CELLULAR MOBILE TELEPHONES AND SUBASSEMBLIES THEREOF FROM JAPAN

Views on Remand in
Investigation No.
731-TA-207 (Final)

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UNITED STATES INTERNATIONAL TRADE COMMISSION

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Determination in Investigation No. 731-TA-207 (Final-Remand)

CELLULAR MOBILE TELEPHONES AND SUBASSEMBLIES THEREOF FROM JAPAN

In 1985, the U.S. International Trade Commission determined in Investigation No. 731-TA-207 (Final) that an industry in the United States was materially injured by reason of imports from Japan of cellular mobile telephones and subassemblies thereof, provided for in items 685.28 and 685.32 of the Tariff Schedules of the United States, that were found by the Department of Commerce to be sold in the United States at less than fair value (USITC Pub. No. 1786 (1985)). That determination was subsequently appealed to the U.S. Court of International Trade and remanded to the Commission for further consideration (Mitsubishi Electric Corporation, et al., v. United States and Motorola, Inc., Slip Op. 88-152 (October 31, 1988)). On the basis of its consideration of the record 1/ developed in its remand investigation, the Commission has made a unanimous affirmative determination. 2/ The attached views were submitted to the Court in response to the remand.

1/ The record is defined in sec. 207.2(i) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(i)).

2/ Commissioners Brunsdale, Cass, and Newquist, not present in the initial case, determined on the basis of consideration of the record as supplemented by the remand investigation, that an industry in the United States was materially injured by reason of imports of cellular mobile telephones and subassemblies thereof from Japan.

VIEWS OF ACTING CHAIRMAN ANNE E. BRUNSDALE

Cellular Mobile Telephones and Subassemblies Thereof from Japan

Inv. No. 731-TA-207 (Remand)

February 16, 1989

On appeal from the Commission's final determination in this investigation, 1/ the Court of International Trade ordered the Commission to collect and evaluate any available data pertaining to subassemblies of cellular mobile telephones. 2/ In its decision, the court held that the Commission's reliance on product line analysis 3/ did not excuse the Commission from collecting such data. The court reasoned that the Commission cannot disable itself from investigating narrow product

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1/ Cellular Mobile Telephones and Subassemblies Thereof from Japan, Inv. No. 731-TA-207 (Final), USITC Pub. 1786 (1985) (hereinafter cited as CMT).

2/ Mitsubishi Electric Corp. v. United States, slip op. 88-152 (Ct. of Int'l Trade, October 31, 1988) at 66-70.

3/ This analysis is derived from the second sentence of section 771(4)(D) of the Tariff Act of 1930, 19 U.S.C. § 1677(4)(D). Section 771(4)(D) provides:

> The effect of subsidized or dumped imports shall be assessed in relation to the United States production of a like product if available data permit the separate identification of production in terms of such criteria as the production process or the producer's profits. If the domestic production of the like product has no separate identity in terms of such criteria, then the effect of the subsidized or dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes a like product, for which the necessary information can be provided.

classifications (like subassemblies) by declining to seek data, then rely on the product line provision to support its determination. 4/

I was not a member of the Commission at the time of the original final determination in this invesitgation, and I therefore had no involvement in the preparation of the record or in the formulation of the Commission's views. Nonetheless, recent decisions of the Court of International Trade make clear that the court's instructions on remand are directed to the Commission as a whole and not just to the individual Commissioners who participated in the original investigation. 5/

In previous remands from Commission final determinations, I have taken a narrow view of the appropriate role of Commissioners who are new to the investigation. 6/ In my view, new Commissioners primarily should assist the Commission in correcting the errors identified by the reviewing court, an exercise that may or may not draw into question the overall merits of the original decision. I note that at least one of my colleagues has expressed a similar view. 7/

4/ Mitsubishi Electric Corp., supra, slip op. at 66-70.

5/ Asociacion Colombiana de Exportadores de Flores v. United States, slip op. 88-172 (Ct. of Int'l Trade, December 27, 1988) at 3 n.2 ("[R]emands are made to the ITC, not to the individual commissioners").

6/ See Cold-Rolled Carbon Steel Plates and Sheets from Argentina, Inv. No. 731-TA-175 (Second Remand), USITC Pub. 2089 (1988) at 13 (Views of Vive Chairman Brunsdale) ("I understand my role in 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 am unable to do so").

