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COLD-ROLLED CARBON STEEL PLATES AND SHEETS FROM ARGENTINA

Views on Remand in
Investigation No.
731-TA-175 (Final)
(Second Remand)



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UNITED STATES INTERNATIONAL TRADE COMMISSION

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UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

Inv. No. 731-TA-175 (Final-Second Court Remand)
Cold-Rolled Carbon Steel Plates and Sheets from Argentina

JOINT VIEWS OF COMMISSIONERS SEELEY LODWICK AND DAVID B. ROHR

On March 15, 1988, the Court of International Trade (CIT) remanded to the Commission its negative injury determination in *Cold-Rolled Carbon Steel Plates and Sheets from Argentina, Inv. No. 731-TA-175 (Remand), USITC Pub. 1967 (March 1987)*. The CIT ordered this remand because it found that the determinations of two of the four Commissioners comprising the majority negative determination were not supported by legally sufficient reasoning. The CIT stated, however, with respect to the views of Commissioners Lodwick and Rohr, "It would be poor judicial economy to review in detail the separate decisions of the commissioners who utilized traditional causation analyses...." The Court also noted that "to the extent possible in the case of multiple opinions, commissioners should indicate the portions of their colleagues' opinions with which they agree."

To be as helpful as possible to the court we have prepared these joint views. In so doing, we emphasize that we do not intend these views to detract in any way from the views that we expressed in our separate opinions in the initial remand determinations in this investigation. We do not believe that those views were inconsistent with one another on any matters relevant to this remand and we adopt those individual views as our joint views, as we detail more specifically below. In this determination, we address the three substantive issues which we have identified in the Court's remand as being determinative, that is, the issues of cumulation, causation, and threat¹.

Cumulation

Concerning the issue of cumulation, we understand that the court rejected legal arguments against the propriety of cumulation in various circumstances, but accepted the appropriateness of the Commission's contributing effects test with respect to pre-1984 cumulation. The issue resolves itself on the question of whether to cumulate imports from Brazil and Korea with those in the present case under the principles of the "contributing effects" test. The Court stated:

"Two commissioners did reach the next stage of analysis and found that Brazilian imports exhibited trends in the domestic market distinct from those of other countries' imports. As the court stated in the previous opinion, under pre-1984 law these distinctions alone may justify a decision not to cumulate,

¹ While it is not clear that the issue of threat was remanded or affirmed by the Court, we have included an indication of our mutual concurrences for the sake of completeness.

distinctions alone may justify a decision not to cumulate, provided such trends reflect actual differences in the way imports affect the domestic market."

The Court also stated, with respect to Korean imports:

"Two commissioners base their decisions not to cumulate on differences in import trends, pricing patterns and geographic markets served. These distinctions properly justify a decision not to cumulate Argentine and Korean imports.

As the two Commissioners referred to above, we affirm the determinations made in our prior views. Commissioner Rohr concurs in the analysis of contributing effects contained in Commissioner Lodwick's opinion, specifically that contained in footnote 5 on pages 47 and 48, and Commissioner Lodwick concurs in the contributing effects analysis provided by Commissioner Rohr on pages 61-64 of his determination.

To summarize the considerations analyzed in those views, we noted the differences in import trends, the differences in marketing, and the differences in pricing. We noted the essentially passive nature of Argentine imports in contrast to the aggressive marketing of the other imports. We concluded that Argentine imports did not contribute to the effects of other imports, specifically the effects of the imports of either Brazil or Korea. We therefore found cumulation inappropriate.

Causation

With respect to causation, Commissioner Rohr concurs with the analysis of causation provided by Commissioner Lodwick, specifically contained at pages 49 to 51 of Commissioner Lodwick's views in the initial remand determination and Commissioner Lodwick concurs with the analysis of the factors relating to causation discussed by Commissioner Rohr at pages 64 to 69 of his views in the initial remand. Any differences in these views are merely matters of emphasis, not of any substance.

We noted that import volumes were small and that their significance depended on how these volumes related to conditions in the market such as relative market shares, growth in demand, and the overall conditions of trade. On the issue of pricing, we noted the price escalation of Argentine steel and related that to market conditions. We also noted that, relative to other elements of the causation analysis, such as the volume of imports and market penetration, the price comparisons had to be given less weight than these other factors because there was simply less factual data on which to base the comparisons. Finally, looking at the lost sales and revenue allegations, we concluded that these allegations confirmed that Argentine steel was marketed in a passive and non-injurious manner.

Threat

With respect to threat, Commissioner Rohr concurs in the analysis provided by Commissioner Lodwick in his views in the initial remand on pages 51 and 52, and Commissioner Lodwick concurs in the analysis of Commissioner Rohr on pages 69 and 70.

We both noted that the additional data obtained by the Commission confirmed our initial decisions. We noted overall increases in capacity utilization in Argentina and the insignificance of the 1984 changes in that

utilization, the importance of the Argentine home market, the stable marketing of Argentine steel in the U.S. market. We also noted the limited relevance of certain additional data submitted by petitioner that related to the Argentine industry as a whole, rather than to that portion of the Argentine industry producing the particular like product under investigation.

Conclusion

We conclude, based on the information before us, that the Argentine imports subject to this investigation were not a cause of, nor did they pose a real and imminent threat of, material injury to the domestic industry.

VIEWS OF CHAIRMAN SUSAN LIEBELER

Cold Rolled Carbon Steel Plates and Sheets from Argentina

Inv. No 731-TA-175

May 2, 1988

On February 10, 1984, Petitioner USX Corporation (then known as United States Steel Corp.) filed its initial petition with the Commission. USX alleged that less than fair value (LTFV) sales of cold-rolled carbon steel sheet and plate from Argentina caused or threatened material injury to the domestic industry.

On January 28, 1985, the Commission reached a final negative determination. In their majority opinion, four Commissioners (Commissioners Liebeler, Lodwick, Rohr and Stern) found that, although the domestic industry, consisting of the producers of cold rolled carbon steel plates and sheets (the like product), was materially injured, LTFV imports from Argentina did not cause the injury. We also found that the subject imports did not threaten the domestic industry with material injury. In our opinion, we utilized the traditional causation analysis and discussed trends in the domestic marketplace during the period of investigation.

On appeal, the Court found fault with certain aspects of the Commission's decision. USX Corp. v. U.S., 655 F.Supp. 487 (Ct. Int'l Trade 1987) and remanded the investigation to the Commission for further consideration of cumulation, causation of injury, and threat of material injury.^{1/} Five separate opinions were issued on remand, and the Commission

^{1/}The Commission was ordered to file its determination on remand with the Court within 45 days of the order.

(Commissioners Brunsdale, Liebeler, Lodwick and Rohr) made a final negative determination (Commissioner Eckes dissenting).

The Court again found fault with certain aspects of the Commission's decision and remanded it to the Commission a second time with instructions to consider cumulation and causation. USX Corp. v. U.S., No. 85-03-00325 (Ct. Int'l Trade, March 15, 1988).

Because it did not sustain the reasoning of a majority of Commissioners on the decision to consider the cumulative effects of Brazilian and Korean imports, the Court instructed the Commission to give further consideration to the issue of cumulation. The Court also found that the causation analysis of two Commissioners (including me) was deficient. Because it had to find the analysis of at least three Commissioners to be in accordance with the law, the Court reserved judgment on the traditional causation analysis used by the two other Commissioners. "It would be poor judicial economy to review in detail the separate decisions of the Commissioners who utilized traditional causation analysis, as the Court does not know what approach will be taken by the ITC on further remand." Id. at 5, note 3. The Court also suggested that further remand might be obviated if on remand Commissioners would indicate the extent to which they agree with portions of other Commissioners' opinions. Id.

On this remand I concur with the Views of Commissioners Lodwick and Rohr and the Views of Vice Chairman Brunsdale. I provide additional explanation of my decision not to cumulate the effects of imports from Korea. In light of the Court's interpretation and criticism of my causation analysis, I provide further explanation in this opinion.

CUMULATION

In response to the Court's first opinion remanding this investigation to the Commission, I cumulated Korean imports with Argentine imports but declined to cumulate Brazilian imports. The Court found my reasoning for not cumulating Brazilian imports to be unpersuasive and instructed that I give this issue further consideration.

I am not cumulating Brazilian or Korean imports with those of Argentina because they exhibit different trends in the U.S. market. These imports display different import trends and pricing patterns and serve different geographic markets, and cumulation is inappropriate. I concur with the reasoning of Commissioners Lodwick and Rohr for not cumulating these imports. In my opinion on the first remand I cumulated Korean imports because I mistakenly believed that I was required to do so by the Court.^{2/}

CAUSATION

I concur in the traditional trend approach to causation used by Commissioners Lodwick and Rohr in this case. I also concur with the Views of Vice Chairman Brunsdale.

In previous opinions, including my earlier opinion on the first remand in this case, I adopted a different approach to assessing the effect that dumped or subsidized imports have had on the domestic industry, relying especially on five factors specified in or suggested in 19 U.S.C. §1677. That approach, first articulated in Certain Red Raspberries from Canada,

^{2/}In its second opinion the Court notes that I read the earlier opinion to require their cumulation. (Slip Op. at 24, note 15.)

Inv. No. 731-TA-196 (Final), USITC Pub. No. 1707 (June 1985), placed special emphasis on the presence or absence of: (1) large and increasing market share, (2) high dumping margins, (3) homogeneous products, (4) declining prices, and (5) barriers in the United States to entry by other foreign firms. I have always believed that in order to determine whether the domestic industry was materially injured by reason of LTFV imports one should try to determine what would have been the circumstances of the domestic industry if the LTFV sales had not taken place and compare these circumstances with those which occurred when the LTFV sales were in fact made.^{3/} The five factors I used in my causation analysis are important elements in making this comparison and in determining whether LTFV imports have caused material injury.

In its criticism of my causation analysis, the Court inferred, from my reference to a different case, that I required predation or predatory intent to make an affirmative determination.^{4/} I did not base my earlier decision on the absence of evidence showing predation or predatory intent. Any such requirement of predatory intent would be precluded by and contrary to the statute. While predation would be a classic case in which LTFV imports caused or threatened material injury, it is not, however, the only case.

The Court was also troubled by my decision that the material injury to the domestic industry was not caused by the subject imports when three of

^{3/}If the differences between these two states are great enough to constitute material injury, then an affirmative determination should be made.

^{4/}Moreover, I have reached affirmative determinations in many investigations, including Red Raspberries; in none of them was there evidence of predation or predatory intent.

the five factors would have supported such an inference. The five factor causation analysis, like the traditional trend analysis of the Commission, was simply a framework for addressing causation by emphasizing certain factors specified in or suggested by 19 U.S.C. §1677.

