross profits, and net profits also declined.[144]

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138. *Id.* at 10 n.56.

139. Inv. Nos. 701-TA-179 to 181 (Preliminary), USITC Pub. No. 1276 (August 1982).

140. Chairman Eckes and Commissioners Stern and Haggert reached this conclusion as to the "threat of material injury" from the importation of both hot-rolled and cold-formed bar. *Id.* at 5 n.1. As to a third product, wire rod, the same Commissioners chose not to reach the threat of material injury issue after finding "reasonable indication" of material injury. *Id.* at 5 n.2.

141. *See infra* notes 151-155 and accompanying text.

142. *Id.* at 9. Hot-rolled bar and cold-formed bar are semi-finished products having application in the manufacture of, *inter alia* , pump shafts, ball bearings, automotive parts, and medical instruments.

143. *Id.*

144. *Id.* at 9-10.

In contrast, during the 1980-81 period hot-rolled bar imports from Brazil rose nearly 20 percent,[145] and cold-formed bar imports by an even higher percentage.[146] For both products the ratio of imports from Brazil to U.S. consumption rose substantially.[147] Moreover, in the context of a strong Brazilian "export orientation," in particular for hot-rolled bar, and of an increase in capacity of Brazil's producers of both hot-rolled bar and cold-formed bar, the Commission noted that the United States had become an "increasingly attractive market" for Brazilian exports of stainless steel bar.[148] This was evidenced further by the fact that Brazilian exports of hot-rolled bar to the European Community had declined from 1979-81 in a proportion congruent with the increase in Brazilian exports to the United States.[149] Given the evidence, the Commission majority concluded that petitioner had proven a reasonable indication of threat of material injury.[150]

In *Hot-Rolled Stainless Steel Bar*, the Commission demonstrated that it will weigh facts which permit it to conclude that the subject industry in the exporting country is strong, growing, and likely to enjoy a continuing excess capacity that will require consistent or increased reliance upon exports.[151] In this investigation, the Commission evaluated the static and deteriorating condition of the U.S. industry in cold-formed stainless steel bar, hot-rolled stainless steel bar, and stainless steel wire rod,[152] and measured this U.S. market against substantial increases in Brazilian exports of the same products.[153] After finding material injury to U.S. industry manufacturing these products, the Commission also concluded that the Brazil-

145. *Id.* at 11. Brazilian imports of hot-rolled bar increased from 450 tons in 1980 to 536 tons in 1981. *Id.*

146. *Id.* at 15-16. Brazilian imports of cold-formed bar increased from 1,489 tons in 1979 to 2,378 tons in 1981. *Id.*

147. The ratio of imports of hot-rolled bar from Brazil to domestic consumption increased from 0.9 percent in 1980 to 1.2 percent in 1981. *Id.* at 11. Import ratios for cold-formed bar rose from 9.3 percent in 1979 to 11.6 percent in 1980. *Id.* at 15.

148. *Id.* at 12.

149. *Id.* at 12-13. Brazilian exports to the EC declined from 64 percent in 1979 and 1980 to 47 percent in 1981.

150. *Id.* at 13-14, 16.

151. *See, e.g., id.* at 11-13 (factors contributing to "material injury" or "threat of material injury").

152. *Id.* at 9-11, 14-15, 17-18.

153. *Id.* at 12-13, 15-16, 18-19.

ian industry's activities, in light of Brazil's own stable domestic needs and in conjunction with depressed United States production, created a "threat of material injury" to the future of U.S. industry.[154] The Commission summarized:

> [G]iven recent substantial additions to Brazil's stainless steel making capacity and only moderate growth in domestic stainless steel consumption, Brazil is expected to continue to place heavy emphasis on exports in order not to create a situation of over-capacity in its domestic industry.[155]

Particular Commission Initiatives

Worthy of separate discussion are other Commission determinations that illuminate the Commission's approach to three distinct issues: first, the extent to which the Commission is likely to find threat of material injury prior to actual importation of the subject goods; second, the weight the Commission attaches to the particular nature of the asserted or proved foreign subsidization; and third, the way in which the Commission has adopted or disregarded the suggestion in the legislative history that it not assign weight to non-import-related causes of injury.

