ADMINISTRATION OF IMPORT TRADE STATUTES: POSSIBILITIES FOR HARMONIZING THE INVESTIGATIVE TECHNIQUES AND STANDARDS OF THE INTERNATIONAL TRADE COMMISSION

*Edward R. Easton**

I. INTRODUCTION

The United States International Trade Commission is a six-member independent agency[1] which has broad investigative powers under several statutes to investigate factors relating to the foreign trade of the United States, with an emphasis on the competitive impact of imported products in the domestic markets of U.S. producers. This article will discuss four such statutory provisions: sections 201 and 406 of the Trade Act of 1974,[2] under which the Commission may recommend that the President impose restrictions on imports of a given product from any source or from designated communist countries, respectively; and sections 705 and 735 of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979,[3] under which Commission findings act as a final order which authorizes the Department of Commerce[4] to impose special duties on subsidized imports or imports sold at less than fair value. The purpose of this article is to demonstrate that the Commission's investigative methods for conducting these cases and the standards for reaching statutory determinations are converging. This appears true in spite of the different philosophies underlying the enactment of each of these statutory provisions and the different statutory remedies in the laws.

---

* Attorney-Adviser, Office of the General Counsel, U.S. International Trade Commission. 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 Commission.

[1] The Executive branch has no control over Commission budget submissions, 19 U.S.C. § 2232 (1976), or litigation, 19 U.S.C. § 1333 (1976). Presidential control of the Chairmanship of the Commission is circumscribed (Pub. L. No. 95-106, § 2(a), 91 Stat. 867 (1977)).

[2] 19 U.S.C. § 2251 (1976) and 19 U.S.C. § 2436 (1976), respectively.

[3] 19 U.S.C. § 1671(d) (1976) and 19 U.S.C. § 1673(d) (1976), respectively.

[4] Prior to the effective date of the Trade Agreements Act of 1979, the Treasury Department performed these functions. The responsibilities were transferred to the Department of Commerce by Reorganization Plan No. 3 of 1979 issued under the authority of the Reorganization Act of 1977 and section 1109 of the Trade Agreements Act of 1979.

II. STATUTORY DETERMINATIONS

A. *The Trade Act of 1974*

Section 201 is the domestic legislation implementing the so-called "escape clause" in Article XIX of the General Agreement on Tariffs and Trade (GATT).[5] The GATT has provided a forum for multilateral reductions in national tariffs by member-signatories. Article XIX is an "escape clause" from concessions negotiated under the aegis of the GATT[6] which might result in an increase in imports with the consequence of injuring seriously or threatening to injure seriously the competing domestic industry. The article provides in part that

> [i]f, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, *the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury to suspend the obligation in whole or in part or to withdraw or modify the concession.*[7]

Under section 201, the Commission is directed to conduct investigations to determine whether a product is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.[8] If the Commission makes an affirmative injury determination under section 201, it is required to recommend an appropriate remedy to the President.[9] Should the President im-

---

[5] General Agreement on Tariffs and Trade, Oct. 30, 1947, January 1, 1948, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

[6] Several multilateral negotiations concerning the exchange of tariff concessions have been held under the auspices of the GATT: Geneva (1947); Annecy (1949); Torquay (1950-1951); Geneva (1955-1956); Geneva (1961-1962); Geneva (1963-1967); Geneva (1975-1979). In addition to tariff concessions, contracting parties to the GATT undertake not to impose quotas on imports except for temporary use for balance of payments purposes (Article XI).

[7] GATT, *supra* note 5, Article XIX, para. 1(a) (emphasis added).

[8] *Id.* at subsection 201(b)(1).

[9] *Id.* Subsection 201(d)(1) provides that in the event the Commission finds injury as a result of its investigation it shall recommend an increase in or imposition of any duty or import restriction necessary to prevent such injury or, if it determines that adjustment assistance can effectively remedy the injury, it may recommend adjustment assistance. Section 203 authorizes the President to negotiate orderly marketing agreements also. The Commission

pose a recommended trade restriction or another trade restriction it must be applied on a most-favored-nation basis to all exporters of the product.[10] If a particular exporting nation is a GATT member, Article XIX entitles it to compensation in the form of withdrawing an equivalent concession or compensatory concessions from the nation invoking the escape clause.[11] Both the most-favored-nation application of trade restrictions and the GATT compensation requirement can be avoided by negotiating bilateral agreements with the exporting nations.