Use of the five factor analysis required the same exercise of judgment and discretion in considering each investigation as does the more traditional approach used by the Commission. My previous emphasis on the five factors does not mean that I disregarded other factors enumerated in the statute. Indeed, I always consider them and generally join in a discussion of their application in those portions of the Commission decision dealing with the definition of the like product and the domestic industry and the condition of the domestic industry. Likewise, this does not mean that I disregard the facts discussed in the traditional analysis employed by Commissioner Lodwick and Rohr or that I have hesitations about joining in their analysis in this case.^{5/}

I believe that the five factors used in my previous causation analysis are consistent with the statute and indeed that the factors address matters the statute recognizes as relevant to ITC determinations. For example, one factor I considered was the market share held by LTFV imported products. Congress has instructed the Commission to consider the volume of the subject imports, 19 U.S.C. §1677(7)(B)(i). Further in evaluating the volume of imports, the Commission is instructed to consider the significance of the volume of imports, either in absolute or relative terms. 19

^{5/}I have joined other opinions employing the traditional analysis. See Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes from Canada, Inv. No. 731-TA-254 (Final), USITC Pub. No. 1808 (Feb. 1986); Carbon Steel Structural Shapes from Norway, Inv. No. 731-TA-234 (Final), USITC Pub. No. 1785, at 3-12 (Nov. 1985).

U.S.C. §1677(7)(C)(i). Thus, the market share of imports is specifically enumerated as a factor for the Commission to consider.

Another factor I examined is market price. The statute clearly states that the Commission in making its material injury determinations shall consider the effect of imports of that product on prices in the United States for like merchandise. 19 U.S.C. §1677(7)(B)(ii) and (C)(ii).^{6/}

The Court concluded that one factor--the presence or absence of barriers to entry--was dispositive in my previous five factor causation framework. Neither barriers to entry nor any other factor was dispositive under my analysis.^{7/} Nonetheless, foreign supply elasticity of competing goods can provide important information for assessing causation of material injury.

^{6/}The other factors I considered especially important--the size of the margin, the homogeneity of the imported and domestic products, and the presence or absence of barriers to entry--are relevant economic factors to assessing the effects of LTFV imports. Congress specifically provided that the Commission should have discretion to consider other factors. 19 U.S.C. 1677(7)(B) and (C)(iii). Moreover the propriety of considering factors such as the size of the dumping margin has been confirmed by the Court of International Trade. *Copperweld Corp. v. U.S.*, No. 86-03-00338 (Ct. Int'l Trade Feb. 24, 1988); *Hyundai Pipe Co. v. U.S.*, 670 F.Supp. 357 (Ct. Int'l Trade 1987).

^{7/}In previous opinions, I often made affirmative determinations despite low or no barriers to entry. For example, in *UREA From the German Democratic Republic, Romania, and the Union of Soviet Socialist Republics*, Inv. Nos. 731-TA-338 and -340 (Final), USITC Pub. No. 1992, pp. 23-24 (July 1987), I determined that the high import supply elasticity (lack of barriers to entry) was less significant than evidence of other factors (declining domestic prices and increasing market share) favoring an affirmative determination. Similarly, I voted affirmatively in the absence of significant entry barriers in *Butt-Weld Pipe Fittings From Japan*, Inv. No. 731-TA-309 (Final), USITC Pub. No. 1943, pp. 24-25 (January 1987), again finding evidence of high and increasing import penetration, high dumping margins, decreasing prices and highly substitutable products more important. See *Butt-Weld Pipe Fittings from Brazil and Taiwan*, Inv. Nos. 731-TA-308, -310 (Final), USITC Pub. No. 1918, p. 32 (December 1986).

The lower the barriers to entry to the American market, the greater the degree to which LTFV imports displace sales of fairly traded imports instead of replacing sales of domestic like product. Moreover, the lower these barriers, the greater the extent to which the price of the domestic product will be held down by competition from fairly traded imports from other countries, even in the absence of LTFV imports. Thus, low barriers to entry necessarily imply that the loss to American firms (both in terms of the quantity sold or the price charged or both) will be less than if the barriers were greater.

It is for these reasons that I believe that consideration of entry barriers is an appropriate relevant factor under 19 U.S.C. §1677(B) and (C)(iii). In this case, the barriers to entry for cold-rolled carbon steel sheets are very low, i.e. the import supply of fairly traded imports is highly elastic. Fairly traded imports from Japan (imports not subject to voluntary restraint agreements) could be redirected toward the United States and away from third markets in response to increased U.S. prices resulting from the imposition of duties.^{8/} Consequently, if LTFV sales of Argentine imports had not been made in the U.S., the ability of American producers to increase prices or shipments would be limited by competition from fairly traded imports.

Another factor I found particularly important in my earlier opinion-- indeed more important than low barriers to entry--was the very low market share of LTFV imports from and Argentina.^{9/} The market share of LTFV

^{8/}Further, during the period of investigation Japan had significant excess capacity for all steel products.

^{9/}The Court suggested that the market share supported an affirmative determination. (Slip Op. at 12, note 8) Instead, I found that low market share held by these imports supported a negative determination.

imports bears critically on the consequences to the American industry from any given decrease in the price of imports from a particular country or countries.

The injury from LTFV imports occurs when, because of their presence in the U.S. market, the volume or price (or both) of the domestic like product decreases. Market share held by imports is relevant to determining how much the demand for the U.S. like product will decrease in the presence of LTFV imports. Any given price decrease of the imported LTFV product will more seriously affect the domestic industry when the market share is larger than when it is smaller. Over the period of the investigation in which annual data was available, the U.S. market share of Argentine imports of cold-rolled carbon steel was less than one percent. In this case, such a small entrant cannot conceivably be suppressing or depressing U.S. prices or sales. The facts in this case suggest that if Argentina were obliged to charge the same price in the U.S. market and its home market, then the effect on its already small U.S. market share, and, consequently, the effect on the domestic industry producing the like product, would be inconsequential. Together with the other facts on the record in this investigation, the small market share held by LTFV imports from Argentina convinces me that their effect on the domestic industry was immaterial, inconsequential, and unimportant.

VIEWS OF VICE CHAIRMAN ANNE E. BRUNSDALE

Cold-Rolled Carbon Steel Plates and Sheets from Argentina
Inv. No. 731-TA-175 (Final)
Second Remand

May 2, 1988

On this remand I concur with the views of Commissioners Lodwick and Rohr.

I was not a Commissioner when this investigation was first before the Commission. Therefore, I played no role in developing the record and I had no opportunity to question the parties before the Commission issued its original negative determination. My first opportunity to address this case came after the Court of International Trade (CIT) remanded that negative determination, with directions that the Commission reconsider various issues relating to cumulation, causation of material injury, and threat of material injury.^{1/} I understood my role on the remand to be either to address the questions returned to the Commission by the Court, or to explain on the basis of the record why I was unable to do so.^{2/} Accordingly I accepted for purposes of my analysis that the domestic industry was "materially injured" and I focused my consideration of this case on the questions relating to cumulation, causation, and threat remanded to the Commission.

^{1/} USX Corp. v. United States, 655 F.Supp. 487 (CIT 1987)
[hereinafter cited as USX 1].

^{2/} See SCM Corp. v. United States, 519 F.Supp. 911, 915-916 (CIT 1981).

Ordinarily, when I decide the question of causation of material injury in a case before the Commission, I use a method of analysis that is somewhat different from the Commission's traditional trend analysis. For the reasons I discuss below, I give significant attention to judgments about the substitutability of the products under investigation and the elasticities of demand and supply that characterize the aggregate forces at work in the relevant market place. I am gratified that the Court in the most recent remand of this investigation has recognized that my approach "has the potential for explaining, within the confines of the statutory framework and in an improved manner, how less than fair value imports affected the domestic industry...."^{3/} Nonetheless, as I read the Court's opinion, my original views in this investigation contain three mistakes: first, I relied on an elasticity estimate that the parties had never had an opportunity to address explicitly before the Commission; second, I did not sufficiently explain in my opinion why the facts in this investigation supported the estimate I used; and third, I did not adequately explain what I meant when I was discussing "lost sales."

As I discuss below, my approach has advanced a long way from where it was a year ago when I wrote the views remanded by the Court in this investigation. Were I writing on a clean slate now, I could participate in the development of the record and give the parties and the Commission staff an opportunity to explore thoroughly the facts

^{3/} USX v. United States, No. 85-03-00325, slip op. 88-30 at 19 (CIT, March 15, 1988) [hereinafter cited as USX 2].

that allow us to make judgments about the elasticities characterizing the aggregate forces at work in this industry. This approach, already in place for investigations conducted after I wrote my original views in this matter, addresses all of the Court's concerns about my earlier decision. The process now followed in new investigations leads to the development of records that surmount the shortcomings perceived by the Court in my analysis in this case. But I am not writing on a clean slate. If this case had not already stretched on for so long, I might ask the Court for additional time to supplement the record. However, the parties and our trading partners deserve a final resolution of this matter after such extended proceedings.

My review of the record a year ago and today leads me to the firm conclusion that this investigation should be resolved with a negative determination. Unfortunately, by using my preferred approach to the analysis of causation on the existing record, I have apparently created more issues for the parties and the Court to address on appeal, rather than fewer issues as undoubtedly contemplated by the original remand. To simplify this matter for the Commission, the parties, and the Court, I have concluded that I should join in the opinions of Commissioners Rohr and Lodwick as coordinated by their response to the current remand. I do so because, as Commissioners Rohr and Lodwick explain, the facts point so clearly to a negative determination. As they set forth, the evidence in the existing record adequately demonstrates, without more extensive development of an explicit record on relevant elasticities,

the lack of a causal nexus between dumped Argentine imports and material injury suffered by the domestic industry. I join in the views of my colleagues without reservation, although I explain in these additional views why my conclusions in my earlier views were accurate, and why my original approach has advantages over the Commission's traditional trend analysis of causation of material injury.

Causation Analysis and the First Remand

The analysis of causation in the Commission's original majority opinion (expressing the views of Commissioners Rohr and Lodwick, Chairwoman Stern, and Vice Chairman Liebeler) based its negative conclusion principally on two factors -- that the trend of Argentine imports as a percentage of total domestic consumption was low throughout the investigation period (the import market share was always less than 1 percent), and that there was no confirmed evidence of actual instances when domestic producers had lost sales or revenue due to Argentine imports.^{4/} Although it is somewhat "thinner" than many Commission opinions, the original Commission views are an example of the Commission's traditional "trend analysis" of causation. As I read the court's opinion in USX 1, the Commission's decision was remanded because it lacked sufficient analysis of how

^{4/} Cold-Rolled Carbon Steel Plates and Sheets from Argentina, Inv. No. 731-TA-175 (Final), USITC Pub. 1637 at 5-6 (January 1985) [hereinafter cited as Argentine Steel].

the factors relied upon by the Commission actually supported the Commission's negative determination.

I discuss the Court's concern about the treatment of lost sales evidence later in these views. For the moment I focus my attention on the Court's concern about the Commission's consideration of the "trend" of import market share. As I understood it, the Court is saying something very important here about the proper role of analysis in Commission opinions. Moreover, although the term "elasticity" never appeared in the Court's opinion, in my view the analysis that was lacking in the Commission's original decision would be best supplied through use of elasticity data.

Quoting the mandate of SCM v. United States that the Commission "explain" the basis of its conclusions,^{5/} the Court concluded: "ITC has failed to articulate any rational connection between low levels of market penetration by Argentine imports and its final negative determination."^{6/} Citing the legislative history, the court observed that it is the significance of a given volume of imports, not the volume alone, that is crucial to the Commission's causation analysis.^{7/} The Court rejected the Commission's consideration of the trend in import market share because it "consisted solely of the statement that levels of market penetration remained low and stable...[w]ithout discussing the significance of this trend or its

^{5/} "Congress has not only directed ITC to state its determinations but also has required the agency to explain those determinations." USX 1, supra note 1, at 490 (quoting SCM Corp. v. United States, 519 F.Supp. at 913).

