# TUBELESS STEEL DISC WHEELS FROM BRAZIL

Views on Remand in
Investigation No.
731-TA-335 (Final)

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**Washington, DC 20436**

UNITED STATES INTERNATIONAL TRADE COMMISSION

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Investigation No. 731-TA-335 (Final)
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DETERMINATION

Pursuant to the Order dated March 10, 1989, of the United States Court of International Trade in the case of Borlem, S.A. Empreedimentos Industriais v. United States, Court. No. 87-06-00693, which order was confirmed by Slip Op. 89-36 (March 22, 1989), the Commission hereby reports to the Court its determination 1/ that the Commission should not reconsider its final affirmative threat of material injury determination in Tubeless Steel Disc Wheels from Brazil, USITC Pub. No. 1971, Inv. No. 731-TA-335 (Final), 52 Fed. Reg. 17,487 (May 8, 1987) in light of the Department of Commerce's ("Commerce") determination in Amended Final Determination of Sales at Less Than Fair Value and Amended Antidumping Duty Order; Tubeless Steel Disc Wheels from Brazil, 53 Fed. Reg. 34,566 (Sept. 7, 1988).

BACKGROUND

On May 8, 1987, the Commission determined that an industry in the United States was threatened with material injury by reason of imports from Brazil of tubeless steel disc wheels provided for in item 692.32 of the Tariff Schedules of the United States Annotated, that had been found by Commerce to be

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1/ Vice Chairman Cass dissenting.

sold in the United States at less than fair value ("LTFV"). 2/ Thereafter, in response to a court remand, Borlem S.A. Empreedimentos Industriais v. United States, 12 CIT ___, Slip Op. 88-77 (June 15, 1988), Commerce, on September 8, 1988, amended its original affirmative LTFV determination, inter alia, to exclude from the scope of its affirmative determination imports from FNV.

On January 24, 1989, Borlem moved the Court in its appeal of the Commission's determination to remand that determination to the Commission to consider, as a matter of primary jurisdiction, whether it should reconsider that determination in view of the Commerce amendment and, if so, to make a new determination. 3/ The Court granted Borlem's motion to allow the Commission to make a finding as to whether to reconsider and, if it found reconsideration to be appropriate, to make a new determination. 4/ The Commission requested and, on March 21, 1989, received briefs from both Borlem and Budd on the issue of whether to reconsider.

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2/ 52 Fed. Reg. 17487 (May 8, 1987).

3/ Borlem, S.A. Empreedimentos Industriais v. United States, Court. No. 87-06-00693, Slip Op. 89-36 (March 22, 1989).

4/ The original order of March 10, 1989, granted the Commission 21 days from March 10 to decide whether reconsideration is appropriate and 60 days from March 10 to make a new determination if it deemed one appropriate. The Commission moved on March 28, 1989 with the consent of both other parties for an extension of the first decision date to April 11, 1989, which motion the Court granted by order dated April 4, 1989.

Views of Chairman Brunsdale and Commissioners Eckes, Lodwick, Rohr and Newquist

Tubeless Steel Disc Wheels from Brazil
Inv. No 731-TA-335 (Remand)

We find that the Commission should not reconsider its determination 5/ that an industry in the United States is threatened with material injury by reason of less than fair value (LTFV) imports from Brazil of tubeless steel disc wheels in light of the Department of Commerce (Commerce) amended final determination. 6/ We conclude that Congress did not intend for such matters to be the basis for a reconsideration by the Commission. We base this conclusion on the relevant statutes, taking into consideration the nature and structure of the statutory process for the conduct of antidumping investigations, and the interests of finality and equity, as well as the consequences for the efficient adminstration of antidumping investigations if matters such as these are remanded to the Commission.

Nature of the Court Remand

The Court's remand order directs the Commission to make "a finding of whether its threat of injury determination should be

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5/ Tubeless Steel Disc Wheels from Brazil, Inv. No. 731-TA-335 (Final), USITC Pub. No. 1971 (April 1987).