Section 406 of the Trade Act concerns market disruption caused by imports from communist countries. The provision has a strange origin. The concept of market disruption was formulated in response to the abrupt increase in U.S. imports of cotton textiles in the late 1950's.[12] The concept provided an explanation for the adverse effect of a sharp increase in imports into established markets of industrial countries as a result of a shift in comparative advantage to new sources. The concept was distinguished from the "escape clause" concept of serious injury in GATT Article XIX on two bases. First, the adverse impact of the imports was not considered "injurious enough" to invoke the national legislation implementing the escape clause.[13] Second, an obligation to provide for compensation to affected exporters within the terms of Article XIX was lacking.[14]

A GATT Working Party convened in 1960 to study the issue of market disruption and develop guidelines for describing the concept. In response to the recommendations of the Working Party, the GATT pronounced that

> in a number of countries situations occur or threaten to occur which have been described as market disruption . . . . These situations generally contain the following elements in combination:

---

does not recommend such agreements generally as it would frustrate the provision on subsection 203(c)(1) for a congressional override of the President's failure to implement a Commission recommendation.

[10] GATT Doc. L/76 (1953).

[11] GATT, *supra* note 5, Article XIX, para. 3.

[12] G. PATTERSON, DISCRIMINATION IN INTERNATIONAL TRADE, THE POLICY ISSUES, 1945-1965, at 299 (1966).

[13] S. D. Metzger, *Injury and Market Disruption from Imports*, in United States International Economic Policy in an Inderdependent World—Papers Submitted to the Commission on International Trade and Investment Policy, 167-189 (1971).

[14] *See* note 10 *supra* and accompanying text.

(i) a sharp and substantial increase or potential increase of imports of particular products from particular sources;

(ii) these products are offered at prices which are substantially below those prevailing for similar goods of comparable quality in the market of the importing country;

(iii) there is serious damage to domestic producers or threat thereof;

(iv) the price differentials referred to in paragraph (ii) above do not arise from governmental intervention in the fixing or formation of prices or from dumping practices.

In some situations other elements are also present and the enumeration above is not, therefore, intended as an exhaustive definition of market disruption.[15]

This approach to market disruption influenced both the "Short-Term Arrangement Regarding International Trade in Cotton Textiles" (1961-1962)[16] and the "Long-Term Arrangement Regarding International Trade in Cotton Textiles" (1962-1973).[17] The successor to the "Long-Term Agreement," the "Arrangement Regarding International Trade in Textiles,"[18] in force since 1974, contains a far more elaborate description of the concept.

The description developed by the 1960 GATT Working Party was ". . . intended to exclude problems arising from imports from state-controlled economies." More specifically, the language in point (iv) ". . . was intended to restrict the concept to goods sold at low prices because of cost factors alone, that is description for which countervailing or anti-dumping duties were not generally applicable."[19] Nevertheless, the so-called "Trade Reform Act of 1973" proposed by the Nixon administration in 1973[20] adopted the concept to imports from communist countries granted most-favored-nation (MFN) treatment on the grounds that MFN treatment would stimulate imports and that communist economies are capable of supplying imports virtually on a permanent basis at

---

[15] GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 9th Supp. (1961), at 26.
[16] 12 U.S.T. 1675, T.I.A.S. No. 4884.
[17] 13 U.S.T. 2672, T.I.A.S. No. 5240.
[18] 25 U.S.T. 1001, T.I.A.S. No. 7840.
[19] G. PATTERSON, *supra* note 12, at 305 n.62.
[20] H.R. 6767, 93rd Cong., 1st Sess. § 201(f)(2) and § 505.

prices lower than those prevailing for competitive goods in the importing country. This analysis takes into account the inapplicability of pricing concepts in a non-market economy and the ability of a non-market economy to manipulate prices or costs to result in no remedial duties being applied to imports.[21]

The 1973 bill was eventually enacted as section 406 of the Trade Act. The provision was not substantially changed by the House Ways and Means Committee and was passed by the House in that same year.[22] The Senate Finance Committee, however, made extensive changes in the market disruption provision of the bill and the Finance Committee version was passed by the Senate.[23] Among the changes was the application of the provision to all communist countries, whether or not they were granted most-favored-nation status. The Conference Committee made minor amendments to the Senate version.[24]

Section 406 directs that the Commission conduct investigations to determine, with respect to imports of a product which is from a communist country, whether market disruption exists with respect to the product produced by a domestic industry. The section further states that market disruption

> exists within a domestic industry whenever imports of an article, like or directly competitive with an article produced by such domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of *material injury*, or threat thereof, to such domestic industry. . . .[25]

B. *The Trade Agreements Act*

The Trade Agreements Act added Title VII to the Tariff Act of 1930, which replaced the Antidumping Act, 1921, and amended the countervailing duty statute. The new provisions of the Tariff Act for antidumping and countervailing duty investigations are intentionally parallel and, to a large degree, identical.

Neither the antidumping nor the countervailing duty provision is intended to protect domestic industries from the importation of

---

[21] In cases where the manufacturer's home country is a state controlled economy, foreign market value is determined by the price to third countries or by the constructed value of the merchandise produced in a non-state controlled economy. This latter situation does not involve any price discrimination. *See* 19 U.S.C. § 1677b(c) (1976).

