CERTAIN TELEPHONE SYSTEMS AND SUBASSEMBLIES THEREOF FROM JAPAN AND TAIWAN

Determinations of the Commission in Investigations Nos. 731-TA-426 and 428 (Final) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigations

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UNITED STATES INTERNATIONAL TRADE COMMISSION

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Note.--Information that would reveal the confidential operations of individual firms may not be published and therefore has been deleted from this report. Such deletions are indicated by asterisks.

UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigations Nos. 731-TA-426 and 428 (Final)

CERTAIN TELEPHONE SYSTEMS AND SUBASSEMBLIES THEREOF FROM JAPAN AND TAIWAN

Determinations

On the basis of the record[1] developed in the subject investigations, the Commission determines,[2] pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)) (the act), that an industry in the United States is materially injured by reason of imports from Japan and Taiwan of certain small business telephone systems and subassemblies thereof,[3] provided for in subheadings 8504.40.00, 8517.10.00, 8517.30.20, 8517.30.25, 8517.30.30, 8517.81.00, 8517.90.10, 8517.90.15, 8517.90.30, 8517.90.40, and 8518.30.10 of the Harmonized Tariff Schedule of the United States (previously in items 682.60, 684.57, 684.58, and 684.59 of the former Tariff Schedules of the United States), that have been found by the Department of Commerce to be sold in the United States at less than fair value (ŁTFV).

Background

The Commission instituted these investigations effective August 2, 1989, following preliminary determinations by the Department of Commerce that imports of certain small business telephone systems and subassemblies thereof from Japan, Korea, and Taiwan were being sold at LTFV within the meaning of

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

[2] Chairman Brunsdale, Vice Chairman Cass, and Commissioner Lodwick dissenting.

[3] For the purposes of these investigations, "certain small business telephone systems and subassemblies thereof" are telephone systems, whether complete or incomplete, assembled or unassembled, the foregoing with intercom or internal calling capability and total nonblocking port capacities of between 2 and 256 ports, and discrete subassemblies designed for use in such systems. A subassembly is "designed" for use in a small business telephone system if it functions to its full capability only when operated as part of such a system. These subassemblies are defined as follows: control and switching equipment, whether denominated as a key service unit, control unit, or cabinet/switch; circuit cards and modules, including power supplies; and telephone sets and consoles, consisting of proprietary corded telephone sets or consoles.

section 735 of the act (19 U.S.C. § 1673d(a)). Notice of the institution of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the Federal Register of August 16, 1989 (54 F.R. 33783). The hearing was held in Washington, DC, on October 31, 1989, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on November 29, 1989. The views of the Commission are contained in USITC Publication 2237 (November 1989), entitled "Certain Telephone Systems and Subassemblies Thereof from Japan and Taiwan: Determinations of the Commission in Investigations Nos. 731-TA-426 and 428 (Final) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigations."

VIEWS OF COMMISSIONER ECKES, COMMISSIONER ROHR, AND COMMISSIONER NEWQUIST

On the basis of the information gathered in these final investigations, we determine that the domestic industry producing equipment dedicated for use in small business telephone systems (SBTSs) is materially injured by reason of imports from Japan and Taiwan that the Department of Commerce (Commerce) has determined are sold at less than fair value. 1/ Our determinations are based, inter alia, primarily on the poor financial condition of the domestic industry that is the result, at least in part, of the significant volume and market share of cumulated LTFV imports and their depressing and suppressing effect on domestic prices and profits. 2/

I. Like Product

A. Legal Standards

In order to determine whether there is "material injury" to a domestic industry, the Commission must first define the "domestic industry." 3/ Section 771(4)(A) of the Tariff Act of

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1/ We note that the investigation as to Korea has been extended by Commerce and a separate Commission determination is due to Commerce on January 31, 1990. 54 Fed. Reg. 33261 (August 14, 1989).

2/ See Additional Views of Commissioner Eckes.

3/ Material retardation of the establishment of a domestic industry is not an issue in these investigations. Further, in light of our determination that the industry is currently experiencing material injury by reason of the LTFV imports, we do not reach the issue of threat of material injury.

1930 defines the relevant domestic industry as the "domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product." 4/ "Like product" is defined as a "product that is like, or in the absence of like, most similar in characteristics and uses with, the article subject to investigation." 5/

The Commission's decision regarding the appropriate like product(s) in an investigation is essentially a factual determination, and the Commission has applied the statutory standard of "like" or "most similar in characteristics and uses" on a case-by-case basis. 6/ Generally, the Commission disregards minor variations between the articles subject to an investigation, and requires "clear dividing lines among possible

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4/ 19 U.S.C. § 1677(4)(A).

5/ 19 U.S.C. § 1677(10).

6/ In analyzing like product issues, the Commission generally considers a number of factors relating to characteristics and uses including: (1) physical appearance, (2) interchangeability, (3) channels of distribution, (4) customer perception, (5) common manufacturing facilities and production employees, and, where appropriate, (6) price. Asociacion Colombiana de Exportadores de Flores v. United States, 12 CIT ___, 693 F. Supp. 1165, 1168 n.4, 1180 n.7 (1988) (Asocoflores); 3.5" Microdisks and Media Therefor from Japan, Inv. No. 731-TA-389 (Final), USITC Pub. 2170 at 7-8 (March 1989); Certain Telephone Systems and Subassemblies Thereof from Japan, Korea, and Taiwan, Invs. Nos. 731-TA-426-428 (Preliminary), USITC Pub. 2156 at 3-4 (February 1989) (hereinafter SBTS Preliminary). No single factor is necessarily dispositive, and the Commission may consider other factors it deems relevant based upon the facts of a particular investigation.

like products." 7/

The imported articles subject to these investigations are small business telephone systems (SBTSs) and subassemblies thereof from Japan and Taiwan. 8/ Thus, these investigations cover a component product (subassemblies) and a finished product (the equipment assembled into a telephone system). 9/

7/ SBTS Preliminary at 4, n.4 (citing Asocoflores, 692 F. Supp. at 1170, n.8).

8/ Commerce's final determinations state that the scope of the investigations includes "telephone systems, whether complete or incomplete, assembled or unassembled, with intercom or internal calling capability and total non-blocking port capacities of between 2 and 256 ports, and discrete subassemblies designed for use in such systems. A subassembly is 'designed' for use in a small business telephone system if it functions to its full capability only when operated as part of a small business telephone system." 54 Fed. Reg. 42541 (Oct. 17, 1989)(Japan); 54 Fed. Reg. 42543 (Oct. 17, 1989)(Taiwan). A port is a point of access in a system, whether internal or external. Report of the Commission (Report) at A-7, n.11. Since subassemblies must be dedicated for use in a SBTS in order to be within the scope of these investigations, "dual use" subassemblies capable of full functionality in a large system are not within the scope of these investigations. Available data suggest that the domestic industry produces no significant amount of "dual use" subassemblies. With the exception of two importers, no respondent claims to import a significant amount of "dual use" subassemblies. See discussion of the allegedly "dual use" imports infra.

9/ When considering whether "semifinished" or "component" articles are "like" the finished product, the Commission typically examines: (1) the necessity for, and the costs of, further processing, (2) the degree of interchangeability of articles at the different stages of production, (3) whether the article at an earlier stage of production is dedicated to use in the finished article, (4) whether there are significant independent uses or markets for the finished and unfinished articles, and (5) whether the article at an earlier stage of production embodies or imparts to the finished article an essential characteristic or function. Light-Duty Integrated Hydrostatic Transmissions and Subassemblies Thereof, With or Without Attached Axles, from Japan, Inv. No. 731-TA-425

(continued...)

B. Issues Considered in the Preliminary Investigations.

There were three fundamental like product issues decided in the Commission's preliminary determinations. These issues involved: (1) whether subassemblies should be considered separate like products from one another and from telephone systems, (2) whether the like product should include larger private branch exchanges (PBXs), and (3) whether digital and analog equipment should be considered separate like products.

In the preliminary determinations, we concluded that all subassemblies dedicated for use in a SBTS should be considered a single like product. 10/ We also concluded that the inclusion of larger systems in the "like product" was not warranted. 11/ Finally, after evaluating the appropriate factors (especially the lack of any distinction between the two in terms of production, distribution, and customer perception), we concluded that both digital and analog subassemblies and systems constitute one like

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9/(...continued)
(Preliminary) USITC Pub. 2149 at 19, n.54 (January 1989); Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, Inv. Nos. 303-TA-19 and 20, 731-TA-391-399 (Final), USITC Pub. 2185 (May 1989).

10/ Our determination was primarily based on the interrelationship of the markets for the various subassemblies and the commonality of production facilities. SBTS Preliminary at 13.

11/ Small and larger systems are distinguishable, not only in terms of their physical characteristics and lack of interchangeability, but also in terms of channels of distribution, customer perceptions, manufacturing facilities, and production employees. Further, the area of overlapping competition is extremely limited. Id. at 21.

product. 12/

None of the respondents who raised these issues in the preliminary investigations has challenged our resolution of them in the preliminary determinations. Further, no information gathered in the final investigations leads us to believe that we should change those determinations. Therefore, we confirm them.

C. Issues Raised in the Final Investigations

Respondents raised additional like product issues in the final investigations. First, they assert that Centrex services, which are admitted by all parties to compete with SBTS equipment, should be considered part of the domestic like product and that the providers of Centrex services are, therefore, domestic producers. Second, they insist that refurbished equipment should be included in the like product.

1. Centrex

In our preliminary determinations, we recognized that Centrex services may be a competitive factor in the SBTS market. 13/ Centrex is the generic name given to switching services provided exclusively by local telephone companies using central office switching equipment (rather than a customer-owned switch) to route calls to, from, and within the customer's business

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12/ A telephone system can employ varying degrees of digital and analog technology. Furthermore, both digital and analog systems are put to the same use and are capable of providing data, as well as voice transfer capabilities. SBTS Preliminary at 20.

13/ SBTS Preliminary at 41-42.

premises. 14/ In the preliminary investigations, we declined to make a final assessment of the effects of Centrex on the condition of the industry producing SBTSs in the absence of complete data. 15/ Neither the parties nor the staff, however, suggested in the preliminary investigations that Centrex services raised a like product issue. Respondents now suggest that Centrex service should be included in the like product. 16/ Petitioner disagrees.