Threat of Material Injury Prior to Actual Importation

The threat of material injury standard in the TAA, similar to the "likelihood" of injury standard of the Trade Act of 1974, permits the Commission to anticipate prospective injury to a U.S. industry, so that the Commission has been petitioned upon occasion to impose countervailing duties before any of the subject products have been delivered for sale to the United States.

Elemental Sulfur–Mexico

In one antidumping proceeding antedating the TAA, the Commission signaled its willingness to find an actionable prospect of

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154. *Id.* at 13-14, 16-17, 20.

155. *Id.* at A-44 ("Information Obtained in the Investigation").

domestic injury prior to actual importation. *Elemental Sulfur-Mexico*,[156] was an investigation under the Antidumping Act of 1921 in which the United States Tariff Commission concluded that LTFV sale of imported elemental sulfur from Mexico was the cause of "significant injury" to domestic facilities of U.S. producers engaged in the mining and recovery of sulfur.[157]

Included in the allegations of injury by interested parties was the claim that in addition to actual LTFV sales, domestic producers were being injured by anticipated future sales of sulfur of Mexican origin. In other words, the Mexican sellers' quotation of LTFV prices for prospective orders created a separate and identifiable threat of injury.[158] The Tariff Commission agreed, based on the absence of temporal limitations in the causation standard of the 1921 Act. "When the statute speaks of 'by reason of the importation,' " the Tariff Commission stated, "no tense is implied—i.e., no actual entry of the merchandise need have occurred."[159] Under this interpretation, LTFV "offers" may be as injurious as actual "transactions."[160]

Certain Rail Passenger Cars From Canada

One determination reached after the effective date of the TAA, *Certain Rail Passenger Cars*,[161] comes as close as any reported Commission decision to basing its affirmative Preliminary Determina-

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156. Elemental Sulphur-Mexico, Inv. No. AA1921-92, U.S. Tariff Comm'n Pub. No. 484 (May 1982), *reprinted in* 1 INT'L TRADE REP. DEC. (BNA) 5068.

157. *Id.* at 5069.

158. *Id.* at 5073 (Statement of Reasons of Comm'rs Leonard and Young).

159. *Id.* (Statement of Reasons of Comm'rs Leonard and Young).

160. *Id.* The Tariff Commission opinion continues:

> The importation, therefore, can be a potential importation, of which offers in good faith are a clear indication. Congress was clearly aware in framing the [Antidumping] act that offers can have the same injurious effects as transaction prices. As the Tariff Commission pointed out in its 1919 study of dumping:
>
> > Moreover, even the quotation of dumping prices, though no sales in fact be made, may occasionally result in compelling merchants with established trade to cut their prices in order to hold their business against threats of dumping competition.

Id. (citation omitted).

161. Certain Rail Passenger Cars from Canada, Inv. No. 701-TA-182 (Preliminary), USITC Pub. No. 1277 (Aug. 1982), *reprinted in* 4 INT'L TRADE REP. DEC. (BNA) 1325.

tion upon the mere award of a contract, as distinct from the actual domestic delivery of the product of foreign manufacture. This action involved a contract awarded by New York's Metropolitan Transportation Authority (MTA) to Bombardier, Inc., of Quebec, Canada, for the supply of components of rail cars. Bombardier represented that while it would not export finished rail cars, it would have finished cars assembled at Barre, Vermont, from parts and components of both U.S. and foreign subcontractors.[162] The petitioner, the Budd Co. of Troy, Michigan, a producer of rail car shells, was the unsuccessful bidder for the MTA award.[163]

In finding immediate material injury to Budd in the MTA award to Bombardier for approximately 60 percent of the Authority's immediate rail car needs,[164] the Commission observed that the nature of awards of this kind require continued purchaser resort to the same supplier for reasons of compatibility of replacement parts and service.[165] On this basis the Commission offered independent grounds for finding a threat of material injury to Budd, concluding that "Budd's future production levels and revenues [would] be adversely affected" should the contract be awarded to Bombardier.[166]

In a strong dissent, Commissioner Stern argued that there is no extant U.S. industry in manufacture of commuter rail cars because potential U.S. entrants in fabrication of these cars depend entirely upon the very occasional offers for bids from transit authorities.[167]

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162. *Id.* at 1327.