6/ Amended Final Determination of Sales at Less than Fair Value and Amended Antidumping Duty Order; Tubeless Steel Disc Wheels from Brazil, 53 Fed. Reg. 34,566 (Sept. 7, 1988).

reconsidered in light of the Commerce Department's determination...." 7/ The Court notes "the issue presented involves complicated questions of administrative policy, practice and procedure..." 8/ and states that the question concerns "the Commission's role in the bifurcated scheme established by Congress for administration of antidumping and countervailing duty laws." 9/ As the Court states, the basis for its review of a Commission decision is whether that decision is "unsupported by substantial evidence on the record or not otherwise is accordance with law." 10/

The ultimate question for the Court is whether a Commission determination that is based, at least in part, on an original determination of Commerce, is "unsupported by substantial evidence or otherwise not in accordance with law" when Commerce subsequently makes an amended determination which contradicts or in some way changes the facts contained in Commerce's original determination. 11/ In this context, the question posed to the Commission is whether there is anything explicit in the statutes, or implicit in the way antidumping and countervailing duty investigations are conducted, that should lead the Court to

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7/ Borlem v. U.S., Slip Op. 89-36 at 15 (March 22, 1989).

8/ Id. at 14.

9/ Id. at 9.

10/ Id. at 6.

11/ The issue arises only in instances when the Commission has already made its final determination.

conclude that Congress intended the Court to consider a subsequent Commerce determination in determining whether the Commission's decision is supported by substantial evidence and otherwise in accordance with law.

To answer the question posed by the Court, we first examined whether there is anything in the statute that explicitly authorizes the Commission to conduct such reconsideration or indicates whether, in light of an amended Commerce determination, the Commission's final determination is unsupported by substantial evidence or otherwise not in accordance with law. Second, we examined the statutory scheme to determine whether it provides an indication of Congressional intent for the Commission to reconsider its determinations in light of subsequent amendments to Commerce's final determinations. Finally, we considered the appropriateness of reconsideration in context of our experience administering the statute. 12/

Statutory Authority

We find that there is no explicit grant of authority for the Commission to undertake a reconsideration of its decisions

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12/ We believe that the most appropriate framework for the Court's consideration of this issue is to consider what Congress intended. We have thus framed our response in terms of that framework. We note that, regardless of the framework the Court ultimately chooses in deciding the question, the substance of the legal and policy arguments which we advance are the same.

except for the process authorized under section 751. 13/

Statutory Scheme

Congress created a complex, but rapid, system for the administration of the antidumping and countervailing duty laws. The system imposes very strict time limits and bifurcates the decisions necessary for the imposition of duties between the Commission and Commerce. The structure requires each agency to rely on the peculiar competence of the other.

The process involves, in the first instance, the decision by Commerce within 20 days of the filing of a petition that a petition is sufficient to warrant an investigation. The Commission then makes a substantive preliminary determination, within 45 days, regarding the effect of imports on the domestic industry, wherein it assumes as true those facts in the petition which relate to matters within the competence of Commerce. Commerce then makes a preliminary determination, in 85/160 days, as to the existence of subsidies/dumping. 14/ This determination is followed by a final determination by Commerce

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13/ We recognize that section 751 review of a Commission determination is not the equivalent of a remand of an original determination. Because the question is not directly before the Commission, we do not prejudge the issue of whether section 751 review might be appropriate in these circumstances. We do believe, however, that if such review is possible, section 751 provides the sole Congressionally mandated mechanism. Another issue we do not address is fraud or abuse of the investigatory process.

14/ See generally 19 U.S.C. 1671a(c), 1673a(c), 1671b(a), 1671b(b), 1673b(a), 1673b(b). We note that the statute allows for the limited extension of these time limits if Commerce provides for such extension.

within 75 days. 15/ The Commerce final determination is followed by a Commission final determination, usually within 45 days of the Commerce final, once again concerning the effect of imports on the domestic industry. The Commission's final determination is followed by the Commerce order imposing duties, usually within two weeks. 16/

As amended by Congress in 1988, the statute authorizes Commerce to reconsider and revise its findings to correct certain ministerial errors. 17/ Subsequently, the Commerce order is followed, annually, by Commerce administrative reviews, which are required by statute if requested in a timely manner. The statute authorizes Commission review of its determination, but only on a showing of changed circumstances (and for reviews within 24 months, also only upon a showing of good cause).