While we have not previously had the occasion to directly address the issue of whether a service can be part of the like product, we determine that Centrex services cannot be considered a like product in these investigations. 17/ Respondents suggest,

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14/ Report at A-13. Centrex offers two basic elements. First, it provides customers with the "local loop" connecting the customer to the telephone company's central office. Second, Centrex provides certain features and functions that a customer may choose to obtain either by purchasing a PBX or via Centrex. Respondents' Centrex Submission dated September 26, 1989.

15/ SBTS Preliminary at 41-42.

16/ Respondents insisted that the Commission send producer questionnaires to the seven Regional Bell Operating Companies (RBOCs), the primary providers of Centrex service. The Commission did not send producer questionnaires to the RBOCs. Six of seven RBOCs, however, responded to interconnect questionnaires. Report at A-13. The Commission obtained sufficient data from primary and secondary sources to reach a determination of the like product issue and evaluate the impact of Centrex on the domestic industry during the period of investigation.

17/ In making like product/domestic industry determinations, the Commission traditionally focuses on the nature of domestic production-related activity. See generally, SBTS Preliminary; All-Terrain Vehicles from Japan, Inv. No. 731-TA-388 (Final), USITC Pub. 2163 at 7-8 (March 1987); Erasable Programmable Read Only Memories from Japan, Inv. No. 731-TA-288 (Final), USITC Pub.

(continued...)

as a matter of law, that services can be considered part of the like product. 18/ We do not believe that Title VII contemplates such a broad interpretation of the term "product." Certainly there is nothing in the statute or its legislative history that directs the Commission to include services within the definition of a "product," or indicates that Congress intended any such inclusion. In the absence of such direction from Congress, we do not believe that the Commission should expand the reach of Title VII to encompass services.

Moreover, even if services could be considered part of the like product as a theoretical matter, Centrex service would not qualify for such treatment as a factual matter since it is not a product "most similar in characteristics and uses, with the article subject to investigation." 19/ Centrex services are not physically identical or even similar to SBTSs, they are not produced in the same manner, nor are they dedicated for use in SBTSs. The product "most similar" to imported SBTSs and subassemblies are domestic SBTSs and subassemblies. 20/

17/(...continued)
1927 at 11, n.26 (December 1986)(inclusion of firm in domestic industry dependent upon analysis of production-related activity in the United States and the value added thereby).

18/ Public Transcript of Hearing (Public Transcript) at 290-91.

19/ 19 U.S.C. § 1677(10).

20/ In addition, providers of Centrex services distribute their "product" in much the same manner as an interconnect and should not be treated differently from interconnects, as respondents suggest. Like interconnects, providers of Centrex services purchase all of their equipment and are not engaged in any
(continued...)

Although not specifically raised by the respondents, we also considered whether the equipment used in providing Centrex services was "like" equipment used in SBTS. Such equipment is different from SBTS equipment in terms of production processes, methods of distribution, and physical characteristics. Moreover, the "producers" of that equipment are not the local telephone operating companies that respondents urge us to include in the domestic industry. Furthermore, the inclusion of Centrex equipment would further suggest the inclusion of larger PBXs and virtually all other types of telecommunications equipment within the like product. Such a result would blur a clear dividing line separating producers of equipment dedicated for use in a SBTS from producers of other telecommunications equipment.

In sum, we believe that services are not eligible for inclusion in the like product. Further, even if the equipment which is used to provide Centrex services could be part of the like product in theory, such equipment is not most similar in characteristics and uses with the imported product and should not be included in the like product, as a factual matter. 21/ We note, however, that all parties agree that Centrex is a

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20/(...continued)
manufacturing activity. Some of the equipment is sold to the end user, while other equipment is retained by the Centrex provider who essentially leases space on that equipment to the end user.

21/ We also observe that, given the market share attributable to Centrex service as opposed to domestic producers of SBTS, the overall domestic industry data would not be significantly affected by the inclusion of Centrex "producers." See Report at A-38, Figure 4.

competitive factor in the SBTS market. We believe that it is more appropriate to treat Centrex as a factor in our causation analysis. 22/

2. Refurbished Equipment

In our preliminary determinations, we considered the competitive impact of sales of refurbished equipment on the domestic industry producing new equipment. We did not consider, nor did any party argue, whether refurbished equipment should constitute part of the "like product." 23/ Refurbished equipment is essentially "used" equipment, offered at a discount, and is in all material respects the functional equivalent of "new" equipment. 24/

As noted above, we believe that the statutory definition of like product and domestic industry presumes actual production-related domestic activity. 25/ As to refurbishers, the issue is whether they are wholesalers or domestic producers of equipment for SBTSs. 26/ Refurbishers engage in relatively little production-related activity. Refurbishers market used equipment, repair that equipment if necessary, and cannibalize that

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22/ See discussion infra.

23/ SBTS Preliminary at 42, n.101.

24/ See Report at A-13, A-37.

25/ 19 U.S.C. § 1677(4)(A).

26/ In this regard, our inquiry regarding the status of refurbishers is similar to the analysis that we traditionally employ in determining whether firms that import parts and assemble finished products in the United States are domestic producers

equipment for parts. Refurbishers also purchase unsold inventories from producers for sale in the secondary market.

Thus, refurbishers are essentially wholesalers of equipment and parts suppliers with minimal assembly and repair operations, which do not involve substantial domestic production-related activity. 27/ In contrast, domestic producers, while they may purchase some parts, manufacture all of their subassemblies. 28/ Therefore, we believe that the production activities of refurbishers are insufficient to warrant their inclusion as producers of the like product. Moreover, to the extent that refurbished equipment was originally produced during the period of investigation, the production of that equipment has already been captured in the Commission's data. Inclusion of refurbished equipment in the like product would essentially allow double-counting in such instances.

Inclusion of refurbished equipment in the like product would be a significant expansion of traditional Commission like product analysis. We are not aware of any case, nor have the parties

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27/ The sales brochure of the Source, Inc. (identified as the largest refurbisher in the United States) lists the following activities of refurbishers: sales of equipment and parts, removal of equipment, inspection, storage, remarketing, reconfigurations, reconditioning, and installation. Manufacturing or other production-related activity are noticeably absent from the list. The Chairman of the Source, Inc., when asked to describe his operations, stated that "we package and sell knowledge."

28/ We note, however, that in terms of physical characteristics and uses, new and used products are very similar. In fact, refurbishers have reported selling new equipment on the secondary market. This would essentially consist of unsold inventory of older systems.

cited to any, wherein the Commission determined that "used" product is part of the like product. 29/ Although we determine that inclusion of refurbished goods in the like product is not warranted, refurbished goods are admittedly a competitive factor within the SBTS market and we will consider the significance of refurbished goods in our causal analysis together with other factors that have had an impact of the domestic industry. 30/

C. Conclusion

In our preliminary determinations, we found one domestic like product, consisting of "all equipment dedicated for use in a small business telephone system" produced in the investigation period. 31/ We again adopt that like product definition in our final determinations. We do not subdivide the like product into subassemblies or component parts, nor do we expand the like product to include services.

II. Domestic Industry and Related Parties

The domestic industry issues relevant to these investigations are limited. First, we must consider whether certain domestic firms that subcontract their production work

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29/ Cf. New Steel Rails from Canada, Inv. No. 731-TA-423, 701-TA-297 (Preliminary), USITC Pub. 2135 at 7, n.16 (November 1988) (used rail not like new rail).

30/ See discussion infra. We also note that the market share of refurbished equipment is sufficiently small so that inclusion of refurbishers in the domestic industry would not have a significant effect on overall industry indicators.

31/ SBTS Preliminary at 13.

offshore are domestic producers. Second, we must determine whether to exclude certain domestic producers who are related to exporters or importers, or are themselves importers, of the subject merchandise.

A. Domestic Producers or Importers

In these final investigations, petitioners again challenge the status of Executone, as well as that of Inter-Tel and NEC America, as domestic producers on the ground that they do not perform "substantial physical manufacturing activities." 32/ Neither Executone nor Inter-Tel responded to the Commission's producer questionnaire, and neither has contested AT&T's arguments in their submissions to the Commission during the final investigations. Without information from Executone and Inter-Tel regarding their internal production operations, it is not possible to provide a detailed analysis of their domestic production-related activity. Given the information of record in these final investigations, we determine that the domestic activities of Executone and Inter-Tel are not sufficient to consider them domestic producers. Therefore we have not included their operations in our analysis of the condition of the domestic industry. NEC America did respond to the Commission's producer questionnaire. On the basis of the available information, NEC America apparently does perform substantial production activity domestically. 33/ We therefore include NEC America's domestic

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32/ Prehearing Brief of AT&T at 30-34.

33/ Prehearing Brief of AT&T at 33.

operations in the domestic industry.

B. Related Parties

The related parties provision, 19 U.S.C. § 1677(4)(B), allows for the exclusion of certain domestic producers from the domestic industry when a producer is related to exporters or importers of the product under investigation, or is itself an importer of that product, and the Commission determines, in the exercise of its discretion, that the circumstances are appropriate for exclusion. 34/ The Commission has examined three factors in deciding whether appropriate circumstances exist to exclude the related parties. Those factors include:

> (1) the percentage of domestic production attributable to the importing producer;
>
> (2) the reasons the U.S. producer has decided to import the product subject to investigation, i.e., whether simply to benefit from the LTFV sales (or subsidies) or whether to enable it to continue production and compete in the U.S. market, and
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> (3) the position of the related producer vis-a-vis the rest of the industry, i.e., whether inclusion or exclusion of the related party will skew the data for the rest of the industry. 35/

34/ Application of the related parties provision is within the Commission's discretion based upon the facts presented in each case. Empire Plow Co. v. United States, 11 CIT ___, 675 F. Supp. 1348, 1352 (1987).

35/ See, e.g., Certain All-Terrain Vehicles from Japan, Inv. No. 731-TA-388 (Final), USITC Pub. 2163 at 17-18 (March 1989); Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, Inv. Nos. 303-TA-19 and 20, 731-TA-391-399 (Final), USITC Pub. 2185 at 41 (May 1989).

In these final investigations, petitioners contend that Executone, Inter-Tel, and NEC America should be excluded from the domestic industry under the related parties provision, if they are domestic producers. As discussed above, we determine that Executone and Inter-Tel are not domestic producers. This determination obviates the related parties issue as to these two companies. However, we still need to consider the related parties question as to NEC America, and also as to Fujitsu America and Mitel, since they are domestic producers that either import the subject merchandise (NEC America and Fujitsu America) or are related to companies that import such merchandise (Mitel).