7/ Frozen Concentrated Orange Juice from Brazil, Inv. No. 731-TA-326 (Remand), USITC Pub. ____ at 15-16 (January 1989) (Statement of Commissioner Ronald A. Cass).

The court in this investigation has ordered the Commission to collect any available information on subassemblies of cellular mobile telephones and to reconsider the determination (including the Commission's reliance on the product line provision) in light of any new information. My role is thus limited to rendering a determination of whether the Commission has complied with that order and whether that event should alter the Commission's original determination. In my view, the Commission has conducted the appropriate supplemental investigation, which has revealed that no useful data on subassemblies exist. I therefore conclude that the Commission's decision in its original determination to rely on product line analysis, and the determination based on that analysis, should stand. 8/

I am satisfied that the conclusion will not lead to an unjust result in this case. I note in particular that three Japanese producers -- Mitsubishi, NEC and Matsushita -- had a significant share of the domestic market during the period of investigation. These three producers were determined to have large dumping margins of 87.83, 95.57 and 106.60 percent, respectively. Absent countervailing considerations relating to

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8/ I note that in the three years since the final determination in this investigation, the Commission has developed, through broader experience, a greater sophistication in its like product determinations concerning electronic devices with several components. In fact, in a case decided just three days ago, the Commission preliminarily determined that a telephone system composed of seven or more sub-assemblies constitutes one like product. Certain Telephone Systems from Japan, Korea and Taiwan, Inv. Nos. 731-TA-426-428 (Preliminary), USITC Pub. ____ (February 1989). While on this record I would have agreed with Commissioner Lodwick that cellular mobile telephones and subassemblies thereof constitute one like product, given the now-confirmed lack of data at the subassembly level, I can confirm then-Vice Chairman Liebeler's view that the number of like products was irrelevant. CMT, supra, at 24 n. 6 (Views of Vice Chairman Liebeler).

the market for the product under investigation, these two factors could lead me to an affirmative determination. 9/

This does not mean, however, that I am satisfied with the Commission's analysis in this case. The Commission rested its decision primarily on three aspects of the cellular mobile telephone market: the financial performance of domestic producers, the increasing market share of imports, and price underselling. I find the Commission's views in each of these areas troublesome.

Cellular mobile telephones were first produced in the United States in 1982. The industry was practically non-existent in 1983, the first year under investigation, yet within two years it had achieved a respectable position in the domestic market. The Commission noted, however, that domestic firms were sustaining financial losses, and that some domestic firms quickly dropped out of production. 10/ These features of the market are not at all unusual given the infancy of the domestic industry. While the financial data of the domestic producers are all confidential, the financial positions of the members of the domestic industry are not at all out of the ordinary for an industry in its first three years of operations; indeed, the Commission noted that the industry appeared to be reversing its financial fortunes and "showing improved trends." 11/ I am therefore somewhat at a loss regarding the Commission's conclusion that the financial

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9/ For a discussion of the use of margins, see Certain Welded Carbon Steel Pipes and Tubes from Taiwan, Inv. No. 731-TA-349 (Final), USITC Pub. 1994 (1987) at 81-82 and the materials cited in id. at 82 n.15.

10/ CMT, supra, at 3.

11/ Id.

data "in their full context" support an affirmative determination. 12/ The "context" would indicate that the domestic industry is performing as expected, and the Commission does not describe the "full context" that disturbs that conclusion.

I also question the Commission's reliance on the increase in import penetration over the period of investigation. The Federal Communications Commission granted the first license for a CMT transceiving system in 1983. Not surprisingly, imports of cellular mobile telephones and CMT subassemblies increased dramatically during the period 1983 to 1985. One could reasonably assume that experienced foreign producers were in a better position than the novice domestic producers to supply and service the newly licensed systems. The question presented is therefore analogous to asking whether a glass is half full or half empty: should we be persuaded by the marked penetration of the imports, or should we be impressed at the respectable performance of the new domestic industry? While neither conclusion is a priori unreasonable, I see no basis in the Commission's opinion for choosing one over the other. Further analysis would appear to be necessary.

Finally, the Commission is not consistent in its treatment of price data. The Commission concludes that there is "intense price competition," 13/ but also notes that "[t]here are many non-price considerations in the purchase of a CMT." 14/ The staff report further indicates that, as the

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12/ Id. at 14.

13/ CMT, supra, at 17.