[22] H.R. 10710, *Trade Reform Act of 1973*, 93rd Cong., 1st Sess., § 405.

[23] SENATE COMMITTEE ON FINANCE, TRADE REFORM ACT OF 1974, S. REP. NO. 1298, 93rd Cong., 2d Sess. 210-213 (1974).

[24] CONFERENCE COMMITTEE, CONFERENCE REPORT TO ACCOMPANY H.R. 10710, TRADE ACT OF 1974, H.R. REP. NO. 93-1644, 93rd Cong., 2d Sess., Amendment No. 389, 44-49 (1974).

[25] Subsection 406(e)(2) (emphasis added).

products. The antidumping statute was designed to provide a customs remedy to prevent foreign industries from selling products into the U.S. market for lower prices than those charged in their national markets or in other export markets.[26] The difference is referred to as less than fair value. When such price differences are established by the Department of Commerce and the Commission finds that a domestic industry is materially injured or threatened with material injury, a special duty is imposed to equal the price difference. In the case of the countervailing duty statute, there is no foreign price to take into account. This statute is not a price discrimination statute, but rather is designed to countervail a foreign government subsidy which might result in exports injuring competing U.S. industries. The rationale of the countervailing duty statute is that it is unfair to force domestic industries to compete against foreign government treasuries.[27]

In the case of an antidumping duty investigation, the Department of Commerce officials attempt to adjust arms-length selling prices to calculate a theoretical ex-factory price of goods sold in the foreign market (or a third market) to compare with the adjusted price of goods sold for export to the United States.[28] Demand factors in the different markets are only relevant insofar as they relate to product and cost of production differences. Also, higher profits from one product line are not recognized as a legitimate source of subsidy for a price difference in another product line.

Countervailing duty investigations are altogether different than antidumping investigations. They focus on foreign legislation authorizing subsidies to manufacturers. The output of those manufacturers utilizing the subsidies which is actually exported to the United States is calculated and allocated against the volume of exports to arrive at an ad valorem equivalent of the subsidy on a per-unit basis. Should imports of these products injure competing U.S. industries, the ad valorem duty is collected to countervail the subsidy. There is no relevant price difference between the imported and the domestically produced products.

---

[26] *See* Dickey, *The Pricing of Imports into the United States*, 13 J. OF WORLD TRADE L. 238 (1979); *A Guide for Pricing Commodities to Enter the Commerce of the United States*, 11 LAW & POL'Y INT'L BUS. 491 (1979).

[27] *See* Marks and Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 LAW & POL'Y INT'L BUS. 327, 347 (1975).

[28] *See* note 25 *supra*.

The determination required of the Department of Commerce in antidumping and countervailing duty investigations is whether the merchandise imported into the United States is either sold at less than fair value or subsidized. The determination required of the Commission in each statute is whether "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded by reason of that merchandise."

If the Commission makes an affirmative determination and the Commerce Department issues a finding of dumping, it is important to realize that the foreign exporters affected by the finding could cease trading or adjust their prices for export to the United States or in their home markets. The latter could be done to eliminate or lessen the amount of any special duty which would otherwise be assessed. Similarly, in the case of countervailing duty orders, the foreign government could suspend payments under its subsidy legislation or institute export taxes on the products subject to the U.S. countervailing duty order to eliminate or offset the countervailing duty.

III. INVESTIGATIVE METHODS

A. *Market surveys*

An injury determination under each of these four statutory provisions can result in the imposition of import restraints if the Commission concludes that the complained-of imports are responsible for the injury, whether actual or threatened, to the U.S. industry producing the product most comparable with the imports. Each of these statutes is oriented toward a specific product; a determination of injury with respect to one product does not affect the importation of other products. This product orientation requires that the Commission have comparable statistics on a product-line basis to analyze the impact of allegedly injurious imports on the complaining industry. However, official statistics on imports and domestic output are not comparable, and statistics on product-line basis are rarely available for either imports or domestic articles.[29] Thus, the necessity that the Commission generate such data governs the character of Commission investigations.

[29] Quinn and Sood, *Cutting Through the Maze of Trade Data Classification*, COLUMBIA J. OF WORLD BUS. (Fall 1978), at 54.

Although there is an obvious adversary relationship between complaining domestic firms and importers, very few firms with the data necessary for conducting the required market research in any given investigation will have an adverse stake in the outcome of a Commission injury determination. The most obvious example is an importer whose merchandise is not subject to a particular investigation. Another example is the distributor who handles both competing domestic and imported merchandise.