Congress's 1988 authorization of Commerce to undertake reconsideration to correct ministerial errors in its determination is particularly significant. That Congress granted the power to reconsider its determination outside the ordinary time frame for its determinations, but did not provide equivalent authority to the Commission, should be construed as

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15/ See generally 19 U.S.C. 1671d(a), 1673d(a).

16/ See generally 19 U.S.C. 1671d(b), 1673d(b).

17/ Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, Sec. 1333.

prohibiting the assumption of such a power by the Commission. 18/

We note that the disparate treatment of Commission and Commerce determinations with regard to reconsideration in the 1988 Act is not the first instance where Congress provided different treatment for the two agencies' determinations. For example, as discussed above, there is an annual review of the Commerce determination, which is required if requested. 19/ Commission review under section 751 is discretionary and is warranted only under changed circumstances and, if sought within the first 24 months after the determination, only for good cause. 20/ Further, while the Commerce determination is based on the same statutory standard as the original determination, the standard for the Commission's determination in review cases is distinct from the standard used in the original investigation. 21/

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18/ In Pipes and Tubes of Iron and Steel from Japan, Inv. No. 731-TA-15 (Preliminary), the Commission asserted the authority to reconsider a decision because of a clear, although unintended, mistake in its record. 45 Fed. Reg. 42898 (June 25, 1980). The Court found that assertion of such power by the Commission was contrary to the "legislative policy manifest in the governing statute." Babcock and Wilcox v. United States, 521 F. Supp. 479, 486 (CIT 1981). Babcock and Wilcox was subsequently vacated as moot and thus is not precedential. Nevertheless, we find the logic compelling.

19/ 19 USC §1675(a).

20/ 19 USC §1675(b).

21/ Compare 19 USC 1675(a) with 19 USC 1675(b). While the initial determination of the Commission is whether the unfair imports caused or threatened material injury, in section 751

(continued...)

Borlem argues that the Court's decision in Badger-Powhatan 22/ stands for the proposition that the Commission has the authority to change, and, indeed, must reconsider, its determination following a change by Commerce. In that case the Court found that Commerce was required to change its calculation of margins when the Commission, upon finding there were seven like products and making negative determinations as to five of those products, changed the universe of imports used by Commerce in the calculation of margins. 23/

There is, however, a significant distinction between Badger-Powhatan's requirement for Commerce redetermination and a requirement for Commission reconsideration. In Badger-Powhatan Commerce was required to recalculate its margins based on a Commission like product finding and final determination made in the normal course of a Title VII investigation. In the normal course of an investigation, the Commission final determination

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21/ (...continued)
investigation the specific question is whether revocation of the order would lead to material injury.

22/ Badger-Powhatan, Div. of Figgie International Inc. v. United States, 10 CIT 241, 633 F. Supp. 1364 (1986), appeal dismissed 808 F.2d 823 (Fed. Cir. 1986).

23/ The situation that the Court now faces, that in which a subsequent Commerce action might affect a prior Commission action, was a potential consequence of the Court's decision in Badger-Powhatan yet the possibility of ordering Commission reconsideration was not, apparently, seriously considered by the Court. Further as is apparent from the Court's "renvoi" footnote, footnote 9, the possibility of having multiple remands between Commerce and the Commission was dismissed only because it was deemed unlikely. In the present circumstances, in which the Court has approved the use of margins analysis, some renvoi, even if not endless, is more likely than not.

follows the Commerce determination. 24/ Because it could be anticipated, in the normal course of an investigation, that a Commission determination might differ from that of Commerce, it would be reasonable to view Congress as requiring Commerce to issue an order reflecting the coordination of the two final determinations. It is also significant that, at the time the Commission made its determination, the order was not yet issued, and thus requiring a Commerce recalculation did not prejudice the interest of finality.

A consideration of the strict statutory time frames also supports the conclusion that Congress did not intend for reconsideration in the circumstances of the present case. One of Congress's primary concerns in establishing the present system for the administration of the antidumping and countervailing duty laws was to speed up the process by which investigations are conducted and duties imposed. It did so by drastically reducing the time allowed for investigations, even though it was clear that, as a result, the records in investigations would necessarily be less complete. By granting the Commission authority to make determinations on "the best information available" 25/ and by limiting review "to the

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24/ Thus, reconsideration by Commerce of its decision in Badger-Powhatan does not implicate the Congressionally required reliance that each agency must place on the other's work for the system to operate.