163. *Id.* The Commission first determined whether Budd, as a prime contractor producing car shells, but dependent for final rail car construction upon "the products of other producers of components similar to those which will be imported," had standing as an "industry in the United States." *Id. But see id.* at n.18 (noting that current U.S. countervailing duty law does not appear to permit the granting of relief to a prime contractor under the facts of this case). The Commission, however, deferred further evaluation of Budd's status as a "prime contractor" for review by the Commission in the course of its arrival at a Final Determination. *Id.* at 1329. The Commission also devoted substantial attention to Budd's assertion that the Canadian government offered Bombardier financing at a rate of 9.7 percent, *id.* at 1328, a rate Budd had been unable to secure in financial markets in the United States or elsewhere. *Id.* at 1328 & n.20.

164. *Id.* at 1328.

165. *Id.*

166. *Id.*

167. In the words of Commissioner Stern:

> There is no continuing market for rail passenger components independent of the transit authority orders. Production takes place when an order is received. A potential subcontractor will not produce products dedicated to the transit authori-

Stern argued that had Budd been awarded the contract, it would have employed Portuguese production, thereby arguably removing the putative material injury from the statutory province of the TAA.[168]

Nature of Foreign Subsidization

A significant subgroup of Commission affirmative determinations of threat of material injury emphasizes the importance of the nature of the exporting country's export-related subsidy.[169]

Plastic Animal Identification Tags From New Zealand

In one Preliminary Determination, *Plastic Animal Identification Tags,*[170] the Commission tracked the threat of material injury

ty specification and maintain an inventory of the products in anticipation of being awarded a subcontract. Until a specific order is received, a producer's facilities will be used producing other products unrelated to passenger rail cars. In the absence of an order for specific components, there are no domestic producers of the like product.

Id. at 1333-34.

168. Stern stated:

> Budd, unlike Pullman-Standard, would not have produced the shell in the United States. The company does, however, produce shells domestically for other contracts at its Red Lion, Pennsylvania, plant.
>
> Budd would have sourced the shell for the MTA contract in Portugal. The company's reasons for the decision to source the shell in Portugal included: the availability of government-supported export financing in the form of buyer's credits; the lack of capacity to manufacture additional shells at its Red Lion plant; and the cost savings from the offshore sourcing. Having decided to produce the shells in Portugal and finish the cars in a yet-to-be refurbished U.S. facility at Hornell, New York, . . . [t]here is nothing on the record to support an inference that the Budd Company would have reconsidered the decision to source the shell in the United States had it been able to secure domestic financing equivalent to that received by Bombardier or, for that matter, had it been awarded the contract by MTA. Rather, another inference is obvious. The company would have sourced the shell in Portugal because it was more profitable than manufacturing it in the United States. Thus, there is no foundation for treating the Budd Company as a 'domestic' producer of shells in analyzing its negotiations with the MTA. Had the Budd bid been successful, its domestic shell manufacturing capability would not have been utilized.

Id. at 1334-35 (citations omitted).

169. *See* 19 U.S.C. § 1677(5) (1982) (defining export subsidies); for a discussion of GATT-related "export" subsidies, see *supra* note 59.

