CHAPTER V

ANTIDUMPING DUTIES

Chapters V and VI consider responses to foreign trade practices deemed to be "unfair." Chapter V covers the imposition of antidumping duties designed to counter price discrimination by a foreign firm. For a number of reasons, such a manufacturer may export goods at substantially lower prices than those it charges at home; this will sometimes hurt an industry in the importing nation, which may then respond with an antidumping duty.

Chapter VI covers the imposition of countervailing devices aimed at equalizing the benefit of subsidies given by foreign governments. Antidumping and countervailing duties are frequently linked; the presence of subsidies may permit exports to take place at a lower price than would be justified if competition was proceeding solely on the economic merits of the product in question. The domestic petitioner may face a choice-of-remedies question *ab initio*: should it take action first against foreign dumping or foreign subsidies?

A. THE ECONOMICS OF PRICE DISCRIMINATION

Price discrimination arises in the domestic context as well as in the international one. Alcohol, for example, has two radically different prices, one for drinking alcohol and one for alcohol used in industry and as a fuel or an antifreeze. Both to enforce the taxes on drinking alcohol and to protect the distiller's profits, the markets are kept separate by denaturing publicly available industrial alcohol so as to make it unfit to drink. (Advertising campaigns emphasizing the importance of specific liquor brands also help.) In another example, airlines offer a range of possible prices. The lower fares are available only to those who are able to plan far ahead and willing to travel at hours that are inconvenient for business traffic. The higher fare is thus charged to the "less elastic" business market– those who tend to travel anyway, regardless of the high price. The lower fare goes to the "more elastic" tourist market– those who may not travel at all unless the price is right. And the airline will fill more seats as a result of the dual pricing practice, thus maximizing its profits.

Figure 5-1 shows the principle graphically. Here L is the lower price–that for industrial alcohol or for tourist class airfares. In contrast, H is the higher price–that for drinking alcohol or for business class fares. By price discrimination, the firm is able to add the shaded area of profits, LHQ_HB, to the profits available if just the lower price option is offered. And the profits with price discrimination are also greater than those available through offering just the higher price. This form of price discrimination permits the firm to appropriate some of the "consumer surplus," the triangle above the line LBQ_L in Figure 5-1. In this area, the consumer is in fact willing to pay more than he or she has to at a single price–to pay, for example, $10 per bottle for gin that, absent price discrimination, might be available for $1 per bottle. Permitting the industry to recoup the

$9 contributes not just to profits but to the level of investment and may move toward optimality. Or, looking at essentially the same phenomenon a little differently, the airline's multiple fare schedule permits it to recover a large portion of the fixed cost of a flight from the business travelers. By filling the otherwise empty seats– which would have to be flown anyway–at any price above the costs of the meal and similar individual passenger handling costs, the airline is able to recoup part of the fixed trip cost, and offer transportation and probably more flights for the benefit of both groups of passengers. The international aspects are described in the articles that follow.

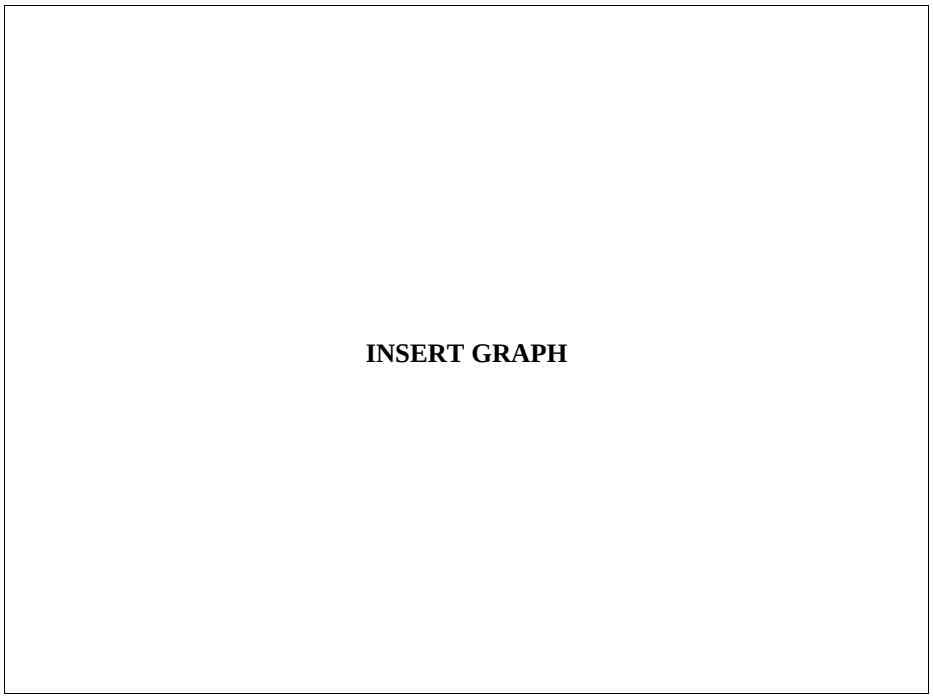

FIGURE 5-1
By discriminating in its pricing structure a firm can reap higher profits than would be the case with a uniformly high price

FISHER, THE ANTIDUMPING LAW OF THE UNITED STATES: A LEGAL AND ECONOMIC ANALYSIS*

5 L. & Pol'y Int'l Bus. 85 (1973)

I. The Economics of Dumping

A. The Definition of Dumping

Dumping is traditionally defined as selling at a lower price in one national market than in another. Accordingly, Viner, in his classic study of dumping, concluded that dumping should be confined to "price discrimination between national markets."

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Theoretically, the definition of dumping includes "reverse dumping," i.e., selling at a lower price in the home market than abroad, but this practice typically does not create international tensions. The prototype dumping case is that in which a country sells goods abroad at a price lower than that price prevailing in its home market. The "dumping" referred to in this article is solely of the latter type.

B. The Economic Motivation for Dumping

The rationale for dumping products in a foreign market is analogous to that for price discrimination within a domestic market: the discriminating firm can maximize its profits by charging different customers different prices for essentially identical products. For example, if some customers are willing to pay no more than $7, when others will pay $15, for an item, it would be advantageous for the seller to be able to charge the higher price to those customers prepared to pay more. Only when sectorization of markets obtains, however, can goods be sold to the low-price customers without sacrificing the benefits to be obtained from the high-price customers.

The opportunities for profits from dumping will depend upon the interaction of three variables: the demand for the firm's product in its own country and abroad, the barriers to reentry into the exporting market, and the nature of the firm's cost structure. These variables are considered below.

1. Demand in the Exporting and Importing Countries

The firm will be more likely to profit from dumping if the home demand for the dumped goods is inelastic. If demand does not slacken in the home market when the dumping firm raises its prices initially (or raises its prices later, if the dumped good is one that can be produced only at increasing costs), then the overall revenue of the dumping firm will be increased. Profitability of the dumping firm will also be increased if there is high price elasticity abroad for the dumped goods. If foreigners respond sharply to lower prices, more goods will be sold and the firm's revenues will be increased.

2. Reentry into the Exporting Country

Internal price discrimination, i.e., within the same country, is difficult to sustain over a long period of time because there are no barriers to reimportation. In international transactions, the seller will find it far easier to engage in price discrimination between the home market and foreign markets, as he can avail himself of barriers to reimportation in the form of tariffs, quotas, and nontariff barriers to trade. A condition precedent for a successful dumping scheme is, therefore, the effective insulation of the home market from the world market for the dumped goods. Otherwise, the dumped goods would reenter the domestic market, equalize the home and export prices, and "ruin" the home market for the discriminating firm.

3. The Cost Structure of the Firm

The final variable in the dynamics of international dumping is the cost function under which the firm must operate. In general, a firm will not dump unless the marginal revenue that it derives from abroad is substantially greater than its marginal costs of production for the dumped goods. Generally, this can be achieved at a lower foreign price only where the cost curve is descending at the margin, i.e., where there is a declining-cost industry involving economies of scale.

The concept of marginal costs helps to explain the three customary subdivisions of dumping–sporadic, intermittent, and continuous (or persistent). Sporadic dumping is of relatively minor concern to the country dumped on, since, typically, it is an unloading of overstock by a foreign producer who prefers to dump his goods in a foreign market rather than endanger his domestic price structure. The firm will ordinarily regard its costs as fixed, its marginal cost as zero, and accept virtually *any* price that can be

obtained for the goods abroad.

Generally, intermittent dumping is an element of a larger scheme to secure a foothold in a foreign market. Consequently, the motives here are much more pernicious than those associated with sporadic dumping. The foreign producer seeks to forestall the development of competition, or eliminate it entirely, in the market he selects for the dumping. A frequent technique of such predatory, intermittent dumping is to sell abroad for brief periods at prices below marginal (but not necessarily average) cost. After the foreign competitor is eliminated, the predatory dumper may then raise his prices above marginal costs.

Continuous dumping may be predicated upon an assumption by the foreign producer that its costs over the long term will be cheaper if it manufactures a large number of items in order to realize maximum economies of scale. Since the overproduction might be a burden upon domestic price structure, a sustained profit from the firm's overall sales will thus be ensured for as long as the average prices charged customers exceed the average cost of production. If the firm desires to pass along the benefits of the dumping to its home customers, lower prices may be made available for the home market. There is no guarantee, however, that the discriminating firm will shift the benefits resulting from dumping to its local customers. Indeed, the interests of the firm and the consumers of the dumping country may be antithetical, i.e., the firm may choose to retain all its profits.

C. The Effects of Dumping on National Economies

1. The Exporting Country

As noted above, the *firm* in the exporting country can profit from dumping under certain demand, reentry, and cost conditions. Whether or not a net benefit will accrue to the exporting *country* is, however, another matter. First, other firms in the dumping country may not benefit from the dumping situation, as foreign fabricators having received dumped goods can undersell the home price for finished goods and, thus, underbid home producers in third-country export markets. The effect of the dumping on consumer prices in the dumping country is more complex. If the dumped goods are being produced at declining marginal costs, then consumer prices may fall in the dumping country if the firm chooses to "pass along" the benefits of the dumping to the local consumers. If the goods are produced at rising marginal costs, then the equilibrium home price after dumping will tend to rise, as the dumping firm must "cover" its relatively unprofitable dumping. In the rising cost situation, then, the dumping firm may obtain higher profits; the user industries in the home market, which must compete with foreign goods containing the dumped items, are harmed; and the consumers, facing rising prices, will suffer.

There is, in any case, misallocation of resources in the exporting country when intermittent or continuous dumping takes place. Such dumping cannot be successful without the artificial conditions of barriers to reentry into the domestic market and some monopolistic control of the home market. These facts, as de Jong notes,

> [c]ondemn the existing economic situation in the exporting country as an inefficient one, because of the misallocation of its productive resources. This country could raise its economic welfare by reducing the output of the dumped article, stop dumping abroad, and expand production of something else.[21]

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21. De Jong, [The Significance of Dumping in International Trade, 2 J.W.T.L. 162] at 173.

2. The Importing Country

In the importing country, the most obvious problem caused by dumping is the harm inflicted upon competing producers of the dumped goods. The degree of harm will depend largely upon the quantity of dumped goods and the margin of dumping involved, i.e., the amount by which the dumped goods were underselling the home-market goods. Under the traditional [International Trade] Commission [(ITC)] analysis, if a foreigner increased his U.S. market share by 5 percent through his less-than-fair (LTFV) exports, the domestic competitors normally would suffer a corresponding loss.

There are also at least three types of "implied injuries" to domestic producers that result from dumping. The first is the amount of growth that would have taken place in the competing industry in the absence of dumping. For example, assume that country X, prior to the sale of LTFV imports, holds 15 percent of the U.S. market in widgets. After the sale of a given amount of LTFV imports, country X still holds 15 percent of the U.S. market in widgets. Has "injury" to competing industries in the United States occurred? The answer is yes: in the absence of LTFV imports, U.S. widget manufacturers would have gained a portion of country X's market share (if the foreign margin of underselling is not substantially greater than the margin of dumping). With LTFV imports, U.S. manufacturers have lost that market opportunity. Thus, while no actual "present" injury has occurred, there is implied injury to U.S. competitors to the extent of lost market opportunities.

The second type of implied injury is the harm suffered by domestic industries with products that are not directly competitive with the dumped imports. Harm to such industries arises because U.S. consumers are tempted to purchase the dumped goods rather than the nondirectly competitive domestic goods. For example, assume that the exporting country dumps television sets but not radios. The LTFV television sets will deflect consumer preferences away from radios in many instances (the degree depending upon the relevant cross elasticities of demand), and thus harm the radio industry in the United States as well as the television industry.

The third type of implied injury is that occurring to user industries in the importing country. Unaware of the source of their low-priced imports, these industries might undertake expansion programs in reliance upon a continued source of supply. If the dumping country terminates the flow dumped goods, however, the additional facilities would be economically dysfunctional and would represent a misallocation of resources caused by faulty signals from the price system.

The key benefit for the importing country is the lower prices that the dumped goods bring to its customers. When dumping is sporadic, the benefit of lower prices would appear to outweigh the marginal harm suffered by local producers. When dumping is intermittent or predatory, however, the substantial injury suffered by local industries would appear to outweigh any benefits resulting from lower consumer prices. The most controversial area is that of continuous (or persistent dumping), which may or may not be economically desirable. If there is a smoothly functioning system of adjustment from import-impacted industries, then the importing country can realize a net benefit from the increased efficiency and lower prices provided by the continuous dumping. If however, the continuous dumping creates large pools of unemployed manpower, then it can effect a hardship upon the receiving country in excess of the benefits consumers will realize . . . .

3. Competing Third Countries

Competing producers in third countries will be injured by dumping in the same manner as suppliers in the importing country. As the demand for their goods declines,

so will their profits. In contrast to importing countries, however, competing third countries receive none of the potential benefits of dumping, such as lower consumer prices and increased efficiency in the operations of domestic manufacturers. Indeed, it would appear that it is the competing third countries that bear the brunt of the disadvantages caused by dumping.

FISHER, DUMPING: CONFRONTING THE PARADOX OF INTERNAL WEAKNESS AND EXTERNAL CHALLENGE, ANTIDUMPING LAW: POLICY AND IMPLEMENTATION

1 Mich Y.B. Int'l Leg. Stud. 11 (1979)

The Implementation of Foreign Dumping: The Enigmatic Role of the State

With the exception of market entry, . . . lower unemployment, reduced balance of trade deficits, and use of overcapacity are *national* objectives superimposed on the objectives of individual enterprises. While an individual firm may be willing to lay off workers and idle capacity, the government may not be willing to do so for political reasons. Conversely, the government may desire to rationalize an inefficient sector of the economy but be unable to stand up to powerful trade unions wishing to avoid economic dislocations. In each case the result is the same: labor becomes a fixed cost that needs to be covered by the domestic enterprise. It is the thesis of this article that dumping policies are increasingly state-led or state-supported efforts to improve national economic postures.

In 1900 Brooks Adams said that nation-states were behaving more and more like huge corporations in competition. Today nation-states frequently are huge corporations in competition. This is especially true in such dumping-prone sectors as steel. For example, governments owned raw steel products enterprises in twenty-one major countries in 1975. Government-owned exports to the United States from these twenty-one countries accounted for 11.1 percent of total United States steel imports in 1974.

In Japan, the state has played a crucial role in the generation and implementation of foreign economic policy. As early as 1950 the government in Japan emphasized the development of the steel industry. Furthermore, the government facilitates the steel industry development by acting, in effect, as a well-controlled revolving door providing entrance to and exit from Japan.

In Italy, state-controlled enterprises have become as significant in domestic and international economic affairs as the large private corporations. The Institute for Reconstruction of Italy (hereinafter IRI), the Ente Nazionale Idrocarburi, and other state-owned enterprises are responsible to the Ministry for State Holdings, and the Foreign Ministry. Finsider, the steel state-participation enterprise run by IRI, has, like its British counterpart, British Steel Corporation, lost enormous sums in recent years.

The list could continue, but, hopefully, the point has been made. United States industries which are particularly vulnerable to dumping, such as the steel industry, are private firms in which shareholders hold management responsible for making a profit, and these private firms are increasingly competing in in a world of profitless enterprises with markets insulated by governmental tariff and nontariff barriers to trade. Dumping has thus become transmogrified from the classical profit-maximizing action of a private firm to a concealed partial devaluation of the currency of the exporting country carried

out by the national government for national objectives. Instead of its traditional role as a micro-economic industry problem, dumping is increasingly a reflection of the macroeconomic problems of central government authorities.

Without the ability to implement the decision to dump for the reasons enumerated earlier, the objectives of national policy would remain objectives, and not national policies implemented by the government. . . .

NOTES AND QUESTIONS

1. Are you convinced that a nation should have an antidumping law? Is international price discrimination any different from its domestic analogue?

2. How (for those of you with an antitrust background) does the wisdom of an antidumping law compare with that of the Robinson-Patman Act?

3. What about a law that applied just to predatory dumping? Note that some economists contend that predatory pricing is no more likely or serious than any other form of price discrimination.

4. How important economically is the distinction between intermittent and continuous dumping?

5. What about the practical implications of this intermittent versus continuous distinction for the design of a remedy? Note that litigation delays are so great that an episode of intermittent dumping could be long finished before the merits of a specific case could be evaluated; hence provisional, interim and retroactive arrangements become crucial. *See, e.g.*, Cell Site Transceivers From Japan, 49 Fed. Reg. 24, 155 (1984) (levying retroactive dumping duty).

6. What other special features of dumping might make the design of a remedy for dumping different from that of one for subsidies? What about the fact that it is usually a *firm* that dumps but a *government* that subsidizes? What about relative ease of access to data? For an example of the problem of dealing with data that a firm in an antidumping proceeding hopes to keep confidential, see *Arbed, S.A. v. United States*, 4 Ct. Intl. Trade 132 (1982).

7. Is there any justification for country ***A*** to impose an antidumping duty on country ***B***'s exports to ***A*** if ***A***'s firms have access to the higher-price market in ***B***?

B. THE UNITED STATES LAW

The dumping laws of the United States are administered by two different agencies, the Commerce Department and the International Trade Commission (ITC). Each agency has a different mandate. The ITC must find material injury, or the threat thereof, to the U.S. industry (or material retardation in its establishment); the Commerce Department is responsible for determining whether goods are being sold, or are likely to be sold, in the United States at less than their fair market value. The difference between the "fair value," typically the home market price, and the U.S. sales price, is known as the margin of dumping. This amount is assessed as a separate antidumping duty and is added to any other duties or import restraints already existing.

Dumping has been condemned by U.S. law since 1916 and by the GATT since 1947. The following article by Lorenzen traces some of the historical background of the U.S. antidumping law.

LORENZEN, TECHNICAL ANALYSIS OF THE ANTIDUMPING AGREEMENT AND THE TRADE AGREEMENTS ACT*

11 L. & Pol'y Int'l Bus. 1405 (1979)

The Antidumping Act of 1916

Widespread fear during World War I that emerging U.S. industries would be harmed by the dumping of merchandise stockpiled by the great European cartels prompted Congress to enact the first federal statute aimed specifically at dumping. There was no consensus, however, as to the focus of the new bill: the Republicans strongly supported a protectionist policy, believing that imports should not undermine domestic industry; the Democrats adamantly argued for relatively free international competition.

In 1916, the free-trade-oriented Democratic Congress prevailed. The Antidumping Act of 1916 took the form of an unfair competition law and condemned only predatory dumping. The Act made it unlawful for persons to import articles into the United States:

> at a price substantially less than the actual market value or wholesale price . . . Provided, That such act . . . be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

The Act provided for federal criminal sanctions (including fines of up to $5000 or imprisonment for up to one year, or both) as well as for private treble damage actions. . . .

The Antidumping Act of 1921

In 1921, Congress passed a second antidumping statute to remedy the inadequacies of the 1916 Act. The new legislation embodied (1) a broad "injury to industry" standard (instead of a narrow "injury to competition" standard) to measure the adverse impact of dumping, and (2) administrative, rather than judicial, enforcement of the Act.

1. Injury to Competition versus Injury to Industry

The proposed House version of the 1921 Act was modeled on the Canadian Antidumping Act, which provides that dumping at less than fair value is per se subject to an antidumping duty. Like its Canadian counterpart, the House bill would have imposed a special dumping duty on merchandise "like" that produced in the United States whenever the merchandise was imported at less than the foreign market value, regardless of predatory intent on the part of the seller or the effect of the dumped sales on domestic businesses. The Senate, however, added a provision requiring a finding that an industry in the United States is being or is likely to be injured, or is prevented from being established by reason of the dumped merchandise, before dumping duties could be assessed.

It is not clear why the Senate added the "injury to industry" requirement to House bill. The legislative history alludes to the Sherman Act and the need to protect competitors from unfair trade practices, but there are also strong suggestions that the purpose of the 1921 Act was to protect U.S. labor and capital from foreign competition.

[This] latter view [is] bolstered by the fact that the Act was enacted as title II of the Emergency Tariff Act of 1921, which was designed to impose protective tariffs on specific imports in the hope of reduction unemployment in key U.S. industries.

The Antidumping Act of 1921 manifested a trade policy more protectionist than that of its 1916 predecessor. It did not discriminate between injury caused by predatory pricing and that caused by competitive pricing. Any injury to a domestic business, such as loss of sales or lower profits, triggered application of the statute; the fact that such injury resulted from competitive pricing was not a defense against the imposition of a dumping duty. The statute thus furnished not only the power to deter predatory pricing, but also the opportunity to chill international price competition with U.S. producers. . . .

International Agreements

The international community has long opposed dumping. In 1927, the World Economic Conference in Geneva adopted a resolution stating that "dumping creates a state of insecurity in production and commerce, and can therefore exercise a harmful influence quite out of proportion to the temporary advantage resulting from cheap imports." By the 1930s, at least 25 countries had enacted antidumping legislation in some form. In 1947, the Western trading nations adopted the General Agreement on Tariffs and Trade (GATT) with the general purpose of encouraging free international competition and discouraging nationalistic economic policies.

