IMPORTS - CUMULATION AND UNFAIR TRADE COMPETITION - CUMULATION DEEMED PROPER WHEN A "REASONABLE OVERLAP" OF COMPETITION EXISTS. *Wieland Werke A.G. v. United States*, 718 F. Supp. 50 (Ct. Int'l Trade 1989)

In February 1987, the International Trade Commission (ITC) determined that imports of brass sheet and strip from West Germany, Brazil, Canada, France, Italy, the Republic of Korea, and Sweden[1] were injuring a United States industry. Pursuant to 19 U.S.C. § 1677 (7)(C)(iv)[2], the Commission cumulated[3] the statistics of the allegedly dumped imports from producers in all seven of these nations when determining that the domestic industry had been injured.[4] The International Trade Commission also decided that even if the West German imports were perceived to be of a higher quality, there was reasonable overlap in competition between the West German brass and the other imported and domestic brass to make the cumulation proper.[5]

In July 1989, the West German producer, Wieland Werke, brought suit in the United States Court of International Trade to challenge

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[1] Certain Brass Sheet and Strip from France, Italy, Sweden, and West Germany, USITC Pub. 1951, Inv. Nos. 701-TA-270 and 731-TA-313, 314, 316, 317 (Final) (Feb. 1987) [hereinafter Certain Brass Sheet and Strip from France, Italy, Sweden and West Germany]. The law defines the term "industry" as domestic producers as a whole of a like product, or those producers constituting a major proportion of the total domestic production of that product. Palmeter, *Injury Determinations in Antidumping and Countervailing Duty Cases - a Commentary to U.S. Practice*, 21 J. WORLD TRADE L. 7, 14 (1987).

[2] 19 U.S.C. § 1677 (7)(C)(iv) (1984). This section addresses cumulation under evaluation of volume and of price effects. The provision reads, "For purposes of clauses (i) and (ii), the Commission shall cumulatively assess the volume and effects of imports from two or more countries of like products subject to investigation if such products compete with each other and with like products of the domestic industry in the United States market."

[3] Cumulation in an antidumping or countervailing duty investigation is the aggregation of the injury data of all imports in the particular industy. Cumulation allows for greater protection of the United States industry because the effect of an import will be measured not by its impact alone, but by the impact of all imports of the product on the domestic industry. Hayes, *Antidumping and Countervailing Duties*, 23 TEX. INT'L L.J. 505 (1988).

[4] Certain Brass Sheet and Strip from France, Italy, Sweden, and West Germany, *supra* note 1 at 314.

[5] *Id.*

the decision of the ITC to cumulate their imports with the dumped and subsidized imports of the other producers.[6] Plaintiff Wieland Werke contended that it competed in a separate high quality special characteristic submarket not served by other imports and therefore was erroneously cumulated with the other investigated imports.[7] The Commission defended its competition analysis by comparing nine categories of brass products with standard dimensions.[8] Based on these nine categories, there was substantial evidence that purchasers whose primary interest was quality purchased brass from several foreign suppliers and that purchasers frequently bought West German brass based on its price and availability rather than quality.[9]

The United States Court of International Trade *held*, affirmed. Even though one producer's imports are perceived to be of a higher quality, when there is a reasonable overlap in competition between that producer's imports and the other producer's imports, cumulation is proper. *Wieland Werke, A.G. v. United States*, 718 F. Supp. 50 (Ct. Int'l Trade 1989).

LEGAL BACKGROUND AND DISCUSSION

Prior to the 1984 Act,[10] the Commission's cumulation process was characterized by inconsistency and confusion.[11] Without the benefit of a cumulation statute or congressional policy, the Commission in effect left the decision of whether to cumulate to the discretion of the individual commissioners.[12] Cumulation was used to test injury

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[6] Wieland Werke, A.G. v. United States, 718 F. Supp. 50 (Ct. Int'l Trade 1989).

[7] *Id.* at 51.