We do not believe that Mitel should be excluded from the domestic industry as it has been able to provide segregable data on its purely domestic activities and there is no evidence that it has benefitted from, or that its data was affected by, the LTFV imports of an affiliated company. NEC America and Fujitsu America, however, are domestic subsidiaries of foreign producers of the subject imports and import a significant percentage of their total U.S. shipments. 36/ Therefore, exclusion may be warranted as their data may have been affected by the LTFV imports and they may have benefitted from the LTFV sales and been shielded from their effects. 37/ Nevertheless, the small share of domestic production attributed to NEC America and Fujitsu

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36/ See Report at A-43.

37/ In fact, it appears that shipment trends for these producers were different from trends for the rest of the industry. Report at A-19, n.51; App. D.

America, especially in comparison to AT&T, 38/ means that the inclusion or exclusion of data from NEC America and Fujitsu America would have no significant effect on the domestic industry data. 39/ We therefore conclude that exclusion of these related parties is not warranted in these investigations.

III. The Condition of the Domestic Industry

In assessing the condition of the domestic industry, the Commission considers, among other factors, domestic consumption, domestic production, capacity, capacity utilization, shipments, inventories, employment, and financial performance. 40/ Evaluation of these factors in these investigations is complicated by the various combinations of subassemblies that comprise a system. There are four basic subassemblies in a SBTS: (1) control and switching equipment, (2) power supplies, (3) other circuit cards and modules, and (4) telephones. 41/

The probative value of data at the subassembly level in examining the condition of the domestic industry as a whole, as well as particular segments of the market, varies. Most domestic producers did not report capacity or production of complete

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38/ Report at A-18.

39/ While the exclusion of the related parties suggests poorer performance for the domestic industry overall, the difference is so minimal as to be insignificant. Compare Tables 5, 7, 9, 10, and 30 of the Report with alternative Tables 5, 7, 9, 10, and 30 presented as App. D.

40/ 19 U.S.C. § 1677(7)(C)(iii).

41/ Report at A-9-A-11.

systems. Instead, such data were provided at the subassembly level. 42/ Further, some producers reported few, if any, shipments of systems, since they reported data only at the subassembly level regardless of whether the subassembly was part of a new system or was an expansion unit. Therefore production and shipment indicators will be examined at the subassembly level.

Control and switching equipment may be the best indicator of activity in new systems sales, since most new systems have only one control unit and control units are less likely than other subassemblies to be sold in the aftermarket. 43/ Thus, in the absence of more reliable data at the system level, we have used data at the control unit level to make inferences regarding data at the system level.

In terms of the total market, including both systems sales and the aftermarket, data regarding telephone sets and consoles are most probative, as they are sold actively in each market and, thus, better reflect total production activities involving both markets. Finally, since producers do not break down income-and-loss data to the subassembly level, profitability can only be

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42/ Report at A-29.

43/ See Report at A-25, A-36, A-133; Prehearing Evidentiary Submission of AT&T, Volume I (statement of Bruce Malashevich) at 36-46. Nonetheless, there are some sales of control units in the aftermarket so that data regarding control units will somewhat overstate the actual data regarding systems.

analyzed at the system and subassemblies level. 44/

Apparent consumption of SBTS and subassemblies, in value terms, declined steadily throughout the period of the investigation, from $1.384 billion in 1986 to $1.253 billion in 1988. This decline continued in interim 1989. 45/

Apparent consumption of control units declined irregularly in both value and quantity terms. The value of apparent consumption for control units declined from $419.1 million in 1986 to $350.7 million in 1987 before rising to $377.8 million in 1988. In interim 1989, the consumption declined to $148.3 million compared with $173.1 million in interim 1988. In quantity terms, apparent consumption of control units declined from 520 thousand in 1986 to 476 thousand in 1987 before rising to 494 thousand in 1988. In interim 1989, apparent consumption declined to 188 thousand compared with 253 thousand in interim

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44/ Given the predominance of AT&T in the domestic industry, much of the aggregate data for the domestic industry is confidential. Thus our discussion of changes in certain indicators is necessarily general.

45/ Report at A-25, Table 2. Apparent consumption figures, particularly in value terms, are suspect in this case because of different levels of trade used in reporting shipments of imports. Apparent consumption is a figure calculated by adding domestic and imported shipments. Domestic shipments, however, were valued at the retail level, while imports were valued at the wholesale level. Thus, domestic shipment values reflect retail markup, while import shipments do not. Unfortunately most quantity figures are confidential and can be discussed only in general terms. Therefore we refer to value terms, specifically, and note that quantity figures generally follow the same trends over time but do indicate higher market share for LTFV imports than do value-based calculations.

1988. 46/

For telephone sets and consoles, apparent consumption by value increased from $612.5 million in 1986 to $625.4 million in 1988. Consumption declined in interim 1989 to $273.0 million, compared with $319.6 million in interim 1988. 47/ Once again, apparent consumption in quantity terms parallelled the value data, increasing from 4.1 million units in 1986 to 4.4 million units in 1988 before declining to 1.8 million units in interim 1989, compared with 2.3 million units in interim 1988.

Production figures appear to belie, at first glance, the downturn in demand. 48/ Production of both circuit cards and modules and telephones increased significantly in volume from 1986 to 1988, before declining in interim 1989. Production of control units increased from 1986 to 1987, but declined in 1988 to below 1986 levels, and continued to decline in interim 1989. Production of power supplies declined steadily throughout the period. 49/

Domestic capacity declined steadily for all subassemblies throughout the period of investigation, with the exception of power supplies. Because of the reduction in domestic capacity,

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46/ Report at A-26, Table 3.

47/ Report at A-28, Table 4.

48/ AT&T introduced two new models in 1987 which we believe is the principal reason for the increase in production during that year. Public Transcript at 106. Further, the increase may be due, in part, to the entry of a related party producer into the domestic industry. Report at A-19, App. D.

49/ Report at A-30, Table 5.

capacity utilization rates actually increased for all subassemblies other than power supplies. This increase is attributable to a faster decline in available capacity relative to the decline in production. 50/ Capacity utilization rates for the domestic industry were consistently low, however, averaging under 60 percent for all subassemblies during the period, and often significantly lower. 51/

The value of domestic shipments of equipment for use in SBTSs declined steadily throughout the period, with particularly significant declines in 1987 and interim 1989. 52/ U.S. shipments of control units declined irregularly in both value and quantity terms, declining between 1986 and 1987, recovering somewhat in 1988, and declining again in interim 1989. 53/ U.S. shipments of circuit cards and modules followed the same pattern as that of control units. 54/ U.S. shipments of telephone sets, however, remained essentially stable from 1986 to 1988 in value terms, and increased slightly in quantity terms, but declined in both value and quantity in interim 1989. 55/

50/ Report at A-29-A-30.

51/ Report at A-30, Table 5. Capacity utilization figures were lowest for control units and power supplies, indicative of a decline in domestic production for the new systems sales market relative to the aftermarket during the period of investigation. See discussion of these market segments infra.

52/ Report at A-31.

53/ Report at A-33, Table 7.

54/ Report at A-34, Table 9.

55/ Report at A-35, Table 10.

End-of-period inventories of all domestic subassemblies increased significantly from 1986 to 1987, consistent with the increase in production and decline in U.S. shipments. Inventories of all subassemblies other than telephones declined in 1988 and interim 1989. Inventories of telephones peaked in 1988, but declined in interim 1989. As a percentage of total shipments, inventories of all domestic subassemblies increased irregularly throughout the period. 56/

Employment data indicate that the number of production and related workers in the SBTS industry declined irregularly throughout the period, increasing in 1987, but then declining in 1988 and dropping below 1986 levels in interim 1989. Hours worked and total compensation followed similar patterns. 57/ At the subassembly level, the number of workers and hours worked declined irregularly for control units and for circuit cards and modules. For power supplies, the number of workers and hours worked declined steadily, until it increased in interim 1989. For telephones the number of workers and hours worked rose from 1986 to 1987, fell in 1988, and dropped back to 1986 levels in interim 1989. 58/ U.S. producers reported permanent reductions in force during the period of investigation in excess of 1700 production and related workers. 59/

56/ Report at A-43.

57/ Report at A-44, Table 14.

58/ Report at A-44, Table 15.

59/ Report at A-45.

The financial condition of the domestic industry can only be characterized as very poor throughout the period of investigation. While we cannot cite specific figures because of the predominance of AT&T in the domestic industry, the income-and-loss data for the domestic SBTS industry, excluding rental income, are anemic. Net sales have declined steadily and operating margins as a percentage of net sales, excluding rental revenues and costs, have been consistently poor. 60/ Relative improvements during the period can be attributed to significant cost reductions, both in absolute terms and as a percentage of net sales. 61/ In addition, the number of firms reporting operating losses increased in interim 1989. Thus, losses have spread throughout the domestic industry, despite significant cost reductions during the period of investigation. 62/

60/ Report at A-47, Table 18.

61/ Ibid.

62/ We note that respondents placed considerable emphasis on allegedly excessive levels of SG&A expenses for the domestic industry. Such expenses are purportedly higher than that of interconnects who handle most of the imported equipment subject to these investigations. Interconnects, however, operate only between the wholesale and retail level of trade and incur SG&A expenses only for that level of activity. The domestic industry, however, incurred SG&A expenses from the manufacturing level through the retail level. The SG&A levels for the domestic industry are not significantly different from the SG&A levels for the imported product when taking into account both the manufacturing and sales operations. Thus, we believe that the operating returns for the domestic industry are reflective of actual operating conditions. Even if there were a demonstrated reason to question the financial data, which there is not, other indicators of the domestic industry's performance confirm that the domestic industry is experiencing material injury. See discussion of AT&T's internal problems infra.

While net sales on total operations (including rental income) declined significantly, positive operating margins were registered throughout the period. The financial performance was greatly enhanced by the highly profitable rental business, however. 63/ The overall operating margins for the industry declined steadily during the period of investigation and have reached levels clearly indicative of material injury. Moreover, profits from the rental business are dropping rapidly as the embedded base continues to erode. Thus, losses from direct sales will become increasingly difficult for the combined industry to absorb.