170. Plastic Animal Identification Tags from New Zealand, Inv. No. 303-TA-14

directly to the facts adduced during the investigation. It found that during the period of the investigation, New Zealand exports of the tags had increased substantially, and that the New Zealand exporting firms had both the capacity and the articulated intent to increase such exports.[171] With specific regard to the nature of the export subsidy in question, the Commission found that recent changes in the New Zealand export tax incentives program "reward firms not only for increases in their export levels, but also for maintenance of their export volume," [172] providing such firms with "further incentive" to increase shipments to the United States.[173]

Frozen Concentrated Orange Juice

The particular nature of the subsidy under review was crucial as well to the affirmative determination in *Frozen Concentrated Orange Juice*.[174] In that decision, Chairman Eckes cited the Department of Commerce conclusion that the subsidies at issue—"preferential working capital financing for exports and income tax exemption for export earnings"—were both programs "designed to promote exports and tied to export performance,"[175] and, in the language of the TAA, the legislative history, and the Subsidies and Countervailing Measures Agreement, were "inherently more likely to threaten injury than are other subsidies."[176]

Nonsubsidy Factors

Relevant to Commission determinations of material injury as well as threat of material injury is the degree to which the TAA permits the Commission to weigh various nonsubsidy causes against the effects of subsidization in assessing actual or potential injury. The 1979 Senate Report states that Title VII of the TAA "does not . . . contemplate that the effects from the subsidized imports . . . be

(Preliminary), USITC Pub. No. 1094 (Sept. 1980), *reprinted in* 2 INT'L TRADE REP. DEC. (BNA) 5149 (1980).

171. *Id.* at 5153 (Statement of Reasons of Chmn. Alberger and Comm'r Stern).

172. *Id.*; *see also id.* at 5160 (Opinion of Vice Chmn. Calhoun).

173. *Id.* at 5157 (Statement of Reasons for the Affirmative Determination of Comm'rs. Moore and Bedell).

174. Inv. No. 701-TA-184 (Final), USITC Pub. No. 1406 (July 1983); *see supra* notes 115-129 and accompanying text.

175. *Id.* at 13 (Views of Chmn. Eckes).

176. *Id.*

weighed against the effects associated with other factors. . . ."[177] The Senate drafters nevertheless do permit Commission inquiry into various causes of alleged material injury or threat thereof to determine if the harm is caused by factors other than the subsidized imports."[178] The TAA conforms to the GATT Subsidies and Countervailing Measures Agreement in this regard, which expressly permits assigning weight to nonsubsidy factors in order to prevent "the injuries caused by other factors. . . [from being] attributed to the subsidized imports."[179] Several Commission determinations adopt this approach by implication.

Fall-Harvested Round White Potatoes From Canada

In an agricultural antidumping investigation, *Fall-Harvested Round White Potatoes*,[180] the Commission was presented with a com-

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177. The Senate Report cites as examples of nonsubsidy factors:

> the volume and prices of nonsubsidized imports or imports sold at fair value, contraction in demand or 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 which may be contributing to the overall injury to an industry . . .

SENATE REPORT No. 249, *supra* note 3, at 57.

178. *Id.* at 58; *see also id.* at 87-89 (discussing causation under antidumping section 771(7) of the TAA, now codified at 19 U.S.C. § 1677(7) (1982)). The 1979 House report also contains a provision for consideration of nonsubsidy factors:

> Of course, in examining the overall injury being experienced by a domestic industry, the ITC will take into account evidence presented to it which demonstrates that the *harm* attributed by the petitioner to the subsidized . . . imports *is attributable to such other factors*.

HOUSE REPORT No. 317, *supra* note 31, at 47 (emphasis added).

179. GATT Agreement on Application and Interpretation, Article 6, paragraph 4, states:

> It must be demonstrated that the subsidized imports are, through the effects of the subsidy, causing injury within the meaning of the Agreement. There may be other factors which at the same time are injuring the domestic industry, and the injuries caused by other factors must not be attributed to the subsidized imports.

Subsidies and Countervailing Measures Agreement, *supra* note 1, art. 6, para. 4, *reprinted in* MTA at 273.