[8] *Id.* at 52. Sales data was available for West German imports in seven of the nine standard categories: products one (builder's hardware), two (slitting stock, 0.02 to 0.25 inch thick), three (communication and electronics, 0.01 inch to 0.013 inch thick), five (slitting stock, .016 to .0199 inch thick), six (reroll, .0061 to .012 inch thick), seven (reroll, .081 to .125 inch thick); and nine (lamp shells and sockets, .011 inch to .016 inch thick).

[9] *Id.* at 54.

[10] 19 U.S.C. § 1677(7)(C)(iv) is often referred to as the 1984 Act.

[11] Bingham & Taylor Div., Virginia Indus. v. United States, 815 F.2d 1482, 1484 (Fed. Cir. 1987).

[12] *Id.* at 1485; *see also* Mock, *Cumulation of Import Statistics in Injury Investigations before the International Trade Commission*, 7 NW J. INT'L L. & BUS. 433, 439 (1986) [hereinafter Mock]; Palmeter, *Injury Determinations in Antidumping and Countervailing Duty Cases - A Commentary on U.S. Practice*, 21 J. WORLD TRADE L. 7, 35 (1986) [hereinafter Palmeter].

in antidumping[13] but was not allowed in duty investigations.[14] For the commissioner's benefit, the Commission developed a standard market analysis approach to use when determining whether cumulation was proper.[15]

The 1984 Act replaced the commisioner's discretion with a statutory standard.[16] Once the Commission demonstrates that cumulation is proper, the 1984 Act mandates the use of cumulation in injury determinations.[17] The Commission must now consider two criteria when determining whether to cumulate.[18] First, the imports to be cumulated must compete with each other and with the domestic product they allegedly injure.[19] Second, the imports must be "subject to investigation."[20]

When considering whether imports compete with each other and with the United States production, the ITC normally considers several factors. The first is the degree of fungibility between imports from

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[13] Mock, at 439. *See also* USITC General Counsel Memorandum GC-F-186 (June 1981).

[14] *E.g.*, Hot Rolled Carbon Steel Plate from Romania, Belgium, and Brazil, USITC Pub. 1208, Inv. Nos. 701-TA-83-84 (Prelim.) (Jan. 1982); Hot Rolled Carbon Steel Sheet from France, USITC Pub. 1206, Inv. Nos. 701-TA-85 (Prelim.) (Jan. 1982). The first cumulation decision was in 1968 in Pig Iron from East Germany, Czechoslovakia, Romania, and the USSR, T.C. Pub. 265, Inv. Nos. AA1921-52 (Sept. 1968).

[15] Authority for this action was derived from the legislative history of the Trade Act of 1974 which instructed the Commission to consider "the factors and condition of trade affecting the market in these goods." These factors were: 1) volume of subject imports, 2) trend of import volume, 3) fungibility of imports, 4) competition in the market for same end users, 5) common channels of distribution, 6) pricing similarity, 7) simultaneous impact, and 8) coordinated action by the importers. Mock, *supra* note 12, at 439.

[16] *Id.* at 440.

[17] USX Corp. v. United States, 655 F. Supp. 487 (Ct. Int'l Trade 1987) (Where the conditions of trade indicate cumulation would be appropriate, it may be arbitrary and an abuse of discretion to fail to cumulate.); Lone Star Steel Co. v. United States, 650 F. Supp. 183 (Ct. Int'l Trade 1986) (cumulation was mandated).

[18] LMI - LaMetalli Industriale, S.P.A. v. United States, 712 F. Supp. 959 (Ct. Int'l Trade 1989); Mock, *supra* note 12, at 441.

[19] *LMI*, 712 F. Supp. at 969.

[20] The question of whether imports are "subject to investigation" is a difficult one. All imports are not automatically subject to investigation. Some reason must be shown. The clearest case occurs when imports from several countries enter the United States at the same time, when they all benefit from the same kind of unfair trade practice, and when the domestic industry files simultaneous petitions. Difficulties arise when petitions are filed at different times, or different unfair trade practices are alleged. Mock, *supra* note 12, at 442. *See also* Bingham & Taylor v. United States, 815 F.2d 1482 (Fed. Cir. 1987); Chaparral Steel Co. v. United States, 698 F. Supp. 254 (Ct. Int'l Trade 1988).