14/ Id. at 16 n.43. This highlights the advantage of economic analysis. A systematic evaluation of the elasticity of substitution between domestic

(continued...)

domestic market for CMTs has matured, price has become less of a factor in purchasing decisions, and that systems operators are more concerned about profits from on-line service than from equipment sales. 15/ In my view, only the large dumping margins provide support for the conclusion that the dumped imports have had a material price effect in the domestic market.

In conclusion, I note that in the Commission's original determination then-Chairwoman Stern expressed views similar to those set out above. With respect to the domestic industry's financial performance, for example, she stated:

> Any industry early in its product life cycle would be expected to experience difficulties and financial losses even if moving toward a profitable position far more rapidly than predicted. . . . The appropriate context for judging the situation requires an assessment of the impact of LTFV or subsidized imports on the industry's performance. 16/

She also did not rely on import penetration data, noting that "in any new industry import penetration could be expected to change drastically over short periods of time." 17/ That Chairwoman Stern considered these issues and nonetheless reached an affirmative determination provides me with some

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14/(...continued)
and imported CMTs using the information on the record would have illuminated the role of price in purchasing decisions.

15/ Report at A-37, A-39.

16/ CMT, supra, at 18 (Additional Views of Chairwoman Stern).

17/ Id. at 16 n.41.

comfort that our reaffirmation of that decision is proper, though I would always prefer that the analysis of these factors be explicit. 18/

18/ See Omnibus Trade and Competitiveness Act of 1988, Pub. Law 100-418, § 1328, 102 Stat. 1107, 1205, codified at 19 U.S.C. § 1677(7) ("[T]he Commission shall explain its analysis of each factor considered under clause (i), and identify each factor considered under clause (ii) and explain in full its relevance to the determination") (emphasis added).

VIEWS OF COMMISSIONER ECKES

On the basis of the original record in this investigation, as supplemented by the information developed on remand, I determine that industries in the United States are materially injured by reason of imports of cellular mobile telephones (CMTs) and subassemblies thereof from Japan, which are being sold at less than fair value.

In making my determination, I have adopted the like product determination I made in the original Commission determination, that there are eight like products, one consisting of complete CMTs or CMT transceivers or control units, and seven subassembly like products, each of which is comprised of subassemblies performing one of the essential functions of a complete CMT. 1/ Consequently, I also adopt my original determination that there are eight domestic industries, each producing one of the like products. 2/

The information developed during the course of the remand investigation supports the conclusion, implicit in the original determination, that information specific to the seven subassembly industries was not obtainable. The record, as supplemented on remand, demonstrates that available information does not permit the separate identification of production in terms of such criteria as the production process or the producer's profits. Therefore, in this remand it is still

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1/ Those functions, as identified in the Commission's original determination, are audio processing, signal processing (logic), frequency transmitting, frequency receiving, frequency comparing (synthesizing), duplexing (enabling sending and receiving at the same time), and power amplifying. Cellular Mobile Telephones and Subassemblies Thereof from Japan, Inv. No. 731-TA-207 (Final), USITC Pub. 1786 at 6.

2/ Id. at 11.

appropriate to apply section 771(4)(D) 3/ and assess the condition of the subassembly industries in terms of the data on complete CMTs. 4/ Thus, my analysis and conclusions as to the condition of the domestic industries and causation in this remand are the same as stated in the original investigation. 5/

3/ 19 U.S.C. § 1677(4)(D).

4/ See Cellular Mobile Telephones and Subassemblies Thereof from Japan, Inv. No. 731-TA-207 (Final), USITC Pub. 1786 at 11-12.

5/ Id. at 12-17.

VIEWS OF COMMISSIONER LODWICK

On the basis of the original record in this investigation, as supplemented by the information developed on remand, I determine that an industry in the United States is materially injured by reason of imports of cellular mobile telephones (CMTs) and subassemblies thereof from Japan, which are being sold at less than fair value.

In making my determination, I have adopted the like product determination I made in the original Commission determination, that the appropriate like product in this investigation includes complete CMTs, CMT transceivers and control units, and the subassemblies dedicated to the production of CMTs, transceivers, and control units, and found a single domestic industry. 6/ Consequently, the information obtained during the remand investigation was immaterial to my analysis, and had no effect on my determination. 7/

6/ Cellular Mobile Telephones and Subassemblies Thereof from Japan, Inv. No. 731-TA-207 (Final), USITC Pub. 1786 (1985) at 7, n.11.