^{6/} USX 1, supra note 1, at 490.

^{7/} Id.

relationship to other facts uncovered in the investigation...."^{8/}
 The court indicated that it was particularly important for the Commission to explain the significance of the trend in import volume in light of the views of certain Commissioners in the Spanish Steel investigation.^{9/}

As I explain below, the most effective way to evaluate the significance of a given volume of imports as it relates to prices, revenues, and other factors relating to industry performance is to use elasticities. But before I discuss the role of elasticities in this case, it is important that I first consider the Spanish Steel investigation that has played such an important role in the Court's review of the Commissioners' views in this case. While I fully join in the views of my colleagues Commissioners Rohr and Lodwick about the Spanish Steel investigation, I have certain additional comments on this matter.^{10/}

A Rose Is a Rose, but Its Fungibility Does Not Necessarily Mean that the Impact of a Dumped Rose Is "Magnified" in the Marketplace

When the Court remanded the Commission majority's causation analysis in USX 1, the Court expressed particular concern about the consistency of the Commission's decision in this investigation with the Commission's previous determination in Spanish Steel. There is a

^{8/} Id.

^{9/} Id.; Certain Carbon Steel Products from Spain, Inv. Nos. 701-TA-155, 157 through 160, 162 (Final), USITC Pub. 1331 at 16-17 (December 1982) [hereinafter cited as Spanish Steel].

^{10/} See Cold-Rolled Carbon Steel Plates and Sheets from Argentina, Inv. No. 731-TA-175 (Final) (Remand), USITC Pub. 1967, at 46-47 (Views of Commissioner Lodwick); 64-67 (Views of Commissioner Rohr) [hereinafter cited as USX Remand Opinion].

suggestion in both USX 1 and USX 2 that the court views Spanish Steel as supporting the proposition that cold-rolled steel is an inherently price-sensitive and fungible product, and therefore, for this reason alone, a small quantity of imports can have a disproportionately large impact on the domestic industry. In both decisions, the Court described the ITC's decision in Spanish Steel as establishing that "cold-rolled steel is inherently price sensitive and fungible...and the impact of seemingly small volumes...is magnified in the marketplace."^{11/} In USX 2 the Court suggested that while the Commission was not bound in this case by the result in Spanish Steel, the Commission nonetheless had the responsibility to identify the facts in this case that would point to a different result.^{12/}

In light of the importance placed by the Court on the Spanish Steel decision, it is important that we explore here the boundaries of the Commission opinion in that case. While the fungibility of imported and domestic products is an important factor in assessing causation of material injury, I do not read Spanish Steel to suggest that fungibility alone is even close to determinative. Nor do I believe that Spanish Steel counsels us that if domestic and imported products are "fungible," a small import volume necessarily will have a "magnified" effect on the domestic industry.

At the outset it bears remembering that the language quoted by the Court from Spanish Steel was contained in the affirmative views of only two Commissioners (Eckes and Haggart),^{13/} one of whom is no

^{11/} See USX 1, supra note 1, at 490.

^{12/} See USX 2, supra note 3, at 3.

^{13/} Spanish Steel, supra note 9, at 16-17.

longer on the Commission and the other of whom dissented from the majority's determination in this investigation. The third Commissioner in office at the time Spanish Steel was decided (Commissioner Stern) voted with her colleagues in the affirmative, but did not agree with their reasoning. Commissioner Stern did not find that the steel products at issue in the investigation were highly fungible or particularly price-sensitive.^{14/} Moreover, Commissioner Stern concluded that the small volume of Spanish cold-rolled steel imports at issue caused material injury to the domestic industry only because she cumulated them with imports from France and Italy.^{15/}

As I read their views in Spanish Steel, I understand Commissioners Eckes and Haggart to be making several separate points in the passages that have been of concern to the Court in this case. These points were made as they described the "conditions of trade" they felt were at work in the steel industry at that time:

First, they argued that the steel products under investigation were "inherently fungible" and thus "price sensitive." As they explained, the fungibility of the products was established once customers found that the products all satisfied the buyers' purchasing criteria, and thereafter "[p]rice then becomes a major factor in the decision to purchase."^{16/}

^{14/} Id. at 44, n.13.

^{15/} Id. at 49.

^{16/} Id. at 16. "One fundamental characteristic of each of the products under consideration is its inherent fungibility and price sensitivity. Fungibility is established once certain objective criteria are met to the satisfaction of the purchaser. Price then

(continued...)

Second, they reasoned that in a market where imported and domestic products competed on the basis of price, domestic producers had to match lower prices offered by importers or they would lose sales. They further reasoned that this process could have a discernible impact on the domestic industry, as lower prices affected the ability of domestic producers to cover costs and generate funds for capital improvements.^{17/}

Third, they observed that the Spanish steel imports under investigation entered the U.S market at the same time as new or increasing volumes of subsidized imports from other countries.^{18/}

Fourth, they observed that subsidized imports from Spain and other countries were entering the U.S. market and increasing their market shares during a period when U.S. consumption of steel products turned downward and domestic capacity utilization was very low.^{19/}

Finally, they reasoned that the loss of sales by domestic firms might mean that their revenues would not be sufficient to cover the

^{16/}(...continued)

becomes a major factor in the decision to purchase." Id. (footnotes omitted).

^{17/} Id. at 17. "...imported and domestic steel compete on the basis of price in the same end-user market. In a market where discounting is now commonplace, the mere presence of an offer from an importer of steel at a lower price can have a discernible impact. Such offers affect the ability of the domestic steel producer to price competitively, to cover fixed costs, and to generate funds for need capital improvements." Id.

^{18/} Id. "Another important condition of trade relevant to these products is that these subsidized imports are entering the U.S. market at the same time as imports from a variety of sources." Id.

^{19/} Id. "Additionally, in some cases, subsidized imports have either entered the U.S. market or have further increased their penetration levels during the most recent period when U.S. consumption for these products turned downward and the domestic industries were operating at very low levels of capacity utilization." Id.

high fixed costs characteristic of steel production -- a factor that Commissioners Eckes and Haggart considered "vital to the ongoing viability of these industries."^{20/}

It seems clear to me that they were referring to all of these factors when they concluded: "All of the above factors regarding the conditions of trade relating to these industries are significant in our analysis of the impact of subsidized imports from Spain."^{21/} It seems equally clear to me that they were considering all of these factors when they argued: "Given these conditions of trade, the impact of seemingly small import volumes and penetrations is magnified in the marketplace" (emphasis added).^{22/} I do not read this language from Spanish Steel to suggest that the fungibility and price sensitivity of the products under investigation alone (just one factor identified by Commissioners Eckes and Haggart) would mean that the impact of a small volume or import market share would be magnified in the marketplace.

The Impact of Spanish Steel in This Investigation

Having identified the factors that Commissioners Eckes and Haggart found important in assessing the "conditions of trade" at issue in Spanish Steel, we must now consider what impact these factors should have in our causation analysis in this investigation.

^{20/} Id. "In these steel industries, each of which is characterized by a high level of fixed costs, the loss of even a few sales means that revenues cannot be maintained at levels sufficient to cover fixed costs. The ability to cover these costs is vital to the ongoing viability of these industries." Id.

^{21/} Id.

^{22/} Id.

As a general proposition, I fully agree with the principles discussed in the first factor identified by the two Commissioners -- the relationship between the "fungibility" of imported and domestic products and the consequent "price-sensitivity." As a matter of basic economics and common sense, the closer two products are as substitutes, the more likely a customer's choice of one over the other will be based on differences in price. In the extreme, when products are such close substitutes that we can call them highly "fungible," these products will be highly price sensitive. I fully agree with these principles and readily accept their application to the analysis of causation in this investigation.

I am not completely familiar with the record in Spanish Steel and I make no judgment about whether the facts before the Commission in that case supported the conclusion that the products under investigation there were in fact highly fungible. I note, however, as I discussed above, that on this matter Commissioners Eckes and Haggart disagreed with Commissioner Stern.^{23/} With respect to the facts at issue in this investigation, I agree with my colleague Commissioner Rohr that, compared to the domestic product, Argentine steel "is a relatively fungible product, but one for which purchasers have identified both product and quality differences."^{24/}

^{23/} Compare Spanish Steel, *supra* note 9, at 16 with *id.* at 49.

^{24/} USX Remand Opinion, *supra* note 10, at 68 (footnote omitted).

While I do not agree with some statements in their argument,^{25/} I agree generally with the principle expressed in the second factor identified by Commissioners Eckes and Haggart -- that is, where products compete on the basis of price, domestic producers have to meet offers to sell imports at lower prices or they will lose sales and revenues, which may mean that they have trouble covering costs and generating funds for capital improvements. Again, this general proposition seems obvious, but I note that the Commission's task in its investigations is to assess whether the dumped or subsidized imports under investigation in fact have caused material injury, as evidenced by lower prices or losses in revenue. As I discuss below, I believe that the best way to make this assessment is through the causation analysis I have proposed.

I prefer to deal with the third factor identified by the two Commissioners in Spanish Steel -- the presence of unfairly traded imports from other sources -- in my consideration of whether cumulation of these imports is appropriate.^{26/} In this regard I

^{25/} Apparently these Commissioners felt (contrary to my own view) that there is something particularly sinister about a market "where discounting is now commonplace." Spanish Steel, supra note 9, at 17. In such a market, they reason the "mere presence of an offer" from an importer to sell at a lower price can have a "discernible impact." Id. With all due respect to my present and former colleagues, I think we need to know a great deal more about the market and a great deal more about the terms of any offer (e.g., how much steel was offered to be sold) before we can conclude that such an offer will have, by itself, a discernible impact on the domestic industry.

^{26/} One could read the views of Commissioners Eckes and Haggart to suggest that the Commission should consider, as a matter of the "conditions of trade" affecting the domestic industry, both fairly traded imports and unfairly traded imports from other countries. See Spanish Steel, supra note 9, at 17 ("Another important condition of trade relevant to these products is that these subsidized imports

(continued...)

prefer the approach adopted by Commissioner Stern (who cumulated unfairly traded imports in Spanish Steel) over the approach pursued by Commissioners Eckes and Haggart (who treated such imports as a factor affecting the "conditions of trade" affecting domestic producers). In my view causation analysis is much more transparent for the parties and the Court if we expressly determine whether unfairly traded imports should be cumulated and, if so, thereafter analyze causation on a cumulative basis.

Since I have not thoroughly reviewed the record, I make no judgment about whether the facts in Spanish Steel support the contention of Commissioners Eckes and Haggart that subsidized imports entered the U.S. market and increased their market share during a period when domestic consumption had turned downward and domestic

26/ (...continued)

are entering the U.S. market at the same time as imports from a variety of sources.") While I agree with the notion that fairly traded imports play a role in the Commission's causation analysis, I reject any suggestion that in a Title VII investigation we should treat fairly traded imports as a harmful factor which somehow should be combined with the impact of unfairly traded imports in assessing whether the latter have caused material injury to the domestic industry. As I understand the law, fairly traded imports are supposed to be treated no worse than domestic products when we assess causation under Title VII.