25/ 19 U.S.C. § 1677e(b).

record," 26/ Congress recognized that the short time limits involve a trade off in which completing investigations promptly and efficiently are of highest priority.

Thus, looking at the structure of antidumping and countervailing duty proceedings, we conclude that there is no express grant of authority for the Commission to reconsider its determinations in the present situation. Such reconsideration, we conclude, would be actually inconsistent with the statute and the structure of antidumping and countervailing duty investigations.

However, to be as responsive as possible to the Court's remand order, we have also considered whether it is possible to discern a contrary Congressional intent from the policies of finality, equity and efficiency, which relate to the statute.

Statutory Policies

One of the stated purposes for revision of the administrative process leading to imposition of antidumping and countervailing duties in the Trade Agreements Act of 1979 (the 1979 Act) was the need for finality in these investigations. As noted by the House Ways and Means Committee:

The Committee has long been dissatisfied with the

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26/ Congress provided that review should be on the basis of whether the final determination was supported by substantial evidence on the record, that is, on the basis of the facts that were before the agency at the time it made its determination. 19 U.S.C. § 1516a(b)(1)(B). Congress thus precluded the extension of the investigation by discovery or factfinding as to new information during appellate review.

> administration of the antidumping and countervailing duty statutes by the Treasury Department. Investigations and determinations are often too lengthy, and assessment and collection of duties are often unreasonably delayed. . . . The Committee believes that streamlining the process [is] . . . essential to effective administration of the antidumping and countervailing responsibilities. 27/

This concern with a streamlined process and prompt resolution of Title VII investigations is restated by the Ways and Means Committee throughout its report. In fact, at one point, the Committee argues that finality and a streamlined process are the major change to the antidumping and countervailing duty laws envisioned in the 1979 Act:

> The primary focus of Title I of the bill has been to expedite countervailing and antidumping duty proceedings. This is reflected in the shorter periods provided for preliminary and final determinations by the Authority and the ITC, the establishment of statutory, expanded authority to suspend investigations when early action by the foreign government or exporter will eliminate the unfair trade practice, or, in extraordinary circumstances, its injurious effect, and the establishment of a time limit on assessment. 28/

The Senate Finance Committee Report echoes the same concerns in regard to the speed and finality of Title VII proceedings. As stated by the Committee, the 1979 Act will "provide for more expeditious decisions, and more effective

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27/ Trade Agreements Act of 1979, Report of the House Committee on Ways and Means to Accompany H.R. 4537, H.R. Rep. No. 317, 96th Cong., 1st Sess. 24 (1979) [hereinafter cited as 1979 House Report].

28/ 1979 House Report at 48. The Committee Report also states that final investigations should be "expedited." See id. at 67.

provisional and financial (sic) relief, when a domestic industry is damaged by subsidized or dumped imports." 29/

When considered in light of the rigorous statutory timetable discussed above, it becomes clear that these Congressional admonishments for greater speed and limits on deliberations in Title VII proceedings are intended to limit consideration by the Commission and the Department of Commerce in these investigations. Congress was disturbed by length of time necessary to complete antidumping and countervailing duty cases prior to 1979. 30/ Congress intended that the statutes should be administered with all due speed and intended that they offer domestic industries prompt relief. In addition, the prompt and final resolution of these investigations limit the uncertainty and disruption to international trade resulting from such proceedings. For these reasons, it is clear that Congress intended that Commission decisions should be final, subject to appellate review, and should not be subject to prolonged administrative appeals and adjustments before a final decision could be issued.

Congress was also aware that conflicting needs were being balanced in these investigations. Timely and final decisions not subject to administrative revisiting effectuate a party's

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29/ Trade Agreements Act of 1979, Report of the Senate Committee on Finance on H.R. 4537, S. Rep. No. 96-249, 96th Cong., 1st Sess. at 37 (1979) [hereinafter cited as 1979 Senate Report].

30/ See note 27 supra and accompanying text.

right to prompt relief and minimize the disruption to international trade; at the same time, the process does limit the ability of parties to present, and the ability of the administrative agencies to collect, information relevant to the investigation.