different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality-related questions.[21] The second factor is the presence of sales, or offers to sell, in the same geographic markets as imports from different countries and the domestic like product.[22] The third is the existence of common or similar channels of distribution for imports from different countries and the domestic like product, and the fourth factor is whether the prices of imports and the domestic like product are within a reasonable range.[23] The fifth factor is whether the imports are simultaneously present in the market.[24]

There are two situations where cumulation is essential to the investigation of injury[25] and also to the enforcement of countervailing duty law.[26] The first occurs when a number of subsidized sources, none of which could injure the domestic industry by itself, combine to do injury to the industry.[27] The second occurs when a single subsidized source, again not sufficient to individually cause injury to the industry, adds to the injury caused by larger sources.[28]

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[21] Granges Metallverkeg, A.B. v. United States, 716 F. Supp. 17, 19 (Ct. Int'l Trade 1989).

[22] *Id.*

[23] *Id.* In Certain Brass Sheet and Strip from France, *supra* note 1, the ITC did not consider this factor in its determination to cumulate. *See* Granges Metallverken, A.B. v. United States, 716 F. Supp. (Ct. Int'l Trade 1989) (The court specifically addresses the fact that this was left out). *See also infra*, note 70.

[24] Mock, *supra* note 12, at 441. *See also* Granges Metallverken, A.B. v. United States, 716 F. Supp. 17 (Ct. Int'l Trade 1989).

[25] Chaparral Steel Co. v. United States, 698 F. Supp. 254, 258 (Ct. Int'l Trade 1988). Congress mandated cumulation to "eliminate inconsistencies in Commission practice and to ensure that the injury test adequately addresses simultaneous unfair imports from different countries." *See* H.R. REP. No. 725, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4910, 5164.

[26] Republic Steel Co. v. United States, 591 F. Supp. 640, 644 (Ct. Int'l Trade 1984).

[27] *Id. See also* Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898 (1988), *aff'd*, 859 F.2d 915 (Fed. Cir. 1988) which held that the cumulation provision authorized an action by the ITC to cumulate despite plaintiffs' argument of lack of a "contributing effect." The court in *Tupy*, adhering to the holding in USX Corp. v. United States, 655 F. Supp. 487 (Ct. Int'l Trade 1987), stated that the "contributing effect" test was held to be improperly applied when it created a process of circular reasoning that rendered cumulation a vestigial part of the causation analysis. Further, the court noted the legislative history, which specifically indicated that a requirement in the bill as introduced was that imports from each country have a "contributing effect."

[28] Republic Steel Co. v. United States, 591 F. Supp. 640 (Ct. Int'l Trade 1984).

The 1984 Act also raised a constitutional issue of fairness. The court in *Fundicao Tupy, S.A. v. United States*,[29] held that the operation of the cumulation provision does not raise a due process issue[30] since the conditions upon which cumulation depend are clearly set out in the law and once the merchandise from any country becomes part of the group of merchandise being subject to a determination of injury, the constitutional right of due process is satisfied.[31]

Although the 1984 Act mandates the use of cumulation in injury determinations,[32] the Act does not specifically mandate cross-cumulation. Cross-cumulation is either the aggregation of injury data concerning subsidized imports in an antidumping injury investigation or the aggregation of injury data concerning dumped imports in a countervailing duty investigation.[33] Thus, cross-cumulation is essentially an extension of cumulation that allows the ITC to aggregate the effects of both subsidized and dumped imports on the United States.[34] In *Bingham & Taylor v. United States*,[35] the court read cross-cumulation into the statute and held that 19 U.S.C. § 1677 (7)(C)(iv) requires the ITC to assess cumulatively the volume and price effects of imports subject to an antidumping investigation together with imports of like products subject to a countervailing duty investigation when making its preliminary injury determinations.[36]

Since cumulation is required by law when it is deemed proper, the key issue is the appropriateness of cumulation. One of the essential factors in determining the appropriateness of cumulation is whether

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[29] Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898 (1988), *aff'd*, 859 F.2d 915 (Fed. Cir. 1988).

[30] The plaintiffs in *Tupy* objected to the ITC's action on constitutional grounds, alleging that the statute did not provide standards for enforcement of the law and therefore violated due process of law. *Id.* at 902.