7/ The original Commission determination examined the condition of the eight industries found by the plurality to exist, based on information for complete CMTs, based on section 771(4)(D) of the Tariff Act of 1930. 19 U.S.C. § 1677(4)(D). Thus, although my determination of one like product and one domestic industry differed from that of the plurality in the original determination, the analysis of the condition of the industry and causation was and remains equally applicable to my determination.

VIEWS OF COMMISSIONER ROHR

On the basis of the original record in this investigation, as supplemented by the information developed on remand, I determine that industries in the United States are materially injured by reason of imports of cellular mobile telephones (CMTs) and subassemblies thereof from Japan, which are being sold at less than fair value.

In making my determination, I have adopted the like product determination I made in the original Commission determination, that there are two like products, one consisting of complete CMTs, and a second consisting of all subassemblies for CMTs. 8/ Consequently, I also adopt my original determination that there are two domestic industries, one producing each of the like products, 9/ and my original conclusions as to the condition of the domestic industries and causation. 10/ The information developed during the course of the remand investigation was immaterial to my analysis and had no effect on my determination.

8/ Cellular Mobile Telephones and Subassemblies Thereof from Japan, Inv. No. 731-TA-207 (Final), USITC Pub. 1786 at 7, n.12.

9/ Id. at 11, n.20.

10/ The original Commission determination examined the condition of the eight industries found by the plurality to exist, based on information for complete CMTs, based on section 771(4)(D) of the Tariff Act of 1930. 19 U.S.C. § 1677(4)(D). Seven of those industries comprised production of all subassemblies dedicated to CMT production, and thus as a whole corresponded to the domestic subassembly industry I determined existed. As the remand investigation made clear, information relating to production of subassemblies is not available, and thus analysis of the subassembly industry by reference to information concerning the CMT industry, under section 771(4)(D), is appropriate.

ADDITIONAL VIEWS OF COMMISSIONER RONALD A. CASS

Cellular Mobile Telephones and Subassemblies Thereof
Inv. No. 731-TA-207 (Final)
On Remand from the Court of International Trade

In an opinion dated October 31, 1988, the Court of International Trade remanded this investigation to the Commission.1/ Although I was not serving on the Commission at the time this case came before the Commission, I recognize that the Court of International Trade has declared that remands are "directed to the entire Commission, and not just individual Commissioners."2/ While this instruction does not define the scope of the remand, I believe it does require me to address the issues that are before the Commission on remand.3/

I. The Remand and the Remand Investigation

The investigation arose from a petition filed on November 5, 1984 by Motorola, Inc., alleging that imports of cellular mobile telephones ("CMTs")

1/ Mitsubishi Electric Corp. v. U.S., No. 85-12-01858, slip op. (U.S. Ct. Int'l Trade, October 31, 1988).

2/ Citrosuco Paulista, S.A. v. United States, Ct. No. 87-06-00703, slip op., 88-176 (Ct. Int'l Trade December 30, 1988), at 60.

3/ Frozen Concentrated Orange Juice from Brazil, Inv. No. 731-TA-326 (Remand) (Additional Views of Commissioner Cass).

and subassemblies4/ thereof from Japan were being sold in the U.S. at less than fair value and that an industry in the U.S. was being materially injured and threatened with material injury, and the establishment of an industry in the U.S. was being materially retarded, by reason of such imports. On October 31, 1985, the Department of Commerce published an affirmative final determination that imports were being sold in the U.S. at less than fair value; that order encompassed both CMTs and subassemblies thereof.5/ On December 17, 1985, the ITC published notice that it had reached a final determination that industries in the U.S. were materially injured by reason of those imports.6/ During the next month, various importers (including OKI Electric Industry Co., Ltd., NEC Corporation, NEC America, Inc., Mitsubishi Electric Corp., Matsushita Communication Industrial Co., Ltd., Matsushita Communication Corporation of America, and Panasonic Industrial Co. (Division of Matsushita Electric Corp. of America) filed individual actions challenging the ITA's affirmative dumping determination and the ITC's affirmative injury determination.7/

4/ The Department of Commerce has defined subassemblies as "any completed or partially complete circuit module, the value of which is equal to or greater than five dollars, and which are dedicated exclusively for use in CMT transceivers or control units. The term 'dedicated exclusively for use' only encompasses those subassemblies that are specifically designed for use in CMTs, and could not be used, absent alteration, in a non-CMT device." Commerce Final Determination on LTFV Sales, 50 Fed. Reg. 45448. Commerce also noted that replacement subassemblies are not within the scope of this investigation. 50 Fed. Reg. 45457.