In balancing these conflicting interests, Congress demanded thorough investigations by the agencies involved, but recognized that, within the stated timeframes, it might not be possible to collect all the information desirable in each investigation. Congress resolved this by allowing agencies to use "best available information" 31/ and to make decisions not based on "mathematical precision," 32/ but on a judgment based on the record, with all the shortcomings inherent in such a system. Congress realized that a potential for unfairness existed by allowing agencies to make decisions on less-than-exhaustive records. Congress decided that the parties' need for speedy relief and minimal disruption to international trade outweighed this potential for unfairness. 33/

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31/ 19 U.S.C. § 1677e(b).

32/ 1979 House Report at 47.

33/ We are mindful of Borlem's argument that a failure to reconsider in this case may subject it to antidumping duties which it would not have to pay if the Commission's determination were based on data concerning only those exporters found by Commerce to be dumping in its amended determination; however, to authorize reconsideration in all cases where Commerce amends a final determination after the Commission's final determination would seriously undermine the interests in expeditious and final administrative determinations of all parties in all our proceedin

Beyond the concerns discussed above, we wish to note several administrative problems likely to arise should the Commission be required to reconsider its determinations. First, we are concerned about the cost to private parties of presenting their cases before the Commission a second time or multiple times. Congress, in its oversight capacity, has repeatedly expressed its displeasure with the rising cost to parties of Commission investigations. These expenses will be compounded in any case subject to reconsideration. 34/ Further, if Commission decisions were reconsidered, potential petitioners will likely figure the added expenses of such proceedings into their decisions whether to file a petition. We do not want the prospect of court-ordered reconsideration to chill the filing of petitions, especially by small businesses with limited resources.

Second, the Commission is concerned about the added burden on government resources. Although we cannot predict the frequency with which Commerce decisions will result in court-mandated revisions, 35/ we would expect such revisions to result

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34/ Here, we are particularly concerned with the financial burden on parties that participate in a reconsideration to defend the underlying determination. Obviously, parties that request court-ordered reconsideration have made a business decision to incur the expense of litigation in court and re-investigation before the Commission. Given the rising cost of representation before the Commission, however, we are also concerned generally that any party to a reconsideration faces many added costs.

35/ Commerce conceded error in Borlem's appeal of its original determination and the Court remanded that case to

(continued...)

in some requests for court-ordered Commission reconsideration.

The added burden will be exacerbated in cases where the Commission is required to obtain new evidence as part of the reconsideration. 36/ For example in the case at hand, much of the pricing information in the record of our final investigation does not distinguish between Borlem and FNV merchandise. In any reconsideration, therefore, the Commission might well be required to issue new questionnaires to obtain separate pricing data for Borlem. Similarly, in cases where Commerce's exclusion of respondents, sales or products were found to be erroneous, and the Commission's final determination was negative, our reconsideration would almost certainly require some additional investigation. This would involve issuing new questionnaires and analyzing the new data, a time consuming and expensive process. 37/

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35/ (...continued)
Commerce without reaching the merits. In the Commission case, this agency did not oppose a remand on primary jurisdiction grounds and the Court acted on that motion expeditiously.

36/ Asociacion Colombiana de Exportadores de Flores v. United States, 13 CIT ___, Slip Op. 89-3 (Jan. 6, 1989). We note that in this decision, the Court of International Trade declined to require Commerce to recalculate margins when the Court found that Commerce's record was not adequate to permit recalculation to conform the margins to the Commission's like product determinations.

37/ Based on our experience conducting injury investigations, however, we can safely predict that new questionnaires will be necessary in any case where the underlying questionnaire data do not permit breakout of particular information by company. Further, the decision to reopen a record involves the discretion of each individual Commissioner.

Such new data gathering and analysis would be especially problematic in cases where the original period of investigation predates the reconsideration by several years--not an unlikely scenario given the lifespan of many title VII litigations. In this case, the Commission staff has advised us that collecting segregated pricing information that is not present in the original record would be difficult, and that this information may not exist at all. Since many companies destroy their records after a certain time in the regular course of business, the chances of our obtaining adequate new data decrease with each passing year and eventually disappear. Because information would be available to varying degrees in each reconsideration, the result could be a lack of uniformity and consistency in our decisions.

