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# ARTICLES

## COUNTERVAILING SUBSIDIZED IMPORTS: THE INTERNATIONAL TRADE COMMISSION GOES ASTRAY

N. David Palmeter\*

In the early 1980s, nearly 500 years after Christopher Columbus made a similar journey, many ships carrying steel left Spanish ports bound for the New World. Some of them would call at East and Gulf Coast ports of the United States. Others carried their products through the Panama Canal to markets in San Diego, Los Angeles and Oakland, where they would compete with suppliers from Canada, Japan, Korea, Mexico and Taiwan for the import share of the United States market for steel. And all of these exporters would compete for that market with United States producers, who took an exceedingly dim view of the import competition.

How was it that the Spanish steel exporters were able to ship their merchandise so far and yet remain price competitive? The answer was simple to the steel producers in the United States: their Spanish competitors, they said, were being subsidized by the Spanish Government. And so it was that in late 1982, the Spanish steel exporters found themselves before the United States International Trade Commission defending against a claim that they were causing material injury to the steel industry in the United States by reason of their subsidized exports to this country.

If the Spanish steel exporters had cause for concern with the outcome of that proceeding, they also had some cause for optimism. After all, the limited quantity of steel they exported to the United States served to lower the costs of the manufacturers in the United States who used steel as a raw material and who themselves had to compete with imported finished products. But more

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importantly, for some of the steel products involved, the Spanish would argue that the subsidies themselves were small. Imports subsidized by small amounts may be less injurious than the same amount of imports subsidized by large amounts—that was clear, they would argue, from some 25 years of precedent, from the terms of an international agreement dealing with subsidies, and from the legislative history of a U.S. law implementing that international agreement.

But this argument did not impress the Commission. Reversing a quarter century's precedent, a majority held that it makes no difference if subsidies are high or low: a subsidy of one percent is as injurious as a subsidy of 100 percent. The Spanish lost their case completely, and two months later, Korean exporters of steel fell victim to the same rationale.<sup>1</sup> United States law had taken a sharp turn with large implications for the trade that it regulates.

The immediate extension of the new doctrine to a Pacific Basin country—Korea—demonstrates its applicability to all exporters in the region. U.S. importers and U.S. consumers will be affected as well. So will U.S. industries that seek protection—and not always by way of more protection.

## I. THE STATUTORY SCHEME AND THE NEW DOCTRINE

The Spanish and Korean steel exporters were being investigated under the countervailing duty provisions of the Tariff Act of 1930.<sup>2</sup> These require imposition of a special duty to offset—or

1. The cases are Certain Carbon Steel Products from Spain, Inv. Nos. 701-TA-155, 157, 158, 159, 160 and 162 (Final), USITC Pub. 1331 (Dec. 1982); Hot-Rolled Stainless Bar, Cold Formed Stainless Steel Bar, and Stainless Steel Wire Rod from Spain, Inv. Nos. 701-TA-176 through 178 (Final) USITC Pub. 1333 (Dec. 1982); Certain Welded Carbon Steel Pipes and Tubes from the Republic of Korea, Inv. Nos. 701-TA-168 (Final) USITC Pub. 1345 (Feb. 1983); and Certain Carbon Steel Products from the Republic of Korea, Inv. Nos. 701-TA-170 through 173 (Final), USITC Pub. 1346 (Feb. 1983).

2. 19 U.S.C. § 1671d(b) (1981). "Title VII — COUNTERVAILING AND ANTI-DUMPING DUTIES" was added to the Tariff Act of 1930, 46 Stat. 590, by Title I of the Trade Agreements Act of 1979, Pub. L. No. 96-39. The Commission's pertinent responsibilities are set forth in Section 705(b)(1):

IN GENERAL.—The Commission shall make a final determination of whether—

- (A) an industry in the United States—
  - (i) is materially injured, or
  - (ii) is threatened with material injury, or
- (B) the establishment of an industry in the United States is materially retarded,

by reason of imports of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a).

Retardation of the establishment of an industry is not commonly at issue. "Net sub-

"countervail"—subsidies paid on products exported to the United States. The companion antidumping provisions of the same law require imposition of an offsetting "antidumping" duty to discourage foreigners from pricing their merchandise in the United States below "fair value," which generally means the price they charge for the same merchandise in their own home market.<sup>3</sup>

But neither a countervailing duty nor an antidumping duty is automatic. Only if the subsidized or "dumped" imports cause injury to an industry in the United States will either duty be imposed.<sup>4</sup> In the absence of injury, the lower the price of the imports, the better, for if no one is being hurt by the imports, why should the law require a buyer to pay more than necessary? To do so, at a minimum, adds to balance of payment difficulties and contributes to inflation. Few would object, after all, if a member of the Organization of Petroleum Exporting Countries were to subsidize its oil exports to this country, or if it were to price lower in the United States than it does in its home market. For this reason, once it is determined that imports are being subsidized or sold below fair value, the Commission considers the question of injury.

Whether imports are in fact benefitting from a subsidy or whether their price to the United States is below fair value is determined by the Department of Commerce, which also determines the amount of the subsidy or less than fair value margin.<sup>5</sup> If Commerce determines that subsidies or sales below fair value exist, the Commission then is charged with determining whether a domestic industry is materially injured, or is threatened with material injury, by reason of those subsidized or less than fair value imports.<sup>6</sup>

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sidy" is defined in Section 771(6) as the gross subsidy less specified deductions. See 19 U.S.C. § 1677(6) (1981).

3. 19 U.S.C. § 1673; *Kleberg & Co., Inc. v. United States*, 71 F.2d 332, 334 (C.C.P.A. 1933); "Antidumping duties are intended to restrain unfair pricing practices by private exporters. Countervailing duties are intended to offset government unfair practices that have their effect on the prices charged by private exporters," K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 167 (1970).

4. 19 U.S.C. § 1673(2) (1981). There is one exception: countries that are not signatories to the International Subsidies Agreement, or who have not assumed substantially equivalent obligations are subject to imposition of countervailing duties on otherwise dutiable merchandise without an injury determination. See *infra* notes 51 and 52 and accompanying text.

5. Responsibility for determining the existence and amount of any subsidies under the countervailing duty provisions of Title VII, or less than fair value margins under the antidumping provisions, was transferred to Commerce from the Department of the Treasury by Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69, 173 (1979) (codified as a note at 19 U.S.C. § 2171 (1981)). See *Palmeter & Kossl, Restructuring Executive Branch Trade Responsibilities: A Half-Step Forward*, 12 *LAW & POL'Y INT'L BUS.* 611 (1980).

6. Both Commerce and the Commission are required to reach preliminary determinations. Tariff Act of 1930, 19 U.S.C. § 1671b(b) (1981). If the preliminary determination by Commerce is affirmative, the Commission must reach its final

Common sense suggests that a central element of the Commission's analysis should be the amount by which the imports are being subsidized or sold below their fair value. The countervailing and antidumping provisions of the Tariff Act are aimed only at subsidies and at sales below fair value; they are not aimed at imports *per se*.<sup>7</sup> The only remedy these provisions offer to an injured U.S. industry is a special additional duty to offset the amount of the subsidy or the differential between the price to the U.S. and "fair value." It stands to reason that the harm and the remedy will be related. If the remedy is small — because the subsidy is small — it may not be enough to alleviate the injury. Even with a special duty completely offsetting a subsidy or a margin below fair value, imports may continue to undersell domestic goods, and grow at their expense. But if this is true, then it follows that the injurious character of the imports is caused by something other than the subsidy or the extent to which the U.S. price is below fair value: better styling or design, for example, or superior technology. When this is true — when the unfair practice at which the statute is aimed is not the cause of the injury — no purpose is served by imposing the special duty.

Until recently, the Commission adhered to this view: the amount of the subsidy, or the margin below fair value, whether one percent or 100 percent, could make a difference in its evaluation of the facts in a particular case. No longer. Now the Commission holds that it need not establish a causal link between "the imports" that are subsidized, or sold below fair value, and the material injury.<sup>8</sup>

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determination before the latter of the 120th day after the Commerce preliminary determination or the 45th day after the Commerce final determination. *Id.* § 1671d(b)(2). If the Commerce preliminary determination is negative but its final determination affirmative, the Commission's final determination shall be made within 75 days of the final determination by Commerce. *Id.* § 1671d(b)(3).

7. See *infra* Section II and cases cited.

8. In *Certain Carbon Steel Products from Spain*, Inv. Nos. 701-TA-155 through 160 and 162 (Final), USITC Pub. 1331 (Dec. 1982), Chairman Eckes and Commissioner Haggart suggested that the subsidy level may merit consideration as a "factor" within the meaning of Section 771(7)(B) of the Act which directs the Commission, in making its determinations, to consider "among other factors" the volume, effect and impact of imports 19 U.S.C. § 1671(7)(B) (1981). They state that "the relationship of the net subsidy to material injury should not be dispositive of the issue of causation." USITC Pub. 1331 at 14. This remark seems to misstate the issue: the argument is not that the subsidy level always is *dispositive*, but that it is a *relevant* consideration which, on the facts of particular cases, may be dispositive. In any event, the Chairman and Commissioner Haggart in fact do not treat the subsidy amount as "among the factors" they considered, nor do they explain why the subsidy amount was in no way relevant.

While conceding "some logic in assuming that a less than fair value dumping margin will manifest itself through price differentials in the market," it is argued that "this may not be the case with a subsidy." *Id.* at 33 (Opinion of Commissioner Hag-

This doctrine is based on a literal reading of the statute which states that the Commission shall determine whether material injury is "by reason of imports of the merchandise." The statute does not say, according to this view, that the Commission is to determine whether material injury is by reason of the amount of a subsidy or the margin at which goods are priced below fair value. The Department of Commerce determination that merchandise exported to the United States is subsidized or is sold below fair value, the reasoning goes, serves only to identify the imports and not to characterize them as products that also carry a subsidy or dumping margin of a given amount. Once the scarlet letters "subsidized" or "dumped" are pinned to the imports, the Commission no longer considers the nature or the degree of the sin involved. Only the quantity matters.

The Commission is in error. Its analysis of the issue of material injury which considers subsidized imports apart from their subsidy (or, in an antidumping investigation, their less than fair value margin) ignores the underlying purpose of the statute which is to prevent or remedy the injury caused by allegedly unfair trade practices (subsidization or dumping) and not from imports *per se*. The Commission's new approach is more than a reversal of its prior practice. It also misinterprets the Trade Agreements Act and its legislative history and is contrary to the international obligations of the United States. The traditional Commission approach not only makes the most sense from a policy viewpoint, it

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gart). Subsidies may be used for many purposes, such as product development. *Id.* Regardless, however, of the form in which a subsidy is paid and regardless of how a foreign producer may utilize it, for countervailing duty purposes a subsidy is reduced to an *ad valorem* percentage for assessment of a specific duty amount. See 19 U.S.C. § 1671(a), § 1677(5) (1981). This is necessary to determine how much in fact the imports benefit from whatever subsidy is granted. To the extent that, in a particular case, it is difficult, unreasonable or impossible to take into account the amount of a particular subsidy, the Commission is not obligated to do so, as indeed it has not done so during the time the prior doctrine was clearly accepted. See *infra* Section II. To say that in a particular case it may be difficult, unreasonable or impossible to take into account a subsidy amount is not to say that this always would be true. Normally, any economic benefit ultimately translates into price. *Dam, supra* note 3. Moreover, while the argument suggests that the Commission should treat less than fair value margins different from subsidy amounts, this in fact has not been done by the majority. In an antidumping determination issued contemporaneously with the Korean steel cases, Commissioner Stern, consistent with her position, reached a negative result as to some of the products because "Japanese prices are so far below U.S. prices that the dumping margin could not have had an injurious effect on the U.S. industry. . . ." Certain Seamless Steel Pipes and Tubes from Japan, Inv. Nos. 731-TA-87 (Final) USITC Pub. 1347 (Feb. 1983) at 19-20 (view of Commissioner Stern). The majority did not even address the issue. In view of her suggestions in Certain Carbon Steel Products from Spain, that there might be a difference between countervailing duty and antidumping investigations on this point, it is unfortunate that Commissioner Haggart did not take the opportunity to address the matter.

also is an approach which has been sanctioned by Congress and is in accord with the international obligations of the United States.