GATT article VI, which governs antidumping, condemns dumping only if it "causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry." Although the GATT uses the broader "injury to industry" language instead of condemning only dumping that injures competition, the standards that must be met before a dumping duty may be imposed suggest that the Agreement adopts a competitive rather than a protectionist stance. First, in order to constitute dumping, import sales must be below "normal value," which is expressly defined as the home market price, or in the absence of such, the highest export price to any third country, or the cost of production in the country of origin plus a "reasonable addition for selling cost and profit." In making these calculations, GATT countries are required to make "[d]ue allowance . . . for differences in conditions and terms of sale . . . ." Second, the injury to or retardation of a domestic industry must be "material."

The United States, however, [was] not bound by article VI due to a provision exempting from compliance with part II of the GATT countries with prior conflicting legislation. The United States thus was able to apply a less stringent injury standard in enforcing its own antidumping law. Accordingly, anything more than *de minimis* injury to an industry has been held sufficient to satisfy the 1921 Act requirements.

The International Dumping Code of 1967

By the opening of the Kennedy Round of negotiations in 1963, GATT members had begun to attack nontariff barriers to trade, including the U.S. antidumping law. In addition to the fact that article VI was not binding on the United States, there was increasing concern among European countries regarding the administration of U.S. antidumping law. The United States, on the other hand, objected to the absence of an injury requirement in the Canadian statute and the failure of European nations to prescribe adequate procedural protections in processing antidumping cases.

The 1967 Code that resulted from Kennedy Round was aimed principally at establishing uniform antidumping standards and procedures and tightening restrictions against the use of such measures for protectionist ends. In an effort to encourage

uniform dumping laws, the 1967 Code outlined in greater detail the basic concepts of "industry," "injury" and "causation." . . .

Implementation of the International Antidumping Code

The International Code was signed on June 30, 1967 by 17 countries in addition to the United States; within a short time, the Code was implemented by every signatory except the United States. The U.S. Congress, however, vehemently opposed the Code for two basic reasons. First, Congress found "sharp and unreconcilable differences" between the 1967 Code and the Antidumping Act of 1921. Congress was particularly unhappy with the provision concerning the degree of injury required for a finding of dumping. It was feared that the differences on this point between the 1967 Code and the 1921 Act would make the domestic law less effective as a defense against predatory pricefixing by foreign producers and that adoption of the 1967 Code thus would result in fewer instances of dumping duties actually being assessed. Second, Congress took umbrage at being excluded from the process of formulation of U.S. trade policy when the problem (by its conception) was essentially a matter of the domestic economic effects of "unfair trade practices." Accordingly, the Senate Finance Committee concluded that the Executive branch, acting without the Congress, lacked constitutional authority to alter the Antidumping Act of 1921.

Ultimately, however, an act of Congress accommodated the conflicting interests of the two branches of government. Title II of the Act assured the supremacy of the 1921 Act over the 1967 Code, but allowed the Treasury and the Tariff Commission to effectuate the 1967 Code as long as basic consistency with the 1921was maintained. . . .

The International Dumping Code of 1979

The Tokyo Round of Multilateral Trade Negotiations . . . culminated in a comprehensive set of trade agreements between the participating nations, one of the most important of which is the code of conduct regulating antidumping practices. The principal objectives of the International Dumping Code of 1979 [were] (1) to harmonize world antidumping laws, and (2) to provide for open procedures and speedy and equitable resolution of antidumping disputes.

To achieve the first goal, the Code provides uniform definitions of the basic concepts of "industry," "injury," and "causation," and details the factors that must be considered in a dumping determination. In this respect, the 1979 Code is very similar to the 1967 International Dumping Code. Although the 1979 Code eliminates the requirement that the dumped imports be the "principal cause" of domestic injury, the new Code retains the requirement that the dumped imports cause "material" injury and provides that a finding of such injury is a sufficient basis for a determination of dumping. The definitions of the terms "injury" and "industry," as well as the factors that must be analyzed in determining whether these terms apply to a given case, are substantially identical in the 1967 and 1979 Codes.

The 1979 Code pursues the objectives of speedy and equitable and resolution of dumping disputes by reducing the harassment potential of the dumping proceeding and promoting procedural fairness. The Code requires that there be evidence of both dumping and injury, and of a causal link between the two before an investigation proceeding is initiating. This prevents domestic complainants from harassing foreign competitors with a steady barrage of dumping complaints based solely on evidence of price discrimination or solely on evidence of injury. The 1979 Code mandates simultaneous consideration of both price discrimination and injury in the preliminary decision whether to initiate an investigation, as well as in the later decision whether to

apply provisional measures. This not only shortens the entire proceeding but discourages the filing of frivolous complaints. The proceeding is further expedited by the requirement that, except in "special circumstances" undefined by the 1979 Code, investigations be concluded within one year after their initiation.

NOTES AND QUESTIONS

1. *Timkin Co. v. United States*, 630 F. Supp. 1327 (Ct. Intl Trade 1986), offers an interesting legislative history analysis in determining what weight to give to the International Dumping Code of 1979.

2. *The 1994 Code*. The Uruguay Round resulted in an Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, known as the Antidumping Code, which is the current WTO agreement with respect to antidumping actions. The Code lays out the basic rules concerning each of the elements required for antidumping measures to be taken under Article VI of the GATT.

a. *Determination of Dumping*. Article 2 of the Code sets out the basic rules concerning an importing country's determination that dumping has occurred, a determination that requires a "fair comparison" between the export price and the "normal value" of the product in question (Article 2.4). This comparative analysis must be made in situations in which a "like product"[1] is also offered for sale in the exporting country (Article 2.1); situations in which there are no sales in the exporting country (Article 2.2); situations in which the *export price* is nonexistent or unreliable (Article 2.3); and, situations in which the product is exported from the country of origin to an intermediary country, and then from the intermediary country to the importing country that is claiming dumping (Article 2.5). Under the 1994 Code, what two prices are being compared in each situation? Under 19 U.S.C. §§ 1673, 1677a-1677b-1?

b. *Determination of Injury*. Article 3 of the Code sets out the basic rules concerning an importing country's determination that the dumping has resulted in the requisite degree of injury–material injury. Evidence of injury must be positive and objective (Article 3.1). The article includes rules concerning determination of the volume of increased dumped products, either in absolute or relative terms (Article 3.2); rules concerning cumulation of dumped products from more than one exporting country (Article 3.3); rules concerning evaluation of the impact of dumping on an affected domestic industry (Article 3.4, 3.6); rules concerning causation (Article 3.5); and, rules concerning injury determination in situations of threatened material injury (Article 3.7, 3.8). How do these rules compare with the corresponding provisions of U.S. statutory law, codified at 19 U.S.C. §§ 1673, 1677(7)?

c. *Procedural Requirements*. The 1994 Code also contains detailed procedural provisions with respect to antidumping actions undertaken by member states. These provisions cover such issues as initiation and conduct of antidumping investigations (Article 5); evidence (Article 6); imposition of provisional measures pending completion of an antidumping investigation (Article 7);[2] settlement of antidumping actions through "price undertakings" by the exporter (Article 8); imposition and collection of antidumping duties (Article 9); retroactivity of provisional measures and antidumping duties

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1. "Like product" is defined in Article 2.6 of the Code. *See also* 19 U.S.C. § 1677(10) (defining "domestic like product).

2. Interim procedures–and the possibility of retroactivity–are extremely important, since they affect the possibility of trade during litigation. On this issue, see *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983).

(Article 10);[3] permissible duration and required review of antidumping duties (Article 11); transparency of antidumping actions (Article 12); required judicial review of antidumping actions (Article 13); antidumping actions undertaken by an importing country on behalf of a third country (Article 14); and, dispute resolution under the Dispute Settlement Understanding (DSU).[4] U.S. statutory procedural requirements are extremely detailed. In this regard, Figure 5-2 outlines the investigatory time table embedded in the statute, as amended.

3. Review the alternative time lines traced out in Figure 5-2, and consider the following questions.

a. Assuming all parties took advantage of all procedural opportunities, how long would a comparatively straightforward antidumping case take before there was a final decision?
b. How long for a complicated antidumping case?
c. Do these time frames impede the effectiveness of antidumping enforcement?

4. The Antidumping Act of 1916 survived enactment of later antidumping legislation, and even establishment of the 1994 Code. What is the relationship between that act and the other antidumping provisions? Can a threatened domestic industry use the 1916 Act to prevent a competing foreign manufacturer from continuing to dump goods in the U.S. market? Consider the following case.

WHEELING-PITTSBURGH STEEL CORP. v. MITSUI & CO., INC.

221 F.3d 924 (6th Cir. 2000)

▬ SILER, CIRCUIT JUDGE.

Plaintiff, Wheeling-Pittsburgh Steel Corp. ("Wheeling-Pittsburgh"), filed suit against defendants, Mitsui & Co., Inc., Marubeni America Corp., and Itochu International Inc., under the Antidumping Act of 1916 ("the 1916 Act"), 15 U.S.C. § 72, seeking damages, as well as injunctive relief to enjoin the defendants from importing hot-rolled steel into the United States. [Wheeling-Pittsburgh also brought state law claims against the defendants for unfair methods of competition and tortious interference with business relationships.] In response to a preliminary motion, the district court held that injunctive relief is not available under the 1916 Act, whereupon Wheeling-Pittsburgh filed this interlocutory appeal. We affirm.

I. Background

Wheeling-Pittsburgh, a domestic producer of hot-rolled steel, alleges that the defendants, importers of such steel, are selling hot-rolled steel in Ohio and other states at prices substantially less than the actual market value in violation of the 1916 Act. ...

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3. *See* note 2, *supra*.
4. On the DSU, see Chapter IX, *infra* at ▬.

[FIGURE 5-2 IN REVISION]

Defendants moved to strike Wheeling-Pittsburgh's demand for injunctive relief and Wheeling-Pittsburgh moved for a preliminary injunction pending a final trial on the merits of the action. In light of the comprehensive administrative scheme enacted by Congress to regulate international trade and illegal dumping, and because the statute itself only provides for treble damages, attorneys' fees and costs, the district court held that it was not authorized to grant injunctive relief under the 1916 Act. . . .

III. Discussion

. . . Although the statute does not expressly provide for injunctive relief, Wheeling-Pittsburgh urges this court to use its inherent equitable powers to find that courts may enjoin foreign competitors from illegally dumping products into the United States. . . .

Whether a district court may grant injunctive relief under the 1916 Act is not only an issue of first impression for this court, but is apparently also an issue of first impression in any jurisdiction. In the eighty-four years since its enactment, no published case indicates another court has ever entertained a request for injunctive relief, nor have many actions been brought pursuant to the 1916 Act. *See Geneva Steel Co. v. Ranger Steel Supply Corp.*, 980 F.Supp. 1209, 1214 (D.Utah 1997) (less than twenty civil actions reported filed under the 1916 Act).

We begin our analysis then by looking at the language of the statute, which provides only for treble damages, attorneys' fees and costs. Generally, when Congress sets forth specific remedies in a statute, those remedies are exclusive. . . .

However, this canon of statutory construction must give way to evidence of "a contrary legislative intent." *Transamerica Mortgage* [*Advisors, Inc. v. Lewis*], 444 U.S. [19,] 457 [(1979)]. Though the defendants cite several cases in which courts have held injunctive relief is unavailable because of Congress' lack of contrary intent, those cases differ in that the courts were able to look to the statutes' legislative histories for guidance. Unfortunately, in our case there is no helpful legislative history to direct this court in determining whether the 1916 Act authorizes private injunctive relief. *See Geneva Steel*, 980 F.Supp. at 1212; Joseph Gregory Sidak, *A Framework for Administering the 1916 Anti-Dumping Act: Lessons From Anti-Trust Economics*, 18 Stan. J. Int'l L. 377, 381 (1982) (legislative history "largely uninformative"). Nevertheless, despite the lack of legislative history and cases on point, we find that when Congress provided for specific legal relief under the 1916 Act, it implied that other relief would not be appropriate.

First, although federal courts do possess an inherent equitable power to grant injunctive relief, such relief "'depend[s] on traditional principles of equity jurisdiction.'" *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999)(quoting 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2941, at 31 (2d ed.1995)). "[E]quity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73)." *Id.* (internal quotation marks and citation omitted). In the instant case, Wheeling-Pittsburgh seeks to enjoin the importation of foreign goods into the United States. We are unable to find, however, any evidence to suggest that this type of relief was "traditionally accorded by courts of equity"; hence, we are under no obligation to exercise our inherent equitable powers to grant Wheeling-Pittsburgh injunctive relief under the 1916 Act. *Id.*

Second, we must interpret the 1916 Act in conjunction with all subsequent antidumping legislation, in particular Title VII of the Tariff Act of 1930, 19 U.S.C. §

1671, et seq. ("Title VII"), which addresses unfair dumping practices. . . . Under Title VII, Congress set up a comprehensive administrative scheme in which the Department of Commerce ("DOC") and the United States International Trade Commission ("ITC") have been authorized to investigate alleged dumping practices and impose tariffs to offset unlawful price differences. See 19 U.S.C. §§ 1671a, 1673. Though the DOC and the ITC are not authorized to restrict importation of dumped goods, the President may impose an import ban under the International Emergency Economic Powers Act [(IEEPA)]. *See* 50 U.S.C. § 1701(a)(President authorized "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.").[e] If injunctive relief was included under the 1916 Act, investigations by the DOC and ITC of alleged illegal dumping practices might not only be impeded, but it is possible that such relief may conflict with the President's power to deal with foreign affairs. Furthermore, there would be no practical way to enforce multiple injunctions banning the importation of foreign goods if each of the ninety-four district courts had the authority to issue such injunctions. We also take note that the World Trade Organization ("WTO") has just recently ruled in two separate decisions that the 1916 Act violates various sections of several international agreements, including the General Agreement on Tariffs and Trade ("GATT"), which generally prohibits bans on imports. *See* Michael M. Phillips, *Japanese Steelmakers Win Victory Against Anti-Dumping Act of 1916*, The Asian Wall Street Journal, June 8, 2000, available in 2000 WL-WSJA 2941139.[4] While GATT "does not trump domestic legislation," Congress has an "interest in complying with U.S. responsibilities under the GATT." *Suramerica v. United States*, 966 F.2d 660, 667-68 (Fed.Cir.1992).

Therefore, parties allegedly injured under the 1916 Act are limited to the remedies expressly provided for in the statute–treble damages, attorneys' fees and costs. Federal courts lack authority to enjoin conduct that violates or may violate the 1916 Act.

1. Determining that Dumping has Occurred

Under 19 U.S.C. § 1673, if the International Trade Administration (ITA) of the Department of Commerce (the "administering authority") determines that a class or kind of foreign merchandise is being or is likely to be sold at *less than fair value* (LTFV), and the ITC determines that a U.S. *industry*[1] is *materially injured*[2] (or is threatened with material injury)–or that the establishment of a U.S. industry is *materially retarded–by reason of the imports*, then an antidumping duty must be imposed on the LTFV imports. The amount of the required duty–the dumping margin–is "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." *Id*. The terms "normal value," "export price," and "constructed export price" are all statutory terms of art. *See id*. §§ 1677a (defining export price and constructed export price); 1677b (determining normal value).

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e. For discussion of the IEEPA, see Chapter XIII, *infra* at ▬.

4. The WTO has requested that the 1916 Act be revoked or amended so that the United States will be in compliance with its obligations with the WTO. . . .

1. For the definition of "industry" for these purposes, see 19 U.S.C. § 1677(4).

2. For the definition of "material injury," see *id*. § 1677(7).

Procedurally–and logically as well–an antidumping action begins with the determination that an LTFV import is involved. That determination is also the predicate for the assessment of the antidumping duty, if the ITA and the ITC both reach final, affirmative determinations as to the elements required by § 1673. Hence, the LTFV determination is a key issue. In that regard, the following questions naturally suggest themselves:

1. What is involved in making the LTFV determination?
2. To what extent is the judgment of the ITA deferred to by the courts, if challenged by importers or competing domestic producers?
3. To what extent have the Uruguay Round and its implementation in U.S. law changed the way in which the LTFV determination is made?

Consider the following case in answering these questions.

AK STEEL CORPORATION v. UNITED STATES

226 F.3d 1361 (Fed. Cir. 2000)

▬ MICHEL, CIRCUIT JUDGE.

[The opinion was issued in connection with the court's grant of a combined petition for rehearing, and denial of a suggestion for rehearing *en banc*, filed by appellees Dongbu Steel Co., Ltd., Pohang Iron & Steel Co. and others. The petition for rehearing was granted for the limited purpose of clarifying the court's prior opinion in the case. The administrative review at issue was initiated after the effective date of the 1994 amendments to the anti-dumping laws contained in the Uruguay Round Agreement Act ("URAA"). Accordingly, the statute as amended by the URAA was applied by the court.]

AK Steel Corporation, Inland Steel Industries, Inc., Bethlehem Steel Corporation, LTV Steel Company, Inc., National Steel Corporation, and U.S. Steel Group (collectively "domestic producers" or "appellants") appealed to this court the judgment of the United States Court of International Trade in this anti-dumping duties case. The International Trade Administration, United States Department of Commerce ("Commerce") issued a decision: (1) using a three-part test it adopted informally in 1987 to determine whether certain sales to U.S. buyers of Korean steel by U.S. affiliates of the Korean producers were properly classified as Export Price ("EP") sales rather than Constructed Export Price ("CEP") sales, as defined in 19 U.S.C. § 1677a(a)-(b) (1994) and (2) declining to apply the "fair-value" and "major-input" provisions of 19 U.S.C. § 1677b(f)(2)-(3) (1994) to transfers among affiliated steel producers in Korea that it had treated as one entity for purposes of the anti-dumping determination. As a consequence of these methods and their application, the duty rates were minimal. The domestic producers then filed suit challenging these methods as contrary to the anti-dumping statute. The trial court, however, upheld Commerce's decision and its methods as consistent with the statute. *See AK Steel Corp. v. United States*, 34 F.Supp.2d 756 (Ct. Int'l Trade 1998). This court, in an opinion issued February 23, 2000, held that the three-part test employed by Commerce is contrary to the express terms defining EP and CEP in the anti-dumping statute as amended in 1994 and therefore reversed in part and remanded for a redetermination of the anti-dumping duties. *See AK Steel Corp. v. United States*, 203 F.3d 1330 (Fed.Cir.2000). As to the fair-value and major-input provisions

we held that Commerce's decision not to apply those provisions to the transactions in suit was reasonable and within its discretion, and its method consistent with the statute, and therefore we affirmed in part. *Id.* . . . This opinion addresses the Korean producers' statutory arguments; however, the outcome of the case is unchanged.

Background

In 1993 Commerce issued an order imposing anti-dumping duties on certain steel products from Korea. *See Certain Cold Rolled Steel Flat Products from Korea*, 58 Fed.Reg. 44,159 (Dep't of Commerce 1993) (hereinafter "*Certain Steel Products from Korea*"). In August of 1995 both the domestic producers and the Korean producers requested an administrative review of that anti-dumping duty order. In its second administrative review of the anti-dumping duty order, Commerce classified all of the sales of the subject merchandise at issue in this appeal[3] as EP sales rather than CEP sales pursuant to 19 U.S.C. § 1677a(a)-(b) (1994). *See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea*, 62 Fed.Reg. 18,404, 18,434 (Dep't of Commerce 1997) (hereinafter "*Final Results*"). In addition, because Commerce had collapsed POSCO and its affiliates, POCOS and PSI, into one entity for purposes of assigning dumping margins, Commerce opted not to apply the so-called "fair-value" and "major-input" provisions to transactions among those companies. *Id*. at 18,430.

I.

In calculating dumping margins, Commerce compares the "U.S. Price" to the "normal value" of the subject merchandise and imposes anti-dumping duties if, and to the extent, the former is lower than the latter. The U.S. Price is calculated using either the EP or CEP methodology. In general, Commerce applies the EP methodology to a sale when the foreign producer or exporter sells merchandise directly to an unrelated purchaser located in the United States. Commerce applies the CEP methodology when the foreign producer's or exporter's steel is sold to an unaffiliated U.S. buyer by a producer-affiliated company located in the United States. If the sale is classified as a CEP sale, additional deductions are taken from the sales price to arrive at the U.S. Price.[4] . . .

For the sales of steel produced by each of the appellees challenged here, Commerce calculated the U.S. Price based on an EP classification. In determining whether to classify the sales here as EP or CEP, Commerce applied a three-part test (the "PQ Test") that it developed on a remand from an unrelated 1987 case, *PQ Corp. v. United States*, 652 F.Supp. 724, 733-35 (Ct. Int'l Trade 1987). An agency interpretation of 19 U.S.C § 1677a(a)-(b), the test has been applied when a foreign manufacturer's affiliated entity in the United States makes a sale to an unaffiliated U.S. purchaser prior to import, as in the case of the sales at issue here. Using the PQ Test, Commerce classifies sales made by U.S. affiliates as EP sales if the following criteria are met:

> (1) the subject merchandise was shipped directly from the manufacturer to the unrelated buyer, without being introduced into the inventory of the related shipping agent;
>
> (2) direct shipment from the manufacturer to the unrelated buyer was the customary channel for sales of this merchandise between the parties involved; and
>
> (3) the related selling agent in the United States acted only as a processor of sales-

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3. Certain other sales were classified as CEP sales. No challenge was raised to those classifications in the Court of International Trade.

4. The classification of the sales impacts the determination of the dumping margin because the statute provides for certain deductions from CEP that are not deducted from EP. Specifically, commissions for selling, any expenses from the sale (such as credit expenses), the cost of further manufacture, and the profit allocated to those costs and expenses must be deducted from CEP sales. *See* 19 U.S.C. § 1677a(d). Therefore, use of CEP is more likely to result in a determination of dumping.

related documentation and a communication link with the unrelated U.S. buyer.

See, e.g., Certain Stainless Steel Wire Rods from France, Final Determination of Sales at Less than Fair Value, 58 Fed.Reg. 68,865, 68,868-69 (Dep't of Commerce 1993).

All of the sales at issue in the present case were "back-to-back" sales: the Korean producer sold the steel to an affiliated Korean exporter; the exporter sold it to its U.S. affiliate; and finally, the U.S. affiliate sold it to the unaffiliated U.S. purchaser. In most cases, however, the steel was shipped directly to the unaffiliated purchaser without entering the inventory of the U.S. affiliate. In the second administrative review, whether the sales of steel manufactured by the Korean producers satisfied the third prong of the PQ Test was one of the principal factual issues in dispute. In classifying the sales at issue, Commerce rejected the domestic producers' argument that the activities of the Korean exporter's U.S. affiliates failed the third prong of the test because they "exceed[ed] those of a mere communications link or processor of documents." *Final Results*, 62 Fed.Reg. at 18,432.