It appears that in this regard I fundamentally disagree with my colleague Commissioner Eckes. In his opinion on the first remand in this investigation, he placed great reliance on the generalized "devastation imports have imposed on the domestic steel industry and its beleaguered position in the marketplace." He argued that it was particularly significant that six months prior to this investigation the Commission found that the domestic industry producing sheet and strip was "seriously injured" by imports within the meaning of Section 201 of the Trade Act of 1974. See USX Remand Opinion, *supra* note 10, at 82-83 (Views of Commissioner Eckes). In my view the findings in the Section 201 investigation (dealing as it did with imports as a whole, whether or not they were unfairly traded) tell us nothing about whether, in this investigation, there was material injury to the domestic industry by reason of dumped imports.

industries were operating at very low capacity. But I agree as a general proposition that this factor is important in assessing whether material injury by reason of the subject imports has occurred in any dumping investigation. If the domestic industry is not operating at capacity, then declining domestic shipments, coupled with rising import market share, is generally probative of the existence of a causal link between unfairly traded imports and lost sales and revenues for the domestic industry.^{27/} The Commission's job in such an investigation remains to assess whether the injury actually caused by the dumped or subsidized imports is "material" -- a task that I prefer to approach through the analysis I describe below. Contrary to the facts described by Commissioners Eckes and Haggart in Spanish Steel, the facts in this case show that the market share of Argentine imports was stable at under 1 percent and that domestic consumption was strongly rising during the period of the investigation.^{28/} In short, it is obvious that we need to explore the facts in far more detail before we can reach conclusions about the existence of a causal link between dumped Argentine imports and any consequent sales or revenues lost by domestic steel producers.

The final factor identified by Commissioners Eckes and Haggart as one of the "conditions of trade" at issue in the Spanish Steel investigation was the relationship between the sales and revenues

^{27/} I say "generally" because there may be factors other than dumping or subsidization that explain the increasing popularity of the imported product. For example, the imported and domestic products may not be close substitutes.

^{28/} USX Remand Opinion, supra note 10, at 49-50 (Views of Commissioner Lodwick) and 65 (views of Commissioner Rohr).

lost by domestic producers and the high fixed costs that characterize steel production.^{29/} At least implicit in their opinion is the notion that a given quantum of injury (e.g., a given volume of lost revenues or profits) is more significant if the domestic industry is operating below, rather than above, the point of recovering its fixed costs. I understand these Commissioners to be suggesting that the relative condition of the industry (that is, the relative health or sickness) of an industry is a factor that should be considered when assessing whether the injury caused by unfairly traded imports is material. Commissioner Eckes' view in this regard was stated more clearly in Brazilian Steel,^{30/} an investigation decided only four months before this one. There, Commissioner Eckes agreed with his colleagues that the Brazilian imports under investigation did not cause material injury to the domestic industry. Distinguishing his decision in Spanish Steel he observed:

The negative determination in this investigation, however, does not reflect a departure from the "conditions of trade" discussion in the [Spanish Steel] investigation...which has served as the framework for [my]...determinations in the various steel products investigations under Title VII. One of the fundamental factors in that "conditions of trade" framework has changed since previous determinations, that is, the performance of the domestic industry. As the discussion in the body of this opinion illustrates, this industry is still experiencing material injury but the condition of the industry has improved from earlier periods.... Therefore, as the conditions of trade improve, the impact of small import volumes and penetrations upon the performance of the domestic industry lessens accordingly.^{31/}

^{29/} Spanish Steel, *supra* note 9, at 17.

^{30/} Cold-Rolled Carbon Steel Sheet from Brazil, Inv. No. 731-TA-154 (Final), USITC Pub. 1579 (September 1984).

^{31/} Id. at 6 n.14.

I agree with my colleagues^{32/} that the "improving" condition of the industry and the stable import penetration during the period of this investigation stand in marked contrast to the increasing import market share and the unhealthy and deteriorating condition of the domestic industry in Spanish Steel. The facts in this investigation thus should amply distinguish the Spanish Steel decision, just as it was distinguished by Commissioner Eckes himself in Brazilian Steel. As a separate matter, however, I am becoming increasingly skeptical that Commissioners Eckes and Haggart's views about the relationship between the relative health of an industry and the consequent significance of the effect of a given quantum of injury caused by unfairly traded imports fully serves our statutory mandate.^{33/} While I do not decide the question here, I am not fully persuaded that a given loss in revenues, profits, or jobs of domestic workers caused by dumped imports necessarily is any more or less "material" to an industry simply because it causes the industry's "bottom line" financial data to be somewhat more or less in the red.

In his recent opinion in 3.5 Inch Microdisks from Japan,^{34/} Commissioner Cass identified a number of significant problems posed by the Commission's traditional "bifurcated" approach to injury analysis. As he observed in that opinion, in recent years the Commission has divided its analysis of the injury by reason of unfairly traded imports into two parts -- first, determining if the

^{32/} See USX Remand Opinion, supra note 10, at 65-67 (Views of Commissioner Rohr).

^{33/} See Spanish Steel, supra note 9, at 16-17.

^{34/} Inv. No. 731-TA-389 (Preliminary), USITC Pub. 2076 (April 1988) [hereinafter cited as Microdisks].

domestic industry has suffered material injury, and second, considering whether unfairly traded imports were a cause of that injury. Commissioner Cass observed that this approach (which essentially asks whether the industry is doing worse today than at some other period and then explores the reasons why) may not be fully faithful to the language and legislative history of Title VII of the Tariff Act of 1930.^{35/} Commissioner Cass argues that the correct approach would not focus on the relative health of the domestic industry compared to other periods, but rather would simply "compare the domestic industry's actual performance with what the domestic industry's performance would have been in the absence of unfairly traded imports during the period of the investigation."^{36/} Among many other authorities cited in support of his position, Commissioner Cass quotes a recent opinion by the CIT in which the Court observed:

[T]he ITC should not be engaged in a determination of whether an industry is "healthy". A "healthy" industry can be experiencing injury from importations and an "unhealthy" industry can be unaffected by importations. The purpose of the ITC's investigation is to determine whether imports are a cause of any effect on an industry which would amount to "material injury."^{37/}

I understand the drift of Commissioner Cass's argument to be that the controlling statutes tell us we should assess the magnitude of the effect of unfairly traded imports apart from how they might play out in the domestic industry's historical financial statements. Under this view, jobs lost because of dumped imports are just as material

^{35/} Id. at 60-63.

^{36/} Id. at 60.

^{37/} Republic Steel Corp. v. United States, 591 F.Supp. 640, 649 (CIT 1984).

whether they are lost through lay-offs in declining industries or through reduced new hiring in expanding industries.

We do not need to decide here whether Commissioner Cass's approach should be followed by the Commission in future investigations. I note his argument only because the principles he expresses and the authorities he cites cast doubt on the notion expressed by Commissioners Eckes and Haggart in Spanish Steel that the significance of a given quantum of harm is different depending on the condition of the industry on which it is inflicted.

With the views of Commissioners Eckes and Haggart in the Spanish Steel investigation now in perspective, I turn to my discussion of the causation analysis in my opinion on the first remand. I explain in the sections that follow my view of the important role played by elasticity data in causation analysis in Commission determinations.^{38/} I also explain the "short cut" analysis that I used earlier in this case and why I believe that it provided a reasonably sound "ball park" estimate of the outside bounds of the actual injury sustained by the domestic industry by reason of dumped Argentine imports. In view of the Court's concerns about the limitations of the current record on explicit elasticity estimates, I should emphasize that in this second remand determination I do not rely on the analysis discussed below, but rather on the facts as

^{38/} Many of the views expressed in this opinion were discussed recently in my opinion in Color Picture Tubes from Canada, Japan, the Republic of Korea, and Singapore, Inv. Nos. 731-TA-367-370 (Final), USITC Pub. 2046 (December 1987) [hereinafter cited as Color Picture Tubes]. I repeat them here for the convenience of the parties and the Court in this investigation.

discussed by Commissioners Lodwick and Rohr. My purpose in adding here the explanation of my preferred approach is to give guidance to the public and parties in future investigations.

Economics, Elasticities, and Causation Analysis

To secure an affirmative determination from the Commission in a dumping case, a sufficiently strong causal link must be established between the fact of dumping and the existence of "material" adverse effects on the domestic industry.^{39/} The controlling statutes are clear on the need for the causal link, but they do not tell us how the Commission is supposed to decide whether the two required elements, material injury and causation, exist. To be sure, the statutes give us a long list of factors, seventeen in all, that we should "consider" and "evaluate" in assessing both the condition of the domestic industry and the causal relationship between that

^{39/} We must find that the domestic industry has been "materially injured...by reason of" dumped imports. 19 U.S.C. 1671(a), 1671b(a), 1671d(b), 1673, 1673b(a), 1673d(b). See also Trade Agreements Act of 1979, Report of the Committee on Ways and Means to Accompany H.R. 4537, H.R. Rep. No. 317, 96th Cong., 1st Sess. (1979) [hereinafter cited as 1979 House Report]. The 1979 House Report stated that "the bill contains the same causation elements as present law, i.e., material injury must be 'by reason of' the subsidized or less than fair value imports." Id. at 46-47. See also Trade Agreements Act of 1979, Report of the Committee on Finance on H.R. 4537, S. Rep. No. 249, 96th Cong., 1st Sess. (1979) at 38, 87 [hereinafter cited as 1979 Senate Report].

condition and the presence of dumped imports.^{40/} But they do not tell us how these factors are to be "considered" or "evaluated."^{41/}

Many of the factors listed in the statutes are traditionally used by the Commission simply as criteria for measuring the condition of the domestic industry. Thirteen of these factors (output, sales, profits, productivity, return on investment, capacity utilization, cash flow, inventories, employment, wages, growth, ability to raise capital, and investment in the business) are almost always used by the Commission solely for determining the existence of material injury. Rarely are they central to the Commission's causation analysis. The Commission generally "considers" or "evaluates" these factors by treating them as historical facts caused by other factors, potentially including dumped imports. In recent years the

^{40/} Section 771(7) of the Trade Agreements Act of 1979. The seventeen factors are: domestic prices, output, sales, profits, productivity, return on investment, market share, capacity utilization, cash flow, inventories, employment, wages, growth, ability to raise capital, investment in the business, and import volume, and import prices. 19 U.S.C. 1677(7)(B), (C). The statutes repeatedly advise us to "consider" and "evaluate" any other factors that we find appropriate for analyzing causation in any particular case. See e.g., the introductory language of Section 1677(7)(B) which indicates that the listed factors are to be considered "among other factors," and Section 1677(7)(C)(iii) which more broadly mandates that the Commission "evaluate all relevant economic factors which have a bearing on the state of the industry, including but not limited to [the listed factors]." Subsection (ii) of that same section broadly tells us that the Commission should evaluate the "factors affecting domestic prices."