## II. PRIOR AGENCY PRACTICE

The question of whether the Commission should consider imports apart from the amount of subsidy or less than fair value margin that they carry might be different if the Commission were writing on a blank slate. But it is not. The Commission's practice concerning causality does not begin with the amendments made by the Trade Agreements Act of 1979. The "by reason of" imports language of both the antidumping and countervailing duty provisions of the present law is carried forward essentially unchanged from the language of the Antidumping Act of 1921<sup>9</sup> and of Section 303(b) of the Tariff Act of 1930, dealing with subsidies on duty-free merchandise.<sup>10</sup> Practice under these statutes was to consider these levels as one of the relevant economic factors in the analysis of causation. That practice was carried over by the Commission into the first Title VII decisions under the 1979 Amendments (Title VII of the U.S. Code which concerns import restrictions).

### A. Commission Practice Prior to the 1979 Amendments

1. *Under the Antidumping Act of 1921, as amended.* The first case in which the level of less than fair value (LTFV) margins appears to have been an important factor in a Commission deter-

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9. Ch. 14, tit. II, 42 Stat. 11 (1921) (previously codified at 19 U.S.C. § 160 *et seq.* (1981)) Injury determination authority under the Antidumping Act of 1921 was transferred from the Secretary of the Treasury to the United States Tariff Commission in 1954. Ch. 1213, tit. III, 68 Stat. 1138 (1954). The United States Tariff Commission was renamed the United States International Trade Commission by the Trade Act of 1974, § 171(a), 19 U.S.C. § 2231 (1981). The Commission is an agency independent of the executive branch which has no control over its budget submission, 19 U.S.C. § 2232, or its litigation, 19 U.S.C. § 1333. For an overview of Commission practice which sets forth the view that the Commission should ignore subsidy amounts, see, Easton, *Administration Of Import Trade Statutes: Possibilities for Harmonizing the Investigative Techniques and Standards of the International Trade Commission*. 10 GA. J. INT'L. & COMP. L. 65 (1980). Easton's views appear to be the first published version of the argument that the Commission should ignore subsidy amounts.

10. The Antidumping Act of 1921, used the phrase, "by reason of the importation of such merchandise into the United States." 19 U.S.C. § 160(a) (1981). Section 303(b) of the Tariff Act of 1930, authorizing the imposition of countervailing duties on otherwise duty free merchandise (*see infra* notes 30 to 32 and accompanying text), employed the phrase, "by reason of the importation of such article or merchandise into the United States." The stylistic difference between the use of "by reason of imports" in Title VIII and "by reason of the importation" of the other statutes does not have bearing on the issue and is not so argued by those suggesting that LTFV margins or subsidy levels are not relevant.

mination was *Vital Wheat Gluten from Canada*.<sup>11</sup> This was the 37th investigation under the 1921 Act following transfer to the Commission a decade earlier of responsibility for the injury determination.<sup>12</sup> In *Wheat Gluten*, the majority observed:

[T]o bring the Antidumping Act into play, such injury must be caused by the "dumping" of the product, not merely by the imports *per se*.<sup>13</sup>

The Commission reached a negative determination on the facts:

[S]ince neither the quantities nor the prices of imports would have been significantly different had the sales been at fair value, the total competitive situation in which the industry found itself was unaffected by the less-than-fair-value sales as such.<sup>14</sup>

Later that same year, in *Carbon Steel Bars and Shapes from Canada*,<sup>15</sup> the level of LTFV margins was used to support an affirmative injury determination:

For the Commission to find injury to a domestic industry in a dumping case, it must be satisfied that there is material injury and that it is being caused by the sales-below-fair-value aspect of the goods in question rather than by their mere importation.<sup>16</sup>

In making the causal connection between the "dumping" and the injury, the Commission found that "[t]he successful penetration of the market was therefore due directly to the less-than-fair-value pricing policy, and not to the mere availability of the goods."<sup>17</sup>

These are the first of at least 53 Commission determinations under the 1921 Act in which the level of LTFV margin was explicitly dealt with in the Commission's rationale.<sup>18</sup> Generally, the

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11. *Vital Wheat Gluten from Canada*, Inv. No. AA 1921-37, TC Pub. 126 (April 1964).

12. *See supra* note 9. The Commission's caseload of 37 cases in the decade between 1954 and 1964 is in sharp contrast to the present. During the fiscal year 1981 alone, the Commission concerned itself with some investigatory aspect of 28 antidumping investigations. UNITED STATES INTERNATIONAL TRADE COMMISSION, 1981 ANNUAL REPORT 4.

13. Inv. No. AA 121-37 TC Pub. 126.

14. *Id.* at 3-4.

15. Inv. No. AA 1921-39, TC Pub. 135 at 2 (Sept. 1954).

16. *Id.* at 2.

17. *Id.* at 6.

18. *Azobisformamide from Japan*, AA 1921-45, TC Pub. 153 (Apr. 1965); *Steel Jacks from Canada*, AA 1921-49, TC Pub. 186 (Aug. 1966); *Plastic Mattress Handles from Canada*, AA 1921-57, TC Pub. 296 (Oct. 1969); *Ferrite Cores from Japan*, AA 1921-65, TC Pub. 360 (Jan. 1971); *Television Receiving Sets from Japan*, AA 1921-66, TC Pub. 367 (Mar. 1971); *Capacitors from Japan*, AA 1921-67, TC Pub. 368 (Mar. 1971); *Ceramic Wall Tile from the United Kingdom*, AA 1921-68, TC Pub. 381 (Apr. 1971); *Clear Sheet Glass and Clear Plate and Float Glass from Japan*, AA 1921-



level of the LTFV margin took on relevance when it was determined to have been high enough to account for the underselling of the domestic article by the imports,<sup>19</sup> when it permitted imports to gain market share,<sup>20</sup> or when it was considered small in relation to

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69/70, TC Pub. 382 (Apr. 1971); Chicken Eggs in the Shell from Mexico, AA 1921-75, TC Pub. 400 (June 1971); Clear Sheet Glass from Taiwan, AA 1921-76, TC Pub. 407 (July 1971); Tempered Glass from Japan, AA 1921-77, TC Pub. 410 (July 1971); Sheet Glass from France, Italy and West Germany, AA 1921-78, 79 and 80, TC Pub. 431 (Nov. 1971); Tubeless Tire Valves from Canada, AA 1921-82, TC Pub. 445 (Dec. 1971); Fish Nets and Netting of Man-Made Fibers from Japan, AA 1921-85, TC Pub. 477 (Apr. 1972); Large Power Transformers from France, Italy, Japan, Switzerland, and the United Kingdom, AA 1921-86/90, TC Pub. 476 (Apr. 1972); Cadmium from Japan, AA 1921-93, TC Pub. 494 (June 1972); Hand Pallet Trucks from France, AA 1921-95, TC Pub. 498 (July 1972); Pentaerythritol from Japan, AA 1921-96, TC Pub. 508 (Sept. 1972); Roller Chain from Japan, AA 1921-111, TC Pub. 552 (Mar. 1973); Manual Hoists from Luxembourg, AA 1921-113, TC Pub. 560 (Mar. 1973); Stainless Steel Plate from Sweden, AA 1921-114, TC Pub. 573 (May 1973); Synthetic Methioinine from Japan, AA 1921-115, TC Pub. 578 (May 1973); Printed Vinyl Film from Brazil and Argentina, Inv. Nos. AA 1921-117 and 118, TC Pub. 595 (July 1973); Germanium Point Contact Diodes from Japan, AA 1921-125, TC Pub. 611 (Sept. 1973); Papermaking Machinery and Parts from Sweden, AA 1921-128, TC Pub. 618 (Oct. 1973); Expanded Metal of Base Metal from Japan, AA 1921-130, TC Pub. 629 (Nov. 1973); Calcium Pantolthenate from Japan, AA 1921-131, TC Pub. 630 (Dec. 1973); Metal Punching Machines, Single-End Type, Manually Operated, from Japan, AA 1921-133, TC Pub. 640 (Jan. 1974); Picker Sticks from Mexico, AA 1921-139, TC Pub. 671 (May 1974); Tapered Roller Bearings and Certain Parts thereof from Japan, AA 1921-143, USITC Pub. 714 (Jan. 1975); Birch Three-Ply Door Skins from Japan, AA 1921-1950, USITC Pub. 754 (Jan. 1976); Melamine in Crystal Form from Japan, AA 1921-162, USITC Pub. 796 (Dec. 1976); Metal-Walled Above-Ground Swimming Pools from Japan, AA 1921-165, USITC Pub. 821 (June 1977); Welded Stainless Steel Pipe and Tube from Japan, AA 1921-180, USITC Pub. 899 (July 1978); Rayon Staple Fiber from Belgium, AA 1921-186, USITC Pub. 914 (Sept. 1978); Steel Wire Strand for Prestressed Concrete from Japan, AA 1921-188, USITC Pub. 928 (Nov. 1978); Silicon Metal From Canada, AA 1921-192, USITC Pub. 954 (Mar. 1979); Bicycle Tires and Tubes from the Republic of Korea, AA 1921-193, USITC Pub. 158 (Mar. 1979); Perchloroethylene from Belgium, France and Italy, AA 1921-196, USITC Pub. 969 (Apr. 1979); Methyl Alcohol from Canada, AA 1921-202, USITC Pub. 986 (June 1979); Kraft Condenser Paper from Finland and France, AA 1921-204 and 205, USITC Pub. 999 (Aug. 1979).

19. See e.g., Steel Jacks from Canada, AA 1921-49, TC Pub. 186 (Aug. 1966) at 3: "The difference in price of the imported and domestic jacks was made possible by the margin between the difference between the 'fair value' and the importer's purchase price, which was substantial;" Television Receiving Sets from Japan, AA 1921-66, TC Pub. 367 (Mar. 1971) at 7: "The LTFV margins were often equivalent to a substantial part of the margin of underselling in the United States; in other instances, the LTFV margin was found to be greater than the margin of underselling;" Tapered Roller Bearings and Certain Parts Thereof From Japan, AA 1921, USITC Pub. 714 (Jan. 1975) at 5: "Had it not been for the LTFV margins, the imported bearings would not have had a significant price advantage in 1973 and 1974, and the domestic bearings would have been more competitive in the domestic marketplace;" Methyl Alcohol from Canada, AA 1921-202, USITC Pub. 986 (June 1979) at 4: "It is clear that without significant dumping margins (in some cases over 100 percent) at which the Department of the Treasury determined that AGCL sold in the United States, these imports would not have undersold U.S.-produced methyl alcohol or suppressed U.S. producers' prices."