A Commission investigation is initiated following the filing of a petition adequately pleading the elements which, if established, would entitle the petitioner to the relief sought and containing information concerning the petitioner's business, including the import competition.[30] Upon the receipt of a sufficient petition, the Commission issues a notice of investigation, which is published in the Federal Register. The notice typically invites the submission of written comments either in lieu of or in addition to an appearance at a scheduled public hearing.

With the initiation of a formal investigation, the Commission's investigative staff prepares questionnaires for firms producing, importing, and distributing the products under investigation. The investigators determine the scope of the market to be surveyed and draft requests for data (the quantity and value of shipments, inventories, etc.). The investigators then field test the questionnaires in personal interviews with a sample of potential recipients to confirm the customary use of terminology describing the products, the manner in which firms in the particular business keep records, etc. After field testing, the questionnaires are mailed to selected importers and producers to insure statistically valid coverage for a survey of the product market. Questionnaires are also mailed to domestic purchasers of both the complained-of imported products and the domestically produced products to verify the prices reported by the importers and producers and to trace sales allegedly lost by petitioners to the complained-of imports. Each questionnaire contains carefully drafted instructions concerning the confidential treatment accorded responses in order to preserve voluntary compliance with the Commission's requests for information. The sensitivity of the questionnaire procedure is quite apparent—if competitive commercial and financial data are

[30] The Commission's Rules of Practice and Procedure are found at 19 C.F.R., Chapter II (1979).

not granted confidential treatment, the Commission will not have enough time to compel compliance from many firms.[31]

B. *Public hearings*

Public hearings in these investigations are legislative rather than adjudicative. Witnesses are encouraged to submit prepared statements prior to the hearing and to summarize the prepared statements at the hearing. Testimony is not made subject to formal examination and exhibits are not formally authenticated. The questioning of witnesses by participants at the hearing is permitted only for the limited purpose of assisting the Commission in obtaining relevant and material facts concerning the subject matter of the investigation.[32] Persons who participated at the hearing are given an opportunity to file posthearing briefs of limited length.

C. *Administrative record*

All of the factual material gathered by the Commission's staff during the course of an investigation, including statistical data aggregated from individual questionnaires, is assembled and analyzed in a staff report to the Commission. This report together with all written submissions, the questionnaire responses, and the transcript of the public hearing, makes up the administrative record of an investigation.[33]

Prior to the conduct of antidumping and countervailing duty investigations under the Trade Agreements Act of 1979, the staff report was published along with the opinions of Commissioners after the determination in the case in a version with confidential data removed. As a result, the staff report was not available to interested persons for rebuttal until the Commission's determination was published. This practice not only prevented rebuttal of staff analysis during the course of the investigation, but also contributed to a lack of focus in the public hearing. Since witnesses for individual firms were often unaware of aggregate data col-

---

[31] The Commission is authorized to compel the production of documents and testimony. *See* 19 U.S.C. § 1333(b) (1976).

[32] 19 C.F.R. § 201.12(c) (1979).

[33] Section 516A of the Tariff Act of 1930, as added by section 1001 of the Trade Agreements Act of 1979, subjects Commission injury determinations in antidumping and countervailing duty investigations to the substantial evidence test and, therefore, a determination must be on the record. Sections 201 and 406 result in advisory recommendations to the President whose decision is political.

lected by the Commission, they could not relate their experiences to the market described to the Commission in the staff report.

The Commission's new regulations for the conduct of antidumping and countervailing duty investigations provide for the disclosure of the staff report, with confidential data removed, before the hearing.[34] This should provide a focus for the public hearings in these investigations. If these hearings are successful, the practice may be extended to investigations conducted pursuant to sections 201 and 406 of the Trade Act of 1974.

IV. STANDARDS FOR INJURY DETERMINATIONS

The four statutes discussed in this paper are oriented to imports of particular products to remedy injury caused by such imports in the markets of domestic producers. This orientation, in turn, requires that domestic industries be defined in terms of individual products—a necessary legal fiction which does not make economic sense. Theories of industrial organization, capital and employment markets and, indeed, the economic performance of firms are sacrificed to measure the imports of a product against domestic output of that product. Only those domestic productive facilities devoted to the product under investigation are included in the meaning of the term "industry" for the purpose of each of these statutes.[35]

The characteristics of an industry will be governed by the particular facts in a particular investigation. Because there is no possible definition of "industry" which would be accurate in more than one investigation, it is impossible to define "injury" or to formulate the impact necessary to constitute injury with any precision. How much injury is necessary for the Commission to make

---

[34] *See* 19 C.F.R. § 207.21, 44 Fed. Reg. 76458, December 26, 1979.

[35] Subsection 201(b)(3)(B) provides that for the purpose of determining serious injury or threat thereof, in establishing the domestic industry producing an article like or directly competitive with the imported article under investigation, the Commission

> may, in the case of a domestic producer which produces more than one article, treat as part of such domestic industry only that portion or subdivision of the producer which produces the like or directly competitive article . . .

