THE CAUSATION OF MATERIAL INJURY: CHANGES IN THE ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS OF THE INTERNATIONAL TRADE COMMISSION

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In this article we present an alternative interpretation to that of Mr. Palmeter of the causation requirements of the antidumping and countervailing duty provisions of the Tariff Act of 1930. [Mr. Palmeter's article begins on page 1.] Our interpretation of the statutory bifurcation of functions between the International Trade Commission and the Department of Commerce, our understanding of the administrative practices in the Commission's injury proceedings,[1] and the general principles for the interpretation of remedial statutes lead us to conclusions which differ from those of Mr. Palmeter.

Basically these differences can be summarized as the following. First, the provisions of these laws must be read as a whole. We emphasize the differences between the methodology of the Commerce Department in its calculation of pricing adjustments and cost estimates in antidumping investigations and its calculation of subsidies in countervailing duty investigations. These differences are fundamental to an understanding of agency functions under different provisions of the statute. Second, it is our view that the purpose of these trade law provisions is not to remedy the injury domestic producers suffer from import competition.

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The views expressed herein are entirely personal and do not put forth any official policy of the U.S. International Trade Commission or any member or officer of the agency.

1. Unless otherwise noted, the term "injury" is used to include the statutory concepts of material injury to an industry in the United States, threat of material injury to such industry, or material retardation of the establishment of an industry in the United States.

Rather, the purpose is merely to tax the amount of dumping and force foreign exporters to raise their prices to the United States or lower their foreign prices, thus reducing or eliminating the dumping. In the case of countervailing duties, the purpose is to offset, or neutralize, any benefit received by a U.S. importer dealing with a subsidized foreign manufacturer/exporter.[2] In theory, the duties can inconvenience U.S. importers of subsidized merchandise to the degree that they will either resort to importing other products or pressure the foreign producers to "do something" about their exposure to countervailing duties.[3] In our view, the annual reviews of the amounts of duty owing and the establishment of the deposit rate for the prospective year must be integrated into an understanding of the statutory system of antidumping and countervailing duty investigations.

We will discuss what the Tariff Act directs the Commission to do in injury investigations and will address the provisions of the international code concerning the conduct of antidumping and countervailing duty proceedings and the legislative history of the Trade Agreements Act. We contend that nothing in any of these documents disturbs our analysis of the statute.

The structure of the statute. The antidumping law requires the Commerce Department to determine the price at which merchandise under investigation is offered for sale to the United States and the price at which it is offered for sale in the home market of the foreign producers. To calculate the prices to be compared, the Department determines the foreign ex-factory price of each. Adjustments for comparability in physical product differ-

2. A theme found throughout Mr. Palmeter's article is that the Commission ought to apply a *de minimis* test where the less-than-fair-value margin or net subsidy calculated by the Department appears to be less than the difference between the average selling prices of domestically produced articles and the average selling prices of the importers of dumped or subsidized merchandise. This assumes a relationship between the cost accounting-like calculations of the Department and the averages of prices reported to the Commission. There is no reason to make this assumption. The task that the statute directs the Commission to perform is to estimate the price effects of the volume of imports subject to investigation and the degree to which competition with these imports has impacted domestic producers of comparable goods. To apply the *de minimis* test on the basis of the numbers calculated by the Department could result in denying statutory relief to the producers most injured by competition from dumped or subsidized imports.

The Commerce Department applies a *de minimis* standard in both antidumping and countervailing duty investigations in situations where the weighted-average less-than-fair-value margin is less than 0.5 percent or the ad valorem equivalent of the net subsidy is less than 0.5 percent.

3. The regulations of the Commerce Department provide for the possibility of antidumping duty avoidance through the reimbursement of the importer by the exporter. 19 C.F.R. § 353.55 (1982). There is no such provision in the regulations implementing the countervailing duty provisions of the Law.

ences and circumstances of sale are calculated by the Department.[4] If the price of comparable merchandise is lower for export to the United States than for home consumption, the amount of the difference is referred to as "less than fair value." Should the Commission determine that the imports of a product sold for export to the United States at less than fair value are injuring U.S. producers of comparable merchandise, the Department will require importers of the merchandise found to be at less than fair value to deposit estimated antidumping duties. These estimated duties are based on those calculated during the dumping investigation. The Department annually will recalculate the exact antidumping duty on a company-by-company basis. This recalculation results in both the actual payment of the duty and the rate for the deposit required for the following year. A company not investigated will have to deposit an estimated duty calculated from the weighted average of all the other companys' dumping margins.[5]

In the case of countervailing duty investigations, the Department does not investigate foreign prices. The prices at which the foreign product is sold to the United States or for consumption in the home market are not relevant to the inquiry. The Department assesses the value of the foreign government's subsidy program and calculates the amount that an individual manufacturer benefits by the program. This amount is allocated to the volume of the exports of the product and an offsetting rate is determined. If the Commission finds that subsidized imports injure U.S. producers, this subsidy amount is assessed in the form of a countervailing duty rate to offset the amount of the subsidy. Again, the assessment is an estimate which will be reviewed annually. At the end of the year, the final duties owing, if any, are paid and the rate for the following year is established.

The tenor of Mr. Palmeter's article is that in an unfair competition statute, it is important to measure the amount of unfairness.