[31] *Id.*

[32] There are cases in which cumulation was not mandated. The court in Asociacion Columbiana de Exportadore de Flores v. United States, 693 F. Supp. 1165 (Ct. Int'l Trade 1988), held that the ITC was not required to use cumulation in a threat investigation, although it was not prohibited from doing so.

[33] Hayes, *supra* note 3, at 508.

[34] *E.g.*, Granges Metallverken A.B. v. United States, 716 F. Supp. 17 (Ct. Int'l Trade 1989); *see also* Hayes, *supra* note 3, at 508.

[35] 815 F.2d 1482 (Fed. Cir. 1987). This decision was followed by the ITC in Industrial Phosphoric Acid from Belgium and Israel, USITC Pub. 2000, Inv. No. 701-TA-286 (Final) Inv. No. 731-TA-36 (Final) (Aug. 1987) (imports of industrial phosphoric acid subsidized by Government of Israel and dumped from Belgium).

[36] *Bingham & Taylor*, 815 F.2d at 1482. The court held that subsidized light iron construction castings from Brazil had to cumulate with dumped light construction castings from India, Canada, and the People's Republic of China. *Id.* at 1486.

the imports compete with each other.[37] In analyzing whether imports compete with each other, the Commission uses the five factor test mentioned previously. When the ITC determines that cumulation is appropriate,[38] it must then consider arguments from the various producers against cumulation. The case of *Granges Metallverken A.B. v. United States*[39] provides a good example of the arguments producers typically make. There, the plaintiff argued that the decision to cumulate was erroneous because the Commission failed to give proper weight to evidence relating to fungibility of the imported goods.[40] The plaintiff's main contention was that the quality of its brass was superior to the quality of the brass manufactured by other producers under investigation.[41] Metallverken further argued that the other imports were not as substitutable for domestic products due to differences in lead times, metal-fixing methods, and quality considerations.[42] The plaintiffs also argued that quality was the major factor considered by most purchasers in determining brass sheet and strip purchases.[43] Granges Metallverken's final argument was that it manufactured brass for caskets and the Commission failed to account for the fact that

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[37] *See supra* notes 17-23 and accompanying text.

[38] *See e.g.*, Certain Brass Sheet and Strip from Brazil, Canada, and the Republic of Korea, USITC Pub. 1930, Inv. Nos. 701-TA-269, and 731-TA-311 (Final) (Dec 1986); Certain Brass Sheet and Strip from France, Italy, Sweden, and West Germany, *supra* note 1.

[39] 716 F. Supp. 17 (Ct. Int'l Trade 1989).

[40] *Id.* at 18.

[41] *Id.* at 20. Plaintiff's argument was that (1) the French primarily produce brass reroll of standard quality while Metallverken does not sell reroll products; (2) the German produce high-quality brass, as does Granges Metallverken, but brass products from these two countries do not compete because the Swedes sell especially thin gauges for unique applications with which the German producers do not compete; (3) imports from Italy, Korea, and Canada do not compete with the Swedish imports "due to quality reasons and due to the fact that they are engaged primarily in producing and selling more standardized products rather than the speciality brass produced by Granges Metallverken," and (4) Brazilian brass does not compete with the Swedish product "because Brazilian product does not compete in the higher quality markets."

[42] *Id.*

[43] *Id.* This argument was based on a customer survey conducted by the Commission staff. The survey indicated that 64% cited quality as the most important factor in purchases and over 85% ranked price and quality in the top three factors they considered when buying. Additionally, "approximately one half of the largest end-users stated that imported Swedish brass sheet and strip was superior to U.S. produced brass," and two distributors reported that mills in Sweden, West Germany, France, and Italy "produce brass strip with a better finish, or surface quality, and that some customers believe that finish is an indicator of metallurgical quality."

there was no domestic production of brass for caskets during the investigation period.[44]