20. See e.g., Roller Chain from Japan, AA 1921-111, TC Pub. 552 (Mar. 1973) at

the amount by which imports undersold the domestic article.<sup>21</sup> Of the 53 decisions, 40 were affirmative and 13 negative. The exercise was not a simplistic addition of the weighted average LTFV margin to the price of the imports and a comparison of the total to domestic prices. In *Fishnets and Netting of Man-Made Fibers from Japan*, for example, the LTFV margins were less than the amount by which the imports undersold the domestic article, but they nonetheless were found to be a significant factor in aiding the imports in gaining market share:

Although the margins of dumping are a relatively small part of the margins of underselling by the Japanese, they are quite significant in the resulting displacement of the domestic product and the adverse price effects in the U.S. market.<sup>22</sup>

A similar rationale was employed in *Metal Walled Above-Ground Swimming Pools from Japan*.<sup>23</sup> The weighted average LTFV margin was only 3.5 percent and the imports undersold the domestic article by amounts ranging from 24 to 41 percent. But because the domestic producers were able to provide numerous

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3: "We find that the price advantage afforded by such sales in the United States at LTFV enabled Japanese importers to make substantial inroads into an already declining market"; Printed Vinyl Film from Brazil and Argentina, AA 121-117 and 118, TC Pub. 595 (July 1973) at 4: "The rapid market penetration achieved by the imports from Brazil and Argentina was made possible mainly through the LTFV pricing by the foreign manufacturers"; Birch Three-Ply Door Skins from Japan, AA 1921-150, USITC Pub. 754 (Jan. 1976) at 13: "The increased penetration of such imports into the U.S. market was largely attributable to their significantly lower prices made possible by the substantial dumping margins"; Perchloroethylene from Belgium, France and Italy, AA 1921-194 through 196, USITC Pub. 969 (Apr. 1979) at 5: "The information obtained in the investigation clearly establishes that this import penetration was achieved as a result of prices being the same as or below domestic prices and that, had the imports been sold at less than fair value, they would have been priced considerably higher than domestically produced perchloroethylene."

21. See e.g., Capacitors from Japan, AA 1921-67, TC Pub. 368 (Mar. 1971) at 3: "Even had these imports of LTFV capacitors been subject to a dumping duty, moreover, the amount of such duty collected on imports of ceramic capacitors would have been trivial and that collected on imports of aluminum electrolytic capacitors, while much larger, would have been equivalent to only a small part of the difference in prices between the domestic and imported capacitors"; Tubeless Tire Valves from Canada, AA 1921-82, TC Pub. 445 (Dec. 1971) at 5: "Had the imports of LTFV valves from Canada been subject to dumping duties, the amount of such duties would have been considerably less than the difference in U.S. market price between the large U.S. producers' valves and the LTFV valves"; Hand Pallet Trucks from France, AA 1921-95, TC Pub. 498 (July 1972) at 6: "Moreover, the margin of dumping was so slight that it could not have affected the competitive position of the LTFV merchandise vis-a-vis either those articles that were priced higher than the LTFV imports or those that were priced lower, so substantial were the price differentials"; Silicon Metal from Canada, AA 1921-192, USITC Pub. 954 (Mar. 1979) at 6: "Furthermore, the dumping margins on the bulk of SKW's sales were sufficiently small in relation to the margin by which these imports undersold U.S. producers, that had they been eliminated entirely SKW would have still undersold the U.S. producers."

22. AA 1921-85, TC Pub. 477 (Apr. 1972) at 5.

23. AA 1921-165, USITC Pub. 821 (June 1977) at 8.

services unavailable from the Japanese (e.g., financing, significantly shorter delivery times), "the practical price advantage" was determined to be less than 10 percent. Consequently, the 3.5 percent weighted average margin was determined to be a "significant factor in causing likelihood of injury to the domestic industry."<sup>24</sup>

The fact that an LTFV margin was comparatively great was not always controlling. In *Saccharin from Japan and the Republic of Korea*,<sup>25</sup> LTFV margins from Japan averaged 9.4 percent on all of the sales examined, except for one producer, while from Korea margins averaging 25 percent were found on 100 percent of the sales examined.<sup>26</sup> Despite these high margins (particularly from Korea) the Commission found no injury because of other economic factors. But in *Tempered Glass from Japan*,<sup>27</sup> a weighted average margin of only six-tenths of one percent<sup>28</sup> (0.6 percent) was deemed critical:

In markets where the product is generally homogenous, where several suppliers exist, where customers are price conscious and able to shift from one supplier to another with relative ease, price competition is often intense. Under such circumstances, a small price advantage, one which might be unimportant in other markets, can be decisive in determining who makes a sale. These characteristics typify the domestic market for tempered glass for patio doors. A realized price differential of 1 cent per square foot, or less, can have an appreciable effect on sales. Hence, dumping margins in this case need not be great to confer a distinct advantage to the foreign producer. . . .<sup>29</sup>

The rule that the level of the LTFV margin could have bearing on the determination of whether the requisite injury was occurring "by reason of the importation" of the merchandise was well established by the Commission in its practice under the Antidumping Act of 1921. The issue was not considered crucial in all of the cases; indeed, in most of them other economic factors played a more important role in the outcome. Nevertheless, margin levels frequently could and did make a difference, depending upon all of the facts of particular cases. Now the Commission says that this particular economic fact—the subsidy or dumping margin amount—is never of importance.

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24. *Id.*

25. AA 1921-174 and 175, USITC Pub. 846 (Dec. 1977).

26. *Id.* at 4.

27. AA 1921-77, TC Pub. 410 (July 1971).

28. *Id.* at 9.

29. *Id.* at 4-5. This was a split decision, two commissioners voting in the affirmative and two in the negative. *Id.* at 2 n.1. Under the Antidumping Act of 1921 an affirmative determination resulted from a tie vote. Antidumping Act of 1921, 19 U.S.C. § 160(a) (1981). Under the 1979 Amendments to the Tariff Act of 1930, this is continued for both antidumping and countervailing duty cases. Tariff Act of 1930, 19 U.S.C. § 1677(11) (1981).

2. *Under Section 303(b) of the Tariff Act of 1930.* The Trade Act of 1974 provided for the imposition of countervailing duties on merchandise otherwise duty free.<sup>30</sup> Prior to that time, only dutiable merchandise was subject to possible countervailing duties, and no injury test was employed.<sup>31</sup> The Commission made ten determinations under Section 303(b) prior to enactment of the 1979 Amendments.<sup>32</sup> The level of subsidies played an important role in four of them.

In the first section 303(b) determination,<sup>33</sup> the issue was whether the industry in the U.S. producing footwear competitive with subsidized zoris (a type of casual sandal) from Taiwan was being injured within the meaning of the Act. The Commission unanimously determined in the negative.<sup>34</sup> It began its analysis by stating explicitly that the relevant operative words of section 303(b) are to be interpreted in the same way as the identical language under the Antidumping Act of 1921. "This was," the Commission said, "clearly the intent of Congress in using identical language."<sup>35</sup> The Commission noted that the Taiwanese zoris benefitted from a bounty or grant of only 1.3 cents per pair, and concluded:

Such a bounty or grant would account for only a fraction of the margin of underselling which the subject imports enjoy over casual footwear produced in the United States. On the basis of these facts, we conclude that any injury or likelihood of injury

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30. P.L. 93-618, 88 Stat. 190 (1975) 19 U.S.C. § 1303(b).

31. When coverage of the law was extended to duty-free merchandise by the Trade Act of 1974, an injury standard was added in order to conform to Article VI of the General Agreement on Tariff and Trade (GATT), 61 Stat. pt. 5 at A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187. The U.S. countervailing duty law applicable to dutiable items predated GATT and was deemed exempt from GATT's injury requirements. See TRADE REFORM ACT OF 1974, S. REP. NO. 1298 93rd Cong., 1st Sess. 185 (1974).

32. Certain Zoris from the Republic of China (Taiwan), 303-TA-1, USITC Pub. 787 (Sept. 1976); Leather Wearing Apparel from Uruguay, 303-TA-2, USITC Pub. 883 (Apr. 1978); Certain Fish from Canada, 303-TA-3, USITC Pub. 919 (Sept. 1978); Yarns of Wool from Uruguay and Brazil, 303-TA-4 and 303-TA-5, USITC Pub. 940 (Feb. 1979); Certain Leather Wearing Apparel from Colombia and Brazil, 303-TA-6 and 303-TA-7, USITC Pub. 948 (Feb. 1979); Gloves and Glove Linings of Fur on the Skin from Brazil, 303-TA-8, USITC Pub. 941 (Feb. 1979); Certain Fish and Certain Shell Fish from Canada, 303-TA-9, USITC Pub. 966 (Apr. 1979); Oleoresins from India, 303-TA-10, USITC Pub. 989 (July 1979). Section 303(b) continues to play a role in a limited number of countervailing duty investigations. See *infra* notes 51 and 52 and accompanying text.

33. 303-TA-1, USITC Pub. 787 (Sept. 1976).

34. *Id.* at 1-2.

35. *Id.* at 4-5. In the quoted text, the Commission by footnote referred to the Report of the House Committee on Ways and Means on the Trade Reform Act of 1973, which subsequently became the Trade Act of 1974. That report stated that "The relevant language regarding injury determinations by the Tariff Commission was derived verbatim from the Antidumping Act, 1921, and is intended to have the same meaning." H. REP. NO. 93-571, 93d Cong. 1st Sess. 74 (1973).

which any domestic industry may be experiencing is not by reason of the subject imports of zoris.<sup>36</sup>

In *Leather Wearing Apparel from Uruguay*,<sup>37</sup> bounties or grants equal to approximately 12 percent of the value of the merchandise supported an affirmative determination.<sup>38</sup> Another negative determination was reached in the third determination, *Certain Fish from Canada*:

The . . . bounties and grants, estimated by Treasury to be equivalent to 1.22 percent of the value of the imports from Canada, are not likely to have any injurious impact on the U.S. industry. In addition, imports into the west coast will be subject to bounties and grants equivalent to only 0.85 percent of the value of such imports.<sup>39</sup>

While Commission precedent under Section 303(b) was not as extensive as that built up under provisions of the Antidumping Act of 1921, it is clear that the level of subsidies was a crucial part of the Commission's determination in cases in which the facts compelled their consideration.

## B. Commission Practice After Enactment of the 1979 Amendment

1. *Antidumping Investigations*. The initial determinations of the Commission under Title VII are clear indications that the Commission shared the view that its prior practice was to be continued. In *Spun Acrylic Yarn from Japan and Italy*,<sup>40</sup> the first Title VII antidumping determinations, LTFV margin levels were cited by all of the Commissioners in support of their determinations. Chairman Bedell and Commissioner Moore, noting that the weighted average LTFV margin for Japan was 23.19 percent and for Italy 48.05 percent,<sup>41</sup> observed:

Without the substantial LTFV margins, imports from both Japan and Italy would have sold at much higher prices and would not have been competitive with U.S.-produced yarn. Under such circumstances, significant sales of the imported product

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36. 303-TA-1, USITC Pub. 787 (Sept. 1976) at 7. Footnote omitted. The use of the phrase "by reason of the subject imports" immediately after noting the insignificant impact of the 1.3 cents per pair bounty or grant on the margin of underselling is revealing. In context, it is clear, the words "subject imports" refers not only to the subsidized imports, in the sense that they may be labelled as such, but to the nature and amount of that subsidy (or bounty or grant) and the *character, e.g.,* ability to undersell, that the subsidy imparts to the imports.

37. 303-TA-2, USITC Pub. 883 (Apr. 1978) at 4.