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4. 19 U.S.C. § 1677b(a)(4) (Supp. V 1981); 19 C.F.R. § 353.15 (1982).

5. Antidumping orders cover all of the subject merchandise exported from the named country unless specific exemptions are stated in the order. Under normal conditions, the Department of Commerce will examine at least 60 percent of the dollar value of exports alleged to be sold to the United States at less than fair value (19 C.F.R. § 353.38 (1982)). The Department will often attempt to investigate 85 percent of the dollar value, the amount derived by the suspension agreement provisions in 19 U.S.C. § 1673(c) (Supp. V 1981). As a result, small foreign producers may not be contacted by the Department during its investigation. An exporter not specifically named in the investigation may submit a voluntary questionnaire response, however.

In those cases where an exporter not investigated by the Department does not voluntarily submit a questionnaire response covering all of its sales for the period under investigation, the Department will establish a rate based on the weighted average for those companies investigated (*See* 19 C.F.R. § 353.45 (1982)).

We submit that this is done by the Department during the annual review process. It is here that exact duties are collected, refunds made for excessively high estimated duties, and deposit amounts established for future imports. The Commission's role in maintaining fairness in an injury investigation is limited to only assessing the impact on the operations of U.S. producers of comparable products of those imports designated by the Department as being sold at less than fair value or as being subsidized.[6]

Sections 701(a) (countervailing duty) and 731(a) (antidumping) of the Tariff Act direct the Commission to determine whether a domestic industry is materially injured or threatened with material injury, or whether the establishment of a domestic industry is materially retarded "by reason of imports of that merchandise." Sections 703(a) and 733(a) provide for a preliminary determination to establish material injury "by reason of imports of the merchandise which is the subject of the investigation . . ." Sections 705(b) and 735(b) provide for final determinations to establish material injury "by reason of imports of merchandise with respect to which the administering authority [the Department of Commerce] has made an affirmative determination . . ."[7] Section

6. The law is clear that any finding of injury by the Commission in a final antidumping investigation must be by reason of the imports covered by the Commerce Department's final finding of sales at less than fair value. 19 U.S.C. § 1673(b) (Supp. V 1981). *Cf.* Sprague Electric Co. v. United States, 488 F. Supp. 910 (Cust. Ct. 1980), *modified on rehearing*, 84 Cust. Ct. 260 (May 23, 1980). The same reasoning would apply, by analogy, to countervailing duty investigations. *See* 19 U.S.C. § 1671d(b) (Supp. V 1981).

7. Beginning at note 62 and its subject text, Mr. Palmeter equates the conduct of review investigations concerning outstanding countervailing duty orders conducted under section 104(b) of the Trade Agreements Act of 1979 with countervailing duty investigations. We do not agree that there is a basis for analogy. In review investigations the Commission must assess the effect an outstanding order had on pricing and other marketing strategies of importers and exporters subject to it. Then the Commission must forecast whether the revocation of the order and the lifting of the inhibiting effect, if any, would result in material injury to the domestic industry. In the review investigation, the amount of money paid in countervailing duties represents a measurable part of the cost of doing business which will no longer be borne by importers of the subsidized products if the countervailing duty order were to be revoked. This is not the case in the regular countervailing duty investigations. Also, it is not the case in review investigations concerning outstanding antidumping orders.

The amount of antidumping duties paid by importers of dumped merchandises can be controlled by the foreign exporters. A foreign exporter can increase its price to the United States, lower its home market price, or both, to remove or limit the less-than-fair-value margin and the importer's liability for antidumping duties. Assuming rational tax avoidances behavior, this is a normal response of companies trading merchandise covered by an antidumping order. The consequence is that the government agencies do not know the effect "any antidumping order ever issued has . . . [had on] the trade in the commodity to which it applied." Statement By Peter D. Ehrenhaft At House Ways And Means Trade Subcommittee Hearings On Trade Remedies Legislation, May 4, 1983, *reprinted in* H. APPLEBAUM & A. VICTOR, THE TRADE AGREEMENTS ACT OF 1979—FOUR YEARS LATER 373, 375 (1983). In a 1979 report on the

771(7) of the Act lists factors which the Commission is to take into account in assessing injury. The effect of the factors in each case is to be assessed in connection with "imports of merchandise." The provisions of section 771(7) of the Act are found in Appendix B, column 1, pages B-1 through B-3. Nowhere does the statute suggest that the Commission should attribute injury to dumping margins or net subsidies.

Mr. Palmeter's conclusion that the Tariff Act permits the Commission to take dumping margins and net subsidy amounts into account in making pricing analyses to determine the causation of injury is based on the argument that by reenacting the "by reason of" language from the Antidumping Act, 1921, and the duty-free provision of the countervailing duty statute (19 U.S.C. 1303(b)), the Congress approved of the prior Commission practices. We maintain that the context in which the reenactment of this language took place does not support the argument. Neither the Antidumping Act, 1921, nor the duty-free provision of the countervailing duty statute contained any standards whatsoever.[8] To argue that the Congress meant for the Commission to apply particular pricing analyses in each antidumping or countervailing duty investigation and failed to mention either analysis throughout the detailed lists of factors in section 771(7) of the Tariff Act is not credible.

Moreover, for the reasons advanced later in this article, we do not believe that one can construct a credible legal argument for congressional acquiescence concerning the former Commission practices.[9] Finally, in our view, the most important reason for rejecting Mr. Palmeter's thesis is that the premises upon which these practices were based are faulty.