II.

Commerce "collapsed" POSCO and its related companies, POCOS and PSI, into one entity for purposes of the anti-dumping analysis and then levied a single anti-dumping duty on the entity. In the second administrative review, Commerce determined that "a decision to treat affiliated parties as a single entity necessitates that transactions among the parties also be valued based on the group as a whole. . . . [Thus] among collapsed entities, the fair-value and major-input provisions are not controlling." *Final Results*, 62 Fed.Reg. at 18,430. Therefore, in its 1995 review, Commerce declined to treat the transfers between the related companies as sales between affiliates, but rather treated them as transfers between divisions of the same company and did not apply the fair-value and major-input provisions of 19 U.S.C. § 1677b(f)(2)-(3).

The domestic producers challenged the *Final Results* by filing suit in the Court of International Trade, calling illegal the PQ Test and its application to appellees, the decision to collapse the POSCO affiliates, and the determination that the fair-value and major-input provisions did not apply to transfers among the collapsed companies. The Court of International Trade sustained Commerce's *Final Results*, holding the PQ Test to be a reasonable interpretation of the statute and the application in this case to be sustainable. In addition the court held that the decisions to collapse the affiliated producers and not apply the fair-value and major-input provisions were within the agency's discretion. *See AK Steel*, 34 F.Supp.2d at 762, 764-66. The domestic producers timely appealed to this court those portions of the judgment based on statutory interpretation, challenging the legality of the PQ Test and the decision not to apply the fair-value and major-input provisions, assuming the affiliates were properly collapsed. This court issued an opinion on February 23, 2000 reversing the trial court's decision upholding the PQ Test and affirming its decision upholding Commerce's decision to collapse the Korean producers and their affiliates. *AK Steel*, 203 F.3d 1330.

The Korean producers filed a timely petition for rehearing and suggestion for reconsideration *en banc* with this court. In that petition the Korean producers argued, for the first time, that language in the URAA implementing act rendered the Statement of Administrative Action ("SAA") submitted to Congress with the URAA a judicially binding interpretation of the agreement and the implementing statute. The panel granted the motion for reconsideration to more fully address the SAA. . . .

DISCUSSION

I. Standard of Review

. . . [N]o facts are in dispute and the only issues before us are: (1) whether the Court of International Trade erred in concluding that Commerce's PQ Test is a correct, or at least a reasonable, interpretation of ambiguous terms of the statute; and (2) whether it erred in holding that the decision not to apply the fair-value and major-input provisions to transactions among collapsed entities was within Commerce's discretion.

"In reviewing the Court of International Trade, this court decides de novo the proper interpretation of governing statutory provisions." *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed.Cir.1994). When reviewing statutory interpretation by an agency charged with implementing a statute by rulemaking and adjudication, as is the Commerce Department here, see *Suramerica de Aleaciones Laminadas v. United States*, 966 F.2d 660, 665 & n. 5 (Fed.Cir.1992), we are guided by the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, Inc., 467 U.S. 837, 842-43 (1984), which requires the court to ask two questions. Under *Chevron*, the court first asks whether Congress has made an express or implied delegation to the agency or if it has "directly spoken to the precise question at issue." *Id.* If it has not made any delegation to the agency, then courts and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* If Congress has not spoken unambiguously on the precise issue, and thus made at least an implied delegation to the agency, then the court must ask *Chevron*'s second question and determine whether the interpretation of the statute by the agency charged with implementing it is a reasonable one. *See id.* The core issue in this appeal is whether Congress itself drew the line between EP and CEP sales, or left it to Commerce to do so.

II. PQ Test

The Court of International Trade held that the PQ Test did not contradict the statute as amended. The court found that the test was "simply a means to determine whether the sale at issue for anti-dumping duty purposes is in essence between the exporter/producer and the unaffiliated buyer, in which case the EP rules apply." *AK Steel*, 34 F.Supp.2d at 762 (emphasis added). The domestic producers argue that Commerce's PQ Test conflicts with the unambiguously expressed intent of Congress because the statute and legislative history make clear that a sale by any producer-affiliated seller in the United States to an unrelated U.S. buyer must be classified as CEP. The appellees argue, however, that the statute is ambiguous about how to classify those sales that occur before importation but that are made by producer-affiliated entities in the United States. Therefore, according to appellees, the PQ Test is an appropriate methodology for determining whether EP or CEP classification is applied to those sales.

The language of the statute must be viewed in context. The U.S. Price used in making anti-dumping determinations is meant to be the sales price of an arm's-length transaction between the foreign producer and an unaffiliated U.S. purchaser. The U.S. Price is derived from either EP or CEP sales. To isolate an arm's-length transaction under the current statute, Commerce looks to the first sale to a purchaser that is not affiliated with the producer or exporter. If the producer or exporter sells directly to the U.S. purchaser, that sale is used because it is considered an arm's-length transaction. In that situation the sale is classified as EP.[6] If, however, the first sale to an unaffiliated purchaser occurs in the United States, then that sale must be used to determine the U.S. Price. Such a sale will be classified as a CEP sale and have additional deductions made to account for

6. We note that the statute appears to allow for a sale made by the foreign exporter or producer to be classified as a CEP sale, if such a sale is made "in the United States." 19 U.S.C. 1677a(a). No such transaction is at issue in this appeal.

certain expenses of the seller in the United States. The purpose of these additional deductions in the CEP methodology is to prevent foreign producers from competing unfairly in the United States market by inflating the U.S. Price with amounts spent by the U.S. affiliate on marketing and selling the products in the United States. In the administrative review process, the foreign producers submit to Commerce the information about sales to unaffiliated purchasers. Those sales must be classified as either: (1) between an unaffiliated U.S. purchaser and the producer or exporter, and thus EP; or (2) between the unaffiliated U.S. purchaser and another entity in the United States that must, by definition, be related to the producer, and thus CEP. Sales in the United States between unaffiliated purchasers and unaffiliated sellers are never at issue; such a sale could never be the first sale to an unaffiliated purchaser.

The question at the root of this appeal is whether a sale to a U.S. purchaser can be properly classified as a sale by the producer/exporter, and thus an EP sale, even if the sales contract is between the U.S. purchaser and a U.S. affiliate of the producer/exporter and is executed in the United States. Appellees argue that it can, if the role of the U.S. affiliate is sufficiently minor that the sale passes the PQ Test. The domestic producers argue that the plain language of the statute prevents such a classification. We agree with the domestic producers.

Commerce's three-part PQ Test and much of the Court of International Trade case law reviewing it were created before the enactment of the URAA in 1994. Prior to the URAA, "purchase price" (now EP) was described as:

> the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States.

19 U.S.C. § 1677a(b) (1988). The "exporter's sales price" (now CEP) was defined as:

> the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter.

19 U.S.C. § 1677a(c) (1988). The amendments to the statute most relevant to this issue are the addition of the phrase "outside the United States" to the definition of EP, and "by a seller affiliated with the producer" to the definition of CEP. . . .

Despite these changes to the definitions of EP and CEP, the SAA submitted to Congress with the URAA states that the statutory changes did not alter the "circumstances under which export price (formerly purchase price) versus constructed export price (formerly exporter's sales price) are used." H.R.Rep. No. 103-316, vol. 1 at 822 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 4163. This panel was aware of the SAA when it prepared its original opinion, now withdrawn. Prior to a petition for panel rehearing none of the parties brought to the court's attention, however, that in the statute itself, Congress declared that the SAA is to be considered

> an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.

19 U.S.C. § 3512(d). When confronted with a change in statutory language, we would normally assume Congress intended to effect some change in the meaning of the statute.

See, e.g., Bausch & Lomb, Inc. v. United States, 148 F.3d 1363, 1367 (Fed.Cir.1998) ("A change in the language of a statute is generally construed to import a change in meaning...."). Here, however, the SAA prevents us from making such an assumption and we have revised our opinion primarily to address the authoritative weight given the SAA in the statute.

The PQ Test arises from Commerce's interpretation of the pre-1994 statutory language. In interpreting the pre-1994 statute, the Court of International Trade in *PQ Corporation* focused on whether there was an affiliate relationship between the foreign producer and the U.S. importer as the primary factor enabling Commerce to differentiate between the two sales classifications. In response to Commerce's argument that there was no statutory requirement that "the importer must be an independent party in order to apply [EP]," the court held that:

> [w]hile the statute does not state in so many words that [purchase price] and [exporter's sales price] are to be distinguished by the relationship of the foreign producer to the U.S. importer, the statutory definitions of [purchase price] and [exporters sales price] have been distinguished upon this basis from their inception .... The express terms of the statute make it clear that a U.S. importer's relationship to a foreign producer will affect the determination of whether [purchase price] or [exporter's sales price] will apply.

PQ Corp., 652 F.Supp. at 732-33 (emphasis added). Despite the Court of International Trade's emphasis on the relationship between the importer and the foreign producer, however, the test developed by Commerce after the remand in *PQ Corporation* actually does not directly examine the legal relationship between the producer and the importer, but rather seeks to determine the role played by the importer in the transaction. The agency continued to apply the test after the statute was amended in 1994.

We are confronted here with a complex statutory interpretation task. The language of the old and new statutes is not identical, yet it is apparently intended to be applied to the same effect in the same "circumstances." The court opinion in *PQ Corporation* interpreting the old version of the statute relies on the legal relationship between an exporter and importer, while the test developed by the agency in response to that interpretation examines the role the importer plays in the transaction. Confronted with these potential contradictions, we start by examining the current statute, as it is the clearest and most current expression of congressional intent.

A. 1994 Statute

Read without reference to the old statutory language, the plain meaning of the language enacted by Congress in 1994 focuses on where the sale takes place and whether the foreign producer or exporter and the U.S. importer are affiliated, making these two factors dispositive of the choice between the two classifications.

The text of the 1994 definition of CEP states that CEP is the "price at which the subject merchandise is first sold *in the United States*." 19 U.S.C. § 1677a(a) (emphasis added). In contrast, EP is defined as the price at which the merchandise is first sold "outside the United States." 19 U.S.C. § 1677a(b). Thus, the location of the sale appears to be critical to the distinction between the two categories. Appellees, however, point to a decision of the Court of International Trade holding that the words "outside the United States" were ambiguous, finding that it was unclear whether they described the location of the sale or the location of the producer/exporter. *See Mitsubishi Heavy Indus., Ltd. v. United States*, 15 F.Supp.2d 807, 812 (Ct. Int'l Trade 1998). We do not perceive the same ambiguity. In any event, the trial court's decision is not binding on

us.

When the EP definition is read in conjunction with the CEP definition, the alleged ambiguity in the EP definition disappears. The language of the CEP definition leaves no doubt that the modifier "in the United States" relates to "first sold." The term "outside the United States," read in the context of both the CEP and the EP definitions, as it must be, applies to the locus of the transaction at issue, not the location of the company. Therefore, the critical differences between EP and CEP sales are whether the sale or transaction takes place inside or outside the United States and whether it is made by an affiliate. A sales contract executed in the United States between two entities domiciled in the United States cannot generate a sale "outside the United States." Thus, if "outside the United States" refers to the sale, as the appellees argues in this appeal, one of the parties to the sale or the execution of the contract must also be "outside the United States" for an EP classification to be proper.[8] Accordingly, the conclusion of the *Mitsubishi* court, that the phrase "outside the United States" ambiguously modifies either the sale or the producer/exporter, is incorrect. In general, a producer/exporter in a dumping investigation will always be located outside the United States. Thus, it must be the locus of the transaction that is modified by "outside the United States" in the EP definition for otherwise the description of the producer/exporter would be pure surplusage. Of course, whether a sale is "outside the United States" depends, in part, on whether the parties are or are not located in the United States. A transaction, such as those here, in which both parties are located in the United States and the contract is executed in the United States cannot be said to be "outside the United States." Thus, such a transaction cannot be classified as an EP transaction. Rather, classification as an EP sale requires that one of the parties to the sale be located "outside the United States," for if both parties to the transaction were in the territory of the United States and the transfer of ownership was executed in the United States, it is not possible for the transaction to be outside the United States.

In the *Final Results*, Commerce attempted to circumvent this geographic restriction on the use of EP sales by stating that when the PQ Test was satisfied it "consider[ed] the exporter's selling functions to have been relocated geographically from the country of exportation to the United States, where the [U.S. affiliate] performs them." The trial judge's holding that the PQ Test does not contradict the statute because it is a means of defining whether a sale is "in essence" between a producer/exporter and the unaffiliated buyer suggests the same point. But it is not a valid point because it departs from the factors Congress put in the statute. As discussed above, the plain language of the EP definition precludes classification of a sale between two U.S. entities (*i.e.*, a U.S. affiliate of the producer and a U.S. purchaser) as an EP sale. Thus, the "relocation" concept produces a result that is contrary to the plain language of the statute.

In addition, the Court of International Trade decision in *PQ Corporation* precludes "relocation" of selling activity by holding that the "statute provides no mechanism for imputing actual sales by an importer to that importer's related 'foreign manufacturer or producer of the merchandise' so that [purchase price (now EP)] will apply." *PQ Corp.*, 652 F.Supp. at 733. Thus, Commerce's decision to redefine the activities occurring inside the United States as occurring outside the United States makes an impermissible end-run around both the plain meaning of the statutory language and the mandate of the

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8. While we can hypothesize a sales contract between two U.S. domiciled entities that is entirely executed outside the United States, we make no determination regarding whether such a sale would be classified as an EP or CEP sale.

Court of International Trade in *PQ Corporation*. Congress has made a clear distinction between the two categories based on the geographic location of the transaction; the agency may not circumvent this geographic distinction by "relocating" the activities of the producer/exporter.

Similarly, the statute also distinguishes the categories based on the participation of an affiliate as the seller. The definition of CEP includes sales made by either the producer/exporter or "by a seller affiliated with the producer or exporter." 19 U.S.C. § 1677a(b). EP sales, on the other hand can only be made by the producer or exporter of the merchandise. *See* 19 U.S.C. § 1677a(a). Consequently, while a sale made by a producer or exporter could be either EP or CEP, one made by a U.S. affiliate can only be CEP. Limiting affiliate sales to CEP flows logically from the geographical restriction of the EP definition, as a sale executed in the United States by a U.S. affiliate of the producer or exporter to a U.S. purchaser could not be a sale "outside the United States." The location of the sale and the identity of the seller are critical to distinguishing between the two categories. . . .

The sales contracts in evidence plainly prove that the sales to the unaffiliated U.S. purchasers were made by affiliates of the foreign producers or exporters that are located in the United States. If the importer and the producer/exporter are affiliated, then the first sale to an unaffiliated party is necessarily the sale between the affiliated importer and the unaffiliated purchaser (unless there is another intermediate U.S. affiliate involved, which would have no effect on the analysis). Thus, the sales at issue fall squarely within the definition of CEP as articulated in the 1994 version of the statute.

The Korean producers argue that it is the question of who is the seller that is left unresolved by the statute. Because the terms "seller" and "sold" are undefined in the statute, they are therefore ambiguous, assert the Korean producers. Thus, they argue, this court should accord *Chevron* deference to the PQ Test because Commerce properly developed the test to determine if the U.S. affiliate is indeed a "seller," based on the affiliate's activities. We, however, are not persuaded that this language in the statute is ambiguous.

When a word is undefined in a statute, the agency and the reviewing court normally give the undefined term its ordinary meaning. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). Black's Law Dictionary (6th ed.1990) defines "seller" as "one who has contracted to sell property . . . the party who transfers property in the contract of sale." As to "sold," this court previously addressed the meaning of that term in the definition of the Exporter's Sales Price (now CEP). *See NSK Ltd. v. United States*, 115 F.3d 965, 973 (Fed.Cir.1997). In that case we defined "sold" to require both a "transfer of ownership to an unrelated party and consideration." *Id*. at 975 (emphasis added). We see no reason to depart from those definitions, and therefore hold that the "seller" referred to in the CEP definition is simply one who contracts to sell, and "sold" refers to the transfer of ownership or title. Since there can be no real ambiguity about these terms, contrary to the assertions of the appellees, we are not required to do any analysis under the second part of the *Chevron* test. Rather than impliedly delegating the task of distinguishing between the two types of sales to the agency, Congress did so right in the statute.

The sales activities of the U.S. affiliates of the Korean producers or exporters clearly meet these definitions, as evidenced by the contracts for sales between the U.S. affiliates and the U.S. purchasers. The record in this appeal is not disputed; it was the U.S.

affiliates of the Korean producers that contracted for sale with the unaffiliated U.S. purchasers. The title or ownership passed from the U.S. affiliate to the unaffiliated U.S. purchaser. There were no contracts between the Korean producers and the unaffiliated U.S. purchasers. Thus, the U.S. affiliates were the "sellers," as indicated by the plain language of the statute. Commerce does not require a cumbersome test, examining the activities of the affiliate, to determine whether or not the U.S. affiliate is a seller, when the answer to that question is plain from the face of the contracts governing the sales in question. If Congress had intended the EP versus CEP distinction to be made based on which party set the terms of the deal or on the relative importance of each party's role, it would not have written the statute to distinguish between the two categories based on the location where the sale was made and the affiliation of the party that made the sale.

Congress's intent to fully define EP and CEP without any delegation to Commerce is further evident when the sections are viewed in the context of the rest of the anti-dumping statute. It is common in the anti-dumping statute for Congress to leave decisions about how to make dumping calculations to Commerce's discretion because of its expertise. . . . Accordingly, if Congress had intended for Commerce to use its discretion to determine whether the use of CEP or EP was appropriate, it would have explicitly left that task to the agency as it did with other calculations in the statute....

B. The Statement of Administrative Action

Here, despite the plain meaning of the amended language of the statute, the SAA that accompanied the URAA declares that the "[n]ew section 772 retains the distinction in existing law between 'purchase price' (now called the 'export price') and 'exporters sales price' (now called the 'constructed export price')." The SAA goes on to state that "[n]otwithstanding the change in terminology, no change is intended in the circumstances under which export price . . . versus constructed export price . . . are used." H.R.Rep. No. 103-316, vol. 1 at 822 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 4163. Appellees cite to the SAA as evidence of congressional intent to endorse the PQ Test as a proper interpretation of the new statutory language. We, however, do not so interpret the SAA.

First, the PQ Test is hardly consistent with the pre-1994 statute, read as a whole. Prior to the 1994 amendments, the statute required only that "purchase price" sales be made "prior to the date of importation" without any explicit reference to where the sales had occurred. 19 U.S.C. § 1677a(b) (1988). The "exporters sales price" (now CEP), however, was defined, as it is today, as the "price at which merchandise is sold or agreed to be sold in the United States." 19 U.S.C. § 1677a(c) (1988). Thus, the distinction based on the location of the sale was already present, although less complete, in the prior version of the statute. Use of the PQ Test to "relocate" the sales activity from the producer/exporter to the U.S. affiliate therefore appears inconsistent with the pre-1994 statutory language for the same reasons it is inconsistent with the language of today's statute. . . .

Second, this court has never endorsed the PQ Test as a proper interpretation of the pre-1994 statute. Prior to this case, this court has never considered the legality of the test, much less held that the test is a reasonable interpretation of an ambiguous statute. In fact, when describing the EP/CEP distinction, this court has repeatedly relied on the affiliate relationship between the producer/exporter and the importer. . . . [I]n light of this court's earlier statements on the EP/CEP distinctions and Congress's clarification of the statute in 1994, we do not find the Court of International Trade's endorsement of the PQ Test to reflect an accurate interpretation of the pre-1994 statute.

Furthermore, in situations where the Court of International Trade has reviewed the

application of the PQ Test after the 1994 amendments, it has only upheld applications that resulted in the sales in question being classified as CEP sales, rather than as EP sales. *See, e.g.*, *Mitsubishi*, 15 F.Supp.2d at 815; *U.S. Steel Group v. United States*, 15 F.Supp.2d 892, 903 (Ct. Int'l Trade 1998); *Koenig & Bauer-Albert AG v. United States*, 15 F.Supp.2d 834, 853 (Ct. Int'l Trade 1998). Until this case, the Court of International Trade was not confronted with EP classification of a sale in the United States by an affiliate. In addition, the Court of International Trade itself has expressed reservations about the test, admonishing "[t]his is not an easily administrable test and the court suggests that Commerce attempt to draw some sharper lines." *U.S. Steel Group*, 15 F.Supp.2d at 903.

Finally, there is no indication in the legislative history that Congress intended to retain the PQ Test upon amending the statute because the test is nowhere mentioned. . . .

Accordingly, we hold that if the contract for sale was between a U.S. affiliate of a foreign producer or exporter and an unaffiliated U.S. purchaser, then the sale must be classified as a CEP sale. Stated in terms of the EP definition: if the sales contract is between two entities in the United States, and executed in the United States and title will pass in the United States, it cannot be said to have been a sale "outside the United States"; therefore the sale cannot be an EP sale. Similarly, a sale made by a U.S. affiliate or another party other than the producer or exporter cannot be an EP sale. Thus, we reverse the decision of the Court of International Trade and remand to that court (for remand, if necessary, to the Department of Commerce) for a redetermination of anti-dumping duties that is consistent with this holding.

III. Application of the Fair-Value and Major-Input Provisions

Commerce deemed three affiliated Korean producers, POSCO, POCOS and PSI, to be a single entity for its dumping analysis and levied a single anti-dumping duty on the entire group of related companies (a process referred to as "collapsing"). *See Final Results*, 62 Fed.Reg. at 18,430. Because it considered the separate companies as one entity, rather than separate though related companies, Commerce did not "disregard" the transaction prices among the group members and apply "fair-value" prices instead when determining the constructed value.[10] The so called "fair-value" provision is described in 19 U.S.C. § 1677b(f)(2). . . .

Similarly, because the POSCO companies were "collapsed" into a single entity, Commerce did not apply the major-input provision of 19 U.S.C. § 1677b(f)(3). . . .