38. *Id.* at 1, 4.

39. 303-TA-3, USITC Pub. 919 (Sept. 1978) at 7-8.

40. Invs. Nos. 731-TA-1 (Final) and 731-TA-2 (Final), USITC Pub. 1046 (Mar. 1980).

41. *Id.* at 3-4.

from Japan and Italy would not have been made.<sup>42</sup>

Commissioners Stern and Calhoun found that price appeared to be the chief factor of competition in the industry and that domestic sales had been lost to imports for less than one percent of the cost of a pound of yarn.<sup>43</sup> “[T]he record reveals clear examples of underselling . . . and the margins of dumping more than adequately account for these differentials.”<sup>44</sup> Noteworthy was the observation of Commissioners Stern and Calhoun in the case of Italy, which accounted for only four percent of U.S. consumption in 1978 and whose share had fallen to two percent in the first three quarters of 1979:<sup>45</sup>

In this case, for example, the volume of imports from Italy was small, but the impact was injurious. The fluctuations of demand were such in this case that the small volume of imports from Italy led to price suppression and lost sales as a result of the large dumping margins.<sup>46</sup>

The Italian case is an example of a situation in which the Commission's present policy could deny relief to an industry that would qualify for relief under the traditional approach. The volume of Italian imports of yarn was comparatively small, but the LTFV margin was large. Analysis of the Italian imports by volume only — with no consideration of whether the margin was 48 percent or 0.48 percent — probably would have led to a negative determination. The Stern-Calhoun analysis, on the other hand clearly lent itself to the interpretation that it was the “large dumping margins” attached to the small volume of imports that caused the injury.

In a separate opinion in these first Title VII antidumping cases, Vice Chairman Alberger made utilization of LTFV margin consideration unanimous. “Without the substantial LTFV margins,” he determined, “imports from both Japan and Italy would not have been price competitive in the U.S. market.”<sup>47</sup>

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42. *Id.* at 5. One may quarrel with the statement that without LTFV margins, imports necessarily would have sold at much higher prices since the exporters presumably would have been free to reduce or eliminate margins by reduction in the home market price, so long as the price reduction did not run afoul of the provisions of § 773(b) of the Tariff Act. Section 773(b) provides that home market sales below the cost of production will not be used for purposes of comparison, if such below cost sales are made over an extended period of time, in substantial quantities, and are not at prices which permit recovery of all costs within a reasonable period of time. 19 U.S.C. § 1677b(b) (1983).

43. Spun Acrylic Yarn from Japan, Inv. Nos. 731-TA-1 (Final) and 731-TA-2 (Final), USITC Pub. 1046 (Mar. 1980) at 12.

44. *Id.* at 13 (footnote omitted).

45. *Id.* at 22 (view of Chairman Alberger).

46. *Id.* at 14 (view of Commissioners Stern and Calhoun).

47. *Id.* at 21 (view of vice Chairman Alberger).

2. *Countervailing Duty Cases - Title VII*. Another unanimous Commission determination — this time negative—was reached in the first Title VII countervailing duty case, *Unlasted Leather Footwear Uppers from India*.<sup>48</sup> In this determination Chairman Bedell and Commissioner Moore were joined by Commissioner Stern in observing that “the impact of a subsidy of 1.01 percent *ad valorem* on the price of finished nonrubber footwear is inconsequential.”<sup>49</sup> Vice Chairman Alberger and Commissioner Calhoun in their separate opinion made a comparable determination: “Furthermore, the impact of the 1.01 percent *ad valorem* Indian subsidy on production costs is also small.”<sup>50</sup>

3. *Countervailing Duty Cases - 303(b) of the Tariff Act of 1930*. The countervailing duty provisions of Title VII, enacted to implement the Subsidies Agreement, apply only to signatories of the Agreement or to countries that have assumed substantially equivalent obligations.<sup>51</sup> For other countries, section 303 continues to apply.<sup>52</sup> In the first post-Trade Agreements Act case under section 303, *Certain Iron-Metal Castings from India*,<sup>53</sup> subsidy levels continued to play an important role. Commissioners Moore and Bedell took specific note of the fact that Commerce found subsidies “ranging from 12.9 to 16.8 percent of the f.o.b. price of the exported product. For most Indian manufacturers/exporters of these products, the net benefit amounts to 13.3 percent of the f.o.b. price.”<sup>54</sup> They went on to an affirmative determination based, in part, upon underselling and price suppression.<sup>55</sup> Vice Chairman Calhoun also made note of the subsidies found by Commerce in reaching his determination.<sup>56</sup>

Commissioner Stern’s opinion in support of her affirmative determination dealt explicitly with the subsidy level issue, includ-

48. Inv. No. 701-TA-1 (Final), USITC Pub. 1045 (Mar. 1980) at 1.

49. *Id.* at 6 (italics added).

50. *Id.* at 14.

51. Tariff Act of 1930, 19 U.S.C. § 1671(a)(1)(A) and (b)(2).

52. The major practical difference between Title VII and § 303, from the point of view of the exporting country, is that under Title VII the material injury test applies to all merchandise, dutiable and non-dutiable, while, under § 303, the material injury test applies only in the case of non-dutiable merchandise. Dutiable merchandise is countervailable, under the provisions of § 303, without a showing of injury. Addition of the injury requirement for dutiable merchandise was the major U.S. concession granted in the Subsidies Agreement negotiations. See, Rivers & Greenwald, *The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences*, 11 LAW & POL’Y INT’L BUS. 1447 (1979).

53. *Certain Iron-Metal Castings from India*, Inv. No. 303-TA-13, USITC Pub. 1098 (Sept. 1980).

54. *Id.* at 4.

55. *Id.* at 6-7.

56. *Id.* at 13.

ing the fact that the margin by which the imported product undersold the domestic item was greater than the amount of the subsidy.<sup>57</sup> She compared the facts of the case with *Welded Stainless Steel Pipe and Tube from Japan*,<sup>58</sup> *Certain Zoris from the Republic of China (Taiwan)*<sup>59</sup> and *Unlasted Footwear Uppers from India*,<sup>60</sup> and concluded:

In *Certain Public Works Castings*, the size of the subsidy, the larger ratio of the subsidy to a narrowing margin of underselling, the huge import penetration, and the unusual price structure of the U.S. market clearly distinguished this case from previous ones.<sup>61</sup>

4. *Reviews of Outstanding Orders.* Insight into the relevance of subsidy levels (or less than fair value margins) to Commission determinations that could result in imposition of countervailing (or antidumping) duties can be had by considering the issue from the other side — what happens if the duty is removed? Under the provisions of § 104(b) of the Trade Agreements Act, the Commission is directed to consider this very question in the context of reviews of outstanding countervailing duty orders that were in ef-

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57. *Id.* at 24.

Respondents maintained at the commission's hearing and in post-hearing brief that the subsidy provided Indian castings is too minimal in light of actual margins of underselling. At the current Indian floor price for these castings, a 13.3 percent countervailing duty would add 1.5 cents per pound to the imported casting, which would decrease the current margins of underselling to 18 to 22 percent on the representative 270 lb.-casting upon which the Commission collected pricing data. Such a margin of underselling without the subsidy in place would still normally guarantee a strong performance by the imports. However, given the four-tier structure of the market under consideration and the rationale for the various price differentials, it is clear that any increase in the price of the lowest level—the Indian imports—can only have one effect, that of making production of the domestic castings relatively more desirable and profitable. If a price increase if fully passed along, it should feed its way up the four levels because the rationale for the various differentials would remain intact. To the extent the duty would not be passed along to ultimate customers, the foundry-importers' choice of imports would be made only at increasingly larger runs because of the reduced profitability of imports. In either case the result on production and profits should be the same — beneficial.

In all likelihood, the effect of any countervailing duty would be further enhanced by the increasing costs of manufacturing and importing the product from India, especially increasing production and freight costs.

*Id.* at 25-26 (footnotes omitted).

58. See AA 1921-180, USITC Pub. 899 (July 1978).

59. See 303-TA-1, USITC Pub. 787 (Sept. 1976).

60. See Inv. No. 701-TA-1 (Final), USITC Pub. 1045 (Mar. 1980).

61. Inv. No. 303-TA-13, USITC Pub. 1098 (Sept. 1980). Chairman Alberger observed, "The margin of underselling by the importer's product was more than twice the amount of the subsidy through 1979."



fect prior to January 1, 1980.<sup>62</sup> *Certain Spirits from Ireland*,<sup>63</sup> for example, presented the Commission with the question of whether an industry in the United States would be materially injured, or would be threatened with material injury, or whether the establishment of an industry would be materially retarded by reason of imports of spirits from Ireland covered by a countervailing duty order if the order were revoked.<sup>64</sup> The order dated from 1914.<sup>65</sup>

Chairman Alberger and Commissioners Bedell and Stern noted that the subsidy amount was 0.004 Irish pounds per liter of alcohol, which translated into "a little less than one-fifth of one U.S. cent for each 'fifth,' (750 milliliters) of Irish whiskey," and that the retail price for a "fifth" ranged from \$7.99 to \$9.97.<sup>66</sup>

The countervailing duty is so minuscule that its removal would not provide an incentive for an importer to lower the price of the goods. Even assuming that the removal of the countervailing duty would result in a price reduction equivalent to the amount of the duty, it would have no effect on the current pricing structure of the market. It would not change Irish whiskey's competitive position vis-a-vis the premium domestic brands, much less any effect on its competitive position with the popular, less-expensive brands.<sup>67</sup>

This case points up the relevance of subsidy levels upon the issue of causation: the reverse of saying that a U.S. industry would not be materially injured by removal of a countervailing duty is to say that the industry would not benefit by its imposition. But if an industry would not benefit by imposition of a countervailing duty, then one is entitled to ask: what harm in fact is being done by the countervailing practice? If material injury is occur-

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62. 19 U.S.C. § 1671 note (Supp. V 1981). These transition provisions provided for Commission consideration of Pre-January 1, 1980 orders upon request, submitted within three years of the effective date of Title VII, by the government concerned or by exporters accounting for a significant proportion of the exports to the United States.

63. Inv. No. 104-TAA-3, USITC Pub. 1165 (July 1981).

64. *Id.* at 1. The operative language parallels that of The Tariff Agreements Act of 1930 § 705(b), 19 U.S.C. § 1671. Section 104(b)(2) provides:

. . . the Commission shall commence an investigation to determine whether—

(A) an industry in the United States—

(i) would be materially injured, or

(ii) would be threatened with material injury, or

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

by reason of imports of the merchandise covered by the countervailing duty order if the order were to be revoked.

19 U.S.C. § 1671 note (Supp. V 1981).

65. *Certain Spirits from Ireland*, Inv. No. 104-TA-3, USITC Pub. 1165 (July 1981) at 1.

66. *Id.* at 7.

67. *Id.* at 8.

ring "by reason of" a subsidy, elimination of the effect of that subsidy by imposition of a countervailing duty should result in elimination of the injury; failure to impose the duty should result in continuation of the injury, and removal of the countervailing duty, (other factors remaining unchanged) should result in resumption of the injury.

A countervailing duty is nothing more than a subsidy amount translated into a tax on imports. The amount of the tax clearly is relevant to the question of its impact on the domestic producers who will benefit to the degree that the tax burdens their foreign competitors. It is self-evident that the degree of that benefit will be dependent upon the amount of the tax. But this simply is another way of saying that the subsidy amount itself has bearing on the issue of whether there is a causal link between the material injury and subsidized imports, for the amount of the subsidy determines the amount of the countervailing duty, the tax.