Other financial indicators also are indicative of an industry experiencing material injury. The rate of return for SBTS assets dropped severely in 1988 and interim 1989. 64/ The domestic industry has experienced highly unsatisfactory cash flow from its sales operations throughout the period of investigation. 65/ At least one domestic producer, Comdial, is reportedly on the brink of bankruptcy. 66/ Although losses have declined, the number of firms reporting losses actually increased. Further, capital expenditures have declined irregularly. 67/ Research and

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63/ Report at A-46, Table 17 and A-48, Table 19.

64/ Report at A-49.

65/ Ibid.

66/ Public Transcript at 43.

67/ Report at A-88.

development expenditures have declined substantially. 68/ Thus, it appears that the domestic industry is having difficulty justifying continued or increased investment. Without adequate funding for research and development, the domestic industry will find it increasingly difficult to compete in a market characterized by rapid innovation and technological change. 69/

Consideration of all the indicators relating to the condition of the domestic industry leads us to conclude that the industry is experiencing material injury. Shipments are declining, inventories have built up. There have been significant adverse trends in employment. Most importantly, financial data show inadequate operating margins and an insufficient cash flow to fund necessary investment in the maintenance, modernization, and expansion of domestic production facilities and the development of the next generation of products.

IV. Cumulation

A. Legal Standards

The provisions of the Tariff and Trade Act of 1984 amended Title VII of the Tariff Act of 1930 (the Act) to require that the

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68/ Report at A-88.

69/ Report at App. E. See Amplifier Assemblies and Parts Thereof from Japan, Inv. No. 731-TA-48 (Final), USITC Pub. 122 at 12-13 (July 1982)(losses had a particularly detrimental impact on research and development expenditures by the domestic industry and, given rapid technological advances in the field, constituted "injury of the most serious sort").

impact of imports be cumulatively assessed when certain criteria are met. Section 771(7)(C)(iv) of the Act now provides in pertinent part:

> [T]he Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market. 70/

The Conference Report accompanying the passage of the 1984 cumulation provision underscored a Congressional concern that there be a temporal limit on cumulation by stating that the "conferees do intend, however, that the marketing of imports that are accumulated [sic] be reasonably coincident." 71/ Thus, imports are to be cumulated if they meet three criteria: (1) they must compete with other imported products and with the domestic like product; and (2) they must be marketed within a reasonably coincidental period; 72/ and (3) they must be subject to investigation.

70/ Section 612(a)(2)(A) of the Trade and Tariff Act of 1984, amending the Tariff Act of 1930, as section 771(7)(C)(iv), 19 U.S.C. § 1677(7)(C)(iv).

71/ H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 173 (1984).

72/ The Court of International Trade recently rejected the ITC's cumulation analysis, noting that reasonably coincident marketing of imported products merely relates to the statutory requirement that the products potentially subject to cumulation compete with like products in the domestic industry, and does not provide an additional basis for refusing to cumulate imports covered by two or three year old orders. Chaparral Steel Co. v. United States, 698 F. Supp. 254 (CIT 1988). This decision has been appealed to the Court of Appeals for the Federal Circuit (Ct. Nos. 89-1338, 89-1339). Oral argument occurred on October 4, 1989, and a decision is pending.

Although Congress specifically rejected a "contributing effects" test, which would have precluded cumulation of imports from countries responsible for only minimal imports, the decision to cumulate imports must be based upon more than the fact that several countries subject to investigation produce imports like the domestic product. 73/

The Omnibus Trade and Competitiveness Act of 1988 introduced a negligible imports exception to the cumulation provision. New section 771(7)(C)(v) provides as follows:

> The Commission is not required to apply [the cumulation provision contained in] clause (iv) or subparagraph (F)(iv) in any case in which the Commission determines that imports of the merchandise subject to investigation are negligible and have no discernible adverse impact on the domestic industry. For purposes of making such determination, the Commission shall evaluate all relevant economic factors regarding the imports, including, but not limited to whether --
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> (I) the volume and market share of the imports are negligible,
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> (II) sales transactions involving the imports are isolated and sporadic, and
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> (III) the domestic market for the like product is price sensitive by reason of the nature of the product, so that a small quantity of imports can result in price suppression or depression. 74/

73/ H.R. Rep. No. 725, 98th Cong., 2d Sess. 36-37 (1984). But cf. Marsuda-Rodgers International v. United States, 13 CIT ___, Slip. Op. 89-106 (July 26, 1989)(contributing effects test arguably reintroduced by the CIT in its analysis of the reasonable overlap of competition between imports).

74/ 19 U.S.C. § 1677(7)(C)(v).

The legislative history emphasizes that the Commission is to apply this provision sparingly, so as not to use it to subvert the application of the statute's mandatory cumulation requirement. 75/

B. Cumulation Issues

The only cumulation issue contested by the parties in these investigations concerns cumulation of imports from Taiwan. 76/ The Taiwan respondents do not contest the fact that imports from Taiwan are subject to investigation. Instead, they focus on the competition requirement, generally, and the negligible imports

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75/ H.R. Rep. No. 40, 100th Cong., 1st Sess. Part I at 131 (1987).

76/ The Korean respondents did not make cumulation arguments, preferring to wait until the Korean investigation returned to the Commission for a final determination. While we will reconsider cumulation of imports from Korea with those of Japan and Taiwan based upon the facts and arguments available at the time of the Korean determination, for the purposes of these investigations as to Japan and Taiwan we determine that cumulation with Korean imports is appropriate. No evidence was presented that showed a lack of competition between Korean imports and imports from Japan and Taiwan and the domestic like product. In fact, the record contains overwhelming evidence of competition among all products, and especially between those of Japan and Korea. Indeed, one of respondents' causation arguments is that there is fierce competition among the subject imports, especially between Japan and Korea, and that the increase in Korean market share has been at the expense of Japan, not the domestic industry. See Public Transcript at 74; Prehearing Brief of Japanese Respondents at 106. Further, interconnects often stock subassemblies from a variety of foreign producers from each of the subject countries. The evidence of lost sales by domestic producers to Korean imports indicates that Korean imports also compete with the domestic like product. We believe, based upon the available evidence, that Korean imports compete with other imports and with the domestic like product. Moreover, imports from Korea are currently subject to investigation. Thus, we determine that cumulation of the effects of Korean imports with the effects of imports from Japan and Taiwan is appropriate.

provision, in particular.

The Taiwan respondents assert that there is no "reasonable overlap" in competition between the domestic like product and the subject imports from Japan, Korea, and Taiwan. They argue that imports from Taiwan do not have the name recognition that imports from Korea and Japan have. Further, they assert that imports from Taiwan serve a discrete, noncompetitive market sector and are predominantly single telephones with intercom capability. 77/

The evidence of record, however, shows that the telephone sets that allegedly form the bulk of Taiwan exports to the United States in fact constitute only a small share of total export shipments from Taiwan. 78/ Moreover, lack of name recognition does not mean that Taiwan imports are not competitive with recognized brands, although it may have an effect on relative prices. Further, there are smaller manufacturers in the United States, Korea, and Japan that also lack name recognition in the United States market. Finally, it should be noted that imports from Taiwan are predominantly at the low end of the market (in the 1-10 station market) where the greatest amount of competition occurs between imports from each of the subject countries and the domestic like product, where product differentiation is least significant, and where price is especially important. 79/ In

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77/ Prehearing Brief of Taiwan Respondents at 7.

78/ See Report at A-58-A-69. The data reveal significant levels of shipments of other subassemblies, not just "special" telephones.

79/ Report at A-78. See discussion of price competition and price infra.

sum, we do not believe that the lack of competition arguments of the Taiwan respondents are persuasive. 80/

We therefore conclude that LTFV imports from Japan, Korea, and Taiwan meet the requirements for cumulation set forth in the statute. Before addressing the negligible imports cumulation issue, we must first determine which imports from Taiwan should be included in our analysis. While there are a number of Taiwan producers, only two were actually investigated by the Department of Commerce -- Taiwan Nitsuko and Sun Moon Star (SMS). Taiwan Nitsuko refused to answer a multinational questionnaire from Commerce and received a margin of 129.73 percent based upon the "best information available." SMS was found not to be dumping and was excluded from the affirmative determinations. 81/

The remaining Taiwan producers were not specifically investigated and were assigned the "all other" dumping margin.

80/ We note that the recent decision of the Court of International Trade in Marsuda-Rodgers International v. United States, 13 CIT ___, Slip Op. 89-106 (July 26, 1989) deals with the factual inquiry regarding the competition requirement. While we disagree with the CIT's decision in Marsuda-Rodgers, our attempt to obtain interlocutory appeal of that decision was rejected by the CIT. Even applying the arguably more stringent criteria for competition set forth in Marsuda-Rodgers, however, the imports from Taiwan satisfy those criteria. There are no "genuine gaps" in quality among imports from the subject countries and the domestic like product, although some individual firms have a reputation for selling a quality product. Moreover, there is direct evidence of competition among imports from all subject countries and the domestic like product, including AT&T. In this regard, it is noteworthy that one of the largest importers of subject merchandise distributes imports from all three countries and does not distinguish the country of origin for its own shipment statistics.

81/ Report at A-3.

However, Commerce determined not to assign the Taiwan Nitsuko margin to "all others" because it was based upon the Multinational Provision. Instead Commerce included all other Taiwan producers in its affirmative determination, but gave them a zero deposit rate. The Commerce notice states:

> [T]he Department has determined that SBTS from Taiwan are being, or are likely to be, sold in the United States at less than fair value. The only company excluded from this determination is SMS. Therefore, all companies subject to the 'All Others' rate are covered by the Department's affirmative determination . . . .

54 Fed. Reg. 42543 (Oct. 17, 1989).

We determine that the imports from Taiwan, Japan, and Korea should be cumulated for the purpose of assessing the volume and price effects of LTFV imports on the domestic industry. We also determine that the Taiwan import data should be adjusted to exclude only the imports of SMS. 82/ That company is the only one specifically excluded from the Commerce dumping determination. 83/ All other companies were included in the LTFV

82/ Petitioner argued that the Commission is not required to exclude SMS from the import data. Posthearing Brief of Petitioner Question 25 at 50, n.22 (citing Algoma Steel Corp. v. United States, 865 F.2d 240,241 (Fed. Cir. 1989), cert. denied, 57 U.S.L.W. 3859 (June 27, 1989). We do not agree with that reading of Algoma. We believe that exclusion by Commerce requires exclusion by the Commission, as the excluded producer's imports are no longer within the scope of the Commission's investigation.