While the domestic producers contested the collapsing of POSCO and POCOS below, they do not do so here. Thus, the only question before this court is whether, once duly collapsed, it was permissible for Commerce, in the exercise of its discretion, not to apply the provisions of 19 U.S.C. § 1677b(f)(2) & (3) to underlying transactions between those companies. In the earlier administrative review of this anti-dumping action and in other similar actions, Commerce applied the fair-value and major-input provisions despite collapsing several entities into one.[11] In this second review, however, Commerce concluded that application of those provisions was unwarranted, if not unlawful, because "a decision to treat affiliated parties as a single entity necessitates that transactions among the parties also be valued based on the group as a whole." *Final Results*, 62

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10. The constructed value is meant to create a proxy for the foreign market price by summing up the cost of inputs, processing, and other relevant factors.

11. That Commerce changed its interpretation, however, need not change the court's analysis. *See Chevron*, 467 U.S. at 863 (initial agency interpretation is not "carved in stone").

Fed.Reg. at 18,430.

"Affiliated" persons are defined in the statute as those directly or indirectly owning five percent or more of the voting shares of an organization or two or more persons controlled by or controlling a common person. *See* 19 U.S.C. § 1677(33)(E) & (F) (1994). The domestic producers argue that collapsing for purposes of levying a single anti-dumping duty does not erase corporate form; thus POSCO and POCOS are "affiliated persons" under the statute, and Commerce should still have applied the fair-value and major-input provisions. Appellees argue, and the Court of International Trade upheld Commerce's determination, that once they have been collapsed, POSCO, POCOS and PSI need no longer be treated as affiliated companies, but rather should be treated as one entity for all anti-dumping determination purposes. We may or may not agree that to do so is necessary or wise, but it cannot be fairly said to be an abuse of discretion.

When analyzing transfers between divisions of the same company Commerce need not and does not apply the fair-value or major-input provisions. *See Certain Forged Steel Crankshafts from the United Kingdom*, 61 Fed.Reg. 54,613, 54,614 (Dep't of Commerce 1996). Thus, it is not unreasonable for Commerce to decide not to apply those provisions to affiliates that are properly treated as one company for the balance of the anti-dumping analysis. Both provisions only apply to transactions "between ... persons"; once Commerce has decided to treat the companies as one "person" for purposes of the anti-dumping analysis, it is not statutorily required to apply the provisions.

Indeed, the domestic producers' argument that the statute requires the application of the provisions even to affiliates that were not treated as one entity is contrary to the plain language of the statute, which merely provides that Commerce "may" determine the values in a manner other than the use of the transfer price. Thus, the statute leaves possible application of the fair-value and major-input provisions to the discretion of the agency, such that Commerce could decline to apply those provisions even if the POSCO producers were considered separate affiliates rather than one entity. We therefore affirm the decision of the Court of International Trade insofar as it upholds Commerce's decision not to apply the fair-value and major-input provisions.

2. Injury Determination

The preliminary determination that there is a reasonable indication of material injury, under 19 U.S.C. § 1673b(a), and the final determination that a U.S. industry has been materially injured (or is threatened with material injury) or that establishment of a U.S. industry has been materially retarded, under § 1673d(b), are the responsibility of the ITC. The injury (or threat thereof) must occur "by reason of" the LTFV imports determined by the ITA. *Id*. § 1673d(b)(1). The statutory rules applied by the ITC in making the injury determination are contained in § 1677(7), which defines "material injury" for these purposes to mean "harm which is not inconsequential, immaterial, or unimportant." *Id*. § 1677(7)(A). In making the determination, the ITC is *required* to consider the volume of imports, the price effect of the imports in the United States, and the impact of the imports on domestic producers of "domestic like products,"[1] but only

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1. The term "domestic like product" is defined to mean "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation. . . ." 19 U.S.C. § 1677(10). Notice that, unlike the corresponding concept in § 201 investigations (*see* ITC Automobile Investigation, *supra* at ▬ (differentiating "like product" and "directly comptetitive product")), the "domestic like product" concept in the antidumping context treats "like product" and

to the extent of U.S. production operations. *Id*. § 1677(7)(B). In addition, the ITC *may* consider "such other economic factors as are relevant" to the injury determination. *Id*. § 1677(7)(B). These rules obviously leave a great deal of gray area in terms of specifying the injury. Some guidance is given by the statute as to factors that the ITC *must* include in considering the volume of imports,[2] the price impact,[3] and the impact on producers.[4]

Whatever the guidance available from the statute, the ITC still exercises considerable discretion in making injury determinations. This raises a number of questions about this phase of the antidumping investigation:

1. How are the economic data to be used in making the injury determination?
2. Can the data be aggregated in deciding whether the injury was material?
3. What does it mean to say that the material injury occurred "by reason of" the LTFV imports?
4. To what extent must the ITC look for and assess causes of material injury other than the LTFV imports?
5. How much deference from the courts is the ITC material injury determination entitled to?

In answering these questions, consider the following cases.

TAIWAN SEMICONDUCTOR IND. ASS'N v. UNITED STATES

118 F.Supp.2d 1250 (Ct. Int'l Trade 2000)

POGUE, Judge.

Before the Court is the U.S. International Trade Commission's ("Commission") second remand determination concerning static random access memory semiconductors ("SRAMs") from Taiwan. In its first determination, the Commission concluded that the U.S. SRAM industry was materially injured by reason of imports of SRAMs from Taiwan that were sold at less than fair value ("LTFV"). . . . The Court could not sustain the Commission's affirmative injury determination, however, because the Commission did not adequately explain how it avoided attributing to the subject imports the harmful effects from other known sources of injury. . . . Therefore, we remanded the Commission's affirmative determination for reconsideration consistent with the Court's opinion. . . .

On remand, the Commission again determined that the domestic industry was materially injured by reason of SRAMs from Taiwan. . . . Absent greater explanation, however, the Court again could not sustain the Commission's remand determination. . . . Therefore, we remanded the Commission's first remand determination for reconsideration consistent with the Court's opinion. . . .

In its second remand determination, the Commission now determines that, pursuant to section 735(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673d(b) (1994), "an industry in the United States is not materially injured or threatened with material

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"most simlar" product as alternative versions of the same required element.

2. *See id*. § 1677(7)(C)(i) (concerning volume factor).

3. *Id*. § 1677(7)(C)(ii).

4. *Id*. § 1677(7)(C)(iii).

injury by reason of imports of [SRAMs] from Taiwan that have been found by the Department of Commerce to be sold in the United States at [LTFV]." . . .

[In its discussion of the issues, the court first turned to the question of whether the ITC had conducted its second remand proceedings in accordance with the remand order and otherwise in accordance with law. Excerpts from that portion of the court's analysis are reproduced in Chapter IV, *supra*, at ▬.]

II. Is the Commission's negative injury determination on remand supported by substantial evidence and otherwise in accordance with law?

A. Present Material Injury

In its second remand determination, the Commission concludes that the U.S. SRAM industry was not materially injured by reason of the Taiwanese imports. "The term 'material injury' means harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A). "In examining 'whether [the subject] imports have caused material injury to a domestic industry,' the Commission is required under 19 U.S.C. § 1677(7)(B) to consider three factors: (1) the volume of the subject imports; (2) the effect of the subject imports on prices of domestic like products; and (3) the impact of the subject imports on domestic producers of like products."[8] . . . "Thus, after assessing whether the volume, price effects, and impact of the subject imports on the domestic industry are significant, the statutory 'by reason of' language implicitly requires the Commission to 'determine whether these factors as a whole indicate that the [subject] imports themselves made a material contribution to the injury.' "[10] *[S]ee also* 19 U.S.C. § 1673d(b)(1). Accordingly, "the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports." Statement of Administrative Action, H.R. Doc. No. 316, 103rd Cong., 2nd Sess. (1994), reprinted in Uruguay Round Agreements Act, Legislative History, Vol. VI, at 851-52. . . .

1. Volume

The statute directs the Commission to determine "whether the volume of [the subject imports], or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i).

In the second remand determination, the Commission majority adopted Commissioner Miller's dissenting views to the original affirmative determination. . . . The Commission stated,

> [I]f considered apart from the other factors we are required to consider, the absolute increase in the volume of the subject imports is significant. When evaluated in the context of the conditions of competition, however, the volume of subject imports, and increase in volume, are not sufficient to demonstrate that the subject imports themselves made a material contribution to any injury experienced by the domestic industry.

In its second remand determination, the Commission did not specify which conditions of competition influenced its analysis. Nevertheless, Commissioner Miller elaborated on the context of the conditions of competition in her original statement of her views. Miller noted that, during the period of investigation ("POI"), "U.S. apparent consump-

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8. In addition, the Commission "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." 19 U.S.C. § 1677(7)(B)(ii).

10. The presence or absence of any factor is not necessarily dispositive to a finding of material injury. *See* 19 U.S.C. § 1677(7)(E)(ii). The Commission has discretion to weigh the significance of each factor in light of the circumstances. *See Iwatsu Elec. Co., Ltd. v. United States*, 758 F.Supp. 1506, 1510-11 (1991).

tion of SRAMs increased substantially...." . . . "In the context of this growing market," Miller continued, "U.S. SRAM producers lost considerable market share to imported SRAMs." . . . Based on the record Miller concluded, however, that the domestic industry lost market share "overwhelmingly to non-subject imports, rather than to subject imports from Taiwan." . . . Substantial evidence supports these findings.[12] Because there was "little gain in market share attributable to [the] subject imports [,]" Miller concluded that the increase in Taiwanese imports was not significant in relative terms. . . .

Section 1677(7)(C)(i) affords the Commission the discretion "to analyze the volume of imports in either an absolute or relative sense depending upon what is appropriate under the circumstances." *USX Corp. v. United States,* 698 F.Supp. 234, 238 (1988). In [the first remand order], the Court held that substantial evidence supported the conclusion that the subject imports' absolute increase over the POI was significant. . . . Nevertheless, given the substantial record evidence indicating that U.S. consumption also increased substantially, . . . and that non-subject imports greatly exceeded the Taiwanese SRAMs in terms of both absolute and relative increases in volume, . . . it was reasonable for the Commission to evaluate the significance of the subject imports in relative terms. Because substantial evidence supports the conclusion that the volume of the subject imports was not significant relative to U.S. consumption, it was reasonable for the Commission to conclude in its second remand determination that the volume of the subject imports lacked significance overall.

In rebuttal, [Defendant-Intervenor, Micron Technology, Inc. ("Micron")] argues, "Nowhere does the statute allow the Commission to negate the significance of import volume based on conditions of competition. The statute requires the significance of import volume be assessed solely in terms of increases considered on an absolute or relative basis." Micron is incorrect. First, the conditions of competition that the Commission largely referred to were the substantial increase in U.S. apparent consumption and the much greater market share held by the non-subject imports. . . . Section 1677(7)(C)(i) clearly allows the Commission to take such factors into account in determining whether the volume of subject imports is significant relative to U.S. consumption. . . . Furthermore, the Commission may consider the broader conditions of competition affecting the domestic industry in evaluating the significance of the volume of subject imports. *See Angus Chemical Co. v. United States,* 944 F.Supp. 943, 952-53 (1996) ("The Commission evaluates import volume 'in light of the 'conditions of trade, competition, and development regarding the industry concerned.'") (quoting *General Motors Corp. v. United States,* 827 F.Supp. 774, 787 (1993)), *aff'd,* 140 F.3d 1478 (Fed.Cir.1998); *see also* S.Rep. No. 96-249, 96th Cong., 1st Sess. at 88 ("The significance of the various factors affecting an industry will depend upon the facts of each particular case.").

Therefore, substantial evidence supports the Commission's conclusion on second remand that the subject imports' volume was not significant.

2. Price Effects

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In its second remand determination, the Commission majority adopted and elaborated upon Commissioner Miller's discussion of price effects from her dissenting views to the original affirmative determination. . . . The Commission found that "substantial evidence

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12. Over the POI, the Taiwanese imports' market share increased by just over 2%, while the non-subject imports gained just under 15% of the U.S. SRAM market. . . . Moreover, the non-subject imports held a much greater share of the U.S. market throughout the POI. . . .

support[ed] the conclusion that price underselling by the subject imports was significant." . . . Nevertheless, the Commission concluded that the Taiwanese imports did not have significant price depressing or suppressing effects. ... *[S]ee also BIC Corp. v. United States,* 964 F.Supp. 391, 401 (1997) ("Evidence of underselling alone is legally insufficient to support an affirmative injury determination.").

The Commission collected price information for six SRAM products, designating them products 1 through 6. The Commission majority noted that domestic prices for SRAM products 1 through 6 generally "increased substantially during 1994 and through the third quarter of 1995[;] [p]rices then fell substantially beginning in the last quarter of 1995 and throughout 1996, before leveling off somewhat in 1997." . . . The record evidence reasonably reflects these domestic price trends. . . . The Commission concluded, however, that subject imports did not contribute significantly to the price trends. . . .

In so finding, the Commission emphasized what it characterized as the "strong evidence of a lack of correlation and causative effect between the subject imports and domestic prices." . . . The Commission stated,

> With respect to products 3 and 5, which made up a greater share of the subject imports and of the domestic product than the rest of the identified products, the subject imports consistently undersold the domestic product by substantial margins during the time that domestic prices rose, yet mostly oversold the domestic product in 1996 and 1997 when prices fell.

. . . Substantial record evidence supports these conclusions.[13] . . .

Micron notes that in [the second remand order] the Court held that substantial evidence supported the conclusion that Taiwanese products 3 and 5 had price depressing effects. . . . Nevertheless, the possibility of drawing two inconsistent conclusions does not prevent the Commission's findings in its second remand determination from being supported by substantial evidence. *See* [*Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966).] Based on the evidence indicating mixed patterns of overselling and underselling by Taiwanese products 3 and 5 during the period in which domestic prices were consistently declining, the Commission's conclusion that Taiwanese products 3 and 5 did not significantly affect domestic prices is reasonable.

The Commission majority next addressed products 1 and 2. First, the Commission noted that these products "accounted for a small share of shipments of domestic and subject import products...." The Commission also pointed out that products 1 and 2 "were relatively new products during the period of investigation, with significant volumes beginning in the fourth quarter of 1995 for product 1 and the first quarter of 1997 for product 2." . . . Substantial evidence supports these conclusions.[14] Moreover, the record indicates that "SRAMs begin their life cycle as a value-added product but are quickly transformed into a commodity product ...[;] [a]s a result, SRAM prices

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13. Combined, Taiwanese products 3 and 5 accounted for over 50% of the Taiwanese SRAM imports in 1996 and over 67% in 1997. . . . Meanwhile, products 3 and 5 accounted for just less than 40% of U.S. shipments in 1996 and over 60% of U.S. shipments in 1997. . . .

Taiwanese product 3 oversold the domestic product 3 in seven months of 1996 and in ten months of 1997. . . . Taiwanese product 5 oversold the domestic product 5 in seven months of 1996 and in eight months of 1997. . . .

14. Combined, Taiwanese products 1 and 2 accounted for slightly over 20% of Taiwanese imports in 1996 and roughly 25% of Taiwanese imports in 1997. . . . Meanwhile, products 1 and 2 accounted for less than 5% of U.S. shipments in 1996 and less than 10% of U.S. shipments in 1997. . . .

historically show a pattern of steep price declines as the products move along market and production life cycles." . . .

Based on this information, the Commission concluded that the subject imports did not have significant price depressing effects on domestic products 1 and 2. Regarding product 1, the Commission first noted that, from January 1996 through January 1997, the "price of domestic product 1 fell at roughly the same rate as prices of domestic products 3 and 5." . . . The record supports this finding. . . . Yet, the Commission claimed, because product 1 was a newer product, "prices for product 1 would be expected to fall more rapidly in 1996 than prices for products 3 and 5." . . . That the "prices for domestic product 1 fell less than would be expected based on the price trends for [domestic] products 3 and 5[,]" the Commission reasoned, suggested that the subject imports did not significantly affect domestic prices for product 1. . . .

The Commission's conclusions regarding product 1 are reasonable. The record indicates that the most dramatic domestic price declines for all products generally occurred in 1996. . . . Based on the evidence that domestic prices for products 1, 3, and 5 fell at approximately the same rate during this year even though Taiwanese products 3 and 5 were both overselling and underselling while Taiwanese product 1 was consistently underselling, the Commission majority reasonably concluded that there was a lack of correlation between the pricing of the subject imports and domestic prices for product 1.

Regarding product 2, the Commission stated, "[P]rices of domestic product 2 fluctuated upward from January through June of 1997, the only year for which we have comparable data, despite [very high margins of underselling by the Taiwanese imports in product 2]." . . . Substantial record evidence supports this finding. . . . From this evidence the Commission concluded, "Thus, the limited data for product 2 also demonstrate[d] an absence of a significant price depressing or suppressing effect by subject imports." . . . The record reasonably supports the Commission's conclusion.

Micron challenges the Commission majority's conclusions as to products 1 and 2, pointing to the Court's holding in [the second remand order] that substantial evidence supported the conclusions that the significant underselling of newer Taiwanese products 1 and 2 had price depressing effects. . . . Again, however, the possibility of drawing two inconsistent conclusions does not prevent the Commission's finding from being supported by substantial evidence. *See Consolo,* 383 U.S. at 620. The record as a whole reasonably supports the Commission majority's conclusion that the subject imports did not have significant price depressing or suppressing effects on domestic products 1 and 2.

Based on the evidence of a lack of correlation between the prices of the subject imports and the domestic products, the Commission majority reasonably concluded that the domestic price declines were not "attributable in significant part to the subject imports."[15] . . . In addition, the Commission concluded that the domestic price trends, "including price increases in 1994 and much of 1995, and price declines starting in the fourth quarter of 1995, [were] attributable to market forces other than the subject

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15. Regarding products 4 and 6, the Commission majority stated that the price data collected on these products "[were] not useful in [its] analysis because of the very small quantities sold." . . . "[I]t is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence." *Maine Potato Council v. United States,* 613 F.Supp. 1237, 1244 (1985). The record supports the Commission's conclusion that the quantities of products 4 and 6 were relatively small. . . . Therefore, the Commission reasonably discounted the data regarding products 4 and 6 in its analysis.

imports." . . .

First, the Commission majority noted the undersupply and oversupply conditions that resulted, in part, due to an inaccurate demand forecast. . . . Substantial record evidence supports the Commission's finding that the undersupply condition and the following oversupply condition significantly contributed to the domestic price increases in 1995 and subsequent price declines in 1996. . . .

The Commission majority also cited the "learning curve" effect as a factor in the domestic price declines, while noting that "the decline was temporarily interrupted by the inaccurate forecast of demand growth in 1995...." The learning curve is a phenomenon by which a firm's manufacturing costs, and hence its prices, decrease as it becomes more efficient in production. . . . Substantial record evidence supports the Commission's conclusion that the learning curve played a role in the domestic price declines. . . .

Based on the evidence indicating a lack of correlation between the Taiwanese imports and domestic prices, as well as the evidence that other market factors caused the domestic price declines,[17] the Commission majority reasonably concluded that the subject imports did not significantly depress or suppress domestic prices.

3. Impact

The statute directs the Commission to examine the consequent impact of the subject imports on the domestic industry. *See* 19 U.S.C. § 1677(7)(C)(iii). The Commission must consider "all relevant economic factors which have a bearing on the state of the industry in the United States, including but not limited to" those enumerated. *Id.* . . . In its second remand determination, the Commission majority adopted Commissioner Miller's views regarding the impact of the subject imports on the domestic industry. . . .

In her dissenting views to the original determination, Commissioner Miller analyzed each of the factors enumerated in § 1677(7)(C)(iii) and found that the domestic industry's financial performance had worsened in the latter years of the POI. . . . Nevertheless, Miller concluded that the subject imports did not cause the deterioration. . . .

Consistent with Miller's analysis, the Commission majority concluded that the domestic industry suffered a "declining financial performance primarily [as] a result of price declines...." Because the subject imports did not have significant price depressing effects, however, the Commission concluded that the subject imports did not make a material contribution to the domestic industry's injury. . . .

The Commission majority's determination is reasonable. In [the second remand order], we noted that the record reasonably supported the conclusion that the domestic industry was suffering material injury as a result of its weakened financial condition in 1996 and 1997. . . . In addition, based on the evidence of the domestic price declines beginning in the last quarter of 1995 and continuing through 1996, . . . the Commission reasonably concluded that price declines were a primary cause of the domestic industry's poor financial condition. Finally, because substantial evidence supports the conclusion that the subject imports did not have significant price depressing effects, the Commission reasonably concluded that the subject imports did not make a material contribution to the domestic industry's injury.

In addition, the Commission majority discussed the evidence of lost revenue

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17. In addition, the Commission noted the competition in products 1, 2, 3, and 5 from non-subject imports, although the Commission appears to ascribe less weight to this factor than to the demand misforecast and the learning curve effect. . . .

allegations. . . . In the first remand determination, Commissioner Bragg concluded that the "relationship between [the confirmed revenue losses for product 5] and industry operating income [losses] ... provide[d] perhaps the most direct possible evidence of the significant effects of subject imports." . . . In [the second remand order], however, we held that, absent an explanation of how it was reasonable to rely on four of the confirmed lost revenue allegations (the "4Q95-1Q97" allegations), the Court could not sustain as supported by substantial evidence the conclusion that the instances of lost revenues for product 5 had a significant impact on the domestic industry's operating income. . . .

"The Commission calculates lost revenues from the equation: (producer's initial U.S. price quote – U.S. price quote accepted by buyer) x (quantity sold)." The four 4Q95-1Q97 allegations bore a quote date encompassing the fourth quarter of 1995 through the first quarter of 1997. Considering the steady decline in domestic prices from late 1995 through 1997, the Court reasoned that the use of such a long quote date potentially inflated the measurement of revenue lost due to competition from the subject imports. . . . Combined, the 4Q95-1Q97 allegations accounted for approximately 94% of all confirmed lost revenue allegations for product 5. . . .

On second remand, the Commission reopened the record to gather additional information on the 1Q95-4Q97 lost revenue allegations. The Commission learned that the purchaser's records regarding these allegations had been destroyed. . . . The Commission, however, did speak with the employee who had confirmed the original lost revenue allegations. The employee indicated that prices were typically negotiated on a quarterly basis and that the differential in price quotes in the allegations stayed about the same from the fourth quarter of 1995 through the first quarter of 1997. . . . In addition, the employee "indicated that his firm probably did use import quotes to get prices reduced in order to maximize profitability." . . .