The question the Commission considers in the 104(b) review cases — whether removal of a countervailing duty of a specified amount will or will not result in material injury to a domestic industry — goes to the heart of the issue of causation in the initial determination because the remedy that is directed at the subsidy is a special duty in the amount of that subsidy. If imposition of a duty reflecting the amount of the subsidy would not remedy the material injury, then it follows that the injury is being caused by something other than the subsidy.

### III. THE INTERNATIONAL SUBSIDIES AGREEMENT OF THE TOKYO ROUND.

The international Subsidies Agreement,<sup>68</sup> placing limits on the use of subsidies in international trade and authorizing countervailing duties in accordance with its terms was a major achievement in the "Tokyo Round" of trade negotiations, that took place under the auspices of the General Agreement on Tariffs and Trade during the 1970's.<sup>69</sup> A stated purpose of the Trade Agree-

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68. *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade*, April 12, 1979 (relating to subsidies and countervailing measures), reprinted in *AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS*, H.R. DOC. NO. 153, 96th Cong., 1st Sess., Pt. 1, 259-306 (1979). The term "Subsidies Agreement" or "Agreement" generally is used herein; it is sometimes referred to as the "Subsidies Code" or "Code" in certain quotations.

69. SENATE COMMITTEE ON FINANCE - TRADE AGREEMENTS ACT OF 1979, S. REP. NO. 96-249, 96th Cong., 1st Sess. 37 (1979) [hereafter "Senate Report"]. United States participation in the "Tokyo Round" of trade negotiations was authorized by Title I of the Trade Act of 1974. See *supra* note 9. It was the seventh round of trade negotiations held under the auspices of the GATT, and officially began with the signing in September 1973, by the ministers of more than 100 countries, of the Tokyo

ments Act of 1979 was to implement this Agreement and the other international agreements reached in the negotiations.<sup>70</sup> The Subsidies Agreement provides:

It must be demonstrated that the subsidized imports are, *through the effects of the subsidy*, causing injury within the meaning of this agreement. There may be other factors which at the same time are injuring the domestic industry, and the injuries caused by other factors must not be attributed to the subsidized imports (footnotes omitted).<sup>71</sup>

The language "through the effects of the subsidy" requires the Commission to consider the subsidy level as an integral part of the imports under consideration, for obviously the level of a subsidy bears upon its effect. The issue is not whether the imports alone are causing injury, but whether they are doing so "through the effects of the subsidy." The view of the Commission majority is inconsistent with this requirement. Their interpretation reads the phrase "through the effects of the subsidy" out of the Code so that Article 6, paragraph 4 would read: "It must be demonstrated the subsidized imports are causing injury within the meaning of this Agreement." Such a reading is inconsistent with the terms of the Agreement, and, consequently, the majority position may be

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Declaration — hence, the name of the round. See, Wolff, *The Larger Political and Economic Role of the Tokyo Round*, 12 LAW AND POL'Y INT'L BUS. 1, 10 (1980); Graham, *Results of the Tokyo Round*, 9 GA. J. INT'L & COMP. L. 153 (1979). Rivers & Greenwald, *supra* note 44. The mechanics of the Tokyo Round negotiating process are discussed in McRae and Thomas, *The GATT and Multilateral Treaty Making: The Tokyo Round*, 77 AM. J. INT'L LAW 51 (1983).

70. 19 U.S.C. § 2502 (Supp. V 1981). The Tokyo Round agreements are set out in AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, *supra* note 68. In addition to the Subsidies Agreement, the other agreements reached include The Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (relating to customs valuation); The Agreement on Government Procurement; The Agreement on Import Licensing Procedures; The Agreement on Technical Barriers to Trade (relating to product standards); The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (relating to antidumping measures); The International Dairy Agreement; The Arrangement Regarding Bovine Meat and The Agreement on Civil Aircraft.

71. Subsidies Agreement, *supra* note 68, at Art. 6, para. 4 (emphasis added). The quotation omits a footnote which appears after the word "effects" in the first sentence. This footnote has relevance to the argument advanced by Commissioner Haggart and is discussed below. See *infra* notes 73 through 80 and text accompanying. Article 6, para. 4 of the Subsidies Agreement parallels the language of Art. 3, para. 4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (relating to antidumping measures) which provides:

It must be demonstrated that the dumped imports are, *through the effects of dumping*, causing injury within the meaning of this Code. There may be other factors which at the same time are injuring the industry and the injuries caused by other factors must not be attributed to the dumped imports (emphasis added). (Footnotes omitted, including a footnote which, in tandem with the Subsidies Agreement, appears after the word "effects.")

construed as placing the United States in violation of the Agreement.

The majority is not troubled by this point. Two arguments are advanced: first, it is contended that properly construed, the majority view in fact is consistent with the Agreement; and second, if it is not, the Commission is compelled to ignore the Agreement in conformity with section 3(a) of the Trade Agreements Act of 1979 which provides that in the event of a conflict between U.S. law and any of the international trade agreements, U.S. law shall prevail.<sup>72</sup>

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72. 19 U.S.C. § 2504(a) (Supp. V 1981). The trade agreements are executive agreements and not treaties ratified by the Senate pursuant to U.S. Const. Art. II, § 2. Trade Agreements Act § 3(a) makes explicit, to the extent that it is necessary, that the trade agreements are not to prevail over inconsistent legislation, prior or otherwise. The trade agreements program has raised issues concerning the separation of powers, delegation of authority and the legal status of agreements virtually since the enactment of the Reciprocal Trade Agreements Act of 1934, Pub. L. No. 316, 48 Stat. 943. The Committee on Ways and Means of the House of Representatives in 1945 had occasion to comment:

Five times now, beginning in 1934, this committee has given the most serious study to the so-called constitutional objections which have been raised by the opponents of the program, and our conclusion remains the same as in 1934: We consider that it is clear, on the basis of precedent and authority, that (1) no constitutional or other legal considerations require Senate ratification of trade agreements and (2) the Trade Agreements Act involves no improper delegation of legislative power.

FOREIGN TRADE AGREEMENTS, H. R. REP. NO. 594, 79th Cong., 1st Sess. 10-11 (1945). The Executive Branch's negotiation in 1967 of an antidumping code as part of the Kennedy Round of Trade Negotiations sparked sharp opposition in Congress.

The conflict arose because of congressional expressions of opinion against the negotiation and signature of such a code during the Paris meetings, the execution of such an agreement by the President, the alleged conflict between the terms of the codes and preexisting statutory law, and the suggestion by the executive branch that executive agreements, like treaties were superior in law to prior, inconsistent statutes.

SEPARATION OF POWERS, S. REP. NO. 549, 91st Cong., 1st Sess. 16 (1969). For the views of the then chairman of the Senate Committee on Finance condemning the 1967 code, see Long, *United States Law and the International Antidumping Code*, 3 INT'L LAW. 464 (1969). Congressional opposition to the 1967 code manifested itself in Title II of the Renegotiation Amendments Act of 1968 which directed the Tariff Commission and the Secretary of the Treasury to resolve any conflict between the code and U.S. law in favor of the latter and to take the code into account only insofar as its provisions were consistent with the law. Pub. L. No. 90-634, 82 Stat. 1347 (Oct. 24, 1968). In *United States v. Guy W. Capps Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955), the Court of Appeals held not only that an executive agreement the provisions of which contravened prior legislation was void; but also said, in *dicta*, that the President was without authority to enter into executive agreements regulating foreign commerce. The Supreme Court specifically declined to address the issue. One commentator states that the precise scope of the President's power to conclude international agreements without Senate consent is unresolved. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 170 (1978). The restatement provides that executive agreements supersede prior inconsistent state laws but not prior inconsistent acts of Congress. RESTATEMENT (SECOND) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 144 (1965).

### A. The Majority, the Agreement, and "Footnote 19"

The argument that the majority view "is not inconsistent with the Subsidies Code" rests upon a footnote to Article 6, paragraph 4 of the Agreement.<sup>73</sup> To the extent that the argument proves anything, however, it proves the contrary. The note, Footnote 19 to Article 6, paragraph 4, is placed immediately after the word "effects":

It must be demonstrated that the subsidized imports are, through the effects<sup>19</sup> of the subsidy, causing injury within the meaning of this Agreement. . . .

The note refers to the two previous paragraphs of Article 6 which set out various economic indicators relating to the question of injury.<sup>74</sup> There are comparable provisions in the Tariff Act.<sup>75</sup> One opinion notes this comparability and concludes:

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73. See Certain Carbon Steel Products from Spain, Inv. Nos. 701-TA-155 through 160 and 162 (Final), USITC Pub. 131 (Dec. 1982) at 30.

74. Subsidies Agreement, *supra* note 68. Footnote 19 reads: "As set forth in paragraphs 2 and 3 of this Article." Paragraphs 2 and 3 provide:

2. With regard to volume of subsidized imports the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing country. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing country, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3. The examination of the impact on the industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

H.R. Doc. No. 153, 96th Cong., 1st Sess., Pt. 1 at 272-73 (1979).

75. Commissioner Haggart refers to § 771(7)(c)(i)(ii) and (iii). Certain Steel Products from Spain, Inv. Nos. 701-TA-155 through 160 and 162 (Final), USITC Pub. 1331 (Dec. 1982) at 30. These provide:

(C) Evaluation of volume and of price effects.—For purposes of subparagraph (B)—

(i) Volume: In evaluating the volume of imports of merchandise, 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.

(ii) Price: In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—

(I) there has been significant price undercutting by the imported

For these reasons, the literal language of the Code cannot be relied upon to defeat the argument that the Commission must follow the plain meaning of Title VII in making its injury determinations.<sup>76</sup>

This conclusion is not justified by Footnote 19; moreover, it misstates the issue: the issue is not whether the "literal language" of the Subsidies Agreement may prevail over the "plain meaning" of the statute (or even the reverse: whether the "literal language" of the statute defeats the "plain meaning" of the Agreement).<sup>77</sup> The issue is whether Congress, in enacting the statute, accomplished what it set out to do: implement the terms of the Agreement.<sup>78</sup>

Certainly Footnote 19 does not compel the conclusion that Congress failed. The footnote simply refers to a number of economic indicia — increased imports, price undercutting, price depression, decline in sales, profits, employment and the like — to be used in evaluating the "effects of the subsidy." But it is still the *subsidy* whose effects are under scrutiny, not the imports. To be sure, these effects are borne by the subsidized imports, for it is only through the imports that the domestic industry feels "the effects of the *subsidy*." But Footnote 19 cannot be relied upon to convert the language "through the effects of the *subsidy*" into "through the effects of the *imports*." The Agreement manifestly requires the level of subsidy to be considered along with the imports by which it travels.<sup>79</sup>

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merchandise as compared with the price of 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.

(iii) Impact on affected industry. In examining the impact on the affected industry, the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry, including, but not limited to-

(I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

(II) factors affecting domestic prices, and

(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.

76. Certain Carbon Steel Products from Spain, Inv. Nos. 701-TA-155 through 162, USITC Pub. 1331 (Dec. 1982) at 32 (Opinion of Commissioner Haggart).