83/ See, e.g. Cellular Mobile Telephones from Japan, Inv. No. 731-TA-207 (Final), USITC Pub. 1786 at 18, n.36 (December 1985). Commerce's finding that "All Other" Taiwan producers were dumping is consistent with its normal practice of reaching affirmative determinations on "All Others" if any investigated

(continued...)

determination but were assigned a zero margin. The Commission has consistently deferred to exclusion determinations by Commerce in calculating import volume. 84/ Since "all other" Taiwan producers were not excluded from Commerce's determination, the Commission cannot exclude them from its causation analysis, regardless of the margin assigned to those producers.

With respect to the negligible imports argument, we must analyze the three factors listed under the negligible imports exception to cumulation prior to determining the propriety of cumulation. The market share by value of Taiwan imports of systems and subassemblies is small, under 2.0 percent for most of the period, but it is significantly higher on the more probative quantity basis. 85/ For example, the market share of one of the subassemblies exceeded 10 percent at one point. 86/ In terms of aggregate value, imports from Taiwan totalled over $10 million annually during the period of investigation. We do not believe

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83/(...continued)
company is found to be dumping. What is unusual is assigning them a zero margin. Normally, the "All Others" category is assigned the weighted average margin of all companies found to be dumping. In this case Commerce chose not to assign "All Others" a margin derived from Japanese, instead of Taiwan, data.

84/ See Algoma Steel Corp. v. United States, 865 F.2d 240, 241 (Fed. Cir. 1989), cert. denied, 57 U.S.L.W. 3859 (June 27, 1989). The Commission's decision to exclude imports of particular producers has always been based upon Commerce's decision to exclude certain producers from its determination. It is not based on a de minimis margin assigned to particular producers, per se.

85/ Report at A-70, Table 30. We note again that market share by value significantly understates import market share.

86/ Report at A-74, Table 33.

that the market share and volume of imports from Taiwan can fairly be characterized as negligible in these investigations. Nor do we believe that the sales of Taiwan imports are isolated or sporadic. Further, it appears that Taiwan imports are predominantly in the smaller systems range, which is a more price sensitive segment of the market that can be adversely affected by a relatively smaller volume of imports. Thus, we determine that cumulation of imports from Japan, Korea, and Taiwan is appropriate.

V. Material injury by reason of LTFV imports

In addition to finding material injury to a domestic industry, the Commission must also determine whether such injury is "by reason of" the less than fair value or subsidized imports. 87/ In making this determination, we are required to consider, inter alia, the volume of the imports subject to investigation, the effect of such imports on domestic prices, and the impact of such imports on the domestic industry. 88/ Evaluation of these factors involves a consideration of: (1) whether the volume of imports, or increase in volume is significant, (2) whether there has been significant price underselling by the imported products, and (3) whether imports have otherwise depressed prices to a significant degree, or have prevented price increases. 89/ In

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87/ 19 U.S.C. § 1673d(b)(1).

88/ 19 U.S.C. § 1677(7)(B).

89/ 19 U.S.C. § 1677(7)(C)(i-ii).

addition, the Commission must evaluate the effects of the subject imports on such relevant economic factors as actual and potential changes in profits, productivity, capacity utilization, and investment. 90/

In assessing the impact of LTFV imports on the domestic industry, the Commission "investigates the conditions of trade and competition and the general condition and structure of the relevant industry" in order to provide a context in which to evaluate the impact of LTFV imports. 91/ The Commission, however, may not weigh the various causes of material injury, 92/ nor must it determine that LTFV or subsidized imports are the principal, a substantial, or even a significant cause of material injury. 93/ Congress specifically prohibited the Commission from adopting such a causation standard stating that "[a]ny such requirement has the undesirable result of making relief more difficult to obtain for industries facing difficulties from a variety of sources; industries that are often the most vulnerable to less-than-fair-value imports." 94/

90/ 19 U.S.C. § 1677(7)(C)(iii).

91/ S. Rep. No. 249, 96th Cong., 1st Sess. at 74 (1979.

92/ La Metalli Industriale, S.p.A. v. United States, Slip op. 89-46 at 31, (CIT April 11, 1989). See also, Citrosuco Paulista v. United States, Slip op. 88-176 (CIT 1988) at 64; Hercules, Inc. v. United States, 673 F. Supp. 454, 481 (CIT 1987); British Steel Corp. v. United States, 593 F. Supp. 405, 413 (CIT 1984); S. Rep. No. 249, 96th Cong., 1st Sess. at 74 (1979).

93/ S. Rep. No. 249, 96th Cong., 1st Sess. at 74.

94/ Id. at 74-75.

Further, while the Commission may consider any information demonstrating possible alternative causes of injury to the domestic industry, the petitioner is not required to bear the burden of proving that the material injury is not caused by such other factors. 95/ Moreover, the Commission is not required "to make any precise, mathematical calculations as to the harm associated with such factors and the harm attributable to less-than-fair-value imports." 96/

In these investigations, we note that our causation analysis regarding the impact of LTFV imports is made more complex by various unusual "conditions of trade and competition" in the SBTS industry. We begin our analysis of causation with a description of these general conditions of trade and competition in order to put our analysis of the statutory causation factors in proper perspective. We then discuss the volume and price effects of LTFV imports and our conclusions as to the significance of the various alternative causes of injury offered by respondents.

A. Conditions of trade and competition

The SBTS industry and the SBTS market have several unique characteristics that affect competition between the subject imports and the domestic like product. These unique

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95/ S. Rep. No. 249, 96th Cong., 1st Sess. 75 (1979). Such alternative causes may include "the volume and prices of imports sold at fair value, contraction in demand or changes in patterns of consumption, trade, restrictive practices of competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry." Id. at 74.

96/ Id. at 75.

characteristics include two distinct, yet related, business cycles, different methods of distribution and marketing, and the existence of several submarkets.

1. The Business Cycle

The Omnibus Trade and Competitiveness Act (OCTA) of 1988 amended section 771(7)(C)(iii) to specify that the Commission "shall examine all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 97/ In these investigations, all parties are essentially in agreement that the industry operates within a 5-7 year replacement cycle that peaked in 1984/85 and is due to peak again in 1990/91. The peak in 1984/85 was apparently the result of a large exodus of rental customers to the sales market following divestiture of the RBOCs by AT&T. Given the rapid technological improvements in telecommunications equipment, producers believe that most customers will replace their systems within 5-7 years, although the useful life of the equipment is longer. 98/

The record suggests that most end users purchase a SBTS at substantially less than full capacity and expand that system with additional subassemblies over time as needs change. 99/ Purchases of expansion subassemblies occur in the aftermarket and appear to follow a cycle that is inversely related to the product

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97/ 19 U.S.C. § 1677(7)(C)(iii).

98/ See Report at A-23.

99/ Report at A-80.

replacement cycle. While the volume of equipment sold in the aftermarket is considerably less than that sold in the new systems market, in terms of profitability, the aftermarket has an even stronger offsetting influence than with other indicators as all parties acknowledge that aftermarket sales have a much higher profit margin than new system sales. 100/

In making our determinations in these investigations, we have considered the significance of indicators of the domestic industry's condition and causation factors within the context of the cyclical nature of demand both for new SBTS equipment (the replacement cycle) and for expansion subassemblies (the aftermarket cycle). We note, however, that the evidence of record suggests that the fluctuations in the overall business cycle are fairly minor, because of the tendency of trends in the replacement cycle to be offset by trends in the aftermarket cycle. 101/ Thus, it is less likely that the declines in certain indicators of the condition of the domestic industry can be fully explained by a downturn in the product replacement cycle, as respondents have argued.

2. General characteristics of the market as a whole

In order to better understand the dynamics of the SBTS

100/ See Public Transcript at 145; Report at A-55.

101/ See Report at A-23-A-24. Thus, the peak in demand in 1984/85 was apparently only marginally higher than demand in subsequent years. Moreover, there is no long term historical evidence of the depth of the product replacement cycle, since a distorting "peak" occurred for the first time in 1984/85 and has yet to repeat itself.

industry, some additional observations regarding the market are in order. First, the evidence of record indicates that aggregate demand for SBTS is relatively insensitive to price changes. 102/ All businesses need a telephone system in order to operate, but it is highly unlikely that additional businesses will be formed in response to low SBTS prices or that existing businesses will buy extra systems in response to price changes. 103/ Second, demand for a specific producer's SBTS is very sensitive to relative price differences among the producers. 104/ In other words, the decision regarding whether to obtain a SBTS is not affected significantly by prices generally, but the decision regarding the source of supply is greatly affected by relative prices. 105/

3. Distribution and marketing methods

One particularly important distinction between most importers and the principal domestic producer is the difference in their distribution and marketing efforts. AT&T has its own sales and service operation and sells directly to end users, while most importers sell to wholesalers, supply houses, or

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102/ Memorandum INV-M-114 at 17.

103/ Relative price, however, along with the rapidity of technological change, may affect the length of time that a firm holds onto a SBTS before replacing it.

104/ Memorandum INV-M-114 at 13-17.

105/ The degree of price competition varies in the different submarkets, but is most severe in the smaller systems segment that constitute the vast majority of total systems sales. Report at A-17.

interconnects who, in turn, sell to end users. Thus competition at the end user level is primarily between AT&T and interconnects. All other domestic producers, however, compete directly with foreign producers at the intermediate distribution levels, since they do not have the same marketing philosophy as AT&T. Executone and TIE are the only importers that market their products through their own distribution systems to any significant extent. Executone essentially has adopted the AT&T marketing philosophy and attempts to sell a "quality" product on a par with AT&T's product. Executone, which markets equipment produced in Korea, also insists that it commands a price premium relative to all other producers, including AT&T. 106/

The fact that different competitors may sell at different levels of trade, however, has no effect on our determination that all the products subject to investigation compete directly with the domestic like product for end user sales. It does mean that semi-annual pricing data provide somewhat less probative price comparisons than is usually the case, though. There is considerable evidence of record, exclusive of direct pricing comparisons, however, that confirms that price is an extremely important factor in the SBTS market. 107/

4. Variety of Submarkets

All parties agree that the total market for SBTS equipment

106/ Posthearing Brief of Executone at 1-5; Public Transcript at 301-06.

107/ See discussion of pricing data infra.

and competitive services can be subdivided into several interrelated submarkets. These submarkets are important because the nature of competition varies throughout the submarkets, with the degree of price competition varying greatly.