THE COMMISSION'S INJURY INVESTIGATIONS

To appreciate the bifurcation of functions between the Commission and the Department, it is necessary to describe how the Commission conducts an injury investigation. There are three basic elements to a determination of whether a domestic industry is

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administration of the antidumping law, the General Accounting Office recommended that the Commission "make wholesale price studies of merchandise subject to antidumping investigations, monitor such merchandise, and determine the effect of antidumping action on industries and labor." GENERAL ACCOUNTING OFFICE, UNITED STATES ADMINISTRATION OF THE ANTIDUMPING ACT OF 1921 iv (1979) (report to the Congress by the United States Comptroller General).

The Commission did not conduct the studies on the ground that such surveys would be more burdensome to producers, distributors, and importers than antidumping investigations.

8. The statutory language for a determination under the Antidumping Act of 1921, is set out in note 14, *infra*. The language in section 1303(b) is virtually identical.

9. *See infra*, note 49.

injured. First, the Commission must determine which U.S. producers manufacture products comparable to the dumped or subsidized imports under investigation. Next, the Commission must assess the impact of the imports on the operations of these U.S. producers. Finally, should the Commission determine that the domestic industry[10] is injured, it must articulate how the imports are at least partially responsible. The Commission must articulate how the operations of U.S. producers are affected by competition from dumped or subsidized imports in U.S. markets to the satisfaction of its reviewing courts.[11]

The difficulty in the Commission's role is that it must generate most of the information needed to make the required statutory determination. The statute requires the grouping of U.S. producers into "industries" which are product specific. This, in turn, requires that the Commission have comparable product statistics for both domestic operations and imports. Official statistics of U.S. output and U.S. imports are rarely comparable and, for that matter, are rarely available on a product-specific basis.[12] Thus, the Commission conducts questionnaire surveys of U.S. producers and U.S. importers to create a statistical profile of the domestic consumption of the article under investigation. The gist of an injury investigation therefore, concerns the displacement of the sales of U.S. produced merchandise by sales of the imports subject to investigation. The focus is on changes in market shares, the relative average price differences between domestically produced products and the dumped or subsidized products, and the explanations of customers of domestic producers for their changing orders from domestic producers to the imports. For the reasons described below, we do not believe as Mr. Palmeter asserts that a weighted average of the less-than-fair-value margins of the companies investigated during the Commerce Department's dumping investigation or the Department's valuation of the benefit received by subsidized foreign manufacturers (often calculated according to foreign accounting principles) could contribute to the Commission's injury determination.[13]

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10. " '[I]ndustries' are . . . just convenient fictions. They are in fact shifting groups of competitors, clustered around particular products and processes." Reich, *Beyond Free Trade*, FOREIGN AFFAIRS 773, 793 (1983). The statutory guidelines for selecting the producers to constitute the industry against which the Commission assesses the impact of import competition are found in 19 U.S.C. § 1677(4)(A)-(D) (Supp. V 1981).

11. Injury determinations in antidumping and countervailing duty investigations are held to a substantial evidence standard. 19 U.S.C. § 1516a(2)(B) (Supp. V 1981).

12. Quinn & Sood, *Through the Maze of Trade Data Classification*, 13 COLUMBIA J. OF WORLD BUS. 54 (1978).

13. To determine the likely effects of economic phenomena in a market place, one would examine economic costs, not accounting costs. The two concepts are quite

The antidumping proceeding. The Commission first received the authority to conduct antidumping injury investigations in 1955. Prior to that time injury investigations had been performed by the Department of the Treasury on the basis of information developed by the Customs Service. These injury investigations were authorized by a statute which provided no standards for the determination.[14]

For the purpose of this article we have attempted to reconstruct how injury investigations were initially conducted by the Customs Service and later by the Commission prior to the use of the weighted-average, less-than-fair-value margin advocated by Mr. Palmeter. In doing so, we have relied on the recent congressional testimony of a former General Counsel of the Commission who, prior to becoming an employee of the Commission, had been an employee of the Customs Service.[15]

The first affirmative injury determination of the Commission in an antidumping investigation took place in a 1955 case concerning *Cast-Iron Soil Pipe from the United Kingdom*.[16] Prior to 1980, the Treasury Department conducted the less-than-fair-value investigations.[17] Typically, Treasury's investigation would sample sales for export to the U.S. and foreign market sales made prior to the filing of the antidumping petition. The results of this pricing inquiry would be summarized on a worksheet which identified the

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different. M. Bradley, *Microeconomics* 138-41 (1980). Accounting calculations for the purpose of tax assessments do not measure phenomena outside the accounting system and the taxation regulations. Accounting conventions "do not provide valid measurements that can be used for answering or gaining insights into most economic questions." Benston, *Accounting Numbers and Economic Values*, XXVII THE ANTITRUST BULL. 161 (1982).

To take a cost accounting-like product, such as the weighted average of differences between adjusted prices for export to the United States and some reference price or value permitted by a statute or a net subsidy calculated by estimating the value to foreign firms of foreign government programs, and add this result to the average of the resale prices of U.S. importers reported to the Commission violates this conventional wisdom. In each of the Commission cases in which the Commission did this and found injury nonetheless, an accurate observation would be that the products under investigation were very price sensitive.