Third, we are reluctant to engage in the type of critical analysis of our sister agency's decisions that parties are likely to demand should reconsideration be a possibility. The Commission has long experience with attempts by parties to persuade it that some aspect of a Commerce determination is erroneous. While we have taken the position that we will not look behind Commerce's determinations, 38/ reconsideration would encourage such arguments. We have found in the past that our

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38/ We note that the Commerce amended determination is currently subject to appeal. If Commerce's determination is not upheld with respect to the exclusion of FNV, the Commission might be required to undo a reconsideration that it conducts now. The uncertainty concerning the Commission's outcome and the potential for additional burdens on the agencies and the parties may be prolonged indefinitely.

processes are impaired when parties advocate such second-guessing, thereby distracting themselves from substantive issues properly before the Commission--particularly those issues the Commission is required by statute to address. Further, it is our experience that this type of second-guessing tends to foster poor relations between two agencies which must cooperate for the bifurcated system to operate effectively.

Finally, many aspects of Commerce determinations could theoretically affect Commission determinations, 39/ either because we are required to consider them, or because Commissioners may consider them as permissible "other factors" in their analyses. We are concerned that, if we are required to conduct reconsideration, Commissioners may feel constrained from adopting approaches that could open their decisions to reconsideration. 40/

We have examined Borlem's arguments carefully and

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39/ As Budd points out, the Commission or individual Commissioners rely on Commerce determinations for matters in addition to the scope of imports to be covered. For example, in making determinations in countervailing duty cases under 19 U.S.C. 1677(7)(E), the Commission must consider information from Commerce as to the nature of the subsidy, particularly whether it is an export subsidy. Further, in cases where Commerce has found critical circumstances, 19 U.S.C. 1671d(a)(2), the Commission must make certain additional findings under 19 U.S.C. 1671d(b)(4). Finally, certain Commissioners rely to varying extents on the margins of dumping or subsidization in making their material injury determinations.

40/ For example, in a plurality determination where one Commissioner relied on a dumping margin in making his determination, reconsideration of that Commissioner's determination could cause reversal of the plurality determination. Parties desiring such reversal would have incentives to seek reconsideration.

appreciate its perception that the system operates to Borlem's disadvantage if the Commission does not reconsider. Nevertheless, for the reasons we have given, we believe that the procedure for rendering antidumping determinations can operate effectively, and as Congress designed it, only if the Commission refrains from creating an exception to the finality of its determinations in order to remedy the exigencies of Borlem's case. Congress opted for expedition and finality in the statutory scheme, and it is our observation that the ability of firms in general to plan and effectively conduct their business, particularly in the area of international trade, depends in no small measure on the stability of administrative processes. Any adjustment in the statutory scheme to provide recourse for those in Borlem's situation is in our judgment properly for Congress and not for this agency or the courts.

DISSENTING VIEWS OF VICE CHAIRMAN RONALD A. CASS

I dissent from the Commission's determination that it is inappropriate for the Commission to reconsider its final affirmative determination in this case in light of the amended dumping finding recently made by the Department of Commerce. Without having seen the opinion that has been submitted to the Court by my colleagues,1/ I cannot comment meaningfully on the reasons why my resolution of this question differs from that of the Commission majority. With that limitation in mind, I will nevertheless explain briefly why I believe that we should reconsider our earlier affirmative determination in this case, even though, in my view, reconsideration of final Commission determinations on the basis of changes in Commerce Department findings should be the rare exception, rather than the rule.

Reconsideration of Commission decisions should not be undertaken lightly. The compressed statutory timeframe established for Title VII antidumping and countervailing duty investigations clearly suggests that Congress wished to minimize the uncertainty and disruption to international trade that necessarily attends such investigations. Consistent with that objective, it is important that there be some measure of finality to our investigations. When we leave open the possibility that

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1/ In this proceeding, as in other Title VII investigations, certain Commissioners among the Commission majority have declined to share their written views with dissenting Commissioners.

our determinations will be revisited, the principle of finality is to some extent compromised.