Weighing arguments such as those cited by Granges Metallverken, the court must determine whether there is a "reasonable overlap" in competition among imports and domestic products.[45] The court in *Florex v. United States* held that completely overlapping markets are not a prerequisite.[46] Applying this analysis in *Certain Cast Iron Pipe Fittings from Brazil, the Republic of Korea, and Taiwan*, the Commission determined that cumulation was proper based on "reasonable overlap" in the geographical and end-user markets in which the imports and the domestic like product were sold, despite alleged difference in quality and evidence that certain products were predominantly sold in discrete end-use markets.[47] Similarly, the court in *Fundicao Tupy S.A. v. United States*,[48] affirmed the Commission's decision to cumulate,[49] holding that it was reasonable to find sufficient evidence of overlap in the end-use market given the "fungibility and similar quality of the imports, the similar channels of distribution, the similar time period involved, and the geographic overlap of the markets."[50]

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[44] *Id.* at 21. Plaintiffs reasoned that the Commission's determination that these products were fungible was not supported by substantial evidence considering the plaintiff's minimal market penetration ratios, the fact that a significant portion of that small market penetration consists of products that were not produced domestically during most of the investigation period, and the lack of fungibility.

[45] It is not the court's function to reweigh the evidence, but to decide whether the Commission's determinations are supported by substantial evidence. 19 U.S.C.§ 1516 a(b)(1)(B); *Id.* at 6; Citrusuo Paulista, S.A. v. United States, 704 F. Supp. 1075, 1093 (Ct. Int'l Trade 1988), *aff'd*, 708 F. Supp. 1333 (1989); Matsushita Elec. Ind. Co. v. United States, 750 F.2d 927, 936 (Fed. Cir. 1984). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Co. v. Nat. Labor Relations Board, 340 U.S. 477 (1951).

[46] 705 F. Supp. 582, 592 (Ct. Int'l Trade 1989). Here, the court held that the plaintiff's argument, that competition between Mexican imports and other imports was limited because of differing ports of entry, was not convincing since completely overlapping markets are not required. *See also Tupy*, 678 F. Supp. at 902.

[47] Certain Cast Iron Pipe Fittings from Brazil, the Republic of Korea, and Taiwan USITC Pub. 1849, Inv. Nos. 731-TA-278-80 (Final), (May 1986).

[48] 678 F. Supp. 898, (1988) *aff'd*, 859 F.2d 915 (Fed. Cir. 1988).

[49] *Id.* The evidence included marketing data from large purchaseres of the product, testimony at the hearing, advertisements, and other material which tended to show that there was competition between the imports from Brazil, Korea, and Taiwan in the residential construction and commercial/industrial end-user markets.

[50] *Id.* at 902.

In the abovementioned case of *Granges Metallverken A.B. v. United States*,[51] the Commission had found that even if some domestic purchasers perceived Swedish brass to be of a higher quality than other imports, there was "reasonable overlap" in competition among imported and domestic brass, and therefore cumulation was proper.[52] The plaintiff, Granges Metallverken, appealed this decision to the United States Court of International Trade, arguing that there was no substantial evidence to support cumulation because the Commission failed to account for fungibility[53] and did not determine whether imported and domestic products were within a reasonable price range.[54]

The court in *Granges* adopted the Commissioner's reasoning that despite a product being delivered to the customer with unique qualities, it does not make it noncompetitive in the steel industry if other importers are also selling the same general merchandise to the same customer.[55] The commission analyzed competition among standard brass sheet and strip by comparing sales of nine categories of brass products using dimensions established by the Commission as common denominators in the industry.[56] Available sales data showed only a slight variation in price among Swedish and domestic products.[57] The record also supported a finding of competition among the imports since many different nations imported the same products from producers in different nations.[58]

In *Granges*, the plaintiff argued that quality was the main consideration for purchasers when buying brass products.[59] The Commission

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[51] 716 F. Supp. 17 (Ct. Int'l Trade 1989).

[52] Certain Brass Sheet and Strip from France, Italy, Sweden, and West Germany, *supra* note 1. This was the same decision used in *Werke*.

[53] *See supra* notes 39-44 and accompanying text.

[54] 716 F. Supp. at 19 (Ct. Int'l Trade 1989).

[55] *Id.* at 22. The fact that Swedish casket brass was sold in the United States without a domestic cournterpart for most of the period under investigation does not undermine the Commission's conclusion that Swedish brass competed with domestic and other imported brass.