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

plaint that Northeastern potato growers were experiencing material economic injury. During the period under investigation, 1980-83, acreage harvested fell 14.8 percent, full and part-time employment fell 15.7 percent, hours worked by persons engaged in potato operations declined 7 percent, and the number of growers reporting losses increased.[181]

The Commission decided that LTFV imports of potatoes from Canada were not "a material cause" of the conceded injury experienced by Northeastern producers of these potatoes.[182] First, the Commission declined to find a causal link between Canadian imports and the precarious condition of the domestic industry.[183] With reference to depressed sales prices of these potatoes, the Commission found that "during the period under investigation domestic prices and losses to the domestic industry were 'a function of domestic production, not of increases in the volume of imports.' "[184]

Turning to its evaluation of threat of material injury, the Commission found no showing of increased Canadian exports of these potatoes or excess Canadian capacity to generate these exports.[185] To the contrary, evidence provided to the Commission reflected a decline in import penetration, and did not support the growers' claim that activities of Canadian export programs would direct potato exports to the Northeast region.[186]

It also is noteworthy that the Commission deliberately weighed marketing and product factors apart from proscribed dumping or foreign subsidization activities that, in the opinion of the Commission, contributed to the travails of the domestic industry. Commissioners Stern and Lodwick stated that "factors such as

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181. *Id.* at 9-10, A-33 (Table 9).

182. *Id.* at 1, 3. Enumerating the four major potato types as long white, round red, russet, and round white, and recounting the separable uses and consumer preferences accorded each, the Commission found that round white fall-harvested potatoes constituted the domestic "like" product competing with the Canadian imports. *Id.* Of round white potatoes, 84.7 percent of domestic production is sold in the northeastern United States, with only 1.3 percent of the demand for that regional market supplied by outside domestic producers. *Id.* at 7. Furthermore, 68 percent of total U.S. imports of the round white potatoes are also concentrated in that market. *Id.*

183. *Id.* at 4.

184. *Id.* at 11.

185. *Id.* at 15-16.

186. *Id.* at 16.

tighter size standards, a perceived higher quality of the Canadian potato and more effective marketing organization among many Canadian growers . . . contribute[d] to the competitiveness of the Canadian product."[187] Chairman Eckes observed that a perceived "higher quality" of the Canadian pototoes, a more appealing color of Prince Edward Island potatoes due to the reddish growing soil, and the more uniform size of the Canadian product constituted "non-price factors" that explained the competitiveness of Canadian potatoes, adding, "[i]t appears that the Maine potato farmers would benefit from effective marketing organizations and a marketing order which would assure customers more uniform size."[188]

Unprocessed Float Glass From Belgium and Italy

In another recent negative determination, *Unprocessed Float Glass*,[189] the issue was whether lifting existing countervailing duty orders would create the prospect of future harm to domestic producers of the "like" product.[190] The Commission deliberately weighed the nonsubsidized import related problems experienced by the domestic industry against any injury arguably associated with importation of the foreign float glass, and concluded that no harmful consequences would follow from lifting the prior orders.[191] Specifically, the Commission noted that the U.S. market for imported float glass, already limited under ordinary circumstances, was depressed further by static U.S. housing and automobile markets and that U.S. glass consumption was further negatively affected by "a growing trend towards down-sized homes and automobiles."[192]

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187. *Id.* at 4.

188. *Id.* at 27. In the same vein, but while reaching a negative Preliminary Determination, the Commission in Certain Commuter Airplanes From Brazil, Inv. No. 701-TA-188, USITC Pub. No. 1291 (Sept. 1982), *reprinted in* 4 INT'L TRADE REP. DEC. (BNA) 1956, unhesitatingly ascribed asserted lost sales to customer dissatisfaction with the U.S. commuter aircraft producer's engine performance, engine modification, maintenance downtime, operating costs, and aircraft durability. *Id.* at 12-13.

189. Inv. No. 104-TA-12, USITC Pub. No. 1344 (Feb. 1983).

190. *Id.* at 3.

191. *Id.* at 10-11, 13.