5/ 50 Fed. Reg. 45447.

6/ Cellular Mobile Telephones and Subassemblies Thereof from Japan, Inv. No. 731-TA-207 (Final), USITC Pub. 1786 (December 1985).

7/ Mitsubishi Electric Corp. v. U.S., No. 85-12-01858, slip op. (U.S. Ct. Int'l Trade, October 31, 1988), at 30.

The appellants' challenge to the action of the International Trade Commission concerned the Commission's like product definition in the investigation, and the appropriateness of the investigation conducted by the Commission in light of that like product definition.8/ The Commission had found that "subassemblies dedicated to the performance of each of the essential functions of a complete CMT constitute a separate like product."9/ There were seven such "essential functions," each of which was regarded by the Commission as a separate like product: audio processing, signal processing, frequency transmitting, frequency receiving, frequency comparing, duplexing, and power amplifying.10/ Nevertheless, the Commission's investigation had asked domestic producers only for information concerning complete CMTs, and had not sought information concerning those producers' financial returns (or related profit, investment, and employment information) with respect to subassemblies.

Because the Commission had not asked for information on these separate like products -- and the information therefore was not "available" to the Commission -- the Commission in reaching its original determination in this final investigation applied a "product line analysis." Although the Commission found seven or eight domestic like products, it evaluated the dumped imports' effect on the domestic industry by using aggregate information on all the like products. In other words, the actual disposition of the investigation was based on the sort of information the Commission

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8/ Mitsubishi Electric Corp. v. U.S., No. 85-12-01858, slip op. (U.S. Ct. Int'l Trade, October 31, 1988), at 62.

9/ Cellular Mobile Telephones and Subassemblies Thereof from Japan, Inv. No. 731-TA-207 (Final), USITC Pub. 1786 (December 1985), at 6-7.

10/ Id.

majority would have deemed relevant if it had found a single domestic like product and a single domestic industry. The statutory basis for reliance on information that is not congruent with the Commission's definition of the domestic industry is Section 771(4)(D) of the Tariff Act of 1930, codified at 19 U.S.C. § 1677(4)(D). That provision states:

> (D) Product lines -- The effect of subsidized or dumped imports shall be assessed in relation to the United States production of a like product if available data permit the separate identification of production in terms of such criteria as the production process or the producer's profits. If the domestic production of the like product has no separate identity in terms of such criteria, then the effect of the subsidized or dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes a like product, for which the necessary information can be provided.

Based on that provision, the Commission used the information it had collected on complete CMT systems and reached an affirmative determination.

Before the Court of International Trade, the appellants argued that the Commission could not properly rely on this provision. Section 771(4)(D) deals with situations in which information is not available, while here the Commission had failed to seek information concerning the production of subassemblies of CMTs that assertedly would have been available had we asked for it.11/

The Court agreed with this argument. Having determined that each principal subassembly of a CMT constitutes a separate like product, the

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11/ Mitsubishi Electric Corp. et. al. v. United States, supra, at 62. The Commission's questionnaire sent to the domestic CMT producers requested that replies to the domestic industry responses should: "report data separately for subassemblies only if such subassemblies are sold to unrelated purchasers as separate units (i.e., if all of your firm's production of subassemblies is used internally to produce transceivers and/or control units, do not separately report data on such subassemblies)." Mitsubishi v. U.S., at 63.

Commission had a responsibility to ascertain whether data were available that would have allowed "the separate identification of production in terms of such criteria as production process or producer's profits."12/ The Court remanded the case to us, directing the Commission

> (1) . . . to request, gather, examine, and consider subassembly-specific information and data that is available to permit the separate identification of production in terms of such criteria as the production process or the producer's profits . . .
>
> (2) Take such other administrative action the ITC deems appropriate not inconsistent with the opinion issued simultaneously herewith; and
>
> (3) Report the results of such remand determination to this Court within 45 days from the date hereof.13/

During the remand, the Commission sent questionnaires requesting subassembly-specific data to producers, importers, and purchasers who were active as such during the period of the original investigation. Virtually all of the companies that received questionnaires responded to the Commission's inquiries by stating that they were unable to provide any subassembly-specific information.14/ None could provide information for all seven subassemblies.15/ Most of the purchasers' questionnaires indicated they had

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12/ Id. at 65 (emphasis in original).