Nevertheless, as Congress has recognized in providing, without any time limits, for judicial review of Title VII administrative determinations, there are circumstances when such compromise is necessary. The real question before us is whether this case presents such circumstances. I believe that it does, but I emphasize that the circumstances justifying reexamination here are quite exceptional.

The error that has apparently been made, and rectified, by the Department of Commerce is by no means a trivial one.2/ Because we have not had occasion actually to reconsider the Commission's earlier determination, it is not possible to say whether our disposition of this investigation would have been different if this error had not been made. However, the record now before us suggests at least a very strong possibility that the error was outcome determinative.

In its second amended determination concerning the less than fair value pricing that has been alleged in this case, Commerce held that one of the two Respondents in this investigation -- FNV - Veiculos E Equipamentos S.A. ("FNV") -- had a de minimis dumping margin of 0.04%. As a result, FNV is now excluded from Commerce's affirmative determination. In Commerce's earlier determinations, more than de minimis dumping margins were found

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2/ I say "apparently" because it is, of course, possible that Commerce's amended determination will be overturned on appeal.

for FNV as well as the other Respondent, Borlem. On remand, Respondent Borlem argued -- in my view, persuasively -- that this error fundamentally affected the record evidence on a host of issues that may have been critical to the Commission's disposition of the case.3/ In short, the error was so important as to cast in doubt the Commission's entire decision-making process.

I believe that it is appropriate for the Commission to reconsider its earlier determination under such extraordinary circumstances. Clearly, this is the result that is most consistent with the requirement that justice be afforded to the parties. I recognize that it may be argued that we do not have the authority to see that justice is done in this instance. However, in my view, this argument is unpersuasive.

If Title VII investigations were not a bifurcated process -- that is, if the authority for such investigations were vested in a single agency, rather than divided between the Commission and the Commerce Department -- I believe that no one would question the authority of the responsible administrative agency to reevaluate an injury determination in light of information indicating that many of the essential predicates of that determination were erroneous. Indeed, but for the bifurcation, the remand to Commerce would have opened a unified decision to a reexamination of the bases for the injury determination as well

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3/ See Brief of Borlem, S.A. Empreedimentos Industrais.

as the predicate definition of the scope of the investigation. There evidently was legal error committed by the Department of Commerce, and that error plainly influenced the subsequent determination of threat of injury by the Commission. This is by no means a harmless error, and it seems incumbent on the relevant decisionmaker to evaluate what outcome is appropriate given the radically different delineation of the scope of the injury investigation.

Admittedly, the Title VII process is in fact bifurcated. The usual standards for judicial review -- did this agency commit legal error or did it, on the record before it at the time of its decision, lack substantial evidence to support that decision? -- may produce very different results in that context. Indeed, here it would appear that no basis exists for reversal of the Commission's decision viewed alone. In the ordinary case, I would not anticipate that our reviewing court would request us to consider or would order a revisitation of our decision on the basis of legal errors by Commerce in the disposition of issues committed to that Department.4/ Even so, it is not evident from the language or legislative history of Title VII that Congress anticipated, let alone intended, that the bifurcation of the investigation process would preclude us from considering the

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4/ For example, there may be instances, perhaps numerous instances, in which the Commerce Department makes minor errors, in the calculation of dumping margins or otherwise, that do not justify reconsideration of an injury determination by the Commission.

consequences for our determinations of major errors in specification of the scope of our investigation such as occurred here. There is at least an arguable tension between such an outcome and our obligation under the GATT to provide an appropriate injury determination for cases of this sort. Title VII, as amended, is clearly intended to implement the GATT Codes to which the United States is a signatory. It is by no means clear that our decision to bifurcate our proceeding would be accepted under the GATT as an adequate basis for refusal to revisit an injury determination that -- substantively, if not procedurally -- was fatally flawed.

Of course, even that concern need not mandate reconsideration at this time. We might wait until ordered to review by the Court. Further, as the Department of Commerce's redetermination of the scope of this investigation might be found invalid on review, staying our hand might be justified as promoting economy. However, when, as here, the Court has already stayed its proceedings awaiting our consideration of this matter, and when the revision by Commerce of the scope of investigation (which, like its initial determination, is presumptively valid) is of such obviously substantial magnitude, I see little to be gained by delay.