The first and most important submarket is the systems submarket and it represents approximately 75-90 percent of total product sales. This submarket is the focal point of price competition and is itself divided into two other submarkets -- sales to new businesses and sales to the installed base. 108/

New businesses are obviously new entrants to the market, who are generally first time buyers of SBTSs. All parties acknowledge that this is the most competitive sector of the market, in which price competition is especially significant. Customers in this segment are most responsive to relative price differences because they have no established supplier relationship, and often purchase SBTSs at the low end of the market (1-10 stations) where there is the least amount of product differentiation and the largest number of competing suppliers. 109/ It appears that approximately 80 percent of the systems sold, and 50 percent of the value of systems shipped, were in the 1-10 station market segment. 110/

The installed base consists of all customers who already have a SBTS on the premises, whether owned or rented. Sales to

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108/ See Report at A-54.

109/ Report at A-128.

110/ Report at A-12.

the installed base are less price sensitive than new business sales as the customer retention rate for the producer of installed systems is acknowledged to be very high (up to 80-90 percent for some large interconnects). However, price remains a significant factor in this market. Even with a high retention rate, there is a strong incentive to compete on price since the impact of the loss of a sale in the new systems market is compounded by the resulting loss of lucrative aftermarket sales and the likelihood of future lost sales as that customer tends to stay with his original supplier when the replacement cycle has run its course. 111/ Thus, there is substantial incentive to be price competitive and to cut price in order to preserve the seller's installed base or to capture a sale from a competitor's installed base.

Within the installed base is another recognized submarket consisting of customers who rent or lease a SBTS. The rental portion of the installed base is referred to as the "embedded base." 112/ The embedded base consists essentially of AT&T's rental customers. All parties agree that this sector of the market is shrinking rapidly as more end users opt to purchase their own equipment. The parties disagree concerning whether

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111/ In addition, growth of the installed base carries with it service revenue over the useful life of a SBTS. This additional source of income plays a significant role in the overall profitability of AT&T and its competitors. While this additional revenue is not directly relevant to the condition of the industry producing SBTS, it provides an additional incentive to be price competitive in end user sales.

112/ See Report at A-39.

LTFV imports have accelerated the decline of the embedded base. Data available in the Commission Report appear to belie the notion of accelerated erosion of the embedded base. 113/

Respondents have noted that AT&T's sales effort in this submarket is hampered by financial disincentives to the sales force of AT&T. 114/ Petitioners dispute this point. 115/ AT&T notes that its "win rate" for sales to its embedded base is higher than its overall win rate. Price competition appears to be a very significant factor in moving customers from the embedded base to the SBTS sales market, and especially in enticing rental customers to purchase LTFV imports.

The second submarket is commonly known as "moves, adds, and changes" (MACs). 116/ This submarket is referred to as the aftermarket for expansion subassemblies and consists of sales of expansion subassemblies to the installed base. MACs revenue overstates the value of actual equipment sales in this submarket, however, as MACs include substantial labor intensive activity (moves and changes). To the extent that equipment is "added" to a system, competition (including price competition) for the sale of that equipment is extremely limited as the owner of the installed system must purchase the original producers' subassemblies, since all subassemblies are proprietary to the

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113/ Report at A-39, Table 11.

114/ Public Transcript at 108-09, 271-72.

115/ Posthearing Brief of AT&T, Question 8 at 15-17.

116/ See Report at A-36.

original equipment manufacturer. 117/ Moreover, refurbished equipment is a more significant factor in this sector of the market than in the systems sector, where it has negligible impact. The data indicate that from 10-25 percent of total new equipment revenue is attributable to the aftermarket. 118/

It is also useful to subdivide the SBTS market on the basis of system size. The vast majority of SBTS sales, both in quantity and value terms, is concentrated in the under 40 station market. Over 95 percent by volume, and 80 percent by value, of installed SBTSs are under 40 stations. 119/ Thus, sales of systems above 40 stations have relatively little impact on the domestic industry since systems sales in that segment of the market represent less than four percent by volume, and less than 17 percent by value, of total systems sales. In essence, the most intense sales competition among all producers is in the under 40 line market segment, with the 1-10 station segment larger than the rest of the market as a whole. 120/ For this reason, much of our analysis of competition focuses on these dominant market segments. Arguments of the parties directed to the over 40 station submarkets, therefore, have limited probative value in analyzing overall market dynamics because the volume and

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117/ The aftermarket consists disproportionately of telephones and circuit cards and modules, since these are the subassemblies that allow more readily for expansion of an existing system.

118/ Report at A-36.

119/ Report at A-12.

120/ Report at A-12.

value of sales in those submarkets are relatively insignificant.

B. Volume and market share of imports

Assessing the impact of LTFV imports on the domestic industry in these investigations is complicated by data comparison problems. There is no perfect "common denominator" for determining the level of shipments of units of systems and subassemblies. However calculated, the market penetration of LTFV imports is significant. For purposes of determining overall market shares of the domestic industry and imports, the quantity data on subassemblies appear to be most probative. In value terms, comparisons are complicated because of the differing levels of trade at which sales are made. Most domestic shipments are reported at end user prices, while imports are reported at interconnect or wholesale prices. Thus, market share by value necessarily understates the market share of imports. 121/ These data do have some limited utility for purposes of separately analyzing trends for importers and domestic producers and they allow for aggregation of systems and subassemblies data into a composite figure for the market as a whole.

Upon review of the evidence, we determine that LTFV imports are significant in both quantity and value terms, and in terms of market share. The total value of cumulated imports of systems and subassemblies was over $311 million in 1988. In quantity terms, imports of control and switching equipment declined during

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121/ Report at A-69.

the period. 122/ Imports of telephones, however, increased from 1986 to 1988, before dropping slightly in interim 1989. 123/

In value terms, the market penetration of cumulated imports increased from 32.2 percent in 1986 to 35.0 percent in 1987 before dropping slightly to 34.0 percent in 1988. 124/ 125/ Data reported on the basis of total lines, indicate that the domestic producers of SBTS equipment supplied 36 percent of the total small business market, while LTFV imports from Japan, Korea, and Taiwan captured 49 percent of the market. 126/ The market share data reported on the basis of total lines are reasonably accurate and more probative of actual market share than the value data.

Market penetration figures for LTFV imports of control and switching equipment, the best indicator of import market

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122/ Report at A-106, Table 26.

123/ Report at A-113, Table 29.

124/ The market penetration dropped in interim 1989 to 31.6 percent. Import shipments from January to June of 1989, however, were likely affected by the Commission's affirmative preliminary determination in early February 1989.

125/ Commissioner Rohr determines that the market penetration calculated by value is a completely unreliable indicator of import presence in the market and does not give such value data any weight in his determination.

126/ Report at A-38, Figure 4. The Eastern Management Group study, relied on by all parties, indicates that competition from Centrex services, the secondary market, other imports, and larger systems, while increasing, was relatively insignificant. Data gathered by the Commission from market participants confirm the relative insignificance of these other competitiors. Total market share figures for 1986 and 1987, on a comparable basis with the data used in Figure 4, show the market share of domestic SBTSs of 41 and 39 percent respectively, and LTFV imports shares of 52 percent in each year.

penetration in the important new systems market segment, fluctuated irregularly over the period, but remained at extremely high levels and exceeded 50 percent in 1987 and 1988. 127/ Market penetration for LTFV imports of telephones, the best indicator of the impact of imports in the overall SBTS market, increased steadily in throughout the period, rising from 55.1 percent in 1986 to 56.0 percent in 1987 and to 56.3 percent in 1988. 128/

Several respondents argue that many of their telephones are "dual use" phones and are not within the scope of this investigation as determined by Commerce. 129/ Thus, they insist that they properly did not include imports of "dual use" telephones in the import data originally provided to the Commission. We have included alleged "dual use" telephones in the Commission's overall import data.

The "dual use" argument is a highly technical argument relating to the scope of the investigations and should be directed to the agency responsible for making scope determinations, the Department of Commerce. Neither Toshiba nor Inter-Tel have even formally requested a scope ruling from Commerce. Further, both respondents reported shipments of all

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127/ Report at A-171, Table 31.

128/ Report at A-174, Table 33.

129/ Posthearing Brief of Toshiba App. D. Such "dual use" phones are allegedly fully functional in a Toshiba system that has 304 non-blocking ports, while SBTSs are defined by AT&T and Commerce as having no more than 256 non-blocking ports.

their imported telephones as subject imports in the preliminary investigation, apparently assuming that they were not dual use telephones. In the absence of a Commerce ruling that such telephones are outside the scope of the investigation, we do not believe that adjustment of import data by the Commission to exclude such telephones is proper. 130/ Respondents should not be allowed to determine unilaterally that their own product is no longer within the scope of these investigations, especially after failing to raise the issue with the agency that makes scope determinations.

C. Effect on prices

Because of the numerous complexities of the total market for SBTS equipment and the different channels of distribution employed by AT&T and most importers, direct pricing comparisons are difficult to draw. Moreover, the degree of product differentiation makes even direct comparison, when available, somewhat problematic. 131/ Finally, the effect of changes in equipment prices is somewhat diluted in the largest and most

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130/ See Algoma Steel Corp. v. United States, 865 F.2d 240 (Fed. Cir, 1989), cert. denied, 57 U.S.L.W. 3859 (June 27, 1989).

131/ We use the term "product differentiation" in a very specific sense. There is wide differentiation within each producer's product line. For example, all producers offer telephone sets of varying prices and varying features. The same can be said of every subassembly. Further, in each sales opportunity encountered in the market, a purchaser may have to choose between different combinations of lines, features, and subassemblies depending on the configuration being offered by the various suppliers. In a general sense, however, all producers offer most of the same features with their products and there is no general product differentiation.

competitive segment of the SBTS total market -- new system sales to end users -- because of the additional costs associated with sales of installed systems to end users.

The extent of the effect of equipment costs on the price of a SBTS to an end user depends on two key factors: (1) the percentage of installed costs attributable to SBTS equipment and (2) the "pass through" of cost reductions from importers to interconnects to end users. 132/ The parties generally agree that the greater the percentage of installed system cost attributable to subject equipment and the larger the "pass through" of costs, the greater the effect of import price on the price of systems to end users. They disagree, however, in their estimates of these percentages.