The provisions of this subsection also apply with regard to investigations conducted under section 406. *See* subsection 406(a)(2).

With regard to antidumping and countervailing duty investigations conducted under the authority of Title VII of the Tariff Act of 1930, subsection 771(7) refers to the impact of less-than-fair-value or subsidized imports on domestic producers of like products. Subsection 771(10), in turn, defines the term like product as

> a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to investigation . . .

an affirmative determination is a matter of judgment and is made on a case-by-case basis. The doctrine of *stare decisis* does not apply to Commission injury determinations because a decision arrived at in the context of the particular facts of a case may not be appropriate for any other investigation.

This case-by-case approach to injury decisions may result in perceptions of inconsistency. For example, one domestic industry witness complained to a Congressional committee that—

> the Commission seems to be able to use nearly any criterion or any vague means it desires to determine whether there is injury or not. And we would like to know definitely what constitutes it.[36]

This type of complaint is typical and has resulted in an increase in Congressional oversight of Commission antidumping investigations,[37] as well as legislation for stricter standards for judicial review of certain Commission determinations.[38]

The case-by-case approach required by the focus of import trade statutes on particular products has prevented the enactment of a Legislative standard for the depth of injury necessary to trigger an affirmative determination under each of these statutory provisions. Congress did, however, address the problem with the adoption of a check-list approach. For example, section 201 does not define "serious injury, or threat thereof." Instead, the provision lists certain economic factors which the Commission is required to take into account in reaching a determination while explicitly authorizing the Commission to consider any other economic factors it considers relevant in reaching a determination.

The present list of factors concerning serious injury and the threat of serious injury is found in section 201(b)(2). That section states

> [i]n making its determination . . . the Commission shall take into account all economic factors which it considers relevant, including (but not limited to)—
>
> (A) with respect to serious injury the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and

---

[36] *Hearings before the Subcommittee on Trade of the Committee on Ways and Means, House of Representatives, on the Adequacy and Administration of the Antidumping Act of 1921*, (Serial 95-46), 95th Cong., 1st Sess., Nov. 8, 1977.

[37] *Id.*

[38] *See, e.g.*, S. 1654, 96th Cong., 1st Sess. (1979) (the so-called "Customs Courts Act of 1979").

> significant unemployment or underemployment within the industry;
>
> (B) with respect to threat of serious injury a decline in sales, a higher and growing inventory, and a downward trend in production, profits, wages, or employment (or increasing underemployment) in the domestic industry concerned. . . .

The list of factors considered may differ from investigation to investigation and still be consistent with the requirements of the law. Moreover, the legislative history of the provision indicates that the Senate Finance Committee did not intend that the Commission apply any mathematical test in its determination of the presence of serious injury and the threat of serious injury.[39] The absence of mathematical certainty in a list of factors, however, does not prevent beneficial results in individual cases. The list of factors, indicates what types of economic information are important to the Commission and provides a frame of reference for the analysis of information submitted to the Commission in written submissions, oral presentations at hearings, and in posthearing briefs. It also provides guidelines for the Commission's professional staff for the analysis of the information gathered during the course of the Commission's investigations.

Prior to the provisions of the Trade Agreements Act, the Antidumping Act, 1921, and the countervailing duty statute did not include provisions listing factors to be taken into account in making injury determinations.[40] Commission experience in the administration of the Antidumping Act, however, did reveal that certain factors recurred in injury determinations in different investigations. These factors were reported to Congressional committees[41] and were used subsequently as checklists in Commission determinations in individual cases. The Commission's decision to interpret the operative language of the countervailing duty statute in the same way as it interpreted identical language in the Antidumping

---

[39] S. REP. 1298, *supra* note 22, at 120.

[40] The operative language of section 160(a) of the Antidumping Act, 1921, was the same as that in section 303(b) of the Tariff Act of 1930—

> 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 . . . .

[41] *See Hearings before the Committee on Appropriations on H.R. 7556: State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations, Fiscal Year 1978, Part 5*, 95th Cong., 1st Sess., 574 (1977); *Hearings before the Subcommittee on Trade of the Committee on Ways and Means, supra* note 36.

Act[42] resulted in antidumping determinations providing guidance for the analysis of information in countervailing duty investigations. The injury factors have been further refined in order to analyze the causation between the importation of products and the injury or threat of injury experienced by the domestic industry.[43]

Because these investigations focus on pricing competition and market share, the primary indicia of injury are price depression, price suppression, and lost sales. Other factors, such as lost profits, under-utilization of productive facilities, and unemployment, result from lost market share.