13/ Mitsubishi v. United States, No. 85-12-01858 (Court of International Trade, October 31, 1989), Order, at 1-2. This 45 day period subsequently was extended by 75 days.

14/ Motorola, in comments in this remand proceeding, notes that its own production facilities are organized in terms of functional areas rather than in departments dedicated to the production of particular subassemblies; hence there was no calculation of production capacity by subassembly; no production or online inventory records were retained after the completion f the manufacturing cycles; no shipment records relating to subassemblies as opposed to finished CMTs were kept; etc. Comments of Motorola, Inc., p. 4.

15/ INV-M-016, Feb. 1, 1989, at 2.

made no purchases during the period of investigation. Importers' questionnaires were returned by fourteen companies; ten indicated there had been no imports of subassemblies or otherwise conveyed no usable information, while three of the remaining four contained no price information, and all four indicated imports of different combinations of the subassembly functions, typically combined in different packages that were not comparable among companies.16/

II. The Like Product and Domestic Industry

The absence of subassembly specific information is not at all surprising, for reasons that illuminate difficulties with the Commission's initial determination that each subassembly within the complete CMT system constitutes its own like product. I think the record makes it clear that the Commission in this investigation should find a single industry that produces complete CMT systems and subassemblies, all of which constitute a single domestic like product.

The Commission's traditional approach to determining appropriate like product categories focuses on two types of criteria. First, the Commission looks at the markets in which the products compete for consumers. To that end, the Commission examines the characteristics and uses of the products in question, their interchangeability, customer perceptions of them, and their channels of distribution. Second, the Commission looks at the nature of the market for inputs to these products, asking whether the products are produced by similar employees using similar facilities, process, and materials. The

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16/ Id. at 3-4.

Commission has long recognized that a component part of a final product may, on these criteria, be included in the same product category as the final product.17/

Under our criteria, it is apparent that subassemblies along with complete CMTs are a single product made by a single industry. This is reasonably clear when one focuses on the production side. Subassemblies are part of a continuous production process that results in a CMT, and all subassemblies covered in this investigation are entirely dedicated for use in a CMT.18/ No producer of subassemblies produces only subassemblies. All subassembly producers use the subassemblies which they produce to make compete CMTs transceivers, complete CMT control units, or both.19/ Clearly, separate industries do not produce the seven subassemblies on which several Commissioners focused. The situation is less plain with respect to the two major components into which the subassemblies are integrated, transceivers and control units. To the same extent, transceivers and control units are produced, imported, and inventoried separately. For most domestic producers, however, even this division did not comport with their view of production realities. As Motorola has explained to us in detail in comments on this remand investigation, producers do not organize their production, or their recordkeeping, in terms of the separate subassemblies initially identified by the Commission. Instead, as Motorola notes with respect to itself, " Motorola

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17/ See 64K Dynamic Random Access Memory Components from Japan, Inv. No. 731-TA-270 (Preliminary), USITC Pub. 1735 (1985); Rail Passenger Cars from Canada, Inv. No. 701-TA-182 (Preliminary), USITC Pub. 1277 (1982).

18/ Final Report to the Commission, Cellular Mobile Telephones and Subassemblies Thereof From Japan, 731-TA-207 (Final), November 13, 1985 ("Report"), at A-4.

19/ Report at A-10-12.

was a CMT producer, not simply a subassembly producer; it had no business or other reason to maintain data in the form sought in the Commission's questionnaires."20/ The inability of Respondents to provide subassembly-specific data to the Commission, though they protested the Commission's failure to collect such data before the Court of International Trade, is indicative that subassemblies do not constitute separate like products produced by distinct industries.

The consumption side of our like product analysis makes even more clear the inappropriateness of subdividing the CMT industry. Critically, the two portions of a CMT are sold and function only as a unit; there are no independent uses for either part of a CMT, nor for any subassembly of either part.21/ Further, each manufacturer's subassemblies for each of the major functions of a CMT can only be used in that manufacturer's complete CMT system, as the manufacturers differ in the manner in which they have organized those functions within the subassemblies. The number, configuration, arrangement, and components of the major subassemblies differ depending on the manufacturer's design. It is therefore impossible for the subassemblies to compete for consumers independently of the competition among complete CMT systems.22/ As a result, the channels of distribution for subassemblies and complete systems are essentially identical.