Upon review of the evidence of record, it appears that equipment dedicated for use in a SBTS constitutes approximately 50 percent of the total installed price of a system, whether imported or domestic. 133/ Moreover, given the competitive nature of the new systems sales market, especially in the 1-10 station segment, interconnects are highly likely to "pass through" a significant amount of any cost savings to the customer in order to secure the sale and generate the expansion and service revenues that go together with an installed base. 134/

132/ See Report at A-123-A-129.

133/ Report at A-41, Table 13.

134/ The likelihood that cost savings will be "passed through" to the end user finds additional support in the Frank Lynn

(continued...)

Further, given the high rate of retention in sales of new systems to the installed base and the profitability of aftermarket sales, there is a strong incentive to cut price in new systems sales in order to gain market share in the installed base.

Several respondents argue that AT&T's alleged premium pricing belies any possible underselling or lost market share caused by LTFV imports. 135/ AT&T responds that the "premium pricing" arguments of respondents greatly exaggerate the significance of any price premium and note that the premium price could still be depressed or suppressed by LTFV imports. In other words, the premium may exist relative to imports, but the absolute price may be lower because of the LTFV imports. In addition, Executone (an importer of LTFV imports from Korea) asserts that it competes in the "premium market," and that its product is better than AT&T in terms of quality. 136/ Executone maintains that competition on price occurs; but if the relative prices are within 10-15 percent of one another, other factors will control purchasing decisions. 137/ Executone concludes that there must be underselling in excess of 15 percent to have an effect on domestic price.

We do not believe that the existence of a premium price

134/(...continued)
Associates survey of interconnect pricing practices. See Public Transcript at 44-48; Posthearing Brief of AT&T at 5-6.

135/ Posthearing Brief of NEC at 5-7.

136/ Posthearing Brief of Executone at 3-5.

137/ Posthearing Brief of Executone at 8.

means that a premium product does not compete with a generic product on the basis of price. In fact, the assertion by respondents that a premium price exists is an admission that their products compete primarily by underselling the domestic product by a significant margin. The premium price is merely the equilibrium price at which most purchasers would be relatively indifferent in choosing the premium product over the generic product. If the price difference between the imports and the premium domestic product exceeds the premium, price depression or suppression may appear or the market share of the premium product may decline. 138/ Conversely, if the price difference is lower than the premium, the premium product will gain market share. In all instances, however, the premium and the generic product compete with one another on the basis of price.

In these investigations, we would expect that AT&T generally could command a premium for its product as the natural result of the familiarity of its name, its service reputation, and its advertising efforts. There is no evidence, however, of any significant physical quality differences between equipment produced by AT&T and that produced by others, both foreign and domestic. Moreover, it appears that all suppliers can command a limited price premium in sales to their installed base and a larger premium in aftermarket sales. In sum, we do not believe that quality differences are such that AT&T's product and the

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138/ The lost sales section of the report indicates that there has been underselling of AT&T's product by amounts far exceeding any alleged price premium.

product of other producers, both foreign and domestic, are not acceptable substitutes for one another or that the price of imports has no effect on the price of the domestic products, both premium and generic. Moreover, we reject the suggestion that other products that are not part of the like product (Centrex services, rentals, or refurbished equipment) are better substitutes for the imported product than the domestic like product.

Point-to-point price comparisons, such as those most frequently relied upon in other Commission investigations, are of limited probative value in these investigations. 139/ However, as the CIT recently noted in discussing the significance of pricing data: "Congress has vested the ITC with considerable discretion 'to make reasonable interpretations of the evidence and to determine the overall significance of any factor or piece of evidence.'" 140/ In particular, "Congress chose to give the ITC broad discretion in analyzing and assessing the significance

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139/ See generally Certain Fabricated Structural Steel from Canada, Inv. No. 731-TA-387 (Preliminary), USITC Pub. 2062 at 14 (February 1988)(no prices available for the product subject to investigation, no other evidence of price sensitive market, unusual nature of sales transactions and bid process preclude price comparisons); Certain Granite from Italy and Spain, Inv. Nos. 701-TA-289, 731-TA-381-382 (Final), USITC Pub. 2110 at 26-27 (August 1988)(pricing data of limited utility because of bid process and importance of non-price factors in the purchasing decision).

140/ Copperweld Corp. v. United States, 682 F. Supp. 552, 564 (CIT 1988) (citing Maine Potato Council v. United States, 613 F. Supp. 1237, 1224 (CIT 1985)).

of the evidence on price undercutting." 141/ We therefore base our determinations regarding the price effect of LTFV imports on the specific information gathered by the Commission in discussions with purchasers at all levels of trade and on the market structure that suggests that competition in the market as a whole, and especially in the dominant submarkets, is very price sensitive. 142/

Based upon our review of the pricing data, including lost sales information, and taking into account general market dynamics, we believe that there has been significant price competition between the domestic like product and the subject imports. This price competition is especially severe in the low end of the market (1-10 stations) where product differentiation is least significant, price sensitivity is greatest, and there is a strong incentive for interconnects to cut prices, coupled with the ability to do so because of the availability of dumped imports. Further, this market segment is larger, both in value and quantity terms, than the rest of the market combined. 143/

While price comparisons are problematic because of the

141/ Copperweld, 682 F. Supp. at 565.

142/ We note that, in the course of the Commission's investigations, various purchasers and other non-parties from whom the Commission routinely gathers much of its independent information on lost sales and market dynamics were also being contacted by the parties. While we do not question the propriety of these contacts at this time, we note that we place lesser probative weight on information that may have been affected by such contacts.

143/ Report at A-12.

limitations in the data, 144/ the data of record indicate that the prices of subject imports were well below any price premium that AT&T could command. 145/ Moreover, prices for installed SBTSs in the crucial new systems market segment declined during the period of investigation, both for domestic and imported SBTSs. 146/ Declines in prices in the smaller systems configurations are indicative of price depression in the most competitive, and most significant, segments of the domestic market.

Lost sales data corroborate the depressing effect of LTFV imports on domestic price and are consistent with the market dynamics that prevail in the SBTS market. The Commission investigated a number of petitioners' lost sales allegations. This anecdotal information confirms instances of underselling well in excess of any possible price premium for AT&T. 147/ Further, the data provided by end users indicate that their purchasing decision is very price sensitive, that all producers' products compete with one another, and that price is often the primary factor in the purchasing decision, although other factors are also important.

D. Other competitive factors

1. Centrex

144/ Report at A-82-A-83.

145/ Report at A-137.

146/ Report at A-84 and Table 34.

147/ Report at A-87-A-91.

All parties agree that Centrex services are competitive with SBTS, but they disagree regarding the significance of that competition. The Commission collected sufficient information to evaluate the significance of Centrex service on the overall small business market, including market share and pricing information. 148/

AT&T asserts that Centrex services account for only 3-4 percent of the under-100 line market. 149/ AT&T maintains that Centrex is more competitive with larger systems and that its impact on the SBTS market has been limited. Moreover, they insist that Centrex is also a complementary product, as there are considerable sales of SBTSs "behind Centrex." AT&T and others allegedly compete for those sales. AT&T admits that its Bell Manual notes that a customer should consider Centrex as an alternative to SBTS equipment, but they assert that sales data show that few actually choose Centrex. 150/

Respondents' expert witness Dr. Francis Collins estimated the market share of Centrex to be 11.2 percent of new lines in 1986 and up to 50 percent of new lines in 1988. 151/ Economists Inc. estimated that Centrex sales captured 21 percent of the

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148/ Report at A-13, A-41-A-42, and A-79-A-80. Six of the seven RBOCs responded to the Commission's interconnect questionnaire and provided relevant information regarding Centrex services.

149/ Posthearing Brief of AT&T, Question 14 at 27 (citing Eastern Management Group Study relied upon in the Commission Report).

150/ Posthearing Brief of AT&T, Question 15 at 30.

151/ Statement of Dr. Francis Collins at 3.

growth of new lines in the under 100 line market during the period of investigation. 152/ Regarding sales of SBTS equipment "behind Centrex," respondents maintain that such sales are limited to approximately 30 percent of Centrex sales. 153/

We believe that the petitioner has a more accurate view of the significance of Centrex competition in the SBTS market. Centrex has had a more profound impact on the large PBX market, which is not being examined in this investigation. Data from third party sources, as well as interviews conducted by staff with industry sources, suggests that the market share of Centrex services in 1988 was approximately 4 percent of the small business market. 154/ While we expect this share to increase over time and the impact of Centrex to become more significant in this market, we do not believe that Centrex has had a significant impact on the domestic industry during the period of investigation. For example, cost factors dictate that Centrex competition is limited to major metropolitan areas within a limited radius of a central office of the local telephone company. Moreover, most of the competition from Centrex in the SBTS market is in the high end segments (over 40 lines) and there is little, if any, effect on the highly competitive 1-10 station market segment.

2. The Secondary Market for Refurbished Equipment

152/ Prehearing Brief of Economists Inc. Pt. II at 23.

153/ Posthearing Brief of Fujitsu at 7-9.

154/ Report at A-38, Figure 4.

All parties agree that there is a secondary market for refurbished SBTS equipment and that refurbished equipment has an effect on sales of new equipment. They also agree that refurbished equipment plays a more significant role in the MACs submarket and the rental submarket than it does in the systems sales submarket. The parties, however, disagree on the significance of the effect of the secondary market on the domestic industry. 155/

Respondents submit that even if the Commission were to find that equipment sold in the secondary market is not included in the definition of the like product, such equipment should nevertheless be analyzed as a significant competitive factor in the overall SBTS market. Thus, respondents urge the Commission to determine the proportion of AT&T's alleged injury attributable to this market, as opposed to the accused imports.

According to a third party market analysis cited by respondents, displacement of new equipment by equipment sold in the secondary market rose from less than 3 percent in 1983 to 8.7 percent in 1987. 156/ Economists Inc. estimated the market share of refurbished equipment at between 10-11 percent in terms of total lines. 157/ Accordingly, respondents believe that sales of refurbished SBTS and subassemblies adversely affected domestic

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155/ See Report at A-37, A-60-A-61.

156/ Respondents' Secondary Market Submission, dated October 3, 1989, at 7.

157/ Prehearing Brief of Economists Inc. Pt. II at 12.

producers of new systems far more so than admitted by AT&T. 158/

Further, respondents argue that AT&T has denied its own contribution to the rapid expansion of this secondary market. They maintain that it is AT&T's commitment to supply component parts, and provide maintenance and continued warranties of this equipment that has encouraged the growth of the secondary market. In sum, respondents believe that AT&T's costs of providing these secondary market services constitute a highly relevant factor in determining to what extent any injury suffered by AT&T in its primary market sales has been of its own making.