192. *Id.* at A-33 to A-34. In the words of the Commission,

> [t]he United States has not been a leading export market for float glass produced by the four foreign producing firms in question. . . . U.S. demand for float glass is

Iron Bars From Brazil

The Commission again found that asserted injury to a petitioning domestic industry resulted mainly from factors other than import underselling in *Iron Bars from Brazil*.[193] In that determination, the Commission found that almost all imports of iron bars from Brazil during the period under investigation were by one importer, American Iron and Alloys Corp (AIA).[194] On the basis of information derived during its investigation, the Commission subscribed to the petitioner's account that domestic industry performance was "generally poor," including its characterization of depressed production, capacity utilization, and shipments.[195] Important to the gravity the Commission attached to these downward trends, nonetheless, was a "soft market" for such products in 1982 and the first three quarters of 1983.[196]

Conclusive for the Commission, however, were the nonprice reasons for AIA's decision to purchase imported iron bars.[197] Citing its authorization to consider nonprice factors, including restrictive trade practices and competition between foreign and domestic producers,[198] the Commission noted that at least two U.S. producers of the iron bar had refused to sell to AIA.[199] As the other U.S. producers did not offer "full product lines," AIA "had no choice but to seek a foreign supplier."[200] Coupled with the low U.S. market penetration by the Brazilian imports and the limited foreign produc-

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> largely dependent on activity in the housing and automobile sectors of the economy, both of which have been severely depressed by high interest rates. . . . In addition to declines in housing starts and automobile production, U.S. glass consumption is also negatively affected by a growing trend toward down-sized houses and automobiles.

Id. at A-32 to A-33.

193. Inv. No. 701-TA-208 (Preliminary), USITC Pub. No. 1472 (Dec. 1983). The relevant "domestic industry" was found to be all U.S. producers of continuous cast iron bars. *Id.* at 4.

194. *Id.* at 6, 7.

195. *Id.* at 4.

196. *Id.* at 5.

197. *Id.* at 6-8.

198. *Id.* at 6 & n.26.

199. *Id.* at 7.

200. *Id.*

tion capacity, the Commission found that Petitioner had failed to establish any reasonable indication of threat of material injury.[201]

INTELLIGIBILITY OF THREAT OF MATERIAL INJURY STANDARD

Even conceding the elasticity of various interpretations available to the threat of material injury standard, the language of the standard, even if not precise, does represent a sufficiently intelligible principle, including articulation of congressional policy, with standards adequate to test and guide its execution.

Conformity with Statutory and GATT Criteria

Incorporating by reference its definition of material injury, the statute requires that an actionable threat of material injury pose a threat of harm "which is not inconsequential, immaterial, or unimportant."[202] Also adopted by reference is the guideline of article 6 of the Code on Subsidies and Countervailing Duties, which states that a determination of threat of material injury must be made by "objective examination of both (a) the volume of subsidized exports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."[203] Lastly, weighing the presence or absence of threat of material injury, the TAA directs the Commission to consider the nature of the subsidy, and the effects likely to be caused by the subsidy, particularly where "the subsidy is an export subsidy inconsistent with the Agreement."[204] Read in conjunction with article 6 of the Subsidies Code and the Agreement Annex,[205] which describes export subsidies deemed inherently suspect and effectively *per se* countervailable, the threat of material injury language provides an adequate expression of congressional policy, with accompanying

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201. *Id.* at 8.

202. 19 U.S.C. § 1677(7) (1982).

203. Subsidies and Countervailing Measures Agreement, *supra* note 1, art. 6, para. 1, *reprinted in* MTA at 272.

204. 19 U.S.C. § 1677(7)(E); *see supra* note 59 and accompanying text.

205. Subsidies and Countervailing Measures Agreement, *supra* note 1, Annex, *reprinted in* MTA at 295.

guidelines, to constitute a lawful delegation irrespective of the "mumbo-jumbo" characterization of some critics.[206]

Commission Application of Threat Factors

The above discussion warrants the conclusion that for the most part, the Commission intelligently has applied the threat of material injury factors, specifically (1) the condition of the domestic industry; (2) the condition of the exporting industry; (3) the nature of the subsidization; and (4) causation.[207] The Commission analyzed the condition of the domestic industry as reflected in the production, sales, market share, profits, and productivity indicia required by the TAA[208] in *Frozen Concentrated Orange Juice* [209] and *Fall-Harvested Round White Potatoes*.[210] As to the condition of the exporting industry and the likelihood of increased exports, *Choline Chloride* [211] and *Hot-Rolled Stainless Steel Bar* [212] and *Plastic Animal Identification Tags* [213] are informative examples of the Commission's sensitivity to growing export capacity and export orientation of the exporting nation.