^{41/} See 19 U.S.C. 1671, 1671b, 1671d, 1673, 1673b, 1673d (the Commission is to "determine" whether material injury, the threat of material injury, or material retardation has occurred). See also 19 U.S.C. 1677(7) (the Commission shall "consider" certain factors and "evaluate" them when "determining" whether material injury, the threat of material injury, or material retardation has occurred). The statute offers no methodology for examining the factors the Commission must analyze in its "consideration" and "evaluation."

Commission's consideration of these factors has been collected in the Commission's opinions (as in this investigation) under a separate heading, "Condition of the Domestic Industry." In most cases I do not disagree with this approach.

The other factors identified in Section 771(7) of the Trade Agreements Act of 1979 play a central role in the Commission's determination of whether the requisite link exists between material injury and dumped imports -- import volume (in both absolute and relative terms (e.g., market share)), import prices, and domestic prices.^{42/} I am certainly not the only Commissioner who focuses most heavily on these three factors when analyzing causation.^{43/}

Although the statutes clearly sanction (indeed, they mandate) that we analyze these factors, they say nothing about what method we should use in doing so. With respect to import volume, Section 771(7)(B) tells us that when we "evaluat[e]" import volume in our analysis, we must "consider" whether the absolute or relative volume

^{42/} See, e.g., 1979 House Report, *supra* note 39, at 46 (referring to analysis of volume and price); see also 1979 Senate Report, *supra* note 39, at 86-87 (referring to volume and price of imports and the price of domestic products).

^{43/} See, e.g., Certain Line Pipes & Tubes from Canada, Inv. No. 731-TA-375 (Preliminary), USITC Pub. 1965, at 13-23 (March 1987) (Views of Commissioners Lodwick and Rohr); Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, and the Netherlands, Inv. Nos. 701-TA-275 through 278, 731-TA-327 through 331 (Final), USITC Pub. 1956 at 22-50 (March 1987) (Views of Commissioners Eckes, Lodwick, and Rohr); Stainless Steel Pipes and Tubes from Sweden, Inv. No. 701-TA-281 (Final), USITC Pub. 1966, at 33-43 (Additional Views of Commissioner Rohr); Certain Stainless Steel Butt-Weld Pipe Fittings from Japan, Inv. No. 731-TA-376 (Preliminary), USITC Pub. 1978, at 12-15 (May 1987) (Views of Commissioners Eckes, Lodwick, and Rohr).

or increases in volume are "significant."^{44/} With respect to prices, Section 771(7)(C) tells us that when we analyze the effects on domestic prices, we should "consider" whether there has been price undercutting by the dumped imports and whether "the effect of [dumped imports]" has been to depress prices or prevent price increases to a "significant degree."^{45/} We are also told that we should "evaluate" generally the "factors affecting domestic prices."^{46/} But, to repeat, nowhere in the statute or in the legislative history are we told how we are supposed to "evaluate" or "consider," or determine the "significance" or "the effects" of, import and domestic product volumes and prices.^{47/} On the contrary, Congress expressly left the

^{44/} 19 U.S.C. 1677(7)(B), (C)(i). See also 1979 Senate Report, supra note 39, at 86-87.

^{45/} 19 U.S.C. 1677(7)(B), (C)(ii). See also 1979 Senate Report, supra note 39, at 87.

^{46/} 19 U.S.C. 1677(7)(C)(iii)(II).

^{47/} The broadest congressional consideration of the analysis of "material injury" is found in the legislative history of the Trade Agreements Act of 1979. See 1979 Senate Report, supra note 39, at 86-88. When explaining the factors the Commission is to examine, the Report states: "With respect to volume of imports, the ITC would consider whether the volume of imports is significant, or whether there is any significant increase in that volume, absolutely or relative to production or consumption in the United States. With respect to prices in the United States of the like product, the ITC would consider whether there has been significant price undercutting by the imported merchandise, and whether such imports have depressed or suppressed such prices to a significant degree." Id. at 86-87. The report continues by requiring the Commission to consider "all relevant economic factors which have a bearing on the state of that industry and certain factors are specified [in the statute]." Id. at 87. No particular methodology is suggested.

The 1979 House Report offers even less guidance. See 1979 House Report, supra note 39, at 46-47 ("the significance of the various factors affecting an industry will depend upon the facts of each particular case."). The report states that, depending on the facts of the case, only a small volume of imports may be necessary to cause material injury, but that the same volume may not be significant in another case. Id. at 46. The report draws a similar conclusion

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selection of the best method of analysis to the discretion of the Commission: "The determination of the ITC with respect to causation is...complex and difficult, and is a matter for the judgment of the ITC."^{48/}

As I have noted above, like my colleagues I have generally assessed the condition of the industry by looking at the reported trends in the factors that measure the industry's condition. One can look at the behavior of a particular factor over time and tell at a glance whether the industry is doing better or worse with respect to that factor than it did in previous periods.^{49/}

I do not, however, generally use trend analysis to resolve the issue of causation. Many factors besides dumped imports affect the performance of domestic producers. The operating and financial performance of any industry depends on a great many factors within the broad areas of costs of production, the level and characteristics of domestic demand, the level and characteristics of domestic supply, and the volume and prices of both fairly traded and unfairly traded imports from many different countries. We can never determine with total precision the exact impact of any one of the many factors

^{47/}(...continued)

about prices, stating that a small price differential may have a determinative effect on sales elasticity in some cases, but not in others. Id. This section of the report does seem to indicate a preference for economic analysis of the factors present in each case. ^{48/} 1979 Senate Report, supra note 39, at 75.

^{49/} As I note above, there may be some question whether the Commission's traditional assessment of the condition of the domestic industry resulting from this analysis of trends in performance indicators in fact fully responds to our statutory mandate. (See Microdisks, supra note 34 (Additional Views of Commissioner Ronald A. Cass)).

within these broad areas. Nevertheless, our responsibility in a dumping case is to isolate the relevant impact of dumped imports and then to assess whether that impact is "material." That does not mean that we should weigh the impact of dumped imports against the impact of other factors. It simply means that we should satisfy ourselves that the relevant adverse impact of dumped imports is itself sufficiently large to be "material" within the bounds of Section 771(7)(A) of the Tariff Act of 1930.

In my view, trend analysis is a difficult tool to use for identifying the effects of dumped imports, for separating those effects from the effects of other factors operating in the marketplace, and for then making a judgment about whether the effects of dumped imports are material. I think it is risky to try to evaluate the extent to which movements in one factor have caused movements in other factors simply by observing the size of those movements and whether they occurred at about the same time.

It appears to me that it was in part the difficulties of traditional trend analysis that led to the remand of the Commission's causation analysis in this case. The original Commission opinion in this investigation cited the small size and stable trend of import market share and then concluded that dumped imports did not cause material injury. The court remanded the Commission's determination because the Commission had not provided any analysis necessary to link the cited facts with the conclusion. The case was remanded for the Commission to consider the "significance of th[e] trend [of import volume and penetration] and its relationship to other facts

uncovered in the investigation." As I discuss further below, assessing the significance of a particular volume or market penetration of dumped imports involves making explicit or implicit judgments about the magnitude of the elasticities of demand, supply, and product substitutability that characterize the aggregate forces at work in the marketplace under investigation.

It is for this very reason that I generally resolve the issue of causation by applying the time-tested tools of elementary economics -- including explicit consideration of relevant elasticities -- to the facts gathered by the staff and reported in the investigation.^{50/}

Much attention has recently been devoted to the role of so-called elasticity analysis (a term I did not create) in Commission investigations.^{51/} To me, elasticity analysis means nothing more

^{50/} The explicit use of standard tools of economics has the advantage of increasing the transparency and predictability of the results of our investigations. It is true that the facts differ in every case, and necessarily must be considered on a case-by-case basis. But it is nonetheless possible to make our decisions more predictable and transparent by placing heavy and explicit reliance on the tools provided by economics and statistics. It seems obvious to me that if the Commission administers the dumping and countervailing duty provisions in such a way that the results of cases are difficult to predict and equally difficult to understand, it will lead to a belief on the part of U.S. producers and importers that our decisions are arbitrary and irrational. In my view, sound economic and statistical analysis, and less reliance on isolated snippets of anecdotal evidence, will lead to more predictable application of our trade laws, which in turn will lead to greater confidence in the integrity of our proceedings.

^{51/} See Color Picture Tubes, supra note 38; See also Internal Combustion Engine Industrial Forklift Trucks from Japan, Inv. No. 731-TA-377 (Final), Hearing Transcript, April 13, 1988 (colloquy between Commissioners and counsel and experts for the parties regarding the use of elasticity estimates in Commission investigations); and A. Eckes, "Economic Illusions and Trade Remedies: An ITC Commissioner's Perspective," Remarks of Commissioner Alfred Eckes, U.S. International Trade Commission, Conference on

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than the explicit use of sound economics in analyzing the facts at issue in a case. As explained by the Director of the Commission's Office of Economics: "Elasticity analysis is simply microeconomic analysis, involving a systematic study of the responsiveness of quantities demanded and supplied to price changes resulting from particular actions."^{52/}

As I noted earlier, there is nothing in the statutes or the legislative history to tell us how we must analyze the factors pertaining to the issue of causation in a case. I use standard tools of economics because they help me focus my analysis on the effects of the dumped imports. Domestic output, prices, and revenues are always determined by a host of factors in addition to the imports under investigation. The concept of elasticity is particularly useful for evaluating whether the reported facts relating to the volume and prices of imports have a sufficiently strong causal relationship to the facts relating to domestic prices, production, and financial performance.

While they may be troubling or mysterious to some, elasticities are just simple tools of standard economics. "Elasticity" is nothing more than a fancy term used in economics to refer to the extent to which one particular factor responds to a second factor, and an "elasticity estimate" is nothing more than a quantitative judgment

^{51/}(...continued)

Economic Issues and Trade Policy, April 15, 1988, Boston, Massachusetts [hereinafter cited as Economic Illusions].

^{52/} Memorandum from the Director, Office of Economics, Memorandum EC-K-470 (December 11, 1987), at 1. A copy of this memorandum was attached to my views in Color Picture Tubes, supra note 38, as Appendix "A".

about the degree of that responsiveness. Whether or not the Commission ever expressly uses the terms in our analysis, three elasticity estimates are nonetheless present in every Commission Title VII investigation. These three elasticities characterize the aggregate forces of demand, supply, and product substitutability at work in an industry.

(1) The Elasticity of Demand. The total revenue received by suppliers in the U.S. market depends on both the price and the volume of the goods that they sell. It is axiomatic for most goods that, as price rises, the quantity demanded in the market falls, other things being equal. In other words, because customers do not have unlimited resources, they will seek out substitutes as price increases. It is equally true that the opposite also generally occurs. As price falls, the quantity demanded generally increases. That is, customers will find the cheaper product more attractive in light of the prices of available alternatives. The "elasticity of demand" simply states in quantitative terms the relationship between aggregate change in the price of a product offered in the U.S. market and aggregate changes in the quantity of that product that will be purchased by U.S. customers.^{53/} When we ask a witness, "How sensitive to changes in price is domestic demand for the product under investigation?", we might equally ask "How elastic is demand?". Both questions mean the same thing.

^{53/} To be precise, the elasticity of demand is the ratio of the percent change in quantity demanded to percent change in price.