77. See *infra* notes 82 through 89 and accompanying text.

78. See *infra* notes 90 through 115 and accompanying text.

79. The regulations of the European Economic Community parallel the Agreement: "A determination of injury shall be made only if the dumped or subsidized imports are, *through the effects of dumping or subsidization*, causing injury. . ." (Emphasis added) 122 O.J. EUR. COMM. (No. L 339) 1 (1979) (Council Regulation, EEC No. 3017/79 of Dec. 1979). Canada's regulations appear to be in accord, although there is some ambiguity. Initiation of an investigation shall begin when "there is *prima facie* evidence that the subsidization. . . has caused, is causing or is likely to

## B. The Agreement and Section 3(a) of the Trade Agreements Act of 1979—The Supremacy Clause

In section 2 of the Trade Agreements Act (TAA), Congress specifically approved the trade agreements reached in the Tokyo Round,<sup>80</sup> but provided, in section 3(a) of the Act, that in the event of conflict between U.S. law and any agreements, the former will prevail.<sup>81</sup> Thus, even if the Subsidies Agreement requires consideration of the level of subsidization in the injury determination, the Agreement must yield if the Act is contrary.<sup>82</sup> This point was raised by former Vice Chairman Calhoun in a preliminary investigation involving steel wire nails from Korea,<sup>83</sup> but it remains

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cause material injury to the production in Canada of such goods." Countervailing Duty Regulations, REVENUE CANADA CUSTOMS AND EXISE § 3(b) (Mem. D15-1-1) (July 1982). The regulations provide for referral to the Antidumping Tribunal. *Id.* § 5, and for imposition of a countervailing duty when "the Tribunal reports that importation of the subsidized goods has caused or is causing material injury to production in Canada. . . ." *Id.* § 7(1). The countervailing duty law itself is silent on the matter of injury. *See* Customs Tariff Act, CAN. REV. STAT. Ch. C-41, § 7 (1970). The Anti-Dumping Act directs the Tribunal to determine whether "the dumping of the goods . . . has caused, is causing or is likely to cause material injury . . ." Anti-Dumping Act, CAN. REV. STAT. Ch. A-15, amended by Ch. 1, 10 (2nd Supp.) 1970-71-72, cc. 43, 63, § 16.1(a)(i) (1974). The Canadian standards may be of particular importance because the language finally agreed to in the Tokyo Round — "It must be demonstrated that the subsidized imports are, through the effects of the subsidy, causing injury within the meaning of the Agreement" — was a Canadian formulation. Rivers & Greenwald *supra* note 52 at 1484. In accord is the Australian law authorizing imposition of countervailing duties when "a subsidy" has been conferred upon exports to Australia and "by reason thereof material injury to an Australian industry is being caused or is threatened, or establishment of an Australian industry has been or may be materially hindered." Antidumping Act, § 10(1)(a)(i) (1975) (as amended). The same standard is applied in antidumping cases. § 8(1)(a)(i) (added by amendment 1982).

80. 19 U.S.C. § 2503 (1981).

81. No provision of any trade agreement approved by Congress under section 2(a), nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States.

*Id.* at § 2504(a).

82. *See supra* note 81. *See also*, Cohen, *The Trade Agreements Act of 1979: Executive Agreements, Subsidies and Countervailing Duties*, 15 TEX. INT'L L.J. 96, 105 (1980).

83. Certain Steel Wire Nails From the Republic of Korea, Determination of a Reasonable Indication of Material Injury, or Threat of Material Injury, Inv. No. 701-TA-145 (Preliminary), USITC Pub. 1223 (March 1982) at 17. This appears to be the first case in which the issue was discussed in Commission opinions, and it is something of a curiosity. The case was a preliminary investigation pursuant to § 703(a) of the Trade Agreements Act which requires the Commission to render a determination within 45 days of the initiation of an investigation as to whether there is a "reasonable indication" of the requisite inquiry. 19 U.S.C., § 1671b(a) (1981). When the Commission's preliminary determination is made, there is no preliminary determination from Commerce concerning the level of subsidy. The preliminary determination from Commerce is due 85 days after initiation (§ 703(b)) unless extended pursuant to § 703(c). 19 U.S.C. § 1671b(b) and (c) (1981). In *Korean Nails*, the Commission's

questionable whether section 3(a) really adds anything to existing law since an executive agreement probably does not prevail over prior inconsistent statute in any event.<sup>84</sup> Nevertheless, because the relationship between the agreements and U.S. law was one of the most sensitive issues surrounding passage of the Act, Congress was particularly concerned with future amendments to or interpretations of the Multilateral Trade Negotiations (MTN) agreements, and with the impact of new terminology on the already existing body of U.S. trade jurisprudence: This was the clear motivation behind enactment of section 3(a): it was intended only to make clear that "new meanings" are not "introduced" into U.S. law by "future" amendments or interpretations of the Agreement.<sup>85</sup> It also seems to be included in the Act out of an abun-

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preliminary affirmative determination was published on March 16, 1982 (47 Fed. Reg. 11336). On March 30, 1982 Commerce extended the investigation pursuant to § 703(c) (47 Fed. Reg. 13392) and only on June 24, 1982 preliminarily determined that nails from Korea were receiving an estimated 3 percent subsidy. (47 Fed. Reg. 27397). (The case did not return to the Commission because on September 8, 1982 Commerce, reversing its preliminary finding, made a final negative determination. (47 Fed. Reg. 39459)). That determination has been appealed to the U.S. Court of International Trade, *Armco Inc., et al. v. United States*, No. 82-10-01403 (filed Oct. 8, 1984); *Atlantic Steel, et al. v. United States*, No. 82-10-01379 (filed Oct. 7, 1984). In the Commission's preliminary investigation, then, the only information before it concerning subsidy levels consisted of the allegations of the petition, which alleged subsidies in excess of 14 percent *ad valorem* (Petition at 27) (copy in record of ITC Inv. No. 701-TA-145 (Preliminary)). These allegations or their impact were not discussed by any of the commissioners. The preliminary affirmative determination was unanimous, but in a separate opinion Commissioner Stern stated:

A very important question has been raised in this investigation as to what the Commission should look to in determining causation in countervailing duty cases. Discussion has focused on two interpretations of the phrase, "the effects of the subsidized imports": (1) judging the full impact of the subject imports, which happen to benefit from a subsidy; and (2) judging the effects of the subsidy in causing the injury through the subject imports. (footnote omitted).

Certain Steel Wire Nails from the Republic of Korea, Inv. No. 701-TA-145 (Preliminary), USITC Pub. 1223 (Mar. 1982) at 11. It was this statement that prompted Vice Chairman Calhoun's response, despite his view "that this issue was not pertinent to our findings in this investigation and need not necessarily be relevant in reaching a determination in the final investigation." *Id.* at 15. The issue apparently was raised only within the Commission as the record does not reveal that it was briefed or argued by the parties.

84. See *supra* note 72 and sources cited.

85. Senate Report, *supra* note 69, at 36:

The committee specifically intends section 3 to preclude any attempt to introduce into U.S. law new meanings which are inconsistent with this or other relevant U.S. legislation and which were never intended by the Congress. This bill has been developed by the committee, other committees, and the President, to implement under United States law the obligations assumed by the United States in the MTN trade agreements. If, in the future, amendments to, or interpretations of, any MTN agreement should be adopted internationally which are inconsistent with U.S. legislation, the President may, upon approval by Congress under section 3(c) of the bill, accept such amendments or interpreta-



dance of caution and does not appear to have been intended to effect any radical change in existing U.S. law concerning executive agreements. One aspect of that law is that regardless of an executive agreement's domestic legal status, it binds the United States internationally in the same manner as a treaty.<sup>86</sup> Thus, while Congress clearly has the power to put the United States in violation of its international agreements, and made that power explicit in section 3(a), as the Restatement emphasizes:

It cannot lightly be assumed that Congress would repudiate an international obligation of the United States by nullifying the effect of an international agreement as domestic law. When an act of Congress and an international agreement relate to the same subject, the courts will endeavor to construe them so as to give effect to both, if that can be done without violating the language of either. The courts do not favor repudiation of an earlier international agreement by implication and require clear indications that Congress, in enacting subsequent inconsistent legislation, meant to supersede the earlier agreement.<sup>87</sup>

U.S. law concerning executive agreements manifestly requires that statutes be construed in compliance with the Agreement, if the terms of the statute permit. Congress will not be deemed to have disavowed the international obligations of the United States by implication.<sup>88</sup>

Contrary to this established law, the Commission contends that "the *literal language* of the Code cannot be relied upon to defeat the argument that the Commission must follow the *plain meaning* of Title VII in making its injury determinations."<sup>89</sup> This

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tions. No such amendment or interpretation shall be given effect under U.S. law until it is approved and the necessary or appropriate changes to U.S. legislation have been enacted.

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

Our trade laws are, and long have been, subject to administrative and judicial review processes. These processes both lead to and require greater precision in our law than the often vague terms of the agreements or implementing regulations of other countries. Furthermore, unfamiliar terms in the agreements, or terms which may have a different meaning in United States law than in international practice or another country's laws, need to be rendered into United States law in a way which ensures maximum predictability and fairness.

86. 14 WHITEMAN, DIGEST OF INTERNATIONAL LAW 211 (1970).

87. RESTATEMENT (SECOND) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 145, Comment b (1983).

88. *Accord*: 7 WHITEMAN, *supra* note 86, at 290.

89. *Certain Carbon Steel Products from Spain*, Inv. Nos. 701-TA-155 through 160 and 162 (Final), USITC Pub. 1331 (Dec. 1982) at 32 (emphasis added) (view of Commissioner Haggert).

stands the law on its head — if there appears to be a conflict, the task of the Commission is to interpret the law in a manner consistent with the Agreement, if that is possible, and not *vice versa*. To do the latter is to put the United States in violation of the Agreement. But such a problem arises only if one concludes that indeed there is a conflict between the “literal language” of the Subsidies Agreement and the “plain meaning” of the statute. One attempt to avoid a conflict was to “interpret” the Agreement by elevating an obscure Footnote 19 into a canon of construction. We have seen that this will not work. But the attempt to avoid conflict by interpretation of the Agreement also begs the question — is there a conflict between the Agreement and U.S. law? There is only if U.S. law is read to require the Commission to consider imports apart from the level of subsidy (or LTFV margin) they carry — a reading that, it is submitted, is far from required by the statute.

#### IV. THE “PLAIN MEANING” OF THE STATUTE

The view that it is the amount of subsidized imports and not the level of the subsidy that should guide the Commission is grounded in the language of the statute,<sup>90</sup> and in that language the position does, at first reading, find apparent support.<sup>91</sup> This language means what it says, according to the majority view, and that is where the matter ends. Unambiguous statutory language should not be contradicted by vague references to legislative history. “[R]ules of statutory construction do not require the Commission to look behind the clear language of the statute.”<sup>92</sup>

There can be no gainsaying the surface appeal of the argument. At first blush, the statutory language does seem to support the majority. Moreover, the new interpretation may indeed offer administrative advantages.<sup>93</sup> But the argument for literalness in a

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90. *Id.* at 12-13 (views of Chairman Eckes and Commissioner Haggart); Certain Steel Wire Nails from the Republic of Korea, Inv. No. 701-TA-145 (Preliminary), USITC Pub. 1223 (Mar. 1982) at 15-22 (additional views of Vice Chairman Michael J. Calhoun).