Concerning the weight to be attached to the nature of the alleged

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206. The material injury standard, and *a fortiorari* the "threat of material injury" standard, have been described as opaque and perhaps unintelligible, even by those responsible for administering the countervailing duty laws. But U.S. endorsement of these opaque standards was explained as politically necessary to "bridge the gap" between the divergent interests of U.S. industry proponents of aggressive countervailing duty enforcement and the interests of U.S. foreign trading partners. Many U.S. trading partners considered U.S. countervailing duties to be a means of erecting nontariff barriers to foreign exportation to the United States and of penalizing foreign exporters for manufacturing or other efficiencies achieved in the exportation to the United States. By this analysis, the language resulting from this political compromise was satisfactory neither to the United States nor to its trading partners and was "no more than mumbo-jumbo"—"essentially meaningless." Greenwald, *supra* note 6, at 39-40.

207. *See* 19 U.S.C. § 1667(7) (1982); S. REP. No. 249, *supra* note 3, at 86-89.

208. 19 U.S.C. § 1677(7)(C).

209. Inv. No. 701-TA-184 (Final), USITC Pub. No. 1406 (July 1983), *reprinted in* 5 INT'L TRADE REP. DEC. (BNA) 1391 (1983).

210. Inv. No. 731-TA-124 (Final), USITC Pub. No. 1463 (Dec. 1983).

211. Inv. Nos. 731-TA-155 & 731-TA-156 (Preliminary), USITC Pub. No. 1473 (Dec. 1983).

212. Inv. Nos. 701-TA-179 to 181 (Preliminary), USITC Pub. No. 1276 (Aug. 1982), *reprinted in* 4 INT'L TRADE DEC. REP. (BNA) 1131 (1982).

213. Inv. No. 303-TA-14 (Preliminary), USITC Pub. No. 1094 (Sept. 1980), *reprinted in* 2 INT'L TRADE DEC. REP. (BNA) 5149 (1980).

subsidization, Chairman Eckes' review of working capital financing in *Frozen Concentrated Orange Juice* [214] and the Commission's examination of commercially unjustifiable low financing in *Certain Rail Passenger Cars* [215] demonstrate Commission attentiveness to export-oriented subsidization. Lastly, with respect to the causation requirement that the threat of material injury standard "by reason of" the allegedly subsidized imports, *Prestressed Concrete Steel Wire Strand* [216] and *Certain Commuter Airplanes* [217] shows that the Commission will decline to make an affirmative determination of threat of material injury when the reversals suffered by the domestic industry are fairly attributable to other causes.

Commission Departure from TAA and GATT Criteria

The single current area of Commission countervailing duty enforcement to depart measurably from the policy of the GATT and the Code pertains to the levying of countervailing duties upon products not yet actually imported to the United States. The 1979 Senate Report conceded that the TAA requirement that alleged injury be "not inconsequential" might represent a lower injury threshold than that provided for by the GATT,[218] and the pre-TAA antidumping determination in *Elemental Sulfur-Mexico* found that the "by reason of the importation" causation language of the TAA permitted antidumping enforcement prior to actual importation of a product.[219] The post-TAA countervailing duty determination in *Certain Rail Passenger Cars*, in turn, based its affirmative countervailing duty determination upon the New York MTA's award of a contract to Canada's Bombadier, a contract award made substantially prior

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214. Inv. No. 701-TA-184 (Final), USITC Pub. No. 1406 (July 1983), *reprinted in* 5 INT'L TRADE DEC. REP. (BNA) 1391 (1983).