(2) The Elasticity of Domestic Supply. The elasticity of domestic supply measures in the aggregate how domestic producers collectively respond to rising or falling prices. As prices rise, producers are generally willing to produce more of the product and, as prices fall, they generally produce less of the product, other things being equal. The degree to which producers are able and willing to expand or contract production varies from industry to industry. When we ask, "How responsive in the aggregate is domestic output of a product to changes in the price of that product?", we are asking the same question as "What is the elasticity of domestic supply?".^{54/} The elasticity of domestic supply is simply a quantitative statement of the relationship between prices in the market and unit volumes that producers are willing to supply.

(3) The Elasticity of Substitution between the Domestic Product and the Imported Product. In nearly every dumping case the parties debate the degree to which the domestic and imported products are fungible or close substitutes. This debate is an essential element of the analysis of whether lower import prices will actually result in lower sales and prices for domestic products. Unless customer tastes change, if the imported and domestic products are not close substitutes, a decline in the price of the imports will not persuade many customers to buy the imports in lieu of the domestic alternative. The higher the degree of substitutability, the greater the likelihood that a given decline in the price of the imports will

^{54/} To be precise, the elasticity of domestic supply is simply the ratio of the percent change in quantity supplied to the percent change in price.

directly translate into lost domestic sales. The central role played by this factor is illustrated by the attention given to the question of product fungibility in the Commission opinions in this investigation. The aggregate degree of substitutability or fungibility between the domestic product and the imported product under investigation is measured by their elasticity of substitution. The term refers to the relationship between the prices of the imported and domestic products on the one hand and the quantities consumed of the two products on the other.^{55/} When we ask "How fungible are the imported and domestic products?", it is akin to asking "How high is the elasticity of substitution?".

It is plain to me that the use of these three concepts is not only allowed by the statutes and legislative history^{56/} but underlies

^{55/} Note that the elasticity of substitution is closely related to another elasticity concept, the cross-elasticity of demand. This latter elasticity is defined as the percentage change in the quantity demanded of one product divided by the percentage change in the price of a second product. Alternatively, the cross-elasticity equals the product of the elasticity of substitution and the relative size of the subject imports in the U.S. market (i.e., their market penetration). See P.R.G. Layard and A.A. Walters, Microeconomic Theory, 1978, pp. 142 and 269.

Since the cross-elasticity of demand between the domestic like product and the subject imports measures the impact on the demand for the domestic product caused by a price change of imports, this particular cross-elasticity necessarily plays an important role in causation analysis. Indeed both the elasticity of substitution and the cross-elasticity of demand measure the same basic factor -- the substitutability of two products.

^{56/} The Senate Report on the Trade Agreements Act of 1979 notes: "Similarly, for one type of product, price may be the key factor in making a decision as to which product to purchase, and a small price differential resulting from the amount of the subsidy or the margin of dumping can be decisive; for others, the size of the differential may be of lesser significance." 1979 Senate Report, supra note 39, at 88.

The House Report, in discussing the various factors affecting the
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the judgments we are obliged to make when we assess whether dumped imports have caused material injury to the domestic industry. We necessarily must rigorously "consider" the relationship of movements in prices and volumes of domestic and imported products in order to evaluate the magnitude of the effect that one has on the other. The strength of the relationships between these factors -- whether expressed explicitly or implicitly -- is not just "theoretical"; it is, rather, the factual reality that lies at the heart of every Title VII case.

Whether or not it is expressly admitted in our opinions, every Commissioner at least implicitly considers these three basic elasticities in every case. As noted by the economic consultants for certain Respondents in the recent Picture Tubes investigation:

The concept of price elasticity is basic to microeconomic theory. It is also basic to the Commission's analyses of causation in all cases because such analyses reflect at least implicit judgments about the relationships among supply, demand, and prices for specific products.... The concept of elasticity is no more than common sense.^{57/}

Petitioners likewise conceded in that same investigation:

As part of the traditional analysis, the Commission has always analyzed the relationship between the volume supplied and price. It has also traditionally included in its analysis the structure

^{56/}(...continued)

domestic industry, states: "For one type of product, price may be the key factor in determining the amount of sales elasticity, and a small price differential resulting from the amount of the subsidy or the margin of dumping can be decisive; in others the size of the margin may be of lesser significance." 1979 House Report, supra note 39, at 46.

^{57/} Posthearing Brief on Behalf of Matsushita Electronics Corporation and Matsushita Electric Corporation of America, Appendix B, Responses to Commissioners' Questions Concerning Supply and Demand Elasticities (ICF Incorporated), at 1 (November 25, 1987).

of the U.S. market and the responsiveness of demand in that market to price.^{58/}

In this investigation, for example, the evaluation of the "significance" of the volume and penetration of Argentine imports, entails explicit or implicit judgments about the elasticities of demand, supply, and substitution that characterize the U.S. marketplace for domestic and Argentine cold-rolled steel. Whether or not they are expressed in the written opinions, judgments about the magnitude of these three elasticities lie beneath every Commissioner's decision in this case.

With respect to the elasticity of substitution, it is relatively easy to see that every Commissioner had to make a judgment about the degree of fungibility that existed between Argentine and domestic cold-rolled steel. The higher the fungibility of the products, the more likely increases in the quantity of one would cause declines in the price of the other, and the more likely sales of one would have displaced sales of the other. Without making this judgment it would have been impossible to consider the extent to which dumped Argentine imports had any effect on the prices for the domestic alternative, or if they captured sales that otherwise would have gone to domestic producers.

The roles of the elasticities of demand and supply, though equally key, require somewhat more explanation. In this investigation, like almost every other, Petitioners alleged that the

^{58/} Posthearing Brief of Petitioners, Appendix E, Responses to Posthearing Questions by Vice Chairman Brunsdale and to Certain Commissioners' Requests for an Evaluation of Office of Economics Memorandum EC-K-451, at 9 (November 25, 1987).

market presence of dumped imports drove down the prices and revenues received by domestic producers. It is a straightforward proposition that the price of products in a free market economy is determined by supply and demand. If we keep that simple principle in mind, it is not difficult to understand the roles of demand and supply elasticities in the Commission's analysis of the price and revenue effects of dumped Argentine imports in this investigation.

The Commission had to make a judgment about the elasticity of demand, because we needed to know the extent to which reduced U.S. market prices would encourage consumers to buy more cold-rolled steel. Looking at the question of lost revenues, unless total demand is completely insensitive to changes in price, lower prices would cause consumers to purchase more steel (a fact that mitigates the revenue loss caused by the lower per/unit prices). And looking at the issue of price suppression, to assess the extent that a given quantity of dumped imports caused lower domestic market prices, we needed to know how far downward domestic prices must have had to move in the aggregate for consumers to have been induced to purchase the total additional steel (imported and domestic) available in the marketplace. Unless we made this judgment about the demand for imported and domestic products at issue in the investigation, we would not be able to assess the impact of dumped imports from the perspective of how they were treated by cold-rolled steel purchasers.^{59/}

^{59/} As I discuss below, as an alternative to making an explicit judgment about the elasticity of demand, we can conduct our analysis
(continued...)

As I explained above, the elasticity of domestic supply tells us in the aggregate how domestic steel producers responded in terms of quantity production to changes in market prices. We needed to make a judgment about the elasticity of domestic supply because we needed to know the extent to which domestic producers contracted or expanded their production in response to movements in domestic steel prices. Stated in the alternative strictly from the perspective of domestic supply, we needed to make a judgment about the extent to which domestic firms could have charged higher prices if they sold higher quantities of cold-rolled steel. We needed to make this judgment about the responsiveness of domestic supply in order to assess both revenue and price effects of the absolute and relative volume of dumped Argentine imports.

It should be apparent from the above discussion and my earlier opinion in this matter that I prefer to make my judgments about the essential elasticities at issue in a case in both specific (i.e., stated in terms of a number or a range) and explicit terms. As I noted above, when we ask a witness "How sensitive is demand to changes in price?", we might equally ask "How elastic is domestic demand?". While the questions are essentially the same, in many cases the answer to the question posed in terms of elasticity will provide far more helpful evidence.

I reach that conclusion for two reasons. First, elasticity is a much more precise concept than other expressions of "sensitivity."

59/(...continued)
by making assumptions about the elasticity of demand most favorable to the Petitioner.

An elasticity estimate computed for two factors literally reflects the observed quantitative relationship between the percent change in one factor and the percent change in the other factor. The higher the computed elasticity, the more responsive one factor is to the other. We can thus compare elasticities from investigation to investigation, using them to evaluate the relative importance of the factors under consideration. This use of elasticities is like asking in our cases: "On a scale of one to one hundred (or compared to some other known industry), how sensitive is domestic demand to changes in price?" I submit that the use of explicit elasticity estimates will produce greater consistency in Commission decisions.

Second, by actually stating the relationship of volumes and prices in terms of estimated numerical elasticities, or ranges of elasticities, the parties and the Commission thereby make explicit judgments about key factors that otherwise are at best merely implicit in the analysis of causation. In this regard I agree with the Commission's Director of the Office of Economics who observed in the Picture Tubes investigation: "Both the Petitioner and the Respondent acknowledge that anyone systematically examining market relationships implicitly uses elasticity estimates; I feel it is preferable to make one's estimates explicit."^{60/} By making explicit judgments about the assumed elasticities that underlie our conclusions, we will produce far more transparent decisions for the parties, the public, and our reviewing courts.

^{60/} Memorandum EC-K-470, supra note 52, at 3.

As a final observation, it should be noted that while I routinely discuss elasticities, I certainly cannot claim the credit for being the first to introduce explicit analysis of elasticity data in Commission opinions. The Commission and various Commissioners have expressly considered elasticities in many cases through the years. These cases include: Television Receiving Sets from Japan (Views of Chairman Alberger, Vice Chairman Calhoun, and Commissioner Bedell commenting on the lack of any "cross-elasticity studies");^{61/} Sugar From the European Community (Views of Chairman Alberger, Vice Chairman Calhoun, and Commissioner Stern considering the elasticity of demand);^{62/} Heavyweight Motorcycles, and Engines and Power Train Subassemblies Therefor (Views of Commissioner Haggart considering the elasticity of demand and the elasticity of import supply);^{63/} Certain Aramid Fibers (extensive discussion of elasticity evidence adopted by the Commission through non-review of that portion of Initial Determination);^{64/} Certain Fresh Potatoes From Canada;^{65/} and Fall-Harvested Round White Potatoes From Canada (Views of Chairman Eckes considering elasticity studies by the U.S. Department of Agriculture);^{66/} Stainless Steel and Alloy Tool Steel (Views of Commissioner Stern considering econometric analyses of supply and demand elasticities prepared by the Commission staff);^{67/} Nonelectric

^{61/} Inv. No. 751-TA-2, USITC Pub. 1153, at 20 (June 1981).

^{62/} Inv. No. 104-TAA-7, USITC Pub. 1247, at 17 n.9 (May 1982).

^{63/} Inv. No. TA-201-47, USITC Pub. 1342, at 50 (February 1983).

^{64/} Inv. No. 337-TA-194, USITC Pub. 1824, Initial Determination at 102-104 (March 1986).