14. The Antidumping Act of 1921, provided that the Commission determine "whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States." 19 U.S.C. § 160(a) (Supp. V 1981). This provision was repealed by section 106 of the Trade Agreements Act of 1979.

15. *Options to Improve the Trade Remedy Laws: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. 1119 (1983) (statement by Russell N. Shewmaker).

16. Inv. No. AA1921-5 (1955).

17. The responsibility was transferred to the Department of Commerce by Reorganization Plan No. 3 of 1979 issued under the authority of the Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 (codified at 5 U.S.C. § 901 *et seq.*) and section 1109 of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979).

foreign sellers, U.S. purchasers, dates and U.S. ports of entry, relevant prices, and the less-than-fair-value differences, if any.[18] This material would be made available to the Commission which would determine whether sales of dumped imports contributed to injury to a domestic industry.

The *Cast-Iron Soil Pipe* case illustrates how this was done. In that case the petitioner was located in California. The Commission determined that there was a discrete market for the product on the West Coast. About eight percent of national production was located in California. The Commission found injury to the regional industry on the basis of the losses of one producer in the region. We believe that the Treasury worksheet indicated the export prices to West Coast importers. The Commission then determined that the sales of those imports were at lower prices than the petitioner's.[19] On this basis and the fact that the petitioner showed losses during the period investigated, antidumping duties were imposed on a nation-wide basis.[20] Other California producers had not shown losses. The petitioner's losses preceeded the period in which it complained of dumped imports. The dumped imports constituted four-tenths of one-percent of the domestic production of the product. During the period investigated, domestic producers had increased their production, sales, capacity, and prices. The decision was criticized in a report of the Joint Economic Committee on Foreign Economic Policy,[21] ridiculed during congressional hearings before the House Ways and Means Committee,[22] and ultimately upheld by the appellate court only on the basis of a theory of threat of injury to a nation-wide industry, a finding the Commission had not reached.[23]

This type of price analysis—looking for underselling by those importers identified in the Treasury Worksheet by comparing the prices of U.S. producers in the same regional markets as the importers—led to the international negotiation of a "material" injury standard for the conduct of antidumping injury

18. Shewmaker statement, *supra* note 15, at 1141-1144, 1178-1179.

19. "If imports are not easily distinguishable as more desirable than the domestic product for stylistic or other reasons, or if there is no excess of demand over current domestic supply at prevailing prices, there must be a differential or discount of import below domestic price to compensate for the annoyance, hazard, delay, additional capital commitment and other costs of depending on a supplier in a foreign country." Adams & Dirlam, *Import Competition and the Trade Act of 1974*, 52 INDIANA L.J. 535, 565 (1977).

20. Ellis K. Orlowitz Co. v. United States, 50 C.C.P.A. 36, 40, 41 (1963).

21. JOINT COMM. ON THE ECONOMIC REPORT-FOREIGN ECONOMIC POLICY, S. REP. No. 1312, 84th Cong., 2d Sess. 27 (1956).

22. *Amendments to the Antidumping Act of 1921: Hearings on H.R. 6006, 6007 and 5120 Before the House Comm. on Ways and Means*, 85th Cong., 1st Sess. 92-98 (1957).

23. *Orlowitz* 50 C.C.P.A. at 42.

investigations.[24] The imports, it was argued, should have a measurable impact on all domestic production.[25] The coincidence of finding domestic producers with financial difficulties in the same regional market as importers of dumped merchandise who subsequently resold the merchandise at prices below those of the same producers ought not result in affirmative determinations and the imposition of nation-wide antidumping relief. Although the result of the *Cast-Iron Soil Pipe* decision is easily criticized, the pricing comparisons were direct. Using the Treasury worksheet enabled the Commission to determine the relative levels of prices among rivals in the same markets. Moreover, the difference between an importer's invoice cost and its sales price could be observed on a case-by-case basis.

The use of Treasury worksheets was subsequently abandoned by the Commission.[26] In its place the weighted-average-less-than-fair value margin was substituted and compared with the average national prices of U.S. producers and the average national resales of imports at whichever level of distribution the Commission had selected to reflect the most direct competition between domestically produced articles and dumped imports. Relying on weighted averages masks those instances where importers of dumped merchandise deliberately undersell rivals to gain new business and discloses nothing concerning the cost of the imports to any individual importer. Indeed, the assumption that the weighted average of the difference between foreign producers' prices for export and their prices for home market sales would have any logical relationship to the prices at which U.S. importers or subsequent distributors resold the merchandise appears shaky if for no other reason than it does not provide for any of the distributors making profits.[27] The weighted-average margin has

24. Agreement on the Implementation of article VI of the General Agreement on Tariffs and Trade, June 30, 1967, 19 U.S.T. 4348, T.I.A.S. No. 6431, (effective July 1, 1968). The material injury standard is found in Articles 3 and 4.

25. The 1967 code began with the proposition that the industry affected by the dumped imports must encompass the national production of the relevant product (Article 4a). A derogation was permitted where producers in regional markets were isolated (Article 4aii). The regional criteria provided that the sales of the regional producers be confined to the region and that producers in other markets did not sell in the region. Similar, but more specific, criteria are found in Article 4(a)(ii) of the 1979 code.