In its second remand determination, the Commission majority concluded that "the lost revenue allegations in this investigation [did] not constitute sufficient evidence to indicate that the subject imports had a significant impact on the domestic industry." Second Remand Determination at 8. The Commission noted that, by quantity and value, the 4Q95-1Q97 allegations constituted "the great bulk" of the lost revenues. ... Yet, since prices were negotiated on a quarterly basis, the Commission could not precisely quantify the amount of revenue implicated by these allegations without the rejected and accepted price quotes for each quarter of the time period covered in the allegation (the fourth quarter of 1995 through the first quarter of 1997). . . . Consequently, although the Commission found that the domestic revenues lost due to the 4Q95-1Q97 allegations "[did] not appear insubstantial[,]" it nevertheless concluded that, "in the absence of significant price depressing or suppressing effects by the subject imports, ... the lost revenue allegations alone were insufficient to demonstrate that the subject imports themselves had a significant impact on the domestic industry." . . .

The Commission's conclusions are reasonable. "[I]t is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence." *Maine Potato,* 613 F.Supp. at 1244. Given that the purchaser's records regarding the 4Q95-1Q97 allegations had been destroyed, it was reasonable for the Commission to accord less weight to their value. Moreover, the evidence indicating that Taiwanese product 5 generally oversold the domestic product in 1996 and 1997 directly undermines the conclusion that U.S. producers suffered heavy revenue losses in product 5 due to price competition from Taiwanese imports. . . . Taken together with the substantial evidence that the subject

imports did not have significant price depressing or suppressing effects, the Commission reasonably concluded that lost revenue allegations alone were insufficient to demonstrate that the subject imports themselves had a material negative impact on the domestic industry. . . .

B. Threat of Material Injury

Pursuant to 19 U.S.C. § 1673d(b)(1)(A), the Commission majority also addressed whether the domestic SRAM industry is threatened with material injury. In examining the causal connection between the LTFV imports and the threatened material injury, the statute requires the Commission to consider, "among other relevant economic factors," nine enumerated factors. Seven factors are relevant to consider in this case. . . .[19] [The court then discussed the seven factors identified in 19 U.S.C. § 1677(7)(F)(i)(II)-(VI), (VIII)-(IX).][20]

The Commission evaluates these factors by applying the standards set forth in § 1677(7)(F)(ii). The Commission is to "consider the factors set forth [above] as a whole in making a determination of whether further dumped ... imports are imminent and whether material injury by reason of imports would occur unless an order is issued...." *Id.* Moreover, the "determination may not be made on the basis of mere conjecture or supposition." *Id.* In sum, "the Commission must determine whether the LTFV imports themselves made a material contribution to the threatened material injury." *NEC Corp. v. Dep't of Commerce,* 36 F.Supp.2d 380, 392 (1998).

[The ITC's second remand determination found that the U.S. SRAM industry was not threatened with material injury by reason of the Taiwanese imports. In so doing so, the majority adopted Commissioner Miller's discussion of the threat of material injury from her dissenting views to the original determination. The court reviewed the analysis of each relevant statutory factor, and held that the record reasonably supported the majority's conclusions.]

In its rebuttal brief, Micron argues that the record evidence indicates that the domestic industry is threatened with material injury by reason of the subject imports. . . . That Micron "can hypothesize a reasonable basis for a contrary determination[, however,] is neither surprising nor persuasive." *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 936 (1984). The Court concludes that, based on a consideration of the record evidence and the § 1677(7)(F)(i) factors as a whole, the Commission majority reasonably determined that the U.S. SRAM industry is not threatened with material injury by reason of the subject imports.

NIPPON STEEL CORPORATION v. UNITED STATES

182 F.Supp.2d 1330 (Ct. Intl. Trade 2001)

RESTANI, J.

Nippon Steel Corporation, NKK Corporation, Kawasaki Steel Corporation, and Toyo Kohan Co., Ltd., (collectively "Nippon" or "Plaintiffs"), respondents in the underlying investigation, move for judgment upon the agency record. . . . At issue is the final determination of the International Trade Commission (the "Commission") in *Tin- and*

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19. Neither a countervailable subsidy (factor I) nor a raw agricultural product (factor VII) is involved in this case.

20. "The presence or absence of any factor which the Commission is required to consider under [§ 1677(7)(F)(i)] shall not necessarily give decisive guidance with respect to the determination." 19 U.S.C. § 1677(7)(F)(ii).

Chromium-Coated Steel Sheet From Japan, 65 Fed.Reg. 50005, USITC Pub. 3300, Inv. No. 731-TA-860 (final determ.) (Aug.2000) (hereinafter "Final Determination"). Nippon first contests the Commission's final affirmative material injury determination in the Tin- and Chromium-Coated Steel Sheet (TCCSS) investigation on the grounds that political interference with the Commission's deliberations violated Plaintiff's right to procedural due process. Second, Nippon challenges the Commission's use of aggregated data in making its injury determination, and contends that its findings with respect to the effects of subject import volume and prices are not supported by substantial evidence. Third, Nippon argues that the Commission did not adequately assess alternative causes of material injury. . . .

Factual and Procedural Background

The Commission initiated an antidumping investigation of TCCSS imports[1] pursuant to a petition filed in November 1999 by Weirton Steel Corporation ("Weirton") and two labor unions. None of the other six U.S. producers of TCCSS joined the petition, but all participated in the investigation. . . . The Commission held a hearing on November 18, 1999, at which it heard testimony from the parties and industry representatives. . . .

In December 1999, the Commission issued an affirmative preliminary determination of material injury. On June 29, 2000, the Commission held a public hearing at which four of the largest TCCSS purchasers in the U.S. market testified, as did seven Members of Congress, including U.S. Senator John D. Rockefeller IV. . . . In June 2000, the Department of Commerce issued final antidumping duty margins as follows: 95.29 percent for Kawasaki, 95.29 percent for Nippon, 95.29 percent for Toyo Kohan and 32.52 percent for all others.

In August 2000, the Commission, in a 4-2 vote, determined that Japanese imports of TCCSS were being sold at less than fair value ("LTFV") and, as a result, were both materially injuring and threatening further material injury to an industry in the United States. In evaluating the relevant factors, the Commission first concluded that Japanese import prices "depressed and suppressed domestic [producers'] prices to a significant degree." This conclusion rested principally on several factual findings regarding, *inter alia*, (1) the existence of "underselling" by Japanese suppliers; (2) the industry practice of establishing prices via negotiations for annual requirements contracts; (3) the relative importance of non-price factors; and (4) allegations of lost sales and lost revenue because of subject imports. Second, the Commission concluded that the volume of subject imports grew rapidly over the period of investigations. Finally, the Commission concluded that the domestic industry's financial performance was poor throughout the period of investigation, with the worst results coinciding with the largest increase in imports during the first three quarters of 1999.

Nippon appeals the Commission's final determination of material injury, claiming that Senator Rockefeller's testimony appeared to and did impermissibly influence the Commission's final determination. Nippon also contests the Commission's findings with respect to volume, price effects, and overall causation of injury.

Discussion

I. Congressional Interference

[Nippon claimed that, in testimony before the ITC during the final phase of the investigation, Senator John D. Rockefeller IV threatened the Commission with reduction

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1. The Department of Commerce ("Commerce") defined the imported merchandise within the scope of the investigation generally as "tin mill flat rolled products that are coated or plated with tin, chromium or chromium oxides." *Tin- and Chromium-Coated Steel from Japan*, 65 Fed. Reg. 39,364, 39,365 (Dep't Comm.2000) (final determ.).

of congressional appropriations to a subdivision of the ITC if Nippon prevailed. The court rejected the assertion, and concluded on this issue as follows.]

. . . [T]here is nothing in the record to support a finding that Senator Rockefeller's testimony affected the Commission's decision-making at all. The Commission's determination is considered and replete with citation to and analysis of the factual findings in the Staff Report. Accordingly, Nippon fails to establish that Senator Rockefeller's testimony improperly affected the Commission's decision, or that it gives an appearance of partiality by the Commission.

II. Material Injury

To determine whether the subject imports have caused material injury to a domestic industry, the Commission is required to consider three factors: (1) the volume of the subject imports; (2) the effect of the subject imports on prices of domestic like products; and (3) the impact of the subject imports on domestic producers of like products. *See* 19 U.S.C. § 1677(7)(B). Nippon disputes the Commission's findings with respect to volume and price effects. Although Nippon does not directly challenge the Commission's findings regarding the impact on the domestic industry, Nippon does dispute the Commission's overall conclusion that material injury was "by reason of" subject imports. *See* 19 U.S.C. § 1673d(b).

A. Volume

Under 19 U.S.C. § 1677(7)(C)(i), the Commission shall consider "whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." "It is the significance of a quantity of imports, and not absolute volume alone, that must guide ITC's analysis under section 1677(7)." *USX Corp. v. United States*, 655 F.Supp. 487, 490 (1987); *see also Atlantic Sugar, Ltd. v. United States*, 519 F.Supp. 916, 921-22 (1981). There is no minimum rate of increase in subject import volume or a baseline percentage of market share for subject imports, above which volume will be considered "significant." Congress has specified that "for one industry, an apparently small volume of imports may have a significant impact on the market; for another the same volume might not be significant." H.R. Rep. 317, 96th Cong., 1st Sess. 46 (1979); *see also* S.Rep. No. 96-249, 96th Cong., 1st Sess. at 88 ("The significance of the various factors affecting an industry will depend upon the facts of each particular case."). Thus, for the Commission's findings under section 1677(7)(C)(i) to be supported by substantial evidence, the Commission must analyze the volume and market share data in the context of conditions of competition. This is especially crucial where, as here, subject imports represent a small percentage of market share relative to that held by the domestic industry.

1. Domestic Market Share and Apparent Domestic Consumption

In determining the significance of subject import volume, the Commission must assess the extent to which, if at all, subject imports "captured" market share from the domestic industry over the POI. This inquiry typically entails accounting for an increase or decrease in domestic producer's market share and in domestic consumption overall. *See, e.g., Taiwan Semiconductor Indus. Ass'n v. United States*, 118 F.Supp.2d 1250, 1258 (Ct. Int'l Trade 2000) (sustaining Commission's negative material injury determination based on a finding that volume lacked significance in relative terms where there was a "substantial increase in U.S. apparent consumption" and there was a greater market share held by non-subject imports). For the volume of subject imports to be considered significant, there is no requirement that subject imports account for *all* of the decline in domestic industry's market share. It is sufficient that the Commission point

to evidence showing that subject imports captured a substantial portion of market share from the domestic industry.

Here, the Commission found that, in absolute terms, tons imported from Japan increased by 85.9 percent between 1997 and 1999 and "continued to increase rapidly through the first quarter of 2000." . . .[8] The Commission calculated that "the quantity of subject imports increased by 35.6 percent between 1997 and 1998; by 37.0 percent between 1998 and 1999; and was 8.1 percent higher in the first quarter of 2000 than in the first quarter of 1999." . . . After apparently deeming these absolute increases in volume facially significant, the Commission determined that because the increase in volume of subject imports took place over a period of declining domestic consumption, the increase in market share of subject imports over the POI was also significant.

The record reflects that the domestic producers' market share did in fact decline over the POI, as did domestic consumption overall.[10] Nippon does not dispute these facts. The record shows that the amount by which domestic producers lost market share over the POI [7.7 percentage points] is significantly higher than the overall increase in non-subject import market share. Thus, there is substantial evidence to support the conclusion that Japanese imports displaced a significant portion of the domestic industry's declining market share.

2. Regional Concentration of Competition

Notwithstanding evidence of the concurrent decline in domestic market share and consumption, Nippon claims that the Commission did not adequately account for characteristics of the TCCSS market that would preclude a finding that subject import volume was significant. Nippon does not, and indeed could not, assert that the Commission was *required* to conduct a market segmentation analysis. Rather, Nippon asserts that the Commission must support its finding of significance by at least taking into account regional concentration of shipments as a "condition of competition." In this case, the court agrees, as apparently does the Commission.[12] Though ultimately deeming the TCCSS market "national," the Commission described the conditions of the market in terms of regional concentration of competition. The Commission stated:

The market for TCCSS is a national market. While most domestic producers are

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8. The quantity of imports of the subject merchandise from Japan was 181,287 short tons in 1997; 245,872 short tons in 1998; 336,961 short tons in 1999; and 98,854 short tons in the first quarter of 2000. . . .

10. . . . Even if consumption is more properly characterized as remaining "stable" over the POI, this does not detract from the substantiality of the Commission's findings. Total U.S. consumption need not in all cases be in decline for an increase in the volume of subject imports to be significant. As the ultimate determination to be made is whether subject imports displaced domestic product, there is nothing to support the proposition that subject import volume cannot be considered significant where U.S. consumption is stable or even increasing, depending on other market indicators that speak to such displacement. For example, in *Companhia Paulista de Ferro-Ligas v. United States*, 20 CIT 473, 476-77 (1996), the court sustained the Commission's affirmative material injury determination where volume of subject imports rose by over 200 percent and the importers' share of domestic consumption increased substantially, notwithstanding evidence of stable or increasing domestic market share.

12. The Commission does not argue that regional concentration of competition or subdivisions of a market, either in product or geographic terms, cannot constitute a "condition of competition" that may or may not vitiate a finding that subject import volume was significant. There is no statutory requirement that the Commission conduct a "market segmentation" analysis in any particular case. "[N]either the governing statute nor its legislative history requires adoption of any particular analysis where a market may consist of several segments." *Acciai Speciali Terni, S.p.a. v. United States*, 19 CIT 1051, 1056 (1995) (citing *Copperweld Corp. v. United States*, 162, 682 F.Supp. 552, 566 (1988)). That a "market segmentation" analysis may not be required in all cases, however, does not absolve the Commission of its general duty to analyze volume or price effects in terms of relevant conditions of competition. Although the question of the importance of market segmentation often relates to *product* subcategories, *see, e.g., Encon Indus. v. United States*, 16 CIT 840, 842 (1992), it is clear that geographic concentration of sales may also be a condition of competition potentially having an effect on the significance of import volume and price effects.

> located in the East and Midwest and many tend to ship much of their production to destinations near their plants, one U.S. producer ... is located on the West Coast, and another ... ships nearly half of its volume to purchasers located on the West Coast. With one exception ... all domestic producers sell to purchasers on the West Coast, notwithstanding the fact that generally they must absorb the cost of transporting their shipments to these purchasers. Moreover, Japanese merchandise also competes throughout the United States. Indeed, only non-subject imports do not compete throughout the United States, as significant head-to-head competition in the West is limited to U.S. and Japanese TCCSS.

In its volume analysis, the Commission found that "imports from Japan to the West Coast did not attenuate subject imports' negative impact on the domestic industry as a whole" for three reasons: (1) the TCCSS market is a national market where "U.S. producers, although mainly located in the East and the Midwest, compete throughout the United States"; (2) subject imports increased over the period of investigation "not only in the West Coast but also in the remainder of the United States," while domestic shipments declined throughout the country; and (3) the only U.S. producer located on the West Coast experienced declines in shipments, price, and financial performance similar to those declines experienced by other domestic producers over the same period." . . .

a. *Attenuated Competition*

Nippon claims that competition was so attenuated as to preclude a finding that the volume of subject imports was "significant" on the ground that domestic TCCSS producers concentrate on local sales. In support of its conclusion that domestic producers compete nationally, the Commission relied on data in the Staff Report regarding shipments to the West by domestic producers expressed as a percentage of each producer's total domestic shipments.[13] Each domestic producer was assigned a percentage that covered the entire POI rather than for each year. The Staff Report indicated that competition among firms was characterized by geographical concentration of sales: "[N]one of the [U.S.] firms possesses a dominating market share. However, U.S. producers are geographically spaced and tend to concentrate on certain regions of the United States to minimize freight cost and shipping times, with some territorial overlap with other producers." . . . The Staff Report did not indicate that this geographical concentration was of such extent that regions of the country are insulated from competition. That producers may concentrate on local sales is not inconsistent with the Commission's finding that producers compete nationally, and does not necessarily equate to insubstantial competition with Japanese imports.

There is no evidence that subject imports to the East and Midwest were insubstantial, much less non-existent. Thus, although Japanese imports compete *more directly* with domestic product in the West, Japanese imports apparently compete throughout the country with all producers. Nippon has not pointed to any evidence that Japanese imports affected the East and Midwest in so attenuated a fashion as to preclude any adverse impact on the domestic industry as a whole in terms of volume or price. The court therefore declines Nippon's invitation to second-guess the weight the Commission

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13. . . . Actual amounts shipped to the West by these producers were not indicated, nor were separate percentages available for each year under investigation. Many of the purchasers apparently have locations across the country and purchase volume was not listed by facility, so the court is unable to reconstruct domestic shipments by region simply by putting purchasers in groups according to region.

assigned the volume of Japanese imports shipped to the West or to the rest of the country, nor will the court recalibrate the relative degree of intensity of competition across these regions.

b. *Correlation*

Nippon argues that the data disaggregated according to geographical zones of competition shows a lack of correlation between the decrease in domestic market share and the increase of subject import volume. Nippon asserts the Commission majority's findings of a consistency in trends across the country is factually incorrect because (1) the two principal West Coast suppliers actually increased their shipments to the West from 1998 to 1999; and (2) western areas of direct Japanese-U.S. competition fared better financially than the rest of the country, as evidenced by the relative performance of the only U.S. producer located on the West Coast.

Nippon's statement that the only two principal West Coast producers increased their shipments to the West from 1998 to 1999 is misleading in that, by omitting data for 1997, it avoids the question of whether shipments by these suppliers increased *overall* during the POI. Under Nippon's method for calculating these 1998 and 1999 figures, the total shipments to the West by these two producers in 1997 is higher than in 1998 or 1999. Thus, there is a net decline in shipments by these two producers to the West over the POI, under Nippon's own methodology.

Even if the combined total of shipments to the West by these two producers did increase from 1997 to 1999, the record supports the Commission's conclusion that the financial performance of the U.S. producer located on the West Coast deteriorated as did the other U.S. producers, even if only somewhat less rapidly. The Commission is not under an obligation to find an *exact* correlation between subject import volume and financial performance, nor must the data be devoid of any inconsistencies. The Commission's overall trend analysis of the data of a particular producer's shipments and financial performance is sufficient to support its conclusions.

Accordingly, the court finds that in isolation the Commission's determination with respect to the significance of subject import volume is supported by substantial evidence. Under the "substantial evidence" standard of review, however, "the court must determine whether ITC's conclusions are supported by the evidence on the record *as a whole." USX Corp.*, 655 F.Supp. at 489 (emphasis in original). Therefore, this court must determine whether the Commission's conclusions with respect to price effects of subject imports is supported by substantial evidence.

B. Effect of Subject Imports on Domestic Prices

Under 19 U.S.C. § 1677(7)(C)(ii), "[i]n evaluating the price effects of subject merchandise on prices, the Commission shall consider whether (I) there has been a significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree." Nippon claims that the majority's methodology of using aggregate pricing data skewed its underselling analysis and masked a lack of correlation between subject imports and the decline in TCCSS prices. Nippon also claims that the Commission lacked substantial evidence to support its findings with respect to (1) price sensitivity; (2) the purchasers' use of Japanese pricing in negotiating with U.S. suppliers; and (3) lost sales and revenue allegations.

1. Methodology

a. *Underselling*

The Commission majority determined that the frequency and magnitude of underselling increased "dramatically" over the POI. . . . With respect to the frequency of underselling, the Commission majority found that "in 1997, four bids out of thirteen [30 percent of comparisons made] undersold the domestic producers' bids. In 1998, seven out of sixteen [44 percent] bids undersold domestic bids. By 1999 that number had risen to 21 out of 25 [84 percent] bids." . . .[18] The Commission further found that there was a significant increase in the magnitude of the underselling while "in 1997 Japanese bids were generally not underselling domestic bids. In 1998, Japanese bids undersold domestic bids by 0.70 percent on average and by 1999, when subject import volume was greatest, the magnitude of underselling had risen to 5.77 percent on average."

Nippon challenges the ITC's finding of underselling on the ground that a particular purchaser reported separate bidding information for three different tin-mill products purchased at each of its three facilities, while the other large purchasers submitted a unified pricing chart detailing a single bid price for each supplier. Nippon argues that data for this purchaser was consequently "over-represented" on account of the Commission's methodology of counting "instances" of underselling without regard to the actual volumes purchased. The Commission contends that its reliance on aggregate pricing data is consistent with Commission practice and has been sustained by this court.

(1) *Aggregate Pricing Data*

As a preliminary matter, generally the Commission is not obligated to conduct a price comparison analysis that accounts for variations in sales volumes. *See, e.g., Metallverken Nederland B.V. v. United States*, 13 CIT 1013, 1024 (1989) (sustaining price comparisons based on largest quarterly sales). Nor is the Commission generally required to make a disaggregated analysis of material injury. *See Copperweld Corp.*, 682 F.Supp. at 569. The court in *Copperweld* reasoned as follows:

> Section 1673d(b)(1) required that the [Commission] make and publish a final determination of whether a 'domestic industry' is materially injured by reason of the subject imports. The domestic industry is further defined as 'the domestic producers as a whole of the like product. 19 U.S.C. § 1677(4)(A). This language makes manifestly clear that Congress intended the [Commission] determine whether or not the domestic industry (as a whole) has experienced material injury due to the imports.

Id.

Nevertheless, where the Commission chooses to limit its underselling analysis to a subset of the pricing data available, the Commission must indicate the criteria it used for making the price comparisons. Neither the Final Determination nor the Staff Report explain the methodology used for making price comparisons. The Staff Report merely states that the price comparison table "shows a summary of the number of cases in which the Japanese product's final bid price was (1) below all final bids by the U.S. producers, (2) within the range of U.S. final bids, and (3) above all U.S. prices." . . . At oral argument, the Commission explained that it based its underselling calculations solely on the number of individual bids from purchasers that purchased from both Japanese and

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18. In contrast, the Commission in the Preliminary Determination analyzed underselling by comparing weighted average f.o.b. prices and quantities for U.S. producers with those for Japanese producers. . . . The court also notes that in the Preliminary Determination, the Commission calculated prices from the discount rate, thereby facilitating comparison of the purchasers' purchasing history. It is not clear why the Commission chose to revert to presenting data in terms of discount rate for some purchasers and price for others. On remand, the Commission shall present pricing data in as consistent a manner as possible to facilitate review.

domestic suppliers in a particular year, irrespective of volume, but it does not explain in the Final Determination or in its Response Brief its reason for doing so, or why it chose to reject the quarterly weighted average price calculations made in the Preliminary Determination. Why underselling was judged on such a narrow basis is not clear to the court. The Commission has not pointed to any previous case in which it limited price comparisons in the manner it did here when it had access to a similar set of specific pricing data. Thus, although the Commission generally has the discretion to choose a methodology for analyzing underselling, where it chooses to limit the set of data for comparison, the Commission is at least under an obligation to explain to the court the manner in which it determined an "instance" of underselling, or in some way enable the court to review its calculations and reasoning process. The Commission has not met this obligation in this case.