20/ Comments of Motorola, Inc. in the matter of Cellular Mobile Telephones from Japan Inv. No. 731-TA-207 (Final -- Court Remand), at 5.

21/ Report at A-6.

22/ Report at A-7-8.

III. Determination on Remand: Implications of Like Product Analysis and New Information

Having determined that the COmmission's earlier like product decision was in error, I am led to the paradoxical conclusion that its failure to seek disaggregated information did not affect the disposition of the petition before it. Although the Commission in its earlier determination concluded that each subassembly should constitute a separate like product, in fact the Commission treated subassemblies and complete CMT systems as a single product category under its product line analysis. Notwithstanding my disagreement with the Commission's prior like product definition, I do not believe that a different outcome would have resulted from adoption of the like product definition advanced here. The very essence of the Court's objection to the Commission's initial determination was that, notwithstanding its explicit decision to the contrary, the Commission in fact had treated the investigation as though it had found a single like product and single industry appropriate to analysis of injury from the dumped imports. I do not believe that the Commission's treatment of the case in that fashion produced an outcome at odds with one that would follow from my preferred industry definition, especially as the information implicated in the seven- or eight-industry definition is not indeed available.

At this point, I believe our task is at an end. The Commission has performed its responsibility to "request, gather, examine, and consider subassembly-specific information and data that is available. . . "23/ None is

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23/ Mitsubishi v. United States, No. 85-12-01858 (Court of International Trade, October 31, 1989), Order, at 1.

available. Hence, the Commission should not deem other action necessary. In general I believe Commission should treat remand issues narrowly to avoid repeated litigation over identical issues. For that reason, I do not believe it appropriate to reassess the injury done by reason of the dumped imports on remand. Moreover, the record in this investigation is deficient in several respects as compared to records compiled by the Commission in more recent investigations, making assessment of the injury caused by the dumped imports more difficult.

Nonetheless, it is not clear whether the Court intended for us to examine anew the effect of the dumped imports on the domestic industry appropriately defined. Certainly, having found an error in the Commission's initial determination, the Court could have vacated that determination and remanded for reconsideration de novo. Although I do not believe that was the Court's intent, to avoid the need for a second remand, I here briefly explain the decision I would reach de novo.

IV. Material Injury by Reason of LTFV Imports

As I have frequently indicated in the past, I believe that Title VII of the Tariff Act commands a three part inquiry for assessing whether a domestic industry has suffered material injury by reason of less than fair value (LTFV) imports. The first part of this inquiry examines volumes of the LTFV imports and especially the extent to which the volumes changed consequent to the LTFV sales. The change in volume will be associated with the reduction in the price of the LTFV imports that occurs in the particular case when the exporter charges a higher price in a foreign market and a lower price for

sales to the United States. The second part of the Title VII inquiry evaluates the effect of these apparent changes in imports' prices and volumes on prices and, correlatively, on sales of the domestic like product. Third, we must consider the impact of these changes in prices and sales of the domestic like product on employment and investment in the domestic industry. The method by which this analysis is performed and the statutory basis for each of its parts is spelled out in detail in other decisions. I will not repeat those explanations here.

The inquiry outlined above suggests an affirmative disposition of this investigation. Although the record does not provide a basis for great certainty,24/ it appears that imports' prices probably declined, and their U.S. sales volume probably increased, significantly as a consequence of their sale to LTFV. The margins alleged in this case are in some instances sizeable.25/ Nothing in the record indicates that these margins were not substantially reflected in U.S. sales prices. Certainly, the fact that sales

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24/ The Department of Commerce in this investigation used several different methods to calculate the LTFV margins. See Fed Reg. 45447 (1985). Information about the value of imports of each Respondent firm into the United States, and about the value of U.S. consumption of CMT systems or subassemblies, is not available. See Report at A-3. Further, in this investigation, information on foreign markets is not available. Thus it is not possible to assess with the usual degree of certainty what change took place in import volumes and prices by reason of LTFV sales. The importance of such information to assessment of the change in imports' prices consequent to dumping is explained, for example, in Certain Internal Combustion, Industrial Forklift Trucks from Japan, Inv. No. 731-TA-377 (Final), USITC Pub. 2082 (May 1988) (Additional Views of Commissioner Cass), at 131; see also USITC Memorandum EC-L-143 (May 6, 1988), from Office of Economics, at 10. For an example of how I have treated the absence of such information in prior cases, see Light Duty Integrated Hydrostatic Transmission and Subassemblies Thereof, with or without Attached Axles, from Japan, Inv. No. 731-TA-425, USITC Pub. 2149 (Jan. 1989), at 71.