91. See *supra* note 2.

92. *Certain Carbon Steel Products from Spain*, Inv. Nos. 701-TA-105 through 160 and 162 (Final), USITC Pub. 1331 (Dec. 1982) at 29 (additional view of Haggart). The full passage, from the separate opinion of Commissioner Haggart, reads: “When the legislative history as a whole does not demonstrate that a literal reading of the statutory language results in an interpretation of the law that is clearly contrary to Congressional intent, rules of statutory construction do not require the Commission to look behind the clear language of the statute. There is no compelling reason to rely upon certain portions of the legislative history to interpret statutory language which is not ambiguous. In the instant case, the legislative history does not contradict the plain meaning of the statute. Accordingly, the statutory language should be accorded its plain meaning.” (footnote omitted).

93. Commissioner Stern suggests that within the Commission concern has been voiced that, should subsidy levels be taken into account, adjustment of those levels as

vacuum is a weak one. It presumes that the statutory language admits of no other interpretation; it would reverse established prior practice; more importantly, it would contravene the international agreement which the statute itself was intended to implement, and it would ignore far from vague — indeed highly compelling — legislative history.

The basis of the majority's position is the "plain meaning" of the statute, but the "plain meaning rule"<sup>94</sup> is not all that "plain":

In many instances, expressions of the plain meaning rule may be a kind of verbal table thumping to express or reinforce confidence in an interpretation arrived at on other grounds instead of a reason for it. It is hard to see much more than this, for example, in the two-edged variant of the plain meaning rule by which a court defends an interpretation it has decided upon with the argument, that if the legislature had intended otherwise it could have said so.<sup>95</sup>

The "plain meaning rule" "is the result of an analysis, not its beginning."<sup>96</sup> Analysis shows that at the time the present statute was enacted, Commission practice clearly was to consider subsidy levels;<sup>97</sup> that the Subsidies Agreement requires consideration of the "effects of the subsidy";<sup>98</sup> that our major trading partners have

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a result of judicial review could destroy the "stability" of Commission determinations. However, she points out that such "stability" might be a synonym for injustice, that indeed "any significant correction to the margins may be proper cause for reconsideration." See *Carbon Steel Bar and Wire Rods from Brazil and Trinidad and Tobago*, Inv. Nos. 731-TA-113 and 732-TA-114 (Preliminary), USITC Pub. 1316 (November 1982) at 23\*. In that opinion, Commissioner Stern also deals with a number of other objections (apart from statutory language) raised against consideration of subsidy or below fair value margin amount. *Id.* at 18\*-24\*. One of the more unusual objections is concern expressed because foreign accounting principles are used in determining whether a program is a subsidy and in assessing the benefits accruing to the foreign manufacturer because of the subsidy. Commissioner Stern points out that, "There is nothing surprising in any of this." *Id.* at 21\*. She adds that the difficulties Commerce has in dealing with accounting systems "are those encountered by the Commission itself in compiling aggregate data on the economic performance of the domestic industry." *Id.*

94. "Where the language is plain and admits of not more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." *Cominetti v. United States*, 242 U.S. 470 (1917). This has become known as the "plain meaning rule." 2A J. SUTHERLAND, *SUTHERLAND ON STATUTORY INTERPRETATION*, 48 (4th ed. 1972).

95. SUTHERLAND, *supra* note 94, at 49. (footnotes omitted).

96. The phrase is that of Edward Easton of the Commission's Office of General Counsel in an unpublished memorandum to the Commission, GC-F-345 (Oct. 8, 1982), in which he advances the argument first put forward in his 1980 article. See Easton, *supra* note 9. Both in the article and in the memorandum Easton argues from the statutory language alone, and merely raises, but does not deal with, the implications of prior Commission practice; disposes of the international obligations of the United States with the "Footnote 19" argument; and does not at all treat the legislative history. *Id.* at 2-14.

97. See *supra* notes 11 through 39 and accompanying text.

98. See *supra* notes 71 through 79 and accompanying text.

adopted laws and regulations consistent with the Agreement and prior commission practice.<sup>99</sup> What does analysis show concerning the intent of Congress? It discloses clear congressional acknowledgement of the requirements of the Agreement; approving congressional discussion of prior Commission practice; and an explicit intent to continue, under Title VII, the prior Commission practice.<sup>100</sup>

#### A. Congressional Understanding of the Antidumping and Subsidies Agreements

The Senate Report's description of the Antidumping and Subsidies Agreements sets forth a clear, explicit description of the standards of the agreements: "Under the rules of the General Agreement on Tariffs and Trade (GATT) neither antidumping nor countervailing duties may be imposed *unless subsidization or dumping* of the imported merchandise *causes or threatens to cause material injury* to a domestic industry. . ." <sup>101</sup>

The Senate, then, seemed under no misapprehension of the requirements of the agreements it was implementing — there is no "Footnote 19" argument made. Rather, there is the explicit acknowledgement that only injury caused by "subsidization" or "dumping" will trigger the special duties. Thus, the United States may be said to have succeeded in gaining, through the Tokyo Round agreements, international acceptance of the standard first laid down by the Commission in 1964 in the *Wheat Gluten* and *Carbon Steel Bars and Shapes from Canada* cases — that injury must be caused by the dumping (or subsidization), and not by the mere importation of the product.

Lest doubts linger, the Report emphasizes: "Furthermore, neither countervailing nor antidumping duties may be imposed at all *unless the dumping or subsidization causes or threatens to cause*

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99. See *supra* note 79 and accompanying text.

100. Indeed, the statutory scheme established by Congress facilitates continuation of the prior practice. The Commission's determination as to material injury always comes after the Commerce determination of subsidy or less than fair value margin amount. If the Commerce preliminary determination is affirmative, the Commission's final determination is due within 120 days or 45 days after the affirmative final determination, whichever is later. § 705(b)(2), 19 U.S.C. § 1671d(b)(2) (1983) (countervailing duty); § 735(b)(2), 19 U.S.C. § 1673d(b)(2) (1981) (antidumping). If the Commerce preliminary determination is negative and the final affirmative, the Commission determination is due in 75 days. § 705(b)(3) (countervailing duty); § 735(b)(3) (antidumping). Particularly in the case of a preliminary affirmative determination, there would be little reason to provide for a delay other than to give the Commission an opportunity to consider the Commerce determination, the essence of which, of course, for the Commission, is the amount of subsidy or less than fair value margin.

101. Senate Report, *supra* note 69, at 37-38. (emphasis added).

*material injury* to a domestic industry . . ." (emphasis added).<sup>102</sup>

Finally, in a section entitled, "Principal Elements of the Agreements," the Senate Report describes the requirements of the Codes for initiation of antidumping and countervailing duty investigations, and notes that they may be initiated "Only if there is 'sufficient evidence' and allegation of (a) subsidization or dumping, (b) material injury, and (c) a 'causal link' between the subsidization or dumping and the injury (Article 2 of the subsidies Agreement; Article 5 of the Antidumping Agreement)" (emphasis added).<sup>103</sup>

#### B. Congressional Description of Prior Commission Practice and the Standards of Title VII

The Senate Report also is explicit in its explanation that the Trade Agreements Act intended no change in existing Commission practice with regard to causation:

Section 705(b) contains the same causation term as in current law, i.e., an industry must be materially injured 'by reason of' the subsidized imports. *The current practice of the ITC with respect to causation will continue under section 705.*

In determining whether injury is 'by reason of' subsidized imports, the ITC now looks at the effects of such imports on the domestic industry. The ITC investigates the conditions of trade and competition and the general conditions and structure of the relevant industry. It also considers, among other factors, the quantity, nature, and rate of importation of the imports subject to the investigation, *and how the effects of the net bounty or grant relate to the injury*, if any, to the domestic industry. *Current ITC practice* with respect to which imports will be considered in determining the impact on the U.S. industry *is continued* under the bill.<sup>104</sup>

Certainly, it cannot be said that the Senate Finance Committee contemplated a major change in Commission practice. Continuity is the uninterrupted theme. But there is more: the Report goes on to note that the level of subsidy (or, in an antidumping investigation, the less than fair value margin) that is injurious may vary from industry to industry:

It is expected that in its investigation the Commission will continue to focus on the conditions of trade, competition, and development regarding the industry concerned. For one industry, an apparently small volume of imports may have a significant impact on the market; for another the same volume might not be significant. Similarly, for one type of product, price may

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102. *Id.* at 39.

103. *Id.* at 41.

104. *Id.* at 57. (emphasis added). Similar language dealing with the antidumping provisions of the Trade Agreements Act appears *Id.* at 74.

be the key factor in making a decision as to which product to purchase and *a small price differential resulting from the amount of the subsidy or the margin of dumping can be decisive; for others, the size of the differential may be of lesser significance.*<sup>105</sup>

The House Report is not as explicit as the Senate Report, but it, too, makes clear that no change in Commission practice was contemplated: "The bill contains *the same causation element as present law*, i.e., material injury must be 'by reason of the subsidized or less than fair value imports.'<sup>106</sup>

To the extent the House Report speaks of "the same causation element as present law" and then defines that element as "by reason of the *subsidized or less than fair value imports*," the source of some confusion may have been identified: the language of section 705(b) and of section 735(b) speaks only of "imports," not "subsidized imports" or "less than fair value imports." Yet these are the only imports with which those two sections are concerned — as the passage quoted from the House Report demonstrates.<sup>107</sup>

105. *Id.* at 88.

106. H.R. REP. NO. 96-317, 96th Cong., 1st Sess. 46-47. (1979) (emphasis added).

107. The difficulties that can arise when subsidy levels and less than fair value margins are ignored surfaced in a preliminary countervailing duty inquiry, Fireplace Mesh Panels from Taiwan, Determination of the Commission, Inv. No. 701-TA-185 (Preliminary), USITC Pub. 1284 (Sept. 1982). In a prior anti-dumping investigation, the Commission had determined that an industry in the United States was materially injured by reason of less than fair value sales of fireplace mesh panels from Taiwan. Fireplace Mesh Panels from Taiwan, Determination of the Commission, Inv. No. 731-TA-49 (Final), USITC Pub. 1250 (May 1982). Former Vice Chairman (then Commissioner) Calhoun joined the unanimous Commission affirmative determination in the preliminary countervailing duty inquiry, but not without some misgivings. He stated his understanding of the majority position succinctly:

Title VII of the 1979 Act only requires that the impact of the particular merchandise in question and not the impact of the unlawful practice be relied upon as the basis for establishing causality for purposes of finding material injury. Since it is the merchandise that is at issue and not the underlying unfair practice and since, as is the circumstance here, the dumped merchandise is the same as the allegedly subsidized merchandise, the adverse impact of the merchandise has already been determined by the LTFV finding.

USITC Pub. 1284 at 21.

Commission Calhoun echoing the position he took originally in Korean Nails, Inv. No. 701-TA-145 (Preliminary), USITC Pub. 1223 (Mar. 1982) at 15, found "a compelling and inherent logic to this reasoning," (*Id.* at 21) and joined the affirmative determination. "But such a legal view," he went on, "is subject to a number of counter arguments," (*Id.*) among them the fact that the petitioner claims two distinct harms—one from dumping, the other from subsidization, which may call for analysis of the harm caused by each of the practices. The problem was heightened, in his view, by the fact that in the dumping case only one of the two Taiwanese producers was found to be causing material injury by selling at less than fair value. Thus, to apply the majority's reasoning and to argue that the merchandise under investigation in the countervailing duty case already had been found to be causing material injury, making separate causality analysis unnecessary, "is arbitrarily to ascribe to one group of imported merchandise harm for which it ought not to be held accountable." *Id.* at 22. Commissioner Calhoun faced the problem with candor: "Even though such an

Moreover, neither the House nor the Senate thought it was changing anything.<sup>108</sup>

"Interpreting a statute is likely to involve a good deal more than reading a printed text and measuring particular facts against the formula set by the words."<sup>109</sup> Title VII of the Trade Agreements Act is not an isolated event; it is part of a continuing process by which Congress has attempted to protect industry in the United States from what it considers unfair practices.<sup>110</sup> This history makes it apparent that the target of Title VII is not imports *per se*, but subsidized or dumped imports and the injury those practices cause.