V. STANDARDS FOR THE CAUSATION OF INJURY

In each of the trade laws under discussion, the Commission must find that the injury or threat of injury to the domestic industry is a result of the import competition which is the subject of the statutory investigation. For example, the standard of causation contained in section 201 of the Trade Act is expressed as "substantial cause" which is defined as "a cause which is important and not less important than any other cause."[44] No weighing of causation was contemplated, however.[45] Section 406 contains a

---

[42] Prior to the Trade Act of 1974, the countervailing duty statute reached only dutiable imports and it did not require any injury determination. Section 331 of the 1974 act extended the law to reach certain duty-free merchandise and provided that the Commission conduct the type of injury investigation for duty-free subsidized imports that it did for less-than-fair-value imports under the Antidumping Act, 1921.

In the first such investigation conducted under section 303(b) of the Tariff Act of 1930, the Commission opinion stated

> In making its determination set out above, the Commission has interpreted the relevant operative words of section 303(b)—
>
> > 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 . . .
>
> in the same way it has interpreted identical language under section 201(a) of the Antidumping Act, 1921, as amended. This was clearly the intent of Congress in using identical language. Thus, Commission determinations under the Antidumping Act provide guidance for the Commission's determination in this investigation. Cer-Zories from the Republic of China (Taiwan), Investigation No. 303-TA-1 (September 1976), at 4-5.

[43] Concurring opinions of Commissioner Stern in Rayon Staple Fiber from France and Finland, Investigation Nos. AA1921-190 and AA1921-191 (February 1979), at 9-10; Certain Steel Wire Nails from Canada, Investigation No. AA1921-189 (February 1979), at 10-11.

[44] Subsection 201(b)(4).

[45] S. REP. No. 1298, *supra* note 22, at 120.

"significant cause" requirement. The Senate Finance Committee report on the bill stated that this standard was intended to be an easier standard to satisfy than the "substantial cause" requirement in section 201.[46] The report also stated that the "term 'significant cause' was meant to require a more direct causal relationship between increased imports and injury" than the standard used in the adjustment assistance provisions of that act.[47] The causation standard in the adjustment assistance provisions of the bill, namely, the phrase "contribute importantly," was described by the Committee as a cause which may have contributed less than another cause, but must have been more than a *de minimis* source of causation.[48] The Committee did acknowledge, however, that a "mechanical designation such as a percentage of causation" cannot be applied.[49] In an understatement, the report also said that the committee recognized "that 'weighing' causes in a dynamic economy is not always possible."[50] Presumably this confused discussion means that the coincidence of increased imports and the existence of material injury will not serve to establish a connection between the two for the purposes of section 406, although they might for the purposes of the adjustment assistance provisions.[51] In other words, the Commission must be able to identify and describe a cause and effect relationship from the information generated by the investigation. The standard is, therefore, one of contributing causation.

Both the antidumping and the countervailing duty provisions of the Tariff Act of 1930 require the Commission to determine whether the injury is "by reason of" the importation of merchandise sold at less than fair value.[52] As a matter of administrative practice under the Antidumping Act, 1921, the Commission sought to establish a relationship or "causal link" between the margin of less than fair value and a price differential between resold less-than-fair-value imported products and competing articles manufactured by the U.S. industry. The assumption was that the less-than-fair-value margin provided the importer with a price advantage which could be passed through successive chan-

---

[46] *Id.* at 212.

[47] *Id.*

[48] *Id.* at 133.

[49] *Id.*

[50] *See* note 45 *supra.*

[51] The Secretary of Labor is charged with determining the eligibility of groups of workers to apply for adjustment assistance under section 222 of the Trade Act of 1974.

[52] *See* sections 705 and 735, respectively.

nels of distribution. The Commission proceeded by calculating the margin of dumping against the home market or third market price of the imports as determined by the Treasury Department.[53] For example, if the home market price was $5.00 and the price per export to the U.S. $4.00, the difference of $1.00 would be divided by the $5.00 figure, yielding a less-than-fair margin of 20 percent. If the dumped merchandise undersold the United States by greater than 20 percent, the Commission would conclude that the less-than-fair-value margin did not have a causal relationship to the injury.

The operation of this causation test is shown in an antidumping investigation concerning *Welded Stainless Steel Pipe and Tube from Japan.* In that case, three Commissioners wrote an opinion for the Commission in which they expressed the theory that there was no injury by reason of less-than-fair-value margin of the imports.