In addition, the Commission must account for differences in the way that data is reported in order to ensure that its calculations are accurate. The Commission has the discretion to fashion its questionnaires in whatever manner it sees fit. Once the data is received, however, the Commission cannot ignore the manner in which the data is presented, and the Commission cannot rely on the number of instances of underselling without first taking into account how the underlying data is grouped. The Commission is not bound to present the data in the exact manner in which they were reported. In this case, the Commission does not explain in the Final Determination why a particular purchaser's three facilities were counted separately. At oral argument, the Commission explained that each the three facilities negotiated independently from one another and from any central corporate headquarters, yet did not address whether this is the case for the other purchasers who reported volume and pricing data. The court does not accept this insufficient "post hoc rationalization." *See U.H.F.C. Co. v. United States*, 916 F.2d 689, 700 (Fed.Cir.1990) ("Post hoc rationalizations of agency actions first advocated by counsel in court may not serve as the basis for sustaining the agency's determination.").[21]

(2) *Margin of Underselling*

As stated above, the Commission found that "[i]n 1997 Japanese bids were generally not underselling domestic bids. In 1998, Japanese bids undersold domestic bids by 0.70 percent on average and by 1999, when subject import volume was greatest, the magnitude of underselling had risen to 5.77 percent on average." . . . The Final Determination cites to an apparently non-existent "Table V-16" as support for its margin of underselling figures. If this table existed, it appears that it was removed from the final version of the Staff Report, thereby precluding any meaningful review of the Commission's conclusions in this regard. Furthermore, the Commission has not met its burden of establishing why these margins, assuming the figures are accurate, are significant. For example, it may be that 2.156 percent–the average margin of underselling over the POI–falls within the range of price differentials that purchasers on the whole indicated would induce them to switch suppliers, but the Commissioners did not analyze the magnitude of selling in relation to this information. . . . Logically, a rapid rate of increase nonetheless may be immaterial if, for example, the margin never goes above a price differential that would cause purchasers to change suppliers to any significant degree. Nor did the Commission analyze whether the undisputed lead-time advantage held by the domestic industry in fact translated into an ability to maintain a price

21. Similarly, the Commission does not explain why for this particular purchaser it counted separately each type of product purchased by an individual canning company. Nor does the Commission explain whether other purchasers who provided separate data according to product type were similarly considered separately. . . .

premium over imports, which may or may not account for the margin of underselling.[22]

The Commission need not analyze every piece of data it receives. Nevertheless, where information is available that would give meaning to the figures used to support a determination, the Commission should use it, or at least explain why such information is unusable. The Commission must be careful not to solicit information from purchasers regarding their decision-making criteria merely as a formality. Nor should the Commission invoke "rate of increase" to support its findings without providing some context that would reveal why the increase is significant for the purposes of determining material injury.

Therefore, on remand, the Commission shall explain its methodology for making price comparisons, and why this methodology was chosen over that used in the Preliminary Determination. It also shall present purchasing history in a way that will facilitate review of pricing/volume trends, *e.g.* weighted average prices, either industry-wide or by individual purchaser, on a quarterly or yearly basis. The Commission must present the data in a reasonably consistent manner with respect to purchaser and product grouping, as well as the expression of prices bid and paid. The Commission also must indicate the basis for its margin of underselling analysis, and indicate why this particular margin is significant.

b. *Correlation of Subject Imports to a General Decline in Prices*

The Commission found that "the evidence shows a clear trend of generally declining prices paid by purchasers over the period of investigation." . . . The Commission grouped the data into those purchasers reporting in terms of price actually paid and those reporting the amount of discount from the annually announced list price. The Commission found that (1) for four major purchasers, discounts from all sources of supply (domestic, Japan, and others) increased for each period examined, and (2) for companies reporting in terms of bid prices, "domestic prices were mixed between 1997 and 1998 ... but down across the board (except for [one purchaser] in 1999)." . . . The Commission also found that, in conjunction with this general decline in domestic prices, "Japanese price movements were mixed between 1997 and 1998 . . . but down across the board (except for [the same purchaser noted previously] in 1999." Thus, the Commission linked the general decline in domestic prices to overall trends in Japanese pricing.

Nippon does not dispute the Commission's finding that prices paid to domestic suppliers generally declined over the POI. Rather, Nippon claims that the majority ignored detailed bidding information submitted by the purchasers demonstrating that subject import prices could not have negatively impacted domestic prices. Nippon asserts that "the Commission's focus on aggregate pricing data is fundamentally flawed, and ignores the lack of any correlation between purchases of subject import by *individual customers* and declines in domestic TCCSS prices."

Nippon contends the following facts contravene a finding of such a correlation: (1) the largest purchasers of subject imports generally paid increased prices to domestic suppliers; (2) those who purchased no subject imports were able to secure price decreases from their domestic suppliers. Pricing trends for a particular large purchaser may indicate the lack of a correlation between the existence of competition with Japanese imports and a decline in prices paid by that particular purchaser. Other large purchasers of TCCSS seem to have paid increased or unchanged domestic prices when

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22. The Staff Report indicates that "[l]ead times from U.S. producers varied between 6 and 12 weeks, with most producers reporting delivery within 6 to 8 weeks. For imports, lead times ranged from 2.5 months to 7 months, with 6 of the 11 importers reporting lead times in the 3 to 4.5 month range." . . .

lower-priced subject imports were present, and in many cases paid decreasing amounts where no subject imports in fact competed for the purchasers' business. In the absence of a table with average industry-wide pricing, on a quarterly basis or otherwise, the court is unable to make a more thorough assessment of the Commission's conclusions. If the Commission deems the evidence apparently contradicting a finding of correlation somehow unimportant, the Commission must state its reasons for so finding. Clearly, a general decline in domestic prices is relevant to the extent it can be correlated to a decrease in Japanese import prices. The Commission is not required in all cases to determine the relationship between subject import competition and domestic prices on an individual purchaser basis. Nevertheless, where the other data is so mixed and where data is available to determine whether such a correlation existed for particular purchasers, and is relied on by respondents,[28] the Commission must address the individual purchaser data in some manner.

2. Substantial Evidence

a. *Price Sensitivity*

In describing conditions of competition in the Final Determination, the Commission recognized that "[t]he record indicates that non-price factors such as product quality, product consistency, and on-time delivery are very important." . . . The Commission found, however, that "the record also reflects that during annual contract negotiations, price is a critical factor. The market is therefore characterized by a high degree of price sensitivity." The Commission does not cite any record evidence to support its conclusion. In analyzing price effects of the subject imports, however, the Commission specified that (1) the domestic TCCSS market is concentrated with respect to both purchasers and suppliers, and (2) "price, in the form of discount rates, is negotiated intensely, often down to the hundredths of one percent." . . . Nippon claims these criteria are not meaningful, and further claims that the Commission's finding of price as a "critical" factor is contradicted by the purchasers' testimony at hearings and in questionnaire responses, according to which reliability and quality were repeatedly cited as most determinative of their purchasing decision, whereas price was ranked seventh in order of importance.

(1) *Market Concentration and Price Specificity*

The Commission did not make clear why the fact that there are a small number of purchasers and suppliers is necessarily indicative of price sensitivity, as markets that are not particularly concentrated may still exhibit a high degree of price sensitivity for any number of reasons. Nor is it apparent why the degree of price *specificity* in negotiations would be necessarily indicative of price *sensitivity*, since the Commission is presumably not precluded from finding a lack of price sensitivity in markets that do not exhibit similar degrees of price specificity. In light of the lack of any precedent in which these two factors alone or in combination supported, without more, a finding of price sensitivity, the court finds that the Commission's explanation for its finding of price sensitivity insufficient.

(2) *Non-price Factors*

Nippon's assertions that purchaser testimony and questionnaire responses reveal that price is not considered the most important factor miss the mark. A finding of "price sensitivity" is not precluded by the fact that price is not the *most* important factor. For

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28. *See* 19 U.S.C. § 1677f(i)(3)(B) (1994); *see also Altx, Inc. v. United States*, 167 F.Supp.2d 1353, 1359-60 & n. 7 (Ct. Int'l Trade 2001) (finding that under the new statute, the Commission is required to respond to parties' material and reasonable arguments with a "reasoned explanation").

example, the court in *Acciai,* 19 CIT at 1059- 60, found that the Commission's finding as to importance of price was supported by evidence where the only two purchasers of a particular import, though not listing price as the most important factor in decision-making, listed price as "a very important factor," and indicated that a five to ten percent rise in import price would cause them to switch to domestic producers.

In this case, unlike in *Acciai,* the Commission did not evaluate purchaser responses regarding the amount of a price increase necessary to induce them to switch suppliers. . . . Nor did the Commission account for the role of non-price factors in purchaser decision- making in any meaningful way.[30] In making its price sensitivity finding, rather than evaluate purchasers' assessments of non-price factors such as on-time delivery or product quality, or whether these other factors actually drove their decision to switch suppliers, the Commission simply noted that other non-price factors were also considered "important."[31] The Commission cannot determine price sensitivity in a vacuum. The focus of the price sensitivity inquiry is apparently on the degree to which price is a determining factor in the mind of the purchaser in making its purchasing decision. Therefore, if the Commission chooses to rely on price sensitivity to support its price effects determination, it must assess other aspects of the TCCSS industry that would tend to reduce if not entirely vitiate, the importance of price in purchaser decision-making. In this case, it is insufficient merely to acknowledge that non-price factors are considered "very important" without discussing the nature of these factors in the industry or relating them to its overall determination, as such factors may eclipse the importance of price in purchaser decision-making.

b. *Negotiating Practices*

The Commission found that "the record reflects that the aggressive pricing by importers of Japanese TCCSS has been used by at least some purchasers in their price negotiations with the domestic suppliers, and Japanese supply is recognized as an important factor affecting U.S. prices." . . . The Commission deemed not credible testimony by four large purchasers that imports from Japan have no effect on TCCSS prices. The Commission found that, contrary to a particular purchaser's testimony, negotiations with importers "often take place simultaneously with domestic supply negotiations," citing this purchaser's documentation referencing negotiations with Japanese suppliers that were taking place in the fall and winter, while negotiations with domestic suppliers were still ongoing.

The court may not question the weight the Commission assigns to particular testimonial evidence. Nevertheless, the Commission's rejection of the purchasers' *entire* testimony is not supported by adequate reasoning. It is not inconsistent for domestic producers to negotiate with purchasers at the same time as Japanese producers, yet in their negotiations remain or at least consider themselves insulated from competition from Japanese pricing. Thus, even if the purchaser inaccurately represented the timing

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30. The Commission did discuss a particular domestic producers' on-time performance in terms of whether the declining health of the domestic industry could be attributed to subject imports or some other cause. *See* discussion, *infra,* section C.

31. The record indicates that seven of thirteen reporting purchasers described price as "very important," and six described price as "somewhat important." . . . The record also indicates that other factors ranked higher than price, *e.g.,* "delivery time" was listed as "very important" by nine purchasers and "somewhat important" by four; and all responding purchasers indicated "quality" as "very important." Overall, price was ranked seventh of approximately ten factors. It is not appropriate for the court to make an assessment of the weight that should be given these data, if any. Nevertheless, where results are, as here, mixed with respect to purchaser assessments of the relative importance of price in decision-making, the Commission should evaluate the other factors cited by purchasers, or at least the amounts they cite as sufficient to warrant changing suppliers. The Commission may articulate a reason why the purchasers' assessment of decision-making criteria is not to be accorded weight, but without an analysis of these factors, a thorough review of the Commission's determination in this regard is impossible.

of negotiations, the Commission must still address the documentary evidence that supports the purchaser's contention and fundamental point that negotiations run on separate tracks according to different procedures and criteria. First, the Commission does not address evidence of supply agreements whereby domestic producers are obligated to match prices with only other domestic producers. Second, the Commission has not assessed whether the acknowledged difference in lead-times cause purchasers to consider foreign supply "supplementary," and allocate predetermined volumes to foreign and domestic supply sources. . . .

In addition, the Commission sidesteps the question of whether Weirton's internal documents belie its contentions that it adjusted pricing according to competition from Japanese imports. The Commission had solicited from Weirton at the public hearing documents to support its claim that subject import pricing damaged its negotiating leverage. In its submitted response, Weirton conceded that "the competitors listed on the [competitive pricing memoranda sent from the sales department to the pricing department] are always other domestic firms." . . . This documentary evidence is consistent with purchasers' testimony that each year domestic producers negotiate only within a set range of a list price announced by a particular domestic producer, and that foreign prices are not established until after domestic contracts have been signed. . . . In an affidavit, however, Weirton stated that this evidence should be discounted because a particular purchaser indicated the availability of lower priced Japanese imports during negotiations. . . . The Commission deemed the affidavit credible "because the statements made therein about the intentions of two major purchasers to increase their purchases of Japanese TCCSS due to its low prices is borne out by the purchasing history of these two companies. As the Commission mentions the purchasing history of only one purchaser, the court cannot speculate as to how the Commission viewed the other's purchasing history to support Weirton's representations.

While the court does not question the veracity of the representations in the affidavit, or the weight the Commission chooses to assign it, the reasoning the Commission extracts therefrom is flawed. That a purchaser switched to a foreign source of supply does not necessarily mean it did so for price reasons. Also, simply because a purchaser indicates to a producer the availability of lower priced subject imports does not negate the evidence of Weirton's pricing practices. Weirton's pricing department apparently derives its pricing allowance range solely according to pricing data of domestic producers submitted by its sales department. There is no evidence that Weirton somehow abandoned its way of calculating the pricing allowances, or that the documents it submitted are somehow inaccurate. Although given the opportunity, Weirton did not provide any evidence that it actually had to bid below the calculated range, or any other evidence that the sales department submitted foreign pricing data to the pricing department. If the ultimate question is whether lower Japanese prices forced domestic producers to lower prices or prevented them from raising prices, the Commission cannot ignore, and must evaluate on remand, evidence showing that the petitioner set its prices within a range established only by domestic prices.

The Commission did rely on four internal negotiating memoranda. Only one of these memoranda indicates that lower-priced Japanese imports were taken into consideration during negotiations with domestic suppliers. The second refers only generally to "foreign suppliers," and the final two discuss only the effect of Weirton's filing of an antidumping petition on the supply of Japanese imports. The Commission may rely on documentary evidence to determine the extent to which subject import pricing factored into domestic supply negotiations. Nevertheless, if the Commission chooses to rely on

this type of evidence, it must make an affirmative assessment of the documentary evidence in its entirety, rather than selecting a few documents without explaining why they exemplify industry practice, or why they otherwise should be accorded weight.

c. *Lost Sales and Revenue*

Lastly, the Commission stated that "the adverse effect of subject imports is also reflected in, among other things, [the fact that] four purchasers confirmed that a particular producer either had been forced to reduce its price to these purchasers because of lower prices by sellers of Japanese TCCSS or had lost a sale outright." . . . Evidence of actual lost sales and lost revenues is not required to support a finding that the domestic industry is materially injured by reason of the subject imports. *Companhia Paulista,* 20 CIT at 479-80 (citing *Acciai,* 19 CIT at 1056-57 (noting that Commission not required to rest its decision on lost sales or lost revenues, as these may be only possible signals of impact)). Although evidence of lost sales and revenue may be probative, the lack of such evidence ordinarily will not vitiate a Commission determination. *Stalexport v. United States,* 890 F.Supp. 1053, 1076 (Ct. Int'l Trade 1995); *Metallverken,* 13 CIT at 1025 (citing *USX,* 11 CIT at 86, 655 F.Supp. at 491). This is not to say, however, that where the Commission chooses to rely on findings of lost sales/revenue, it need not support such findings with substantial evidence.

The Commission fails to indicate the data upon which it relied in making its lost sales/revenue conclusions, or any context which would reveal why these four confirmations were given weight. Presumably, the Commission derived "four confirmations" from the Staff Report. Nippon alleges that the purchaser may have been confused about whether the lost sale had to be to a Japanese supplier. The record shows, however, that the Commission took steps to make sure the purchaser understood the nature of the allegation. . . . Nippon also alleges that one confirmed lost sale was "an impossibility" because the Japanese producers supplied different facilities than the U.S. producer alleging lost sales. Nippon overlooks the fact that each of this purchaser's facilities in fact received bids from Japanese and U.S. producers. "Lost sales allegations refer to the situation in which the domestic industry is unable to make a sale because of the presence of lower priced imports." *Copperweld,* 682 F.Supp. at 572 n. 15. Thus, it is not "impossible" for this producer to report as a "lost sale" a sale that was ultimately awarded to a Japanese producer.

Nevertheless, the data in the lost sales allegation do not reflect the purchasing history data provided for this particular purchaser. Although the Commission followed up on the lost sales allegation with the purchaser in question, the Commission does not indicate that there was in fact a competing import price for that sale. Furthermore, the absolute number of lost sales is not, by itself, meaningful. Rather, the Commission must indicate in the Final Determination how many allegations were actually made, or at least the volume of the individual confirmed lost sale(s) it relies on, in order to give the court a basis for reviewing why the Commission deemed the lost sale(s) significant. Therefore, on remand, the Commission shall indicate the specific data upon which it relied in light of the corresponding purchasing history, and explain why such data are significant.[42]

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42. Nippon also asserts that "the majority also cites three unconfirmed lost sales allegations as further evidence of the adverse impact of subject imports." The Commission discounted purchaser testimony disputing the lost sales/revenue allegations with circular reasoning, stating that "the evidence of lost revenue and sales undermined the credibility of purchaser testimony and Respondents' argument that Japanese and domestic suppliers do not compete for the same business." . . . Nevertheless, Nippon overstates its case, as it is clear that the Commission did not "rely" on unconfirmed sales. The Commission merely noted its concerns about the veracity of the purchasers who disagreed with the lost sales allegations, and did not convert these unconfirmed lost sales into "confirmed" lost sales. Thus, the Commission need not revisit the issue of

C. Causation

After assessing the significance of volume, price effects, and impact of the LTFV imports on the domestic industry, "the Commission must take an analytically distinct step to comply with the 'by reason of' standard: the Commission must determine whether these factors as a whole indicate that the LTFV imports themselves made a material contribution to the injury." *Gerald Metals, Inc. v. United States*, 27 F.Supp.2d 1351, 1356 (Ct. Int'l Trade 1998). In addition, the court in *Taiwan Semiconductor*, 59 F.Supp.2d at 1329-31, held that "the Commission must not attribute the harmful effects from other sources of injury to the subject imports and must adequately explain how it ensured not doing so." . . .

Nippon claims that the majority failed to account adequately for: (1) declining domestic producer reliability; (2) rapid purchaser consolidation; and (3) non-subject imports. Nippon, however, misstates the Commission's obligations with regard to assessing alternative causes of injury. It is not sufficient that the other putative sources of injury had a "demonstrable effect" on the ability of U.S. producers to raise prices. . . . The Commission need not find that the alternative causes entirely *negate* the possibility of subject imports' having *any* adverse effect on domestic pricing. Rather, the Commission must determine whether these alternative sources are of such extent and magnitude that they preclude a finding that the subject imports made a *material* contribution to the injury. *Taiwan Semiconductor*, 59 F.Supp.2d at 1329 ("[I]n some cases, other sources of injury 'may have such a predominant effect in producing the harm as to . . . prevent the [subject] imports from being a material factor.") (citing *Gerald Metals*, 27 F.Supp.2d at 1356 n. 8).

1. U.S. On-Time Performance and Quality

Nippon does not dispute that the domestic industry's performance deteriorated between 1997 and 1999, in terms of employment, capacity utilization, shipments, and profits. Nippon claims, however, that the Commission's attribution of these effects to subject imports is in error on the ground that the majority ignored evidence that purchasers were forced to requisition increased quantities of imported TCCSS due to declining domestic producer reliability. In its impact analysis, the Commission acknowledged that there was documentary evidence that showed domestic producers' on-time performance was poor during the POI. The Commission stated, however, that it was "not persuaded by respondents' inconsistent and contradictory testimony that purchasers turned to Japanese sourcing solely because of non-price reasons." . . . The Commission's basis for rejecting all "respondents' testimony"[44] regarding on-time performance was an inconsistency in U.S. Can's testimony: . . .

[T]he court is unable to assess the Commission's reasoning fully. . . .

2. Purchaser Consolidation

In the Final Determination, the Commission rejected the Respondents' claim that rapid purchaser consolidation rather than Japanese imports actually caused the general domestic price decline. The Commission based its rejection on the finding that the effect that consolidation among TCCSS purchasers had on domestic prices was "slight" because: (1) "with only seven producers, there is a similar degree of concentration between the major U.S. purchasers and the domestic producers;" (2) the most significant buyer consolidation occurred between 1990 and 1996, during which time consolidation

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unconfirmed lost sales allegations, but may choose to do so.

44. Apparently the Commission considers purchaser testimony to be "respondents' testimony."

did not "substantially affect prices;" and (3) there had been no significant increase in purchaser consolidation during the POI. . . .

The record shows that purchaser concentration increased from 1990 to 1999, although much more rapidly mid-decade than in the latter part of the decade. During the POI, the top six purchasers maintained roughly three-quarters of the market. In contrast, the number of domestic producers remained at six from 1990 until 1997, when Ohio Castings entered the TCCSS market.

The question underlying the issue of purchaser consolidation in this case is whether the purchasers have increased their leverage to an extent that subject imports could not have been a material cause of the injury. The fact of a similar degree of concentration across purchaser and producer sectors during the POI, or that no significant consolidation took place during the POI, says nothing about whether the relative bargaining power has changed over time to have an effect on price. In some cases, events occurring before the POI may have a *current effect* on the industry dynamics during the POI. Therefore, the Commission's second finding regarding pricing trends during periods of purchaser consolidation is crucial.