26. Shewmaker statement, *supra* note 15, at 1142-1143, 1178-1179.

27. Customers of domestic producers are not lost to imports, but to the sales of imports. It is highly unlikely that importers price their merchandise to compete with U.S. producers by making amateur tax assessment calculations to pass-through the equivalent of the foreign supplier's less-than-fair-value margin to the next buyer in the U.S. channel of distribution for the product. Rather, such merchandise is priced both to undersell comparable domestic products and provide the importer with healthy profit margins. In this regard, a 1979 Library of Congress study prepared for the subcommittee on Trade of the House Ways and Means Committee focused on the

been described as having "no probative usefulness whatsoever for the purposes of the Commission's import-injury determination."[28] We agree. We do not lament the Commission's having abandoned its reliance on weighted-average, less-than-fair-value margins in pricing comparisons.

The countervailing duty proceeding. As Mr. Palmeter accurately describes, the Commission began to use the subsidy rate calculated by the Department in comparing the average prices of domestically produced and subsidized imported merchandise in its first countervailing duty investigation.[29] The Department's net subsidy calculation concerns the benefit to foreign producers of foreign government programs. The calculation does not concern either the foreign price of subsidized merchandise or its resale price by U.S. importers. Although a per-unit export subsidy could have a price effect which could be passed through successive channels of distribution in the United States, it is impossible to determine what effect it might have. Indeed, since money is fungible, it makes no sense to try to trace a particular subsidy amount to the consequences of its specific use.[30] It is not rational to assume that importers resell merchandise in the United States at prices they have calculated from performing their own estimates of the equivalent rates of foreign government subsidies.[31] Moreover, if the Commission requires the finding of a causal relationship between the net subsidy calculated by the Department and the amount by which subsidized imports undersell U.S. products, a serious loophole in the administration of the law could result. As the Commission has stated in a relevant study, subsidies could be

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markup on three imported product groups and concluded that their markup ratios were higher than those on comparable domestically produced products. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 95TH CONG., 1ST SESS., LIBRARY OF CONGRESS STUDY ON IMPORTS AND CONSUMER PRICES (Comm. Print 1977).

28. Shewmaker statement, *supra* note 15, at 1143 and 1179.

29. Certain Zories from the Republic of China (Taiwan), Inv. No. 303-TA-1 (September 1976).

30. The Department of Commerce has acknowledged the difficulty of trying to trace a subsidy amount to its alleged effects. During a 1983 countervailing duty investigation of carbon steel wire rod from Brazil, the Department noted that—

> [W]e do not find that the subsidies received necessarily create a price differential for wire rod in the two markets compared. It is possible, as respondents claim, that the U.S. prices are reduced as a result of the subsidies. It is equally possible, however, that the subsidies had the effect of increasing the respondents' revenues without affecting U.S. prices.

Carbon Steel Wire Rod From Brazil; Final Determination of Sales at Less Than Fair Value, 48 Fed. Reg. 43,202, at 43,205 (1983).

31. In a 1951 article on the fundamentals affecting the pricing decision, the author listed nearly fifty considerations which affected the kinds of information necessary for an informed price decision. Huegy, *Price Decisions and Marketing Policies*, in PRICING STRATEGY 295, 297-299 (B. Taylor & G. Wills eds. 1969).

used by foreign producers to improve their case flow, to achieve economies of scale, to contribute to their product development, and for other purposes unrelated to the resale prices of U.S. imports.[32]

The issue of determining the economic effects of foreign government subsidies in U.S. markets was a focal point in the 1982 Commission countervailing duty investigations of certain European carbon steel products.[33] In those cases, the arguments made by Mr. Palmeter in this Journal were made before the Commission. Only one party to those investigations, the Federal Trade Commission, proposed a methodology for assessing the effects of foreign subsidies in the United States markets for carbon steel products.[34] The FTC recommended that the International Trade Commission could determine whether the financial restructuring of foreign steel firms led to larger sales or lower prices of foreign steel in the United States by examining the cost structures of the foreign firms. The FTC suggested that the Commission determine whether the subsidies were utilized to affect fixed costs or variable costs.[35] If the subsidies affected only the fixed costs of a foreign producer, the FTC reasoned that they would be unlikely to affect a firm's short-term output decisions and, therefore, they would be unlikely to result in increased exports or strategies to lower prices in the export markets.

Although this was a serious attempt to estimate the likely effects of foreign government subsidy activities in U.S. markets, it is not consistent with the direction of the statute. The countervailing duty provisions require the Commission to make injury determinations on a country-wide rather than a firm-by-firm basis. Assuming that uniform methods of cost accounting were practiced among the different firms in each of the different countries subject to investigation, each producer would have different costs for the same steel products.[36] This would raise the possibility of the

32. STAFF OF COMM. ON FINANCE, 96 CONG., 1st SESS. MTN STUDIES: PART 6: AGREEMENTS BEING NEGOTIATED AT THE MULTILATERAL TRADE NEGOTIATIONS IN GENEVA - U.S. INTERNATIONAL TRADE COMMISSION INVESTIGATION No. 332-101, 186 (Comm. Print 1979).