[56] *Id.*

[57] *Id.* at 23. The products compared were product one (builder's hardware), product two (slitting stock .02 to .25 thick), and product five (slitting stock .016 to .0199 inch thick), as well as electrical stamping and wiring imports.

[58] *See generally* Certain Brass Sheet and Strip from France, Italy, Sweden, and West Germany, *supra* note 1. Product one was sold by Swedish, Brazilian, French, Italian, Korean, and West German producers. *Id.* at 70, B36. Product two was sold by Swedish, Brazilian, Canadian, French, Italian, Korean, and West German producers. *Id.* at 73. Product three was sold by Swedish, French and West German producers. *Id.* at 73. Product five was sold by Swedish, Brazilian, Canadian, Italian, Korean, and West German producers. *Id.* at A96.

[59] Granges Metallverken A.B. v. United States, 716 F. Supp. at 22.

conceded that quality appeared to be a major factor in a purchaser's decision, but noted that price was also a major factor.[60] Of course, the Commission is not required to track every sale of every product to show that all imports compete with all other imports and all domestic like products. The Commission simply is required "to find evidence of reasonable overlap in competition to support its determination to cumulate imports."[61] Plaintiff's final argument, that almost all of their imports were of uniquely high quality, was undermined by showings of comparable quality among the other imports.[62] Rejecting all of these arguments, the court held that the record supported a finding of "reasonable overlap" in competition.[63]

ANALYSIS

Under a strict interpretation of existing case law, the court in *Wieland Werke, A.G. v. United States*[64] correctly determined that even if West German imports were perceived to be of a higher quality, cumulation was proper based on a finding of "reasonable overlap" in competition. The court in *Wieland Werke* essentially duplicated its reasoning in *Granges*[65] in addressing the issue of competition. In both cases the plaintiffs argued that because of their higher degree of quality, the competition requirement necessary to invoke the cumulation statute was not met.[66] The court in *Wieland Werke* again used the nine standard categories of brass products established by the Commission in *Certain Brass Sheet and Strip from France, Italy, Sweden, and West Germany*,[67] and compared each product with respect to how many different importers sold that particular product.

Expanding the quality argument, plaintiff stated that it sold to a distinct high-quality submarket comprised of end-users who required

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[60] *Id.*

[61] *Id.* "Competition" is defined as "rivalry in the marketplace, where goods will be bought from those who, in view of the purchasers, provide the 'most for the money'." J. P. FRIEDMAN, DICTIONARY OF BUSINESS TERMS 109 (1987). Thus, it would not be unreasonable for the Commission to find that domestic purchasers prefer to purchase higher quality products at a lower price than other goods considered to be inferior.

[62] *Granges Metallwerker*, 716 F. Supp. at 23.

[63] *Id.*

[64] 718 F. Supp. 50 (Ct. Int'l Trade 1989).

[65] *Granges Metallwerken*, 716 F. Supp. at 19.

[66] *Id.* at 19; *Wieland Werke*, 718 F. Supp. at 52.

[67] Certain Brass Sheet and Strip from France, Italy, Sweden, and West Germany, *supra* note 1 at 316.

special quality or special characteristics and only brass manufactured by German companies, a handful of domestic producers, the Japanese, and the Swedish producers could compete in this submarket because other imports lacked the necessary quality.[68] The Swedish importers in *Granges* also made this argument, but in both instances, the court relied on the Commission's findings that West German, Brazilian, Italian, Korean, and Swedish imports all competed for the same sales.[69] Further, the court in *Wieland Werke* also relied on the Commission's finding of substantial evidence that purchasers specifically interested in quality often purchased brass from several foreign suppliers, and that purchasers frequently bought West German imports based on price and availability rather than quality.[70]

The holdings in *Granges* and *Werke* logically followed the holding in *Tupy*. There the court considered geographical, quality, and fungibility aspects similar to those used in *Werke* and *Granges*.[71] All three of these holdings stem from the holdings in *USX Corporation v. United States*[72] and *Bingham & Taylor v. United States*[73] that mandating the use of cumulation and cross-cumulation.