215. Inv. No. 701-TA-182, USITC Pub. No. 1277 (Aug. 1982), *reprinted in* 4 INT'L TRADE REP. DEC. (BNA) 1325 (1982).

216. Inv. No. 701-TA-152 (Final), USITC Pub. No. 1358 (Mar. 1983), *reprinted in* 5 INT'L TRADE DEC. REP. (BNA) 1115 (1983).

217. Inv. No. 701-TA-188 (Preliminary), USITC Pub. No. 1291 (Sept. 1982), *reprinted in* 4 INT'L TRADE REP. DEC. (BNA) 1956 (1982).

218. *See* SENATE REPORT NO. 249, *supra* note 3, at 36; *see supra* note 42 and accompanying text.

219. Inv. No. AA 1921-92, Tariff Comm'n Pub. No. 484 (May 1972), *reprinted in* 1 INT'L TRADE REP. DEC. (BNA) 5068 (1972).

in time to any domestic delivery of the rail cars.[220]

Such an interpretation of the "by reason of the importation" language of the TAA has no support in the TAA, its legislative history, or the GATT as it has been interpreted. Paragraph 3, Article VI of the GATT unambiguously limits countervailable products to products "imported" into the territory of another contracting party, while paragraph 6(a) of the GATT makes it clear that to be countervailable, it is the actual "importation" of the product that must "cause or threaten material injury."[221] Congruent with this policy, article 6 of the Subsidies and Countervailing Duties Agreement requires "positive evidence" following "an objective examination of both (a) the volume of subsidized imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."[222]

The decisions in *Elemental Sulfur-Mexico* and *Certain Rail Passenger Cars from Canada* evidence the Commission's view that it may impose countervailing duties prior to actual importation on the basis that pre-import sanctions vindicate the preventive purposes of the threat of material injury standard, interpreted by the 1979 Senate Report to countenance countervailing duties "so as to prevent actual injury from occurring."[223] That reading, however, cannot be reached consistently with either the Court of International Trade's reversal of *Alberta Gas Chemicals*, proscribing Commission antidumping enforcement premised upon the possibility of future injurious imports,[224] or with the GATT and the Agreement on Interpretation requirements of actual importation. If Commission interpretation of the threat of material injury standard is to complement that of the GATT and the Agreement on Interpretation, without stretching the "imports" and "importation" language of those two instruments beyond recognition, the threat of material injury standard must be reviewed from the vantage point of actual importation.

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220. Inv. No. 701-TA-182, USITC Pub. No. 1277 (Aug. 1982), *reprinted in* 4 INT'L TRADE REP. DEC. (BNA) 1325 (1982).

221. GATT, *supra* note 1, Art. VI, paras. 3 & 6(a).

222. Subsidies and Countervailing Measures Agreement, *supra* note 1, Art. 6, para. 1, *reprinted in* MTA at 272.

223. SENATE REPORT NO. 249, *supra* note 3, at 88-89; *see supra* text accompanying note 44.

224. 515 F. Supp. 780 (1981).

CONCLUSION

However arguably elusive the TAA's threat of material injury standard may be, the Commission has marshalled effectively, with only one significant exception, a coherent, predictable, and supportable enforcement policy thereunder. Rather than permit the threat standard to provide an expedient loophole for imposition of countervailing duties in cases presenting intricate and difficult economic variables, or resorting to affirmative findings of threat of material injury in instances in which there may exist significant political pressure to do so, the Commission decisions have conformed closely to the guidelines of the TAA, the legislative history, and the GATT with its accompanying codes, protocols, and agreements. In doing so, the Commission's exegesis of the threat of material injury standard, and the proof necessary thereunder, consistently has been attentive to the analysis of import trends, the predictable effects of such imports upon the domestic industry, and the nature of the foreign subsidies under review.

On this basis it may be fairly concluded that Commission enforcement of the countervailing duty law effectively refutes the critics who label the material injury and threat of material injury standards as unintelligible and not susceptible of predictable enforcement. To the contrary, to date the Commission's enforcement of these standards under the TAA has served to further the national goal of fairness in international trade by minimizing the potential for capricious imposition of countervailing duties, while at the same time providing lucid and evenhanded standards for U.S. and foreign businesses alike.