33. Inv. Nos. 701-TA-86-144, 701-TA-146, and 701-TA-147 (Preliminary), USITC Pub. 1221 (1982).

34. Posthearing Brief of the Federal Trade Commission, In the Matter of: Certain Steel Products From Belgium, Brazil, the Federal Republic of Germany, France, Italy, Luxembourg, The Netherlands, and the United Kingdom, Inv. Nos. 701-TA-86, 87, 92, 93, 96, 97, 99, 101, 104, 105, 107, 109, 117, 119, 121, 123, 124, 128, and 138 (Final) September 14, 1982.

35. *Id.* at Attachment B, p.9.

36. There are several layers of difficulty here. The first is time. The Commission has 120 days—at most—to conduct and complete these investigations. The FTC argued, in effect, that the Commission should send its staff to Europe to determine the current costs of each steel plant's output. This would require a larger staff than the

Department finding a net subsidy for a firm where the Commission might find that the subsidy did not affect the firm's variable costs. The statute does not authorize the Commission to make negative determinations on this basis. Had the Commission done so, we assume that the case would be remanded for an investigation in accordance with section 771(7) of the act.[37]

The only reference in the Tariff Act concerning the Commission's authority to examine a foreign subsidy is found in subsection 771(7)(E)(i) of the Act.[38] It is limited by its terms to the consideration of the threat of material injury and specifically directs the Commission to consider only information presented to it by the Commerce Department concerning (1) whether the subsidy is to be classified as an export subsidy within the meaning of the international code, and (2) the effects likely to be caused by the subsidy.[39] Nowhere in the checklist of specific items the Commission should take into consideration when making an injury determination is there any authorization for the Commission itself to develop this information.

There is no legislative history on point. We suggest that the Congress did not wish to place the Commission, an independent

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Commission has, a foreign language and accounting capability on the part of this hypothetical staff, and a solution to the problem of adjusting all of the calculations into comparable dollar amounts through the various exchange rates. It is very possible that all of this effort would be futile. As an antitrust expert has remarked on the problem of determining costs for predatory pricing litigation,

> [C]ourts barely are able to calculate firms' costs, and without knowledge of costs (as well as income) they cannot compute profits. In litigation under the Robinson-Patman Act, for example, a firm charged with price discrimination may defend by showing that a particular discount was justified by cost savings. Efforts to assert this defense routinely fail, though, because courts cannot ascertain 'cost;' whichever party has the burden of persuasion loses. Similarly, the Supreme Court has rejected attempts to argue that mergers are justified because they create efficiencies; that refusal obviates the need to inquire into the costs of production. The wisdom of the Court's refusal to inquire into costs is fortified by the chronic inability of regulatory commissions to calculate the costs and revenues of utilities even under the best conditions—the commissions have decades to study the matter, full access to all data, and the cooperation of the utility.

Easterbrook, *Comments On 'An Economic Definition of Predatory Product Innovation,'* in STRATEGY, PREDATION, AND ANTITRUST ANALYSIS, 415, 431-432 (S. Salop ed. 1981).

37. The statutory direction is precise. The Commission is to focus on (1) the volume of imports, (2) their effect on prices in U.S. markets of domestically produced domestic merchandise and, (3) the impact of the imports on the domestic producers of the comparable merchandise. *See* 19 U.S.C. § 1677(7)(B) (Supp. V 1981). The statutory language is set out in Appendix B, at B-1, column 1.

38. 19 U.S.C. 1677(7)(E)(i) (Supp. V 1981).

39. An illustrative list of export subsidies is identified in the Annex to the international agreement on subsidies and countervailing duty measures. *See infra* note 44. The responsibility for classifying foreign subsidies into export subsidies or domestic subsidies is delegated to the Department, not the Commission.

agency, in a position of characterizing the sovereign acts of foreign states as unfair trade practices which injure companies in the United States. The statutory language directs that both the characterization of foreign government subsidies and any forecasts of their likely effects be undertaken by the executive branch.

In fact, to date, the Commission has never conducted an investigation into foreign subsidies but, rather, has relied on information developed by the Department of Commerce or, in cases before 1980, the Department of Treasury. This has a practical significance. It is currently the practice of the Department of Commerce to issue an affirmative determination in cases where the net subsidy is *de minimis* for the period under investigation but future subsidy amounts could be substantial.[40] Without independent information the Commission would have no basis for an independent assessment of whether the subsidy might be substantial in a future period.

THE INTERNATIONAL CODES

The report of the Committee on Ways and Means on the bill which became the Trade Agreements Act of 1979 describes the origin of the key provisions of both the 1979 version of the international antidumping code and the international code concerning subsidies and countervailing duty measures.[41] The 1967 version of the international antidumping code was taken as the reference point for both the provisions relating to a material injury standard and those concerning the causal relationship between dumped imports or subsidized imports and material injury. Article 3, paragraphs (a) through (c) of the 1967 version specifically addressed these points. These paragraphs are reproduced in Appendix A of this article. A careful reading of the language indicates that the terms "dumping" and "effects of the dumped imports" were used interchangeably.[42] These provisions, as refined, were carried over into the 1979 codes. Again, a careful reading of the cross-references concerning the effects of dumped or subsidized imports indicates that the drafters of the 1979 codes equated the terms "effects of dumping" with the volume of dumped imports and their effects on prices of comparable products in the importing country. This cross-reference is found in Article 3, paragraph 4, of the 1979 antidumping code, at footnote number four.[43] As

40. *See*, e.g., Final Affirmative Countervailing Duty Determinations; Certain Stainless Steel Products From Spain, 47 Fed. Reg. 51, 459 (1982).