The Staff Report indicated that "[a]s a result of [purchaser] consolidations, smaller purchasers have indirect access to discounts that once were reserved for the larger purchasers." . . . The Commission's review of pricing data from 1990 to 1996 led it to conclude otherwise. Rather than analyze industry-wide pricing data to support its conclusion that domestic pricing remained relatively unaffected by the rapid purchaser consolidation from 1990 to 1996, the Commission relied on Weirton data showing that its weighted average price remained within a "narrow range" during this period. It is within the Commission's discretion to draw conclusions about an industry from the pricing trends of a particular producer occupying a substantial portion of the market. The record reveals that Weirton itself, however, viewed purchaser consolidation during the entire decade as having an effect on its bargaining power and pricing. In a Weirton Steel Mill Visit Report, ITC officials state that Weirton represented that "Weirton purchaser base went from approximately 80 in 1989 to approximately 6 [in 2000]. The result was a *greatly diminished power to negotiate and a decrease in price."* . . . The Commission did not state that the ITC investigators' findings were incorrect.

Nevertheless, the court finds no error here. The Commission's interpretation of the data it receives is not limited by the interpretation of the party providing them. Nippon has not pointed to evidence that industry-wide pricing trends from 1990 to 1996 are inconsistent with Weirton's submitted pricing data for this period. Nor has Nippon asserted that Weirton's pricing actually declined over this period. For the purpose of discounting purchaser consolidation as having a "predominant effect" in producing injury, it is sufficient in this case, where there is minimal evidence to the contrary, for the Commission to rely on evidence that prices for a substantial segment of the industry remained relatively stable over time in the face of rapidly increasing purchaser concentration.

3. *Non-Subject Imports*

The Commission rejected the contention that non-subject imports accounted for the decline in domestic pricing based on its finding that "[a]lthough non-subject imports were a significant factor in the domestic market during the period of investigation, subject imports [1] grew more rapidly and [2] were generally priced more aggressively." . . . Nippon argues that non-subject import volume would have had a significantly larger competitive impact than subject import volume because the majority of domestic shipments were in the Eastern United States, in direct competition with all non-subject

competition. Nippon also argues that the "ITC staff's own comparison of subject and non-subject prices demonstrates that subject imports largely oversold non-subject imports." . . .

a. *Non-Subject Import Volume*

With respect to non-subject import volume, the Commission discounted non-subject imports as an alternative source of injury on the ground that subject imports' market share was "comparable" to the non-subject imports' market share where "[b]y 1999, the volume of imports from Japan alone nearly equaled the volume of imports from all other sources combined." . . . The Commission in describing "conditions of competition" had noted that "while non-subject imports accounted for a somewhat greater proportion of total U.S. market share than subject imports during most of the period of investigation,[55] subject imports' total market share increased at a substantially greater rate than non-subject imports." . . . As stated in the discussion above regarding volume, Japanese imports account for at least some of the decrease in market share held by the domestic industry. Although this may be sufficient for the purpose of finding subject import volume "significant," the Commission must still address whether non-subject imports constitute a predominant source of injury in light of conditions of competition. *See Taiwan Semiconductor,* 59 F.Supp.2d at 1329. The Commission acknowledged in its conditions of competition discussion that non-subject imports were not sold in the West, yet does not analyze this condition in response to Respondents' alternative source of injury claim. Even if subject and non-subject market share levels are "comparable" on the whole, non-subject imports are not necessarily precluded from constituting the predominant source of injury where, as in this case, they are concentrated in regions to which most domestic shipments were made. That Japanese import volume grew at a higher rate of increase does not relieve the Commission from assessing characteristics of the industry that may or may not show a correlation between non-subject imports and injury to the domestic industry.

b. *Non-Subject Import Pricing*

With respect to non-subject import pricing, the Commission specified that "high-quality subject imports frequently undersold high quality non-subject imports and even undersold lesser quality non-subjects as well." . . .

First, the Commission does not make clear why it chose to distinguish between "countries that are sources of high-quality TCCSS" and "those whose principal sales advantages are favorable prices and/or discounts," or its basis for grouping the countries in the way that it did. The Commission does not cite to anything that would enable the court to review the reasons for this choice. Nor does the Commission explain the apparent inconsistency in its grouping in this manner with that described in purchaser testimony. . . .

Second, the Commission neglected to compile the pricing data in any meaningful, consistent way to enable the court to follow its reasoning process. It is insufficient for the Commission simply to cite to all the tables of raw pricing data submitted by the purchasers, and force the court to attempt to reconstruct its analysis. . . . Where the Commission has access to data that would enable it to construct a table comparing Japanese prices directly to non-subject prices, in either aggregated or disaggregated form, it should do so (as it now must on remand), rather than leaving the parties and the

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55. The record shows that the market share of non-subject imports was greater than that of subject imports at all times during the POI except the first quarter of 2000. . . .

court to figure out how it arrived at its conclusion.

Conclusion

Even though the court finds no error in the Commission's volume analysis, the price effects analysis is unsupported and the causation analysis is flawed in at least two respects. The court expresses no opinion on the result, but the Commission must provide a more complete analysis for whatever decision is reached. Accordingly, the court remands the Commission's Final Determination. With respect to price effects, the Commission on remand shall, in light of the concerns detailed herein: (1) reconsider underselling taking into account inconsistencies in the manner in which the data were presented; (2) explain its methodology for making price comparisons for underselling; (3) indicate the basis for calculating the yearly average margin of underselling and for concluding that such margins are significant; (4) reassess its conclusions with respect to a correlation between subject import competition and domestic prices; (5) reevaluate its price sensitivity finding in light of evidence in the record; and (6) indicate the data and context upon which it bases its findings regarding lost sales. The Commission shall also reassess causation taking into consideration the role of non-price factors in purchasing decisions and non-subject imports.

3. Review and Reconsideration of Antidumping Duties

Article 11 of the Antidumping Code requires periodic review of antidumping duties. Procedures for periodic, five-year review can be found in 19 U.S.C. § 1675(c), (d). Changed circumstances serve as a basis for review at anytime after the issuance of an antidumping order. *Id*. § 1675(b). *See also id*. § 1675a (providing special review rules). Consider the following questions:

1. On what basis could an antidumping duty be terminated under the periodic review procedures?
2. What constitutes "changed circumstances" for purposes of review under § 1675(b)?
3. Do the statutory review procedures comply with the requirements of Article 11 of the Antidumping Code?

Are the following decisions helpful in addressing these questions? What is the statutory authority for the "reconsideration" procedure eventually adopted by the ITC in the case? If it were authorized, how must a reconsideration proceeding be conducted?

ELKEM METALS CO. v. UNITED STATES

135 F.Supp.2d 1324 (Ct. Intl. Trade 2001)

▬ EATON, J.

Plaintiffs Elkem Metals Company ("Elkem"), American Alloys, Inc. ("American Alloys"), Applied Industrial Materials Corporation ("AIMCOR"), and CC Metals and Alloys, Inc. ("CC Metals"), and Plaintiff-Intervenor Globe Metallurgical, Inc. ("Globe") (collectively, "Petitioners"), move for preliminary injunctions to enjoin liquidation of entries pending a final decision on the merits of the underlying action. . . . However, this Court, for the reasons set forth below, denies Petitioners' motions.

Background

The present motions were made in the context of a challenge to the United States

International Trade Commission's ("ITC") reconsideration and reversal of its final affirmative material injury determinations in antidumping investigations . . . covering ferrosilicon [an iron alloy used in the production of steel and cast iron] from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela. . . . [The ITC reconsideration and reversal also included a countervailing duty investigation covering allegedly subsidized ferrosilicon from Venezuela. This ITC action was also challenged by the petitioners. Countervailing duties are considered in Chapter VI, *infra*.]

The ITC issued the original injury determinations, whose reconsideration and reversal are the subject of the underlying dispute, in 1993 and 1994, shortly after the United States International Trade Administration ("ITA") found that ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela was being sold in the United States at less than fair value. . . . Based on the final determinations of the ITA and ITC, the United States Department of Commerce ("Commerce") issued antidumping orders against ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela. . . .

The imposition of these orders remained unchallenged until 1998, when certain Brazilian ferrosilicon producers petitioned the ITC to institute a review of its final affirmative material injury determination as to ferrosilicon from that country. The petition alleged that a recently disclosed price-fixing conspiracy among certain domestic manufacturers, and its consequent distortion of the price data presented to the ITC during its original material injury investigations, constituted "changed circumstances" sufficient to warrant review pursuant to 19 U.S.C. § 1675(b). On July 28, 1998, the ITC instituted the requested changed circumstances review and, further, self- initiated changed circumstances reviews of the other related final affirmative material injury determinations, *i.e.*, those pertaining to ferrosilicon from China, Kazakhstan, Russia, Ukraine, and Venezuela. . . .

In May 1999, the ITC suspended these changed circumstances reviews and proceeded to "reconsider" its original determinations. [The ITC explained at the time that reconsideration was "a more appropriate procedure for review of the original determinations.] Thereafter, the ITC reversed its original affirmative material injury determinations *ab initio* and issued a negative injury determination as to each of the original investigations. . . . Thus, the ITC concluded, on reconsideration, that the domestic industry had never been materially injured, or threatened with material injury, by reason of the unfairly priced . . . imports. . . .

In accordance with the ITC's action, Commerce "rescinded" the antidumping . . . duty orders covering the subject imports. [Commerce explained at the time that the ITC reconsideration had rendered the orders "legally invalid from the date of issuance".] In conjunction with this rescission, Commerce terminated all related administrative reviews, . . . and instructed Customs to liquidate all unliquidated entries.[3] . . .

Thereafter, domestic ferrosilicon producers brought individual suits separately challenging the actions of the ITC and Commerce. The suits against the ITC were consolidated, as were those against Commerce. The former consolidated action is currently before the Court.[4] Petitioners have, in the interim, made the instant motions, seeking to enjoin liquidation of the subject entries.

The ITC and Defendant-Intervenors . . . oppose these motions, contending that

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3. Excepted from these instructions were all entries of ferrosilicon from Venezuela, which were, and remain, the subject of a previously granted preliminary injunction. *See AIMCOR v. United States*, 83 F.Supp.2d 1293 (1999).

4. The latter action . . . is stayed pending resolution of the merits of the case at bar.

Petitioners have failed to make the requisite showings for the grant of the requested relief.

Discussion

. . . The movant bears the burden of establishing that: (1) absent the requested relief, it will suffer immediate irreparable harm; (2) there exists in its favor a likelihood of success on the merits; (3) the public interest would be better served by the requested relief; and (4) the balance of the hardships on all parties tips in its favor. . . . The Court, having considered the requisite factors, concludes that Petitioners have not made a clear showing that they are entitled to the requested relief.

I. Irreparable Harm

Petitioners advance three grounds for a finding of irreparable harm. First, Petitioners maintain that they have suffered "specific competitive injury and substantial adverse operating results as a result of the Reconsideration Determinations" . . . and that they will continue to suffer such "grievous, immediate and irreparable economic injury" . . . in the absence of injunctive relief. Second, Petitioners, citing *AIMCOR v. United States*, 83 F.Supp.2d 1293 (1999), contend that "this [c]ourt has already found . . . that [they] would be irreparably harmed if they are deprived of the remedial effects of the antidumping . . . statute[] [, that is, if] entries of subject ferrosilicon are liquidated without assessment of antidumping . . . duties while this case is pending, yet plaintiffs ultimately prevail on the merits." . . . Third, CC Metals asserts that the ITC's reconsideration determinations violated the due process guarantees of the Fifth Amendment . . . , and further claims that "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that 'no further showing of irreparable harm is necessary.'" . . . The Court addresses each argument in turn.

A. Economic Harm

In support of their first argument, Petitioners . . . allege the following: (1) an increase in the volume of ferrosilicon imports since the rescission of the relevant orders . . . ; (2) the existence of a "heavy downward pressure on domestic prices" . . . ; (3) an overall drop, from the third quarter of 1999 to the first quarter of 2000, in the average unit value of Plaintiffs' quarterly requirements contracts with steel producers for the sale of 75 percent ferrosilicon, as well as for certain Plaintiffs' quarterly requirements contracts with steel producers for the sale of 50 percent ferrosilicon . . . ; (4) "sales losses" on the part of Elkem . . . and a decline in the volume of CC Metals' and AIMCOR's sales of 75 percent ferrosilicon to steel producers in the first quarter of 2000, as compared to the companies' average quarterly volumes in 1999 . . . ; and (5) that American Alloys has been rendered bankrupt as a "direct result" of the ITC's determinations on reconsideration. . . .

While Petitioners arguably present a claim of past and even present financial losses, as to the future such statements are speculative and conclusory, and cannot provide the basis for a finding of irreparable injury. That the harm is irreparable cannot be determined by surmise. . . . Furthermore, much of Petitioners' evidence is controverted by the ITC and Defendant-Intervenors, and is, in large part, presented by interested parties.

Even assuming that certain such evidence were probative, *i.e.*, that there exists adequate proof of a surge in the absolute volume of the subject imports; a decline in the domestic price of such goods; a drop in the volume and profitability of certain quarterly domestic sales; and some lost sales, the claimed injury fails to rise to the level of irreparable harm. Economic injury of the kind claimed here is "not necessarily

'irreparable.'" . . . Irreparable injury is harm for which there exists no adequate remedy at law. . . . As Petitioners, by this action, are pursuing a remedy for the financial injury of which they complain (that is, the reimposition of antidumping . . . duties), their allegations of irreparable harm are severely undermined. . . . Moreover, this court has in several prior opinions declined to find irreparable injury on the basis of financial losses similar to those alleged herein. . . . Petitioners, in essence, invite the Court to find that the evidence proffered demonstrates past and present economic injury, and to transform such a finding into a prediction of irreparable harm. This feat of judicial legerdemain the Court cannot perform. . . .

As to American Alloys' bankruptcy, the Court is not persuaded that its Chapter 11 filing was a "direct result" of the ITC's actions. Petitioners . . . claim that "U.S. prices fell . . . and the company could not continue to operate its 75 percent commodity-grade ferrosilicon furnace." . . . Petitioners further state that American Alloys shut down this furnace in October 1999, and, "after considering the likely future price trend and its future cash flow" . . . filed for bankruptcy on January 26, 2000. However, as acknowledged by CC Metals, "the market's downward pricing trend . . . began in early 1999 as a result of a decline in world-wide steel production." . . . Petitioners further report that "demand softened due to declines in U.S. iron and steel production and the displacement of some ferrosilicon consumption by substitute products such as silicon carbide and silicomanganese" . . . , and that such declines began in early 1997 and continued into 1998. . . . Moreover, Petitioners concede that operating income had begun to fall in 1997 and 1998, also as a result of the weakened demand and price pressure caused by substitute products and the decline in iron and steel production . . . , and that the "closure of American Alloys . . . was caused by the[se] earlier price declines." . . . Indeed, Mr. Farrell says that "[t]he large influx of Chinese silicon carbide imports caused U.S. ferrosilicon prices to begin to deteriorate. . . . The [average unit value] of American Alloys' ferrosilicon sales eroded . . . and [its] operating income slipped." . . . Consequently, Petitioners fail to establish that American Alloys' Chapter 11 status is the result of competition from the subject imports liquidated without the assessment of duties. *See Armco, Inc. v. United States*, 570 F.Supp. 51, 56 (1983) (noting, in its negative conclusion with respect to irreparable harm, plaintiffs' failure to "establish a nexus between the lost sales and the failure to impose dumping duties"). . . . Nor have Petitioners explained how irreparable harm would result from a denial of the requested relief. . . . Petitioners merely claim that, "[i]f antidumping and [countervailing duty] relief is restored and market prices improve, American Alloys may be able to restart production, bring back its laid-off workers and emerge from the Chapter 11 proceedings as a viable company." . . . Such a proposition is clearly too speculative to serve as the basis for a preliminary injunction. Thus, the Court must reject Petitioners' first argument.

B. Issue Preclusion

In their second argument, Petitioners allege that the ITC and Defendant-Intervenors, as a result of the decision in *AIMCOR*, 83 F.Supp.2d at 1293, are precluded from litigating the issue of irreparable harm. [The court rejected this contention, arguing that the court in AIMCOR made no determination with respect to irreparable injury, since the issue was not before it. Neither the ITC nor the defendant-intervenors were as a matter of law estopped from litigating the issue of irreparable harm.]

C. Alleged Deprivation of Constitutional Due Process

Petitioners' final assertion . . . is that Petitioners have made a sufficient showing of irreparable harm merely by alleging a deprivation of a constitutional right. . . . However,

as noted by the ITC . . . :

> [c]ases so holding ... are almost entirely restricted to cases involving alleged infringements of free speech, association, privacy or other rights as to which temporary deprivation is viewed of such qualitative importance to be irremediable by any subsequent relief.... The alleged denial of procedural due process, without more, does not automatically trigger such a finding.

. . . As previously noted, CC Metals merely alleges that the ITC violated the due process guarantees of the Fifth Amendment. Consequently, CC Metals' allegation, without more, fails to trigger an automatic finding of irreparable harm. . . .

II. Likelihood of Success on the Merits

. . . [G]iven the absence of a showing of irreparable injury, it would be "inappropriate to resolve [these questions] . . . according to a likelihood of success on the merits standard." . . .

III. The Public Interest

. . . While it is well settled that "the purpose of the antidumping and countervailing duty scheme is to 'equalize competitive conditions' between exporters and a domestic industry," *Chr. Bjelland Seafoods A/S v. United States*, 16 CIT 945, 953 (1992) (citing *Nat'l Knitwear & Sportswear Ass'n v. United States*, 779 F.Supp. 1364, 1372 (1991)), it is impossible to determine whether the relief requested would effect this public policy, *i.e.*, whether the non-assessment of duties would in fact "level the playing field." In addition, the potential consumer harm associated with the suspension of liquidation is a substantial concern that must be taken into account in this inquiry. . . . Consequently, as the issues to be litigated are "extremely complicated and of great importance to all of the parties, sovereign and otherwise," the Court concludes that the public interest would be better served by maintenance of the status quo pending a conclusive resolution of the merits. . .

IV. Balance of the Hardships

With respect to the relative hardships on the parties, the economic hardship that may be borne by Petitioners as a result of price competition, in the absence of the requested relief, is balanced by the hardship that may be borne by Defendant-Intervenors as a result of the price uncertainty caused by a stay of liquidation. . . The hardships do not, therefore, favor Petitioners. . . .

ELKEM METALS CO. v. UNITED STATES

193 F. Supp. 2d 1314 (Ct. Int'l Trade 2002)

EATON, J.

Before the court are the motions of plaintiffs . . . for judgment upon the agency record. . . . For the reasons set forth below, the court remands this case to the United States International Trade Commission ("ITC") for further action consistent with this opinion.

Background

Plaintiffs challenge the ITC's reconsideration and reversal of its final affirmative material injury determinations in antidumping investigations Nos. 731-TA-566-570 and 731-TA-641 (Final) covering ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela and countervailing duty investigation No. 303-TA-23 (Final)

covering ferrosilicon from Venezuela ("Final Determination"). . . .

In May 1999, the ITC suspended these changed circumstances reviews and gave notice of its intention to "reconsider" its Final Determination. *See Ferrosilicon From Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela*, 64 Fed.Reg. 28,212 (May 25, 1999) ("*Notice* "); *see also* USITC Pub. 3218, at 6 (Aug.1999) (stating that "reconsideration was a more appropriate procedure for review of the original determinations"). The *Notice* stated:

> The [ITC] ... has suspended the [changed circumstances reviews] and is instituting proceedings in which it will reconsider its [Final Determination].
> For further information concerning the conduct of this reconsideration and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, C, and D (19 CFR part 207).

Notice, 64 Fed. Reg. at 28,212.

Further, the *Notice* alerted interested parties that the record from the changed circumstances reviews would "be incorporated into the record of the [ ] reconsideration proceedings" ("Reconsideration Proceedings"). In addition, the *Notice* stated:

> Each Party can submit comments, including new factual information ... limited to the issues of (a) the price-fixing conspiracy, or other anticompetitive conduct relating to the original periods of investigation, and (b) any possible material misrepresentations or material omissions, by any entity that provided information or argument in the original investigations, concerning: (1) the conspiracy or other anticompetitive conduct or (2) any other matter.

See Notice, 64 Fed. Reg. at 28,213.

Thereafter, the ITC reversed and vacated its Final Determination, and issued a negative injury determination as to the original investigations. *See Ferrosilicon From Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela*, 64 Fed. Reg. 47,865 (Sept. 1, 1999) ("Reconsideration Determination"); *see generally* USITC Pub. 3218, at 1. As part of this Reconsideration Determination, the ITC concluded that it need not examine whether the alleged price-fixing conspiracy actually distorted the domestic ferrosilicon prices at issue in the original investigations. *See* USITC Pub. 3218, at 23-24 ("[The ITC] cannot conclude what, if any, of the representations made by the domestic producers on pricing and market conditions are sufficiently credible to rely on. Consequently, in our reconsideration determinations we have taken adverse inferences against these firms and used the facts otherwise available, as authorized by the statute and case law.").[2] As a result, the ITC concluded that, during the period under review in the original investigations, the domestic ferrosilicon industry "in the United States [was] neither materially injured nor threatened with material injury by reason of imports of

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2. On this point, the ITC stated:

> The discussion [here] demonstrates that ... each [party] withheld or misrepresented essential information directly relevant to the Commission's statutory mandate: whether the domestic industry is materially injured by reason of subject imports. By such conduct, these producers significantly impeded, undermined, and compromised the integrity of the Commission's investigations.
>
> The Commission's governing statute provides that "whenever a party ... refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, [the Commission shall] use the best information otherwise available." This provision enables the Commission . . . to avoid "rewarding the uncooperative and recalcitrant party for its failure to supply requested information . . . ."

See USITC Pub. 3218, at 21 (footnotes omitted).

ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela that have been found by . . . Commerce to be sold at less than fair value and imports of ferrosilicon that ... Commerce has found [were] subsidized by the Government of Venezuela." *See Ferrosilicon From Brazil, Kazakhstan, People's Republic of China, Russia, Ukraine, and Venezuela*, 64 Fed. Reg. 51,097, 51,098 (Sept. 21, 1999); *see also* USITC Pub. 3218, at 4.