Title VII attempts only to neutralize the presumed unfair advantage accruing to the exporter by reason of the subsidy or the less than fair value margin.<sup>111</sup> Title VII is aimed at the practices,

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undertaking may smack of the kind of tracing I have questioned whether the statute compels [sic] us to make in the normal process of reaching determinations under Title VII [footnoting his *Korean Nails* opinion] if the application of the language of the statute to the peculiar facts of a case suggests it ought to be done, then so be it." *Id.* at 23. "[I]t seems to me," he went on, "we must be able to identify how the subsidized character of the merchandise and not the LTFV character of the merchandise is causing material injury." *Id.* at 24. His invitation to the parties to address the issue in the final investigation became moot when Commerce terminated the investigation based on a *de minimis* subsidy of 0.012 percent. Final Negative Countervailing Duty Determination; Fireplace Mesh Panels From Taiwan, 48 Fed. Reg. 11,305 (1983).

108. See *supra* note 10.

109. J. HURST, DEALING WITH STATUTES 31 (1982).

110. "Twentieth-century courts in this country show themselves sensitive to legislation as typically the product of a continuing process. In contrast, nineteenth century decisions were likely to treat a statute as an isolated item." *Id.* at 41. The continuing process of attempting to protect industry from subsidized imports dates back to the McKinley Tariff Act of 1890, 26 Stat. 567 (1890). This was followed by the Tariff Act of 1894, ch. 349, 28 Stat. 509 (1894); the Tariff Act of 1897, ch. 11, 30 Stat. 151 (1897); the Tariff Act of 1909, Pub. L. No. 4, 36 Stat. 11 (1909); the Tariff Act of 1913, Pub. L. No. 16, 38 Stat. 114 (1913); and the Tariff Act of 1922, Pub. L. No. 317, 42 Stat. 858 (1922). Dumping was first addressed in the Revenue Act of 1916, Pub. L. No. 271, 39 Stat. 756 (1916).

111. The relevance of less than fair value margins is apparent from the settlement procedures set forth in Title VII for both countervailing duty and antidumping investigations. (§ 704(c) and (h)(2); § 734(c) and (h)(2)). Both may be suspended by agreements reached between Commerce and the exporters to eliminate the injurious effect of the exports by offsetting at least 85 percent of the subsidy or weighted average margin. Both types of agreements are subject to review by the Commission to determine whether in fact the injurious effect of the imports is eliminated completely by the agreement. If the Commission agrees that the injurious effects are eliminated, then the agreement stands and the investigation is suspended; if the Commission determines in the negative, then both investigations will go forward.

This statutory scheme contemplates that an 85 percent reduction in the subsidy benefits or an 85 percent reduction in the less than fair value margin could, by itself, result in the elimination of the injurious effect of the imports. Since by this requirement 15 percent of the subsidy amount or less than fair value margin would remain, this is nothing more than a statutory formula that requires the Commission to consider the amount of the subsidy or less than fair value margins in reaching an injury

and not the imports. It is the subsidy or the margin that is offset by the special duty, not the imports. It is the subsidization or "dumping" that is condemned by the international agreements that Title VII implements, not the imports. To say that Congress could have been more explicit is not to say that Congress did not accomplish what it set out to do — implement the Agreements and continue existing Commission practice with regard to injury. Title VII speaks of "imports," it is true, but it speaks of the imports "with respect to which the administering authority has made an affirmative determination."<sup>112</sup> The meaning of this determination for the Commission is the core of the issue.

The Commission majority now holds, in effect, that the affirmative determination of the administering authority—i.e., the determination by Commerce of the subsidy or LTFV margin amount—serves only to *label* the imports. But the better view, the traditional view, and, it is submitted, the Congressional view, is that the Commerce determination serves also to *characterize* the imports. It says, in effect, not only that these imports are subsidized, but that they are subsidized by a certain amount, and if the Commission determines affirmatively as to injury, the domestic industry will receive the protection only of a special duty to offset that subsidy amount. It is the character of the imports as subsidized or "dumped" that brings them within the ambit of Title VII, and it is the degree of this character that will establish the degree of the remedy — i.e., the amount of the duty. This one-to-one relationship between the amount of the subsidy or margin and the remedy emphasizes the relevance of these amounts to the question of whether the requisite causal nexus exists.

### C. Congressional Ratification of Prior Practice Amounts to Reenactment

It is beyond dispute that Congress understood the requirements of the Antidumping and Subsidies Agreements;<sup>113</sup> Congress

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determination and is precisely what Congress would have the Commission do in all investigations where appropriate.

112. 705(b)(1). See *supra* note 2.

113. See notes 101-103, *supra* and accompanying text. Moreover, the Trade Act of 1974, Section 102(d) and (e), required that statements of administrative action proposed to implement any agreement, such as the Antidumping or Subsidies Agreement, be submitted to Congress together with a draft of an implementing bill. The addition of required preliminary determinations in all countervailing duty (section 703(a)) and antidumping (section 733(a)) investigations under Title VII of the Tariff Agreement Act called for brief discussion of those new procedures as set out in the draft implementing bill which became the Trade Agreements Act. As to countervailing duties, the statement included the remark: "In the investigation, the Commission would be expected to be guided by the description of the subsidized merchandise and the amount of the subsidy contained in the petition or as modified by the Author-



clearly was aware, too, of the Commission's prior practice;<sup>114</sup> and, as the committee reports make clear, both the House and the Senate intended to continue that practice. When Congress is aware of the administrative interpretation, and gives explicit affirmative indication, at the time of re-enactment, of its intent to continue the existing standard, then Congress may be said to have re-enacted the prior standard by ratification.<sup>115</sup> Manifestly, in enacting Title VII Congress has re-enacted the standards of prior law as they apply to the issue of causation of injury.

## V. A MATTER OF DECISIONAL STYLE

Apart from substance, as a matter of decisional style, of articulation of a reasoned opinion, the majority's determinations are wanting. Commissioner Stern, in dissent, advanced serious argument against the new doctrine. That argument merited response.

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ity." As to dumping: "In its investigation the Commission will be guided by *the description of the allegation of the margin of dumping* contained in the petition or as modified by the Authority." TRADE AGREEMENTS ACT OF 1979: STATEMENTS OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 153, 96th Cong., 1st Sess., Pt. 2, at 398, 415. (emphasis added). While these statements have specific reference to the new preliminary determination procedure, on the substantive issue there is no meaningful distinction between preliminary and final determinations. Of what relevance is the Commission's being guided the "amount of the subsidy" or "the margin of dumping" if not to take them into account?

114. The awareness pre-dates passage of Title VII. Endorsement of the Commission's practice was given by the Senate Committee on Finance in its Report on the Trade Act of 1974:

Conceptually, the Antidumping Act is not directed toward forcing foreign suppliers to sell in the U.S. market at the same prices that they sell at in their home markets. Rather, *the Act is primarily concerned with the situation in which the margin of dumping contributes to underselling the U.S. product in the domestic market, resulting in injury or likelihood of injury to a domestic industry.*

S. REP. NO. 931-1208, *supra* note 27, at 179.

115. Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414, n.8, 95 S. Ct. 2362, 2370, n.8, 45 L.Ed.2d 280 (1975); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366, 71 S. Ct. 337, 340, 95 L.Ed. 337 (1951); *National Lead Co. v. United States*, 252 U.S. 140, 147, 40 S. Ct. 237, 239, 64 L.Ed. 496 (1920); 2A C. Sands, *Sutherland on Statutory Construction* § 49.09 and cases cited (4th ed. 1973). So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

*Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). ". . . in order to bring this 'doctrine of re-enactment into play, Congress must not only have been made aware of the administrative interpretation, but must also have given some 'affirmative indication' of such intent." *Association of Am. R.R. v. ICC*, 564 F.2d 486, 493 (D.C. Cir. 1977). *Accord Merrill Lynch, Pierce, Fenner & Smith v. Curran* 456 U.S. 353, (1982); *Cannon v. University of Chicago*, 441 U.S. 677 (1979). *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978).

The majority did not furnish that response. To the contrary: the majority dropped without discussing many years of precedent; it put the United States unnecessarily in violation of the Subsidies Agreement; it ignored explicit congressional language in the Committee reports concerning how it should look at the imports before it in a Title VII proceeding.

Perhaps the basic error of the majority is in its treatment — or, more precisely, lack of treatment — of its own precedents. It is the majority's ignoring of these many cases that seems to lead it to ignore both the Subsidies Agreement and especially the legislative intent expressed upon enactment of Title VII. One need not be a devotee of rigid *stare decisis* to appreciate the value of precedent. As Justice Cardozo has written: "What has once been settled by a precedent will not be unsettled overnight, for certainty and uniformity are gains not likely to be sacrificed."<sup>116</sup>

Certainty and uniformity — predictability — indeed are values in a legal system not to be lightly discarded. Yet this is what the majority has done.<sup>117</sup> Had the majority faced in any way the long line of cases going back to *Vital Wheat Gluten from Canada*,<sup>118</sup> it would have needed to have said why those prior decisions were in error, or why Title VII compels departure from them despite essentially identical operative language.<sup>119</sup> This would have led to a need for an explanation of why the word "imports" in Title VII is not amenable to the interpretation given it by Congress in the Committee Reports, and why the United States now must be said to have violated an international agreement by implication, despite the fact that Title VII was intended to implement that agreement.

It is obvious that the majority did not face these issues because equally obvious, it could not — not and conclude as it did that the amount of a subsidy is of no consequence. Proper respect for the Commission's own precedents by the majority would have led it to confront these issues and that confrontation, openly faced, would have led it to the opposite result.

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116. B. CARDOZO, *The Paradoxes of Legal Science*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 276 (1967).

117. That individual commissioners may disagree with their predecessors does not relieve them of the obligation of dealing with their predecessors' work as the work of the institution any more than a new judge is entitled to dismiss prior cases on the grounds that they were decided by others. The Commission, like a court, "is a continuing institution, regardless of changes in its membership." *SCM Corp. v. United States* 519 F. Supp. 911, 2 Ct. INT'L TRADE 1, (1981).

118. Inv. No. AA 1921-31, TC Pub. 126 (Apr. 1964).

119. Antidumping Act of 1921, ch. 14, tit. II, 42 Stat. 11 (previously codified at 19 U.S.C. 160 *et seq.*).

## VI. CONCLUSION

The antidumping and countervailing duty provisions of the Tariff Act are designed to remedy injury caused by imports that are sold below their fair value or that benefit from subsidies. The remedy is in the form of a special duty designed to offset the margin by which the price to the United States is below fair value or the amount of the subsidies. For 25 years the International Trade Commission considered the amount of any margin below fair value or subsidy as a relevant economic factor in its determination of whether the "dumped" or subsidized imports were a cause of injury. The international Subsidies Agreement, to which the United States is a party, requires that the margin or subsidy amount be taken into account in the injury determination. In the 1979 legislation implementing that Agreement, Congress made it plain that it intended no change in Commission practice. The Commission majority has ignored its own precedent, has ignored the legislative intent, and has placed the United States unnecessarily in violation of the Subsidies Agreement. The Commission should return to its traditional mode of analysis of this issue.