^{65/} Inv. No. 731-TA-124 (Preliminary), USITC Pub. 1364, at 18 (March 1983).

^{66/} Inv. No. 731-TA-124 (Final), USITC Pub. 1463, at 25 (December 1983)

^{67/} Inv. No. TA-201-48, USITC Pub. 1377, at 35 (May 1983).

Cooking Ware (Views of Commissioners Stern and Alberger considering elasticity of demand);^{68/} and Certain Iron-Metal Castings from India (Views of Vice Chairman Calhoun considering elasticity of substitution).^{69/}

The Sources of the Elasticity Estimates that Are Used in Commission Investigations

As I read the Court's opinion on this remand, the Court is concerned not with my explicit use of elasticity data, but rather with the source and reliability of the elasticity estimates that I used. As I discuss below, there is ample reason to believe that the elasticity estimates I used in my analysis are reasonable. Nonetheless I agree with the Court that it is far better to allow the parties an opportunity to participate expressly in the process of estimating relevant elasticities. The process followed in Commission investigations since shortly after I wrote my opinion on the first remand already responds to the problems identified by the Court as being posed by the approach I followed with respect to elasticity data in this case.

Before I comment specifically on how explicit elasticity estimates have been generated in this and subsequent investigations, I have several observations about the general subject of the sources and reliability of elasticity data. Much attention has recently been given to whether the Commission can gather reliable elasticity data during the course of its investigations and, if so, how it should go

^{68/} Inv. No. TA-201-39, USITC Pub. 1008, at 10 (November 1979).

^{69/} Inv. No. 303-TA-13, USITC Pub. 1098, at 16 (September 1980).

about that task.^{70/} I submit that, to a very great extent, the concerns about how the Commission should gather elasticity data are misplaced. As I have already emphasized, every Commissioner must make judgments in every investigation about the essential elasticities of substitution, demand, and supply that characterize the aggregate forces at work in the industry at issue. When a Commissioner states the elasticity estimates underlying a decision on the ultimate issue of causation of material injury, that Commissioner is simply expressly stating conclusions of fact that otherwise would be implicit. When seen in their proper light, as conclusions of fact, elasticity estimates, whether express or implied, should be subjected to no more (or less) scrutiny regarding their reliability and support in the record than other important conclusions of fact reached by Commissioners in the course of investigations. I submit that the most important issue regarding elasticities is not how elasticity data should be gathered, but rather whether Commissioners would better serve the parties, the public, and our reviewing courts by making their judgments about relevant elasticities explicit.

When we do gather evidence on the explicit numerical values of relevant elasticities, we are gathering opinion evidence not unlike the opinion evidence gathered in many other adjudicative proceedings. Elasticity estimates offered by the parties, their experts, or the Commission staff are like other expert opinion evidence or statistical surveys. While their precision will obviously depend on

^{70/} See, e.g., USX 2, supra note 3, at 19-22; Alberta Pork Producers Marketing Board v. United States, 669 F.Supp. 445, 462-463, (CIT 1987); Economic Illusions, supra note 51.

the skill and judgment of the expert computing them and the reliability of the data on which they are based, they are no more theoretical than estimates of reject rates on a production line or expert opinion testimony from a coroner about the cause of a crime victim's death. The reliability and relevance of elasticities can be questioned on the same basis that lawyers and other scholars question other surveys and opinion testimony. But just like other statistical evidence and opinion testimony, elasticity estimates are not theories or theoretical models; they are conclusions of fact.

In the latest remand, the Court contrasted this investigation with Alberta Pork and identified several concerns with the process that generated the elasticity estimates used in my opinion on the first remand.^{71/} I understand the Court to be suggesting that evidence on the specific subject of elasticity estimates would be more acceptable if it were the subject of expert testimony to the Commission, submitted to scrutiny by the parties through adversarial participation in the administrative process, addressed to the specific products involved in the investigation, and founded in a contemporaneous assessment of the characteristics of the relevant industry.^{72/} My approach in investigations subsequent to my decision on the original remand is responsive to each of the Court's concerns.

In each investigation, the Commission's Office of Economics now prepares and delivers to the Commission and the parties prior to the hearing a detailed analysis and estimation (in numbers or ranges) of

^{71/} See USX 2, supra note 3, at 19-22.

^{72/} Id. at 20-22.

the relevant elasticities that characterize the aggregate forces at work in the industry under investigation. This analysis is based on the staff's review of the information then available in the record, including producer, importer, and purchaser questionnaire responses, telephone interviews, field work, and secondary research. The parties then have an opportunity at the hearing and in their post-hearing submissions to reply to the staff's analysis and provide their own estimates for consideration by the Commission.

If the Commission had reopened the record more broadly on the first remand, we could have pursued this rigorous approach. Frankly, to avoid additional burden on the parties, I agreed with my colleagues that the record should be reopened on only a limited basis. One of the costs of that approach was that the parties had no warning that they should explicitly address before the Commission the numerical values of elasticities at issue in this case. That does not mean that they never addressed the relevant elasticities -- since after all these elasticities are implicit in every Commission determination. Nonetheless, I must concede that specifically involving the parties in the process of analyzing and estimating the relevant elasticities would have given us greater confidence in the reliability of my conclusions and would have far better served the goals of reliability and transparency in this proceeding.

The Elasticities and Causation Analysis Used in My Opinion on the First Remand^{73/}

I took the Court quite seriously when it said, on the first remand, that the Commission was supposed to explain the "significance" of the reported volume and market share of Argentine imports. To me there is no better way to explain the significance of a given volume of imports than to assess, as well as possible, what those imports actually "cost" the domestic industry in terms of lost revenues and lower prices.^{74/} In some investigations, such as this one, we can generate a reasonable, explicit "ball park" quantitative judgment of the outside bounds of the lost revenues and price suppression suffered by the domestic industry.^{75/} To make such a judgment, I first reach conclusions about the elasticities that characterize the aggregate forces of demand, supply, and substitution at work in the industry, and then use those elasticity estimates to gauge the outer

^{73/} As I stated above, on this remand I expressly concur in the views of Commissioners Rohr and Lodwick. The views I here express about the basis for my analysis in the first remand are intended merely to explain my original reasoning for the benefit of the public and the parties in future investigations. I find the views of my colleagues to be fully consistent with my own evaluation of the elasticities of substitution, demand, and supply that characterize the forces at work in the cold-rolled steel marketplace, and for that reason I can join them without hesitation.

^{74/} Contrary to the approach pursued by my colleagues (who do not expressly state the results of their analysis in quantitative terms), I prefer wherever possible to explicitly indicate in actual numeric terms my best judgment about the bounds of the injury I conclude was caused by dumped imports.

^{75/} I do not attempt to make a specific, explicit quantitative judgment about the outside bounds of the injury sustained by the domestic industry in all investigations, although it is fair to say that explicit use of relevant elasticities is standard in my decisions in final investigations.

limits of the lower prices and lost revenues sustained by domestic producers.

In my views on the first remand, I made three judgments -- two implicit and one explicit -- about the elasticities that characterize the aggregate forces at work in the domestic cold-rolled steel marketplace:

Substitutability. There is ample evidence in the record to support the conclusion that Argentine and domestic cold-rolled steel were at least moderately, but by no means perfectly, substitutable -- that is, the elasticity of substitution was positive but not infinitely high. For example, Commissioner Rohr expressed the view in his opinion that, when Argentine steel is compared to the domestic alternative, cold-rolled steel "is a relatively fungible product, but one for which purchasers have identified both quality and product differences."76/ The Commission's Office of Economics studied this issue and concluded that the evidence gathered concerning allegations of lost sales suggested that the substitutability of the Argentine and domestic products (stated in terms of their cross-elasticity of demand) was "likely to be at most in a moderate range."77/ To give

76/ See USX Remand Opinion, supra note 10, at 68 (footnote omitted). I expressly concur in this conclusion, and the rest of Commissioner Rohr's analysis of causation for purposes of this remand.

77/ Memorandum from the Director of Investigations, Memorandum INV-K-029, at 26-27 (March 13, 1987). See also id. at 17-18, 23 (discussing customers' comments about quality differences between the domestic and Argentine products).

In his opinion on the original remand, Commissioner Eckes places reliance on the thirteen instances of "underselling" reported in the Commission's investigation. See USX Remand Opinion, supra note 10, at 77. I agree with Commissioner Rohr that these price comparisons should be afforded little weight. Id. at 68. In any event, in light
(continued...)

Petitioners the benefit of all doubt, I assumed in my original views that the Argentine and domestic products were perfect substitutes that is, the elasticity of substitution was infinitely high.^{78/} Under this assumption, I treated every steel customer as infinitely "price sensitive" with respect to every purchase of cold-rolled steel.^{79/}

Elasticity of Demand. Cold-rolled steel is an intermediate product which, in many uses (e.g., manufacture of automobiles, appliances, and electrical equipment), contributes a relatively small part of the total cost of the finished product.^{80/} This fact points to the conclusion that the total quantity of steel demanded in the U.S. market is relatively insensitive to price -- that is, the elasticity of demand is relatively low. While the evidence suggests that the elasticity of demand for cold-rolled steel is low, but not zero, in my analysis on the original remand, I assumed that domestic demand was completely inelastic -- that is, no matter how low prices

^{77/}(...continued)

of the stable market penetration of Argentine imports and the growth in domestic demand, if the pricing pattern could be called "consistent undrselling," it is evidence that the Argentine and domestic products are not highly substitutable. For otherwise, the consistently lower prices for Argentine steel necessarily would produce a rising market share.

^{78/} Under this assumption a customer would always purchase the cheaper product, and there would be no differences in product attributes, such as quality or delivery terms, that would allow domestic firms to charge higher prices without losing sales.

^{79/} Moreover, I assumed that the Argentine and domestic producers were the only suppliers in the U.S. market -- that is, they were the only substitutes. Under this assumption, every sale gained by an Argentine importer was a sale that otherwise would have gone to a U.S. producer at the same product prices. I assumed that none of the sales lost by domestic firms to Argentine imports otherwise would have gone to fairly traded imports from other countries.

^{80/} Memorandum INV-K-029, supra note 78, at 24.

moved in the market, the total quantity of steel demanded would remain the same. When analyzing causation of material injury, this assumption is quite favorable to Petitioners since it assumes that, as market prices fell because of Argentine imports, no new market opportunities were created and every sale gained by the Argentine product was a sale lost by other suppliers in the U.S. market.^{81/}

Elasticity of Domestic Supply. In my analysis on the first remand I made the judgment, on the basis of the best evidence then available, that the elasticity of domestic supply for cold-rolled steel was roughly 3.5. Unfortunately I apparently created the impression that I simply seized upon an estimate of the elasticity of supply for the whole steel industry that had been published in a study by Robert Crandall in 1981.^{82/} On the contrary, my selection of the 3.5 value was based on my review of the evidence in the record and my careful consideration of the analysis of this issue by the Commission's Office of Economics.^{83/} On reflection, I realize I would have better served the interests of reliability and transparency if I had given the parties an opportunity to explicitly address the question of the relevant supply elasticity before I made my judgment on the matter.