In accordance with the ITC's Reconsideration Determination, Commerce "rescinded" the antidumping and countervailing duty orders covering the subject imports. *See Ferrosilicon From Brazil, Kazakhstan, People's Republic of China, Russia, Ukraine, and Venezuela*, 64 Fed. Reg. at 51,098. In conjunction with this rescission, Commerce terminated all related administrative reviews, *see id.*, and instructed the United States Customs Service to liquidate all unliquidated entries. *See id*. at 51,099.

Subsequently, Plaintiffs brought separate suits challenging the actions of the ITC, and these suits were consolidated. This consolidated action is currently before the court, and in it Plaintiffs raise both procedural and substantive issues. At this time, however, the court need only address two procedural issues: (1) whether the ITC had the authority to reconsider its Final Determination; and (2) if the ITC possessed such authority, whether the Reconsideration Proceedings were improperly conducted because, among other reasons, the ITC failed to hold a hearing as provided for in the procedures that it published as those that would govern the Reconsideration Proceedings.

The ITC and defendant-intervenors . . . argue that: (1) the ITC had the inherent authority to reconsider its Final Determination; and (2) the Reconsideration Proceedings were properly conducted, in that the ITC was not required to conduct a hearing because Plaintiffs did not request one. . . .

Discussion

I. Authority to Reconsider

In considering the issue of the ITC's power to reconsider the Final Determination, two questions need to be examined: first, does the ITC have the authority to reconsider a final determination; and second, in the event that it possesses such authority, does it extend to a reconsideration taken approximately four and one-half years after such final determination was rendered?

As to the first question, Plaintiffs claim that the ITC did not have the authority to reconsider the Final Determination, because the ITC is " 'entirely a creature of statute [and][a]ny authority delegated or granted to [it] . . . is necessarily limited to the terms of the delegating statute.' " . . . This being the case[,] Plaintiffs argue, since "Congress[] fail[ed] to grant the ITC reconsideration authority in antidumping investigations . . . affirmative injury determinations in antidumping proceedings cannot be reconsidered by the ITC. . . ."

Defendants, on the other hand, argue that administrative agencies in general, and the ITC in particular, have the inherent authority to institute reconsideration proceedings so as "to vindicate the integrity of the administrative process." In addition, Defendants argue that the antidumping statute does not "preclude reconsiderations under appropriate circumstances." . . .

The court agrees with Defendants. It is indeed the general rule that federal agencies have the power to reconsider their final determinations. *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir.1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider ." (citation omitted)); *Prieto v. United States*, 655 F.Supp. 1187, 1191 (D.D.C.1987) ("There can be no dispute that administrative agencies have

inherent power to reconsider their own decisions. . . ." (citations omitted)); *accord Bookman v. United States*, 453 F.2d 1263, 1265 (Ct.Cl.1972) ("[I]t may be imperative for [agencies] to consider new developments or newly discovered evidence in order to facilitate the orderly and just resolution of conflict. . . . [Therefore,] '[e]very tribunal, judicial or administrative, has [the] power to correct its own errors or otherwise appropriately to modify its judgment[s]. . . .'" (citation omitted)).

Plaintiffs contend, however, that this inherent authority to reconsider final decisions is limited to adjudicative rather than investigatory agencies . . . and that because the ITC's "proceedings are not 'adjudicative[]'" it, therefore, "has no 'equitable' powers when acting in its investigative capacity." Indeed, in *Grupo Indus. Camesa v.. United States*, 18 CIT 461, 463, 853 F.Supp. 440, 443 (1994), *aff'd*, 85 F.3d 1577 (Fed.Cir.1996), this court held, *inter alia*, that Congress intended the ITC's "hearing[s] to be non-adjudicative in nature." However, while the ITC is usually characterized as an investigatory rather than an adjudicative agency, this court in later decisions has found that the ITC renders its final determinations in a quasi-adjudicative manner. *See Fujian Mach. & Equip. & Exp. Corp. v. United States*, 25 CIT ___, ___, Slip Op. 01-120, at 10 (Sept. 28, 2001) ("The proceedings in an antidumping investigation or administrative review constitute a very strange creature in the taxonomy of modern American administrative law. [Although] Congress has stated that such proceedings are 'investigatory' rather than adjudicatory . . . the Court of International Trade . . . has observed that in substance they are quasi-adjudicatory." (citation omitted)).[5] In fact, courts have explicitly found the ITC to have the authority to reconsider its final determinations. *See Borlem S.A.--Empreedimentos Industriais v. United States*, 913 F.2d 933, 938-39 (Fed.Cir.1990) (finding Court of International Trade has the authority to order ITC, on remand, to reconsider a prior determination where such decision was based on erroneous data); *see also Alberta Gas Chems., Ltd. v. Celanese Corp.*, 650 F.2d 9, 12-14 (2d Cir.1981) ("This universally accepted rule [that Federal Courts possess the authority to reconsider their final decisions] has been applied to proceedings before federal administrative agencies. . . . We find no reason, therefore, not to give the [ITC] the opportunity to resolve in the first instance the major issues in this litigation." (citation omitted)). A finding that the ITC has the authority to reconsider a final determination is particularly appropriate where after-discovered fraud is alleged.[6] *See Alberta Gas Chems., Ltd.*, 650 F.2d at 13 ("It is hard to imagine a clearer case for [the ITC] exercising this inherent power than when a fraud has been perpetrated on the tribunal in its initial proceeding.").

Here, the Final Determination was predicated on, what the ITC later described as, "serious material misrepresentations and omissions [Plaintiffs] made during the original investigations on the key issue of ferrosilicon pricing." . . . According to the ITC's brief,

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5. *Compare Pesquera Mares Australes Ltda. v. United States*, 266 F.2d 1372 (Fed.Cir.2001) ("In short, Commerce's antidumping determinations are 'adjudication[s] that produce . . . rulings for which deference [under *Chevron*] is claimed.'" (citation omitted)); *but see Nippon Steel Corp. v. United States*, Slip Op. 01-154, at 6 n. 4 (Dec. 31, 2001) (finding antidumping proceedings investigative because their "basic core findings must be made without regard to the claims of the parties, *ex parte* factual submissions are permitted, there is no administrative law judge, and there is no formal record prior to the final determination." . . .)

6. The court in *Alberta Gas Chems., Ltd.* relied on *Hazel- Atlas Glass Co. v. Harford-Empire Co.*, 322 U.S. 238, 244 (1944), where the Supreme Court stated, in discussing the inherent power of federal courts to reconsider their final judgments, "there has existed . . . a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry." Although *Hazel* dealt with a federal court's inherent authority to reconsider final judgments *Alberta Gas Chems., Ltd.*, extended this reasoning to cover federal agencies. *Alberta Gas Chems., Ltd.*, 650 F.2d at 12-13 ("This universally accepted rule has been applied to federal agencies. . . . Under these circumstances, it makes good sense to allow the [ITC] to determine initially whether there was perjury and if there was, whether the perjury affected the result before the [ITC].").

during the changed circumstances reviews, it learned "that individuals from the domestic ferrosilicon industry who provided information . . . in [the] original investigations were either involved in or personally aware of the price-fixing conspiracy" that overlapped a substantial portion of the original investigation period. . . . Since "[t]hese [individuals] testified and submitted information . . . asserting that the ferrosilicon market was driven by intense price competition" . . . it seems, therefore, to "make[ ] good sense," *see Alberta Gas Chems., Ltd.*, 650 F.2d at 12, that the ITC examine whether the data relied on in making its Final Determination was either false or misleading. Thus, the court finds that the ITC possessed the authority to reconsider the Final Determination.

Having determined that the ITC had the power to reconsider its Final Determination, the court addresses the question of whether too much time passed from the issuance of the Final Determination to the date the ITC initiated its Reconsideration Proceedings. Plaintiffs argue that the "ITC did not [conduct its Reconsideration Proceedings] within a reasonable time after it knew or should have known of the [price-fixing conspiracy] convictions." . . . The ITC, however, argues that it "initiated [the Reconsideration] [P]roceedings promptly after information about the misrepresentations and omissions in the original investigation was presented to it. . . ."

The question presented to the court, then, is whether the four and one-half year period of time that elapsed between the Final Determination and commencement of the Reconsideration Proceedings was reasonable. *See Belville Mining Co. v. United States*, 999 F.2d 989, 997 (6th Cir.1993) ("Even where there is no express reconsideration authority for an agency, however, the general rule is that an agency has inherent authority to reconsider its decision, provided that reconsideration occurs within a reasonable time after the first decision." (citations omitted)). Under the facts presented here, the court finds that the Reconsideration Proceedings were held within a reasonable time. In accordance with its statutes and its regulations, the ITC does not monitor subsequent developments as they pertain to a particular final determination. After rendering a final affirmative determination, the ITC publishes its findings in the Federal Register and communicates them to Commerce, which then issues an appropriate order. The ITC, therefore, was under no obligation to monitor the domestic ferrosilicon industry subsequent to rendering its Final Determination; nor is it reasonable to expect that the ITC should have done so of its own accord. The statutory scheme governing an antidumping or countervailing duty final affirmative determination provides, however, for various kinds of reviews–*e.g.*, changed circumstances reviews and five-year reviews–that allow interested parties to bring relevant developments to the ITC's attention. Thus, allegations of fraud, of the kind made here, would necessarily come to the ITC's attention, if at all, at a time somewhat remote from the original investigations. Indeed, in this case, the evidence of the purported fraud came to light during the course of changed circumstances reviews. *See Ferrosilicon From Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela*, 63 Fed.Reg. at 40,314. Thereafter, the ITC acted promptly, by suspending the changed circumstances reviews, and initiating the Reconsideration Proceedings. *See Notice*, 64 Fed.Reg. at 21,812. . . .

. . . Thus, the ITC took action soon after it possessed information it believed substantiated the allegations concerning the price-fixing conspiracy. Therefore, even though the period of time that elapsed between the Final Determination and the commencement of the Reconsideration Proceedings was substantial, it was not unreasonable.

II. Adherence to Procedures

In their briefs, Plaintiffs contend that, in deciding whether they were entitled to a

hearing during the course of the Reconsideration Proceedings, the court must address the issue of whether the ITC violated their constitutional due process rights. In support of their contention, Plaintiffs argue that due process required that they be granted an evidentiary hearing because "an opportunity to be heard was central to the fact-finding process." . . . And, that "[i]n taking the 'extraordinary step' of . . . instituting a reconsideration proceeding . . . the ITC should have recognized that its inquiry had changed from the conventional economic investigative ambit to [a] historical fact-finding [procedure.]" Defendants, for their part, contend that Plaintiffs' constitutionally protected interests were not violated in the Reconsideration Proceedings, because "[a] prerequisite for due process protection is [that Plaintiffs have] some interest worthy of protect[ion]." . . .

While both Plaintiffs and the ITC couch their arguments, at least in part, in constitutional terms, the issue of whether Plaintiffs' constitutional due process rights were violated need not be addressed to decide the questions presented. *See Transcom, Inc. v. United States*, 182 F.3d 876, 879-80 (Fed.Cir.1999) ("[W]e need not address [Plaintiff]'s argument that the . . . administrative reviews violated [Plaintiff]'s rights under the due process clause of the Fifth Amendment to the Constitution, because we hold that Commerce's conduct in this case violated Commerce's statutory and regulatory notice obligations in connection with the administrative reviews." (citation omitted)); *see also NEC Corp. v. United States*, 21 CIT 933, 946, 978 F.Supp. 314, 326-27 (1997) (quoting *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 321 (1933)). The court, therefore, need not consider the proposed constitutional issues if the matters in question can be settled by reference to statute. *Transcom, Inc.*, 182 F.3d at 879-80. To reach this determination, however, the court must examine whether Plaintiffs were afforded a proceeding conducted in accordance with: (1) the provisions of the *Notice;* and (2) the ITC's governing law, and the regulations promulgated thereunder. *NEC Corp.*, 21 CIT at 946, 978 F.Supp. at 326-27.

As to Plaintiffs' argument that the Reconsideration Proceedings were improperly conducted because they were not afforded a hearing, Defendants argue that Plaintiffs "did not request . . . any additional hearing during [the R]econsideration [P]roceeding[s]" and, therefore, it was not required to conduct one. . . . In support of its argument, the ITC relies on subsection 1677c of title 19, which states: "[T]he . . . Commission shall . . . hold a hearing in the course of an investigation *upon the request of any party* to the investigation before making a final determination under section 1671d or 1673d of this title." 19 U.S.C. § 1677c(a)(1) (1988) (emphasis added). The statute cited by Defendants, however, does not end the matter. The ITC was bound to conduct the Reconsideration Proceedings not only in accordance with its statutes, but also in accordance with the regulations referred to in the *Notice*. That the ITC was required to give notice to interested parties regarding how the Reconsideration Proceedings would be conducted is well settled. *See, e.g., Am. Lamb Co. v. United States*, 785 F.2d 994 (Fed.Cir.1986). It is equally well settled that once it gave notice as to how the Reconsideration Proceedings would be conducted, the ITC was required to actually conduct those proceedings in accordance therewith. *See PPG Indus., Inc. v. United States*, 13 CIT 183, 190 n. 4, 708 F.Supp. 1327, 1332 n. 4 (1989) ("[A]n agency's failure to follow its own rules and procedures is fatal to action." (citation omitted)). In addition, the ITC was obligated to notify interested parties of any change in the manner in which these proceedings would be conducted. *See Gen. Elec. Co. v. United States*, 53 F.3d 1324, 1329 (D.C.Cir.1995) ("If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify,

with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner. ..." (citation omitted)).

Here, while the ITC styled its proceedings as a reconsideration, it had no statutory or regulatory guidance as to how the proceedings were to be conducted.[8] . . . Under these circumstances, it was not unreasonable for the ITC to rely on existing regulations and, thus, it notified interested parties to look to "the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts, A, C, and D (19 CFR part 207)." *Notice*, 64 Fed.Reg. at 28,212. By doing so, the ITC informed interested parties that were entitled to rely on the provisions of subsection 207.23(a), which state, in relevant part, "[t]he Commission shall hold a hearing concerning an investigation before making a final determination. . . ." 19 C.F.R. § 207.23 (1993). Thus, the ITC gave notice "with ascertainable certainty," *Gen. Elec. Co.*, 53 F.3d at 1329, that there would be a hearing prior to a final determination being rendered, thereby creating an obligation on its part to provide such hearing. *See Mercer v. Dep't of Health and Human Servs.*, 772 F.2d 856, 859 (Fed.Cir.1985) ("Where the agency has adopted a procedure that provides for a predecision hearing the denial of [this] predecision hearing is clear error.").

Rather than doing so, however, the ITC concluded no new hearings would be held. Instead, the ITC included in the record a January 22, 1993 hearing conducted in connection with the original investigation leading to its Final Determination, . . . and, further, incorporated into the record a second hearing conducted on April 13, 1999, during the changed circumstances reviews. . . . Each hearing was held before the ITC gave notice that it had suspended the changed circumstances reviews and instituted the Reconsideration Proceedings.[9] These hearings, however, were not sufficient to fulfill the ITC's commitments. Although the ITC may not have been required by statute to grant a hearing during the course of the Reconsideration Proceedings, by directing interested parties to the regulations cited in the *Notice* it created an obligation to do so. *See Mercer*, 772 F.2d at 859. In addition, by citing these regulations in the *Notice*, the ITC obliged itself to conduct the Reconsideration Proceedings in every particular in accordance with those regulations. Thus, Plaintiffs were entitled not only to a hearing, they were also entitled to all of the other benefits of the "Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts, A, C, and D (19 CFR part 207)[ ]" *Notice*, 64 Fed.Reg. at 28,212, including adequate notice, pre-hearing briefing and post-hearing briefing. *See* 19 C.F.R. § 207.20(b) ("Upon receipt of notice from the administrating authority of an affirmative preliminary determination [or] notice of an affirmative final determination . . . the Commission shall publish in the Federal Register notice of its investigation to reach a final determination. . . ."); 19 C.F.R. § 207.22 ("Each party may submit to the Commission, no later than a date specified in the notice of investigation, a prehearing brief."); 19 C.F.R. § 207.23(a) ("The Commission shall hold a hearing concerning an investigation before making a final determination. . . ."); 19 C.F.R. § 207.24 ("Any party may file a posthearing brief concerning the information adduced at or after the hearing

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8. *See Ferrosilicon from Brazil, Kazakhstan, People's Republic of China, Russia, Ukraine, and Venezuela*, 64 Fed.Reg. at 51,098 ("The ITC's action in these cases is unique and there is no statutory provision which explicitly provides for the manner in which the Department should rescind these orders. . . . In this instance, therefore, rescission of the[se] ferrosilicon orders from the dates of issuance is the legal equivalent of the action required to be taken by the Department under sections 705(c)(2) and 735(c)(2) .").

9. This is particularly significant as to Globe for, although Globe was party to the proceedings leading to the Final Determination, it did not participate in the changed circumstances reviews. *Notice*, 64 Fed.Reg. at 28,212. . . .

with the Secretary within a time specified in the notice of investigation or by the presiding official at the hearing.").

Finally, as to the ITC's contention that it need not examine whether the alleged price-fixing conspiracy actually distorted the domestic ferrosilicon prices at issue in the original investigations, should evidence with respect thereto be presented during the course of the further proceedings on remand, the ITC shall consider such evidence as it would consider any other evidence on the record. *See* 19 U.S.C. § 1677e (1988).

C. THE WIDGET CASE

In light of the material presented so far in this chapter, we now consider a hypothetical antidumping case taken in its entirety.

1. Taking Action under U.S. Law

NusGidgets ("NG"), a Nusquami company, manufactures and sells gidgets for export only. Nusquam is an Islamic state that strictly prohibits domestic sales of psychotropic devices; hence, there is no domestic market for, *inter alia*, widgets, gadgets or gidgets in Nusquam. However, NG does produce steel ball bearings (not subjected to cross-hatching to turn them into gidgets) and sells them in Nusquam for approximately $0.80 per ball bearing.

Under a long-term Master Operating Agreement ("the agreement"), NG regularly sells, in commercial quantities, gidgets to its U.S. subsidiary, NusGidgets (US) ("NG-US"), at $1.00 per gidget. NG-US sells the gidgets to Gidgets R We at $1.10 per gidget. NG-US as importer of the gidgets pays a $0.05 U.S. tariff on the gidgets. The agreement also requires NG-US to pay $1,000 for each container in which the gidgets are shipped (amounting to $0.01 per gidget); $1,000 in shipping charges per container; $2,000 in insurance and handling for each container (amounting to $0.02 per gidget). NG is required to pay the Nusquami Port Authority port user fee (amounting to $0.10 per gidget). The agreement also provides for an "agency fee" payable by NG to NG-US amounting to $0.02 per gidget sold by NG-US in the United States. In addition, under the agreement NG has extended a long-term line of credit to NG-US; current costs of the line of credit amount to approximately $0.01 per gidget, at current levels of NG-US indebtedness.

NG also produces gidgets for sale and export to Royal Plodget, a major retailer of psychotropic devices in the United Kingdom. These sales, in commercial quantities, are priced at approximately 1 pound per gidget. (Current conversion rate: 1 pound = $1.63.)

The U.S. Gadget Producers Association (GPA), a trade association of all domestic producers of gadgets (which tend to be relatively small firms), has noticed that over the past year NG gidget exports to the United States have risen by 100 percent. NG's U.S. market share of psychotropic devices (*i.e.*, widgets, gadgets and gidgets) has increased from five percent to thirteen percent. In the same period, prices for domestic psychotropic products have declined by an average of 20 percent. In the past eighteen months, three of the twenty U.S. gadget producers have gone out of business, and one has merged into a large U.S. widget manufacturer.

The GPA wishes to file a petition for AD duties against imports of NG gidgets. The GPA anticipates that, once it files a petition, the American Widget Council (AWC) a trade association of all producer-importers of widgets (which tend to be relatively large

firms), will try to oppose the petition.

You are a new associate with the U.S. law firm, Dent, Arthur, Dent & Prefect. The GPA has approached the partner with whom you are working for advice. The partner has related the above facts to you, and has asked you to draft a memorandum to prepare her for her next meeting with the GPA's president and general counsel. In particular, she would like guidance on the following issues:

a. What procedures would be followed if the petition were filed?
b. Would the AWC be permitted to oppose the petition, and if so, on what grounds?
c. What is the likely outcome of the petition?

If you believe that you need other facts or information in order to respond to any issue, indicate what fact or information you need and what difference it would make to your answer.

2. WTO Implications

Assume that the DOC has made a final determination that gidgets exported by NusGidgets ("NG") to the United States do involve dumping, in an amount determined in accordance with Part I of our problem. Assume also that the ITC has made a final determination that there is material injury to the U.S. gadget industry (but not to the U.S. widget industry).

In part, the ITC's determination was based upon the data resulting from a questionnaire that it distributed to U.S. manufacturers of psychotropic devices. It distributed questionnaires to 50 manufacturers, seeking information about "industry" definition and characteristics, total sales and net profits for the relevant period under investigation, and relative market shares, among other things. It received complete and usable responses from 26 respondents (20 gadget manufacturers, 4 widget manufacturers, the GPA, and the AWC). On the basis of this information, information derived from the GPA's petition, information made available by the DOC, and information submitted by NG and by the AWC, the ITC reached its conclusions with respect to material injury to the gadget industry.

The DOC issued an AD order in accordance with the findings reached in Part I of this problem. NG challenged the Government's action before the CIT. The CIT upheld the AD order, holding that the determinations of the DOC and the ITC were supported by "substantial evidence." NG did not appeal this ruling to the Federal Circuit.

Nusquam is considering whether to challenge the U.S. action imposing AD duties before the WTO. You are on the staff of the USTR. She has asked you to prepare a memorandum discussing the implications of such a challenge. Specifically, she wants to know:

a. What procedures would apply to such a challenge?
b. What are the likely grounds on which Nusquam would challenge the U.S. action?
c. On the information currently available, what is the likelihood that the Nusquami challenge would be successful?

If you believe that you need other facts or information in order to respond to any issue, indicate what fact or information you need and what difference it would make to your answer.

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