> Whatever injury the domestic industry may have suffered, it was not by reason of imports sold at LTFV. Pipe and tubing imported from Japan undersold domestically produced pipe and tubing by average weighted margins ranging from 17 to 25 percent from 1974 to the first quarter of 1978, while the dumping margin, *i.e.*, the margin by which Treasury found that the Japanese pipe and tubing was sold below fair value was 3.1 percent on an average weighted basis. Thus, the dumping margin accounted for only a small part of the amount by which the Japanese pipe and tubing undersold the domestic product. Even without the LTFV margins, the Japanese pipe and tubing would have been priced substantially below domestically produced pipe and tubing and at a price differential to attract sales from domestic producers. Under these circumstances, any sales that U.S. producers might have lost to Japanese imports or any price suppression that might have been experienced by U.S. producers cannot be attributed to the LTFV margins applicable to the imports from Japan.[54]

In a concurring opinion two other Commissioners stated that

> [w]hen the LTFV margins are compared to the average margins of underselling, it is apparent that the lost sales cannot be attributed to LTFV sales. Pipe and tube imported from

---

[53] *See, e.g.*, Railway Track Maintenance Equipment from Austria, Investigation No. AA1921-173 (November 1977), at A-3.

[54] Welded Stainless Steel Pipe and Tube from Japan, Investigation No. AA1921-180 (July 1978) at A-5.

> Japan undersold domestically produced pipe and tube by average weighted margins ranging from 17 to 25 percent during 1974-77 and January-March 1978. However, the dumping margin (3.1 percent on an average weighted basis), accounted for only a small margin of the underselling. Thus, even without the LTFV margins the Japanese pipe and tube would have been priced substantially below the normal differential required to attract sales from domestic producers. Under these circumstances any sales that U.S. producers may have lost to Japanese imports or any price suppression that might have been experienced by U.S. producers cannot be attributed to the LTFV margins applicable to the imports from Japan.[55]

The administrative practice of creating a legal fiction, *i.e.*, that a less-than-fair-value margin between constructed foreign home market prices and the prices for export to the United States (as adjusted by the Treasury Department), created a pricing differential which was passed through successive channels of distribution from the importer to the point of competition with sales of domestically produced goods. This operated as a rebuttable presumption which was consistently and uniformly employed by the Commission in its administration of the Antidumping Act, 1921.[56]

It can be argued that the new antidumping provisions of Title VII of the Tariff Act do not authorize such an administrative practice. This argument is based upon the following analysis. First, like the Antidumping Act, 1921, the literal terms of the new provisions merely charge the Commission with a determination of whether injury is caused by the importation of the dumped merchandise. There was no statutory directive under the 1921 Act to determine whether there is injury by reason of the importation of the merchandise at a less-than-fair-value margin recalculated by the Commission, nor is there any such directive under the new law. Second, although the administrative practice of creating a rebuttable presumption was not an unreasonable interpretation of the 1921 Act, two specific provisions of the new law interfere with its continuation. Subsection 771(7)(c) of the Tariff Act of 1930 directs the Commission to consider price suppression as well as price depression in evaluating the imports of dumped merchandise on prices in the United States for like products. The provi-

---

[55] *Id.* at 11-12.

[56] A uniform and consistently applied interpretation by the agency charged with the administration of the statute is usually given weight by courts in construing the statute.

sion specifically requires the Commission to consider "whether . . . the effect of imports of such merchandise . . . prevents price increases, which otherwise would have occurred, to a significant degree." Essentially, this type of analysis requires the Commission to determine whether the price of the competitive domestic product is increasing less rapidly than an index of comparable articles. This analysis is different from that used in rebuttable presumption that a less-than-fair-margin causes underselling. Underselling would be demonstrated by an absolute price differential between identical products. Both the domestic and the imported product must be of the same quality for the underselling measure to have any validity.

Even more significant is the direction in the new law to the Commission that it "consider whether the volume of imports of the [dumped] merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States is significant."[57] This provision would permit a determination of material injury without any demonstrable price effect at all. Such a provision is not unreasonable. Costs are important with many products. Experience-curve theorists relate market share, market growth, and declining costs with increased output.[58] Where imports increase their market share at the expense of domestic companies, they can prevent the domestic companies from attaining economies of scale at which their costs decrease and profits increase.

Similar considerations concerning the "causal link" are relevant to the administration of the countervailing duty statute. A foreign subsidy might not have any price effect in the U.S. market. Even if the foreign subsidy does have a price effect in the U.S. market, assuming that it is identifiable and measurable, a duty is assessed on the basis of the per-unit amount of the subsidy, not its price effect. Logically there is no necessary connection between many subsidies and pricing strategies for imports in the U.S. market. There is no conceptual need for an analogy between government subsidies and dumping. As one commentator noted,

> the charging of different prices for the same product in different markets can result from the fact that there are always some impediments to arbitrage and from the fact the elasticities of de-

---

[57] Subsection 771(7)(C)(i) of the Tariff Act of 1930.

[58] *See, e.g.*, Walter Kiechel III, *Playing by the Rules of the Corporate Strategy Game*, Fortune (September 24, 1979), at 110; Bruzzell, Gale, and Sultan, *Market Share—A Key to Profitability*, HARVARD BUSINESS REVIEW (January-February 1975), at 97.