I have concurred in the opinions of my colleagues, Commissioners Lodwick and Rohr, who do not explicitly state their judgments about

^{81/} While Commissioners Rohr and Lodwick do not explicitly state their judgments about the elasticity of demand, I nonetheless find their views in this investigation sufficiently similar to mine, in part because any assumption they made about this elasticity would be no more favorable to the domestic industry than the assumption I made.

^{82/} USX 2, supra note 3, at 21.

^{83/} See Memorandum INV-K-029, supra note 78, at 27-28.

the elasticity of domestic supply.^{84/} The discussion that follows is not intended to detract from their analysis. Rather, it is intended simply to explain to the parties, the Court, and the public why my explicit judgment about the magnitude of the elasticity of domestic supply in this investigation was neither arbitrary nor unreasonable.

The record is clear that domestic capacity utilization was low throughout the period of the investigation. The utilization rate was 70.6 percent in 1981, 51.5 percent in 1982, 70 percent in 1983, and 77.7 percent for interim 1984.^{85/} That means that, particularly over the short run, the domestic industry could easily expand production to include the volumes at issue in this investigation without materially raising marginal unit costs.^{86/} Assuming that this is a competitive industry -- a fact that the parties in this investigation do not seem to dispute -- the significant unused capacity means that market prices for cold-rolled steel will rise very little as producers increase their output. This is the same thing as saying that the domestic supply is highly elastic in the relevant range.^{87/}

^{84/} As I read their analysis of causation, which essentially follows a traditional "trend" approach, Commissioners Lodwick and Rohr have implicitly made the judgment that the elasticity of domestic supply is not extremely low. While I would have preferred that they expressed their judgment on this matter explicitly, their failure to do so does not prevent me from concurring in their views in this investigation.

^{85/} Argentine Steel, supra note 4, at A-12.

^{86/} We must consider the relevant elasticity of domestic supply over the proper range. Since at bottom we are asking how the domestic industry was affected by the Argentine imports under investigation, the boundaries of the correct range for determining the elasticity of domestic supply are established by the volume of Argentine imports and time periods implicated in the investigation.

^{87/} Stepping back from the economic jargon for a moment, I simply concluded that if domestic producers expanded their production by the
(continued...)

My conclusion in this regard is reinforced by reference to domestic shipment data in the original staff report.^{88/} These data indicate that, while the average unit price was virtually constant between 1981 and 1983, the volume of domestic shipments fluctuated significantly.^{89/} This wide swing in domestic shipments over a period of relatively stable prices suggests that the domestic supply curve was highly elastic over this three-year period.^{90/ 91/}

^{87/} (...continued)

amount of all Argentine imports, the prices they could demand in the market would be only slightly higher. Surely this does not seem to be a startling conclusion given the fact that the volume of Argentine imports was only equal to between 1 percent and 1.2 percent of total domestic production throughout the period of the investigation.

^{88/} See Argentine Steel, *supra* note 4, at A-13 (Table 7) (confidential data).

^{89/} *Id.*

^{90/} For the record I should note that this analysis from domestic shipment data can be used to give a fair indication of supply elasticity only if the record supports the conclusion that domestic supply conditions have remained relatively stable during the period of the analysis (in economic jargon -- only if the domestic supply curve has not shifted). The facts in this case appear to support such a conclusion. First, the technology used by domestic firms does not appear to have changed dramatically -- capital expenditures as a percent of net sales were low and stable throughout the period. See *id.* at A-18, A-17 (Table 11) (confidential data). Second, wage costs are only about one fourth of variable costs and wage rates did not appear to change substantially. *Id.* at A-16 (Table 10), A-17 (Table 11) (confidential data). Third, the cost of goods sold was steady during the period of the investigation. *Id.* at A-17 (Table 11) (confidential data). Finally, the number of domestic producers remained fairly stable. *Id.*

^{91/} The data for the stub periods (interim 1984 compared to interim 1983) suggest that while supply is elastic, it was not as highly elastic as in the previous period. Shipments of cold-rolled carbon sheet increased from 7,568,000 tons in interim 1983 to 8,308,000 tons in interim 1984, an increase of 9.78 percent. *Id.* at A-13 (Table 7). Over the same period average unit price increased 6.12 percent. *Id.* This suggests that elasticity of supply, which is the ratio of percent change in quantity to percent change in price, was only 1.60.

Turning to the published literature, we found that experts who had studied the subject had concluded that the elasticity of supply for the steel industry as a whole ranged from 1.38 (which seems to me to be low, particularly with respect to small volumes over the short run) to 3.5 (moderate) to 16.24 (high).^{92/} As the staff observed, "cold-rolled carbon steel sheets are the largest volume single steel mill product."^{93/} Because cold-rolled steel is such an important component of steel production generally, I felt safe in concluding that the published literature confirmed my judgment, based on my review of the evidence, that the elasticity of supply was at least in the moderate range.

Based on the foregoing analysis I made the judgment that it was reasonable to use 3.5 -- a moderate value -- as the supply elasticity in my appraisal of the outside ball-park limits of the lost revenues and price suppression suffered by domestic cold-rolled steel producers by reason of dumped Argentine imports. On reflection, it probably would have been better to use a range of elasticity estimates in my analysis and to provide the explanation that now appears above. My selection of a single number, with a simple citation to the Memorandum from the Office of Economics, apparently created the incorrect impression that I had relied solely on published data and that I had intended to select a number that was precisely correct. I had no intention to create either impression.

^{92/} Memorandum INV-K-029, supra note 78, at 24, n.3; 28, n.1.

^{93/} Argentine Steel, supra note 4, at A-5.

The essential point of my judgment regarding the elasticity of domestic supply was that it was not extremely low. Any value greater than 3.5 would have produced an estimate of lost revenues and price suppression lower than the estimate in my original opinion. If (contrary to the facts in the record) I had used the lowest published value for the steel industry generally (1.38), or even a value as low as 1.0, I nonetheless would have concluded that the price and lost revenue effects of dumped Argentine imports were not material. Under the same methodology I used in my opinion on the first remand, if I had assumed that the elasticity of supply was 1.38 and Argentine imports had been "fairly priced," domestic shipments would have been 1 percent higher, domestic prices would have been 0.72 percent higher, and aggregate revenues received by domestic firms would have been 1.72 percent higher.^{94/} Had I judged that the correct elasticity of supply was 1, the results would have been domestic shipments 1 percent higher, prices 1 percent higher, and aggregate revenues received by domestic firms 2 percent higher. Based on my review of the record, I cannot conclude that these numbers are material within the meaning of the statutes. Moreover, the record would not reasonably support a conclusion that the elasticity of domestic supply over the relevant range was so low.^{95/}

^{94/} The mathematics of this computation are very simple if the value selected for the elasticity of supply is simply substituted for the numerical value 3.5 in the calculations set forth in my original opinion.

^{95/} Finally, as I noted earlier, my assumptions regarding the elasticities of demand and substitution called every doubt in favor of the domestic industry. If the domestic and Argentine imports are anything less than perfect substitutes, and if demand is at all

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Of Causation Analysis and "Lost Sales"

While I concur in my colleagues' consideration of lost sales in this investigation, I feel constrained to add some additional comments about the role of "lost sales" evidence in this and other investigations. Because the court expressed some puzzlement over the relationship between the Commission's traditional use of "lost sales" evidence and my analysis of aggregate lost revenues, some explanation is in order.

As I have noted on a number of previous occasions, the consideration of anecdotal evidence of alleged "lost sales" is of limited help in analyzing whether dumped imports have caused material injury to the domestic industry.^{96/} Indeed, the Commission's traditional lost sales evidence has been described by the Commission's Director of the Office of Economics as "not just useless, but seriously misleading because it appears to be something that it is not."^{97/} The lost sales information gathered by the Commission from allegations by domestic firms has the inherent potential of either seriously undercounting or overcounting sales lost by domestic firms.^{98/} Because of these problems, I find that

^{95/} (...continued)
responsive to price, then my original estimate and the estimates above are overstated.

^{96/} See, e.g., Certain Welded Carbon Steel Pipes and Tubes from India, Taiwan and Turkey, Inv. Nos. 731-TA-271-273 (Final), USITC Pub. 1839 at 49-50 (April 1986) (Views of Vice Chairman Liebeler and Commissioner Brunsdale).

^{97/} Memorandum from the Office of Economics, EC-J-010, at 1 (January 7, 1986).

^{98/} As explained by the Director of the Office of Economics, there have been investigations where the Commission actually confirmed more lost sales than total imports. More often than not (as in this

(continued...)

even conclusively confirmed lost sales provide me with only limited useful information beyond the fact that the imported product was a sufficiently good substitute and was priced at a sufficiently low level to capture the sale in question.^{99/} Whether that sale was captured from a domestic producer or another import competitor is often difficult to tell.

In most cases, we have no basis to extrapolate with confidence from anecdotal, individual lost-sales evidence to a conclusion that the aggregate injury to the domestic industry has been material. Moreover, there is no reason why the Commission should take such a step. As noted by the director of the Commission's Office of Economics and as recognized by this court, anecdotal evidence regarding lost sales adds little to the record that is not more reliably provided by aggregate data regarding the factors such as the fungibility of the products under investigation, import volumes, and market shares.^{100/}

With this in mind, I hope it is clear that when I referred to "lost sales" in my opinion on the first remand, I was not referring to the anecdotal evidence referred to in this and other

^{98/}(...continued) investigation) confirmed lost sales account for only a small fraction of total imports or excess capacity. Id. at 4.

^{99/} I concur in Commissioner Rohr's conclusions regarding lost sales evidence in this investigation. As I read his views, he does not find the lost sales evidence to support a quantitative assessment of total domestic sales lost to Argentine imports. Rather, he simply finds it instructive on the differences between the marketing of the domestic and Argentine products.

^{100/} See Memorandum EC-J-010, supra note 98, at 4; Gifford-Hill Cement Co. v. United States, 615 F.Supp. 577, 585-587 (CIT 1985); Lone Star Steel Co. v. United States, 650 F.Supp. 183, 186 (CIT 1986).

investigations as "lost sales." Rather I was referring to the ultimate judgment I made in the form of what I felt was a reasonable estimate of the losses in aggregate revenues caused by dumped Argentine imports. This estimate, which was based on the analysis discussed above in this opinion, is the sum of the total sales "lost" to Argentine imports (which I assumed to be equal to every sale of the Argentine product) plus the lower price received by domestic firms as a result of the price suppression caused by dumped Argentine imports (which I computed through the use of relevant elasticities). I hope that this explanation clarifies this matter for the Court, the parties, and the public.

VIEWS OF COMMISSIONER CASS

Commissioner Cass did not participate in the remand determination. He views the scope of the remand order as limited to further explanation or modification of the individual views enunciated in the Commission's prior decision, a matter directed principally to the Commissioners who participated in this case previously. Further, after reviewing the record in this investigation, Commissioner Cass concludes that the information contained therein is insufficient for a determination of the effect of LTFV imports on the domestic industry under the criteria he believes best effectuate the relevant statutory provisions. See 3.5 Inch Microdisks from Japan, Inv. No. 731-TA-389 (Preliminary), USITC Pub. No. 2076 at 29096 (April 1988) (Additional Views of Commissioner Cass).

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