41. H.R. REP. No. 96-317, 96th Cong., 1st Sess. 44 (1979).

42. Appendix A. Note the underscored language.

43. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade. Appendix B, at B-4, column 2.

Mr. Palmeter acknowledges, there is a similar cross-reference concerning the "effects of the subsidy" and the volume of subsidized imports and their effects on prices of comparable products in the importing country in the 1979 code on subsidies and countervailing duty measures.[44]

This same interchangeability in the use of terms is found in the description of the code on subsidies and countervailing duty measures in the April 1979 report of the Director-General of the General Agreement on Tariffs and Trade, the organization under whose aegis the codes were negotiated.[45] We submit, therefore, that there is no conflict between the provisions of the Tariff Act and the international obligations of the United States.[46] Readers are invited to compare the provisions of the Tariff Act with those of the 1979 antidumping and subsidy codes. The relevant sections are set out in Appendix B.

LEGISLATIVE HISTORY

To paraphrase a recent article on the British welfare system, politicians are not foreign trade specialists or technocrats familiar with the provisions of GATT; they are more comfortable with generalizations. Yet they have managed to create an import relief and duty assessment system of such complex detail they can not possibly understand it.[47] We do not argue that there are no references to causation "by reason of dumping" or "by reason of net subsidies" in the House and Senate reports on the Trade Agreements Act.[48] The members of the committee staffs were aware of the former practices of the Commission[49] and they were also aware that the literal language of the bill and the codes did not

44. Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade. Appendix B, at B-4, column 3.

45. DIRECTOR-GENERAL OF GATT, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS 59, 131 (Geneva 1979).

46. At note 79 to his article, Mr. Palmeter suggests that the antidumping and countervailing duty regulations of the European Community, Canada, and Australia require these entities to determine the effect of a foreign subsidy or a dumping calculation in the markets of the importing entity independent of the effects of the volume of imports. He does not give an example of how any of these authorities accomplishes these feats. We suggest that these entities focus on the resale prices of the imports in their markets, not the calculations Mr. Palmeter advocates. In the case of the European Community, 88 out of the 149 investigations of dumped or subsidized imports concluded between 1980 and 1982 were resolved by exporters agreeing to revise their prices. "EC Commission Issues First Report on Its Application of Anti-Dumping And Anti-Subsidy Legislation," European Community News, of November 17, 1983, at 1 (No. 20/1983).

47. *Britain: The Welfare Muddle*, THE ECONOMIST p. 35 (Oct. 1, 1983).

48. Citations to these references are found at notes 101 through 106 of Mr. Palmeter's article.

49. M. Stein, General Counsel, U.S. International Trade Commission, Remarks

require the former Commission practice of relying on weighted averages of dumping margins or net subsidies in pricing comparisons in U.S. product markets. They placated the interests of domestic manufacturers by drafting the law as they did and the interests of U.S. importers by making references to causation by reason of dumping or net subsidies in the committee reports[50] and leaving the administration of the statute to the Commission and, ultimately, the courts to resolve.

CONCLUSION

If there is no confusion in the statutory direction of the Tariff Act and the apparent inconsistency with the 1979 codes is reconciled by reading three paragraphs in each agreement, one is left with the conclusion that perhaps nothing is wrong. The causal nexus between the dumping or the subsidization and the legally congnizable injury consists of the imports subject to antidumping and/or countervailing duty investigation. This makes a great deal of sense. The estimated amount of unfair advantage enjoyed by

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at Workshop on Current Issues in International Trade Law of the American Bar Association (May 31, 1983).

In note 115 to his article, Mr. Palmeter develops the argument that Congress had intended to reenact the causation practices that he complains the majority of Commissioners abandoned after the enactment of the Trade Agreements Act of 1979. Although the doctrine of legislative acquiescence has been raised in situations where agency standards were not explicitly disapproved at the time a statute was reenacted, the doctrine is not appropriate here. Although we do not doubt that the staffs of the Senate Finance Committee and the House Committee on Ways and Means were aware of at least some of the Commission investigations Mr. Palmeter cites, the Commission never gave these practices the dignity of acknowledged statutory interpretation in its communications with its oversight committees.

The Senate Finance Committee requested the Commission to analyze the consequences of U.S. adherence to the provisions of the 1967 antidumping code and the 1979 antidumping and subsidy codes. On both occasions, the Commission responded with reports that it interpreted the language of the codes to require an analysis as to whether dumped or subsidized imports were causing injury to the U.S. industry. SENATE COMM. ON FINANCE-REPORT OF THE U.S. TARIFF COMMISSION, S. Con. Res. 38, *reprinted in* Hearings on the International Antidumping Code Before the Senate Committee on Finance, 90th Cong., 2d Sess. 317, 331, 335 (1968); Senate Finance Committee MTN Studies (1979), *supra* note 32, at 156-158. The Commission did not acknowledge a practice of relying on the use of weighted-average less-than-fair-value margins or net subsidies in its antidumping and countervailing duty investigations in either report.

Similarly, in 1977, the House Subcommittee on Trade of the Ways and Means Committee requested the Commission to identify the criteria it used to determine injury in investigations conducted under the Antidumping Act, 1921. Again, the response did not mention the use of dumping margins. Letter from the Chairman, U.S. International Trade Commission, to the Chairman, House Subcommittee on Trade (November 16, 1977), *reprinted in* Hearings on the Oversight of the Antidumping Act of 1921, 95th Cong., 2d Sess. 60, 62 (1977).