> mand vary from market to market. . . . This has nothing to do with the question of subsidies.[59]

Moreover, requiring the presence of a price differential in an injury determination under the countervailing duty statute could establish a loophole for competitive advantages bestowed on exporters of the subsidized merchandise. Examples of these advantages would include the ability to provide concessionary credit, product guarantees, and advertising.[60] In spite of these considerations, the Commission did employ a "causal link" analogy to its practice under the Antidumping Act, 1921 in its first countervailing duty investigation, concerning zories from Taiwan. The Commission opinion stated:

> the bounty or grant paid on the subject imports of zories would amount to only about 1.3 cents per pair. 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 which an [sic] domestic industry may be experiencing is not by reason of the subject imports of zories.[61]

Should the Commission adopt the standard that material injury under the new antidumping and countervailing duty laws must be "by reason of" the imports of merchandise which is sold at less than fair value or subsidized rather than continue to require that the amount of the margin or the amount of the subsidy cause the injury through a price effect in the U.S. market, the standard of causation for injury under these laws will not differ from that under section 406 of the Trade Act of 1974. The "by reason of" language has consistently been interpreted as a contributing cause standard. For instance, in a 1968 report to the Senate Finance Committee, the Commission stated that the "by reason of" standard of the Antidumping Act, 1921, did

> not require that a determination that dumped imports are adversely affecting an industry to a degree greater than any one or a combination of other factors adversely affecting an industry before there can be an affirmative determination of injury. . . .

---

[59] MALMGREN, INTERNATIONAL ORDER FOR PUBLIC SUBSIDIES 40-41 (1977).

[60] Report of the U.S. International Trade Commission on Investigation No. 332-101, *Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva, reprinted in* SENATE COMMITTEE ON FINANCE MTN STUDIES No. 6, Part 1 (Comm. Print 96-27 Aug. 1977), at 186.

[61] *See* note 42 *supra*, at 7.

> The Commission in making its determinations with respect to injury under the Act has not weighed the injury caused by such imports against other injuries that an industry might be suffering.[62]

This policy has been articulated in the opinions of Commissioners concerning their determinations in individual investigations, *e.g.*,

> besides less than fair value sales, other causes of injury are also present. . . . All that is required for an affirmative determination is that the less than fair value sales be a cause of injury to a domestic industry. The causation between sales at less than fair value must be identifable; *i.e.*, the injury must result from less than fair value sales.[63]

The legislative history of the Trade Agreements Act confirms that the Senate Finance and House Ways and Means committees intended that the use of the "by reason of" language in Title VII of the Tariff Act of 1930 would not change the contributing cause standard applied in the Antidumping Act, 1921 and the injury provisions of the countervailing duty statute.[64]

VI. CONCLUSION

A recapitulation of the discussion in this paper illustrates the potential for a convergence of methodology and standards applicable to these statutory investigations. If the "causal link" theory of tracing less-than-fair-value margins and ad valorem equivalents of foreign subsidies to price effects in domestic markets is discontinued, and the Commission instead determines whether there is injury by reason of the importation of the dumped or subsidized merchandise into the United States, the application of these statutes would operate much as sections 201 and 406 operate in response to an increasing volume of imports. The similarity of the legislative history for the standard of injury causation, which must be attributable to the imports subject to investigation, would justify the Commission's explicit adoption of a contributing cause standard for investigations under the antidump-

---

[62] Report of the U.S. Tariff Commission on S. Con. 38, *reprinted in Senate Committee on Finance, International Antidumping Code Hearing*, 90th Cong., 2d Sess., June 27, 1968, at 331-332.

[63] Concurring opinion of Commissioners Leonard and Young in Elemental Sulfur from Mexico, Investigation No. AA1921-92 (May 1972), at 9.

[64] Senate Committee on Finance, *Trade Agreements Act of 1979*, S. REP. No. 96-249, 96th Cong., 1st Sess., 57 (1979); House Committee on Ways and Means, *Trade Agreements Act of 1979*, H.R. REP. No. 96-317, 96th Cong., 1st Sess., 47 (1979).

ing and countervailing duty provisions of the Tariff Act and section 406 of the Trade Act. The similarity of the material injury standards for these provisions would justify the Commission's adopting the material injury standard set forth in subsection 771(7)(A) of the Tariff Act[65] for investigations conducted under section 406 of the Trade Act. Finally, the check-list approach legislated under section 201 of the Trade Act and under section 771 of the Tariff Act would justify the Commission's developing a group of factors along with standards for allocating financial data to discrete product lines which would be used in all of the investigations discussed. The basic differences remaining among the statutes would be the remedy sought by the petitioner and the higher standards of injury and causation in section 201.

---

[65] Subsection 771(7) provides that

> The term 'material injury' means harm which is not inconsequential, immaterial, or unimportant.