25/ Commerce has reported an LTFV margin for Respondent Matsushita of 106.6%; for Respondent NEC of 96.57%; for Respondent Mitsubishi of 87.83 %; for Respondent OKI of 9.72%; and for Respondent Hitachi of 2.99%. Report at A-4.

in Europe and elsewhere are a significant part of total world sales26/ is at odds with the sort of sales concentration in the United States that might prevent LTFV sales from appreciably lowering the price of imports.

The record also suggests that a significant decrease in the price of the imports lowered the price of the U.S. like product. The record indicates significant substitutability between domestically produced CMT systems and imported CMT systems.27/ Although I do not find the evidence of underselling persuasive respecting U.S. prices, the evidence of relatively easy substitution is consistent with testimony of significant price depression in the United States market. That evidence suggests, furthermore, that the dumping practices had a substantial effect on the sale of domestic CMTs, especially when viewed in conjunction with evidence that U.S. producers were far from producing at full capacity during the period of investigation,28/ and that they held quite substantial inventories over that period.29/

The evidence concerning employment and investment in the domestic industry also are consistent with a conclusion that LTFV imports caused material injury to the domestic CMT industry. As is common in a new industry, both employment and financial indicators for domestic CMT producers have in some respects not been positive over the period of investigation.30/

26/Report at A-32-33.

27/ See report at A-5-6.

28/ Report at A-18.

29/ Report at A-23.

30/ The employment figures for the domestic industry in particular appear not to show any trend of increasing injury. See Report at A-24. However, trends cannot indicate what the employment experience of the domestic industry would have been in the absence of LTFV sales.

Petitioner Motorola, for example, has shown

over the period of investigation.31/ In large part, the evidence shows, these

32/

E.F. Johnson Co., another domestic producer, similarly reported

over this period.33/

In sum, the information in this investigation supports the conclusion that an industry in the United States suffered material injury by reason of LTFV imports of cellular mobile telephones and subassemblies thereof from Japan.

31/ report at A-25.

32/ Report at A-27.

33/ Report at A-29.

VIEWS OF COMMISSIONER NEWQUIST

On the basis of the original record in this investigation, as supplemented by the information developed on remand, I determine that an industry in the United States is materially injured by reason of imports of cellular mobile telephones (CMTs) and subassemblies thereof from Japan, which are being sold at less than fair value.

In making my determination, I have concluded that the appropriate like product in this investigation includes complete CMTs, CMT transceivers and control units, and the subassemblies dedicated to the production of CMTs, transceivers, and control units. As noted by Commissioner Lodwick in the Commission's original determination 11/, all of the subassemblies within the scope of this investigation are dedicated for use in CMTs. There is no independent market for subassemblies, and most are produced by CMT manufacturers themselves, or by contractors, to the unique specifications provided by the CMT producer. Thus, insofar as subassemblies are uniquely configured for the particular CMT model in which they are used, there is no potential for mixing the subassemblies of different CMT producers in a complete CMT by consumers. Based on these factors, I conclude that complete CMTs and the dedicated subassemblies at issue in this investigation comprise a single like product, and that the domestic industry consists of those firms which produce complete CMTs, CMT

11/ Cellular Mobile Telephones and Subassemblies Thereof from Japan, Inv. No. 731-TA-207 (Final), USITC Pub. 1786 (1985) at 7, n.11.

transceivers or control units, and the CMT subassemblies at issue, in the United States. 12/

I also concur with the Commission's original analysis of the condition of the domestic industry, as well as its reasoning in determining that a cause of material injury to the domestic industry has been the subject imports from Japan. 13/

12/ I also join the Commission's analysis and conclusions regarding the related parties issue, as set forth in the original Commission determination. Id. at 9-11.

13/ The original Commission determination examined the condition of the eight industries found by the plurality to exist, based on information for complete CMTs, pursuant to section 771(4)(D) of the Tariff Act of 1930. 19 U.S.C. § 1677(4)(D). Thus, although my determination of one like product and one domestic industry differs from that of the plurality in the original determination, the Commission's original analysis as to the condition of the industry and causation is equally applicable to my determination