The holdings in *Wieland Werke* and *Granges* will probably have two results: more claims by the domestic industry and less variation in the quality of imported goods. These two cases make it easier to

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[68] Wieland Werke, 718 F. Supp. at 53. These end-users used brass to manufacture computers, aerospace products, fasteners, connectors, and other high technology applications. Plaintiff further argued that this submarket required brass of the highest quality in terms of tolerances, surface, chemical, and physical conditions.

[69] Unlike Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898 (Ct. Int'l Trade 1988), *aff'd*, 859 F.2d 915 (Fed. Cir. 1988) the evidence in this case is uncontested that the same domestic users of brass purchased brass from several different sources.

[70] The similarity between *Granges* and *Wieland Werke* makes it plausible to group the near-identical holdings when analyzing the correctness of the Commission's determination to cumulate. The court in *Wieland Werke* addressed every situation in *Granges* except the complaint that the Commission did not specifically address reasonable price range. This issue also could have been addressed in *Wieland Werke*; however, the court in *Granges* was strongly supported by case law that stated there was no requirement for the Commission to conduct a price range analysis in an injury investigation. *See* Negev Phospates, Ltd. v. United States, 699 F. Supp 938, 942 (Ct. Int'l Trade 1988); National Ass'n of Mirror Mfrs. v. United States, 696 F. Supp 642, 648 (Ct. Int'l Trade 1988). The court in *Wieland Werke* did however discredit the plaintiffs complaint of methodology with similar arguments.

[71] Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898 (1988), *aff'd*, 859 F.2d 915, 920 (Fed. Cir. 1988).

[72] 655 F. Supp. 487 (Ct. Int'l Trade 1987).

[73] 815 F.2d 1482 (Fed. Cir. 1987).

invoke the cumulation statute in injury determinations, allowing greater protection of the domestic industry from unfair trade practices. Since relief can be obtained more easily, there will be an increase in claims against importers for alleged dumping and subsidizing.[74] United States producers could easily use this ruling to their advantage in attempts to eliminate competition.

This could lead to harsh results for small quantity importers. The major suppliers cause most of the injury to the domestic industry, but if cumulation is mandated based on a "reasonable overlap," the International Trade Commission will hold the small importer just as responsible as the major supplier causing the smaller importers to be punished along with the major suppliers.[75]

This decision may also result in international political conflict.[76] Since it will be easier find injury caused by a combination of dumping and subsidizing, the subsidies granted to foreign industries by their government will also be more likely to run afoul of Antidumping and Countervailing Duty statutes.[77] The result may be excessive duties which will in effect nullify the govern subsidies that are vital to many foreign industries.[78] While this relaxed standard will be beneficial to the United States, it may result in the elimination of small importers' products from the United States marketplace. By protecting the United States in this way, foreign countries may retaliate by increasing trade barriers. This would ultimately injure the domestic manufacturers.[79]

A second disadvanageous result of these holdings is that quality may be reduced. If importers realize that despite their efforts to provide a high-quality product with special characteristics, they will still be considered "competing" with lesser imports, they may reduce their quality. Further, the financial risk of having their products cumulated may force importers of higher quality products to reduce quality in order to reduce costs.[80] The result will be less variation in quality as importers try to obtain the median quality. To maintain higher standards would be futile since it could still be shown that they have a "reasonable overlap" in the market.

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[74] Hayes, *supra* note 3, at 513.
[75] *Id.* at 513-14; Palmeter, *supra* note 1, at 37.
[76] Hayes, *supra* note 3, at 513.
[77] *Id.*
[78] *Id.*
[79] *Id.* at 515. *See also* Mock, *supra* note 12, at 441.
[80] Hayes, *supra* note 3, at 515; Mock, *supra* note 12, at 452.

CONCLUSION

Precedent makes *Werke* a sound decision. Undoubtedly the domestic producers will welcome this relaxed method of measuring overlap in competition as a measure to combat foreign competition. However, it may have some far-reaching effects for overall United States industrial competitiveness because the quality and quantity of foreign products available in the United States will be reduced, causing the American consumer to suffer.

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