50. *Cf.* William Armstrong, "For the Record," The Washington Post, December 23, 1982, at A-16.

the imports is offset by an estimated tax in the form of a cash deposit. At an annual review, the exact amount of tax owing, if any, is calculated. To require the Commission to trace accounting entries through successive channels of distribution in international commerce where dumped or subsidized imports were otherwise an obvious cause of material injury would defeat the purpose of offsetting dumping margins or net subsidy amounts with equivalent duties. With a remedial statute, there is no reason to read such requirements into the law.[51]

51. The leading case is C.J. Tower & Sons v. United States, 71 F.2d 438 (C.C.P.A. 1934). The holding is that antidumping duties are not penalties. The same reasoning, by analogy, applies to countervailing duties.

APPENDIX A

1967 Version of the International Antidumping Code

Article 3

*Determination of Injury**

(a) A determination of injury shall be made only when the authorities concerned are satisfied that *the dumped imports are demonstrably the principal cause of material injury* or of threat of material injury to a domestic industry or the principal cause of material retardation of the establishment of such an industry. In reaching their decision the authorities shall weigh, on one hand, *the effect of the dumping* and, on the other hand, all other factors taken together which may be adversely affecting the industry. The determination shall in all cases be based on positive findings and not on mere allegations or hypothetical possibilities. In the case of retarding the establishment of a new industry in the country of importation, convincing evidence of the forthcoming establishment of an industry must be shown, for example that the plans for a new industry have reached a fairly advanced stage, a factory is being constructed or machinery has been ordered. [Emphasis added.]

(b) The valuation of injury—that is the evaluation of *the effects of the dumped imports* on the industry in question - shall be based on examination of all factors having a bearing on the state of the industry in question, such as: development and prospects with regard to turnover, market share, profits, prices (including the extent to which the delivered, duty-paid price is lower or higher than the comparable price for the like product prevailing in the course of normal commercial transactions in the importing country), export performance, employment, *volume of dumped and other imports*, utilization of capacity of domestic industry, and productivity and restrictive trade practices. No one or several of these factors can necessarily give decisive guidance. [Emphasis added.]

(c) In order to establish *whether dumped imports have caused injury*, all other factors which, individually or in combination, may be adversely affecting the industry shall be examined, for ex-

* When in this code the term "injury" is used, it shall, unless otherwise specified, be interpreted as covering cause of material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry.

ample: *the volume and prices of undumped imports of the product in question*, competition between the domestic producers themselves, contraction in demand due to substitution of other products or to changes in consumer tastes. (emphasis added.)

APPENDIX B

Section 771(7)	International Antidumping Code Article 3	Subsidies Code Article 6
Section 771(7)(B) Volume and Consequent Impact—In making its determinations under sections 703(a), 705(b), 733(a), and 735(b), the Commission shall consider, among other factors— (i) the volume of imports of the merchandise which is the subject of the investigation, (ii) the effect of imports of that merchandise on prices in the United States for like products, and (iii) the impact of imports of such merchandise on domestic producers of like products.	Paragraph 1 A determination of injury for purposes of Article VI of the General Agreement shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.	Paragraph 1 A determination of injury[17] for purposes of Article VI of the General Agreement shall involve an objective examination of both (a) the volume of subsidized imports and their effect on prices in the domestic market for like products[18] and (b) the consequent impact of these imports on producers of such products.

17. Determinations of injury under the criteria set forth in this Article shall be based on positive evidence. In determining threat of injury the investigating authorities, in examining the factors listed in this Article, may take into account the evidence on the nature of the subsidy in question and the trade effects likely to arise therefrom.

18. Throughout this Agreement the term "like product" (*produit similaire*) shall be interpreted to mean a product which is identical, i.e., alike in all respects to the product under consideration or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

Appendix B (page 2)

Section 771(7)	Antidumping Code Article 3	Subsidies Code Article 6
Section 771(7)(C)(i) and (ii) 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 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.	Paragraph 2 With regard to volume of the dumped imports the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped 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.	Paragraph 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 signatory. 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 signatory, 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.

Appendix B (page 3)

Section 771(7)

Section 771(7)(C)(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.

Antidumping Code Article 3

Paragraph 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 investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

Subsidies Code Article 6

Paragraph 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, 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.

Appendix B (page 4)

Sections 705(b) and 735(b)	Antidumping Code Article 3	Subsidies Code Article 6
Section 705(b) and 735)(b)	Paragraph 4	Paragraph 4
Final Determination by Commission.— (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). . . .	It must be demonstrated that the dumped imports are, through the effects[4] of dumping, causing injury within the meaning of this Code. There may be other factors[5] which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports.	It must be demonstrated that the subsidized imports are, through the effects[19] of the subsidy, causing injury within the meaning of this Agreement. There may be other factors[20] 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.

4. As set forth in paragraphs 2 and 3 of this Article.

5. Such factors include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

19. As set forth in paragraphs 2 and 3 of this Article.

20. Such factors can include *inter alia*, the volume and prices of nonsubsidized imports of the product in question, contraction in demand or changes in the pattern of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.