Petitioners assert that the sale of used or refurbished small telephone systems is a relatively insignificant factor in the market. 159/ They claim that sales of used or refurbished systems account for only 2-3 percent of the total market. 160/ Petitioners note that there are approximately 230 dealers in secondary market, but they are most active in the large PBX market. 161/ AT&T asserts that the secondary market is 65 percent subassemblies for MACs and 35 percent systems. AT&T states that the refurbished equipment discounts range from 20-50 percent.

Petitioners also assert that refurbishers in the secondary market do not need AT&T's authorization and are not authorized by

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158/ Respondents' Secondary Market Submission, dated October 3, 1989.

159/ Prehearing Brief of AT&T at 92.

160/ Posthearing Brief of AT&T, Question 9 at 18-19.

161/ Posthearing Brief of AT&T, Question 10 at 20.

AT&T. Petitioner notes that other producers and importers also report that refurbished systems represent only a small percentage of the small business telephone system market, but that it is a growing percentage.

As with Centrex, we believe that the significance of the secondary market for refurbished equipment is limited. The vast majority of refurbished equipment is sold as parts in the PBX market or is used in AT&T's embedded base, and, therefore does not compete directly with sales of new equipment. Further, to the extent that refurbished equipment is sold to SBTS customers, most of those sales are in the aftermarket where there is little competition. There is slight, if any, effect from refurbished sales on the domestic industry. 162/

3. Rentals

The parties disagree concerning the relevance of the rental market. Respondents argue that the demise of the rental market was a natural result of the increased availability of customer premises equipment brought about by the deregulation of the industry. AT&T admits that the erosion of the embedded rental base is a natural occurrence, but alleges that it has been accelerated by LTFV imports. 163/

We believe that AT&T's performance in the rental market is relevant only insofar as it has an impact on the domestic industry producing the equipment. Moreover, rental income is in

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162/ Report at A-37.

163/ Posthearing Brief of AT&T, Question 20 at 39.

part dependent on equipment produced during the period of investigation. To that extent, rental income is relevant to the financial condition of the domestic industry as a whole. The financial condition of AT&T's rental business, therefore, provides indirect evidence of the financial condition of the domestic industry producing SBTSs, since a decline in rental business could be carried through to a decline in demand by AT&T's rental operations for new equipment. In this regard, it should be noted that AT&T asserts that equipment used in the rental market is roughly 20 percent new, 80 percent refurbished, thus further diluting the impact of the rental business on the domestic industry. 164/ Further, a decline in rentals would presumably translate into an increase in demand in the new systems sales market segment, since all small businesses must have a SBTS or a substitutable service. Finally, the domestic industry, as noted above, is experiencing material injury regardless of how one analyzes the significance of rental operations.

4. AT&T Internal Problems

Respondents argue that the poor performance of the domestic industry can be attributed to internal problems of AT&T. They maintain that most of AT&T's problems are self-inflicted and are the result of a former monopolist having difficulty adjusting to a changing, more competitive, market. In particular, respondents

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164/ Posthearing Brief of AT&T, Question 12 at 23-24.

rely on the testimony of GBS officials and internal documents, 165/ claiming that they are the best evidence of internal problems of AT&T in the service side of the SBTS business. 166/ Finally, all respondents have asserted that AT&T has unusually high SG&A expenses and that these are probative evidence of internal inefficiencies.

While AT&T has admittedly been affected by internal problems, we do not believe that such internal problems fully explain the poor performance of the domestic industry as a whole. That there are internal documents that suggest that the poor performance of the GBS division is the result, in part, of internal inefficiencies is not surprising. GBS has acknowledged many of these problems publicly. It is also not surprising that, in a communication with its employees regarding the conditions affecting GBS, management would emphasize matters over which its employees might have some control, such as improved efficiency, rather than matters over which they have no control at all, such as LTFV imports. Moreover, the existence of internal problems does not negate the impact of LTFV imports, especially given the volume and market share of those imports and the price sensitive nature of the market for SBTS. The most important data regarding

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165/ Respondents referred particularly to two internal documents -- the so-called "rumor killer" letter and the Chow Memorandum. The "rumor killer' letter was written by the president of the GBS division of AT&T to his employees regarding the condition of the division. The Chow Memorandum is a report to the Board of Directors of AT&T regarding the condition of the GBS division in 1988. Posthearing Brief of Goldstar at 1-4.

166/ E.g., Posthearing Brief of Nakayo at 6.

the causes of the condition of the domestic industry, in our judgement, are not general internal assessments from the perspective of a single, albeit important, producer, but actual aggregate data reported in response to Commission questionnaires.

In addition, the allegedly high SG&A expenses for AT&T in comparison with other producers are largely attributable to AT&T's captive distribution and marketing efforts, expenses normally incurred by interconnects, not foreign producers. Further, to the extent that there may be structural problems in the domestic industry, these problems are exacerbated by LTFV imports. In this context, we refer to the legislative history accompanying the 1979 Act that suggests that industries, such as the SBTS industry, that are "facing difficulties from a variety of sources . . . are often the most vulnerable to less-than-fair-value imports." 167/

F. Conclusion

We determine that the substantial volume of LTFV imports from Japan, Korea, and Taiwan, both in an absolute sense and in terms of market share, have had a depressing or suppressing effect on domestic prices. This impact has been especially severe in systems sales in the 1-10 station market segment, but has been significant in all market segments. The losses in the systems market will inevitably be compounded by the loss of aftermarket sales and the loss of the domestic industry's

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167/ S. Rep. No. 249, 96th Cong., 1st Sess. at 75 (1979); Citrosuco Paulista, S.A. v. United States, 12 CIT ___, 704 F. Supp. 1075, 1101-1102 (1988).

installed base. The adverse price effects of LTFV imports has been translated into lower revenues for the domestic industry than would otherwise have been the case. The lower revenues have manifested themselves in operating losses for the domestic industry and the inability to generate funds for research and development of new products and investment in the industry in general. Thus, we conclude that the LTFV imports from Japan and Taiwan are a cause of material injury to the domestic industry.

ADDITIONAL VIEWS OF COMMISSIONER ECKES

In order to explain more fully for the parties and the public the bases for my analytical decisions in this investigation of telephone systems, I offer these additional comments. They are intended to supplement my views in New Steel Rails from Canada and respond further to several misconceptions surrounding Commission practice in administering antidumping law.[1] [2]

More on Bifurcated Analysis

In this investigation, as in other Title VII cases involving allegations of injurious dumping and subsidization, I have employed the dual-requirement, or bifurcated, method of conducting injury

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[1] See also my "Additional Views" in New Steel Rails from Canada, Inv. No. 701-TA-297 (Final), USITC Pub. 2217 (September 1989), at 29-70 [hereinafter "Rails"]. As in Rails, I have used for reasons of verbal variety the following terms interchangeably: bifurcated analysis, dual requirement, dual standard, two-factor, twin-test.

[2] These additional views were prepared without the benefit of access to the dissenting, separate, and additional views of other Commissioners. Lack of access to the views of other Commissioners is from time to time a source of frustration to many Commissioners, including this one, and apparently to at least one judge on the Court of International Trade. See, e.g., Fresh, Chilled, or Frozen Pork from Canada, Inv. No. 701-TA-298 (Final), USITC Pub. 2218 (September 1989), at 63, note 78 (Dissenting Views of Chairman Brunsdale and Vice Chairman Cass); Rails, supra, at 126, note 2 (Dissenting Views of Vice Chairman Cass); Borlem S.A. v. United States, 87-06-00693, slip op. at 24 (CIT, June 29, 1989).

In the best of all worlds, in which each Commissioner worked at approximately the same pace and the institution faced no tight statutory deadlines for the completion of investigations, a complete sharing of views would be both feasible and desirable to focus argumentation and facilitate Court review. But, in final ITC investigations Commissioners have approximately one week, not months, to complete their views. Within such a tight timetable, it has been my experience that some of the most eloquent advocates of a complete exchange of draft views are least able to provide reciprocal access to their own views and thus demonstrate that such sharing is equitable to all Commissioners.

analysis. The dual-requirement approach is not an eccentric theory, espoused by one or two Commissioners, which has not been subjected to careful court review. Rather, it has been employed at least twenty years, deemed necessary by almost all Commissioners serving during that period, and has been repeatedly affirmed by our reviewing courts.

Succinctly stated, when bifurcated analysis is employed, an affirmative injury determination can result only if two conditions are satisfied. First, the domestic industry producing the like product (or in the absence of like, most similar in characteristics and uses) must be materially injured. Second, less-than-fair value imports must be a cause ["by reason of"] of that material injury. In other words, the decisionmaker must find a causal nexus between unfairly traded imports and injury. And, if the evidence of record fails to satisfy either of these threshold conditions, a Commissioner, using this method, shall make a negative determination.

Unitary Challenge

It is necessary to review the underpinnings of bifurcated analysis because this method has emerged as a topic of debate among Commissioners during the last 18 months. There is one current of thought that "the bifurcated approach is ... fundamentally at odds with the legislative history of Title VII."[3] One exponent of this perspective avers that:

certain of my colleagues have a radically different

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[3] Title VII refers to countervailing duty and antidumping provisions of the Tariff Act of 1930, as amended. See 19 USC 1671-1673. Quote from Rails, supra, at 151.

> understanding of the task that the Commission is to perform. In my view, these Commissioners have misinterpreted the law [emphasis added] in important respects, and are, as a consequence, contributing to an overall understanding of U.S. trade law that is contrary to Congressional intent as embodied in that law and contrary to our international obligations under the GATT.[4]

Elsewhere I have replied that this critique apparently rests on incomplete legal research and, thus, a flawed understanding of the appropriate historical record and judicial precedents.[5]

I note with interest that one who advocates the unitary approach has indicated that he "would not lightly disregard Commission practice" if any one of three conditions existed.[6] He stated:

> I would not lightly disregard Commission practice if the Commission had a long history of consistent adherence to such an approach, if there were judicial precedent binding the Commission to such an approach, or if the legislative history of congressional enactments subsequent to Commission decisions taking this approach indicated a congressional intent that subsequent legislation, although silent on this matter, be construed as confirmation of the bifurcated approach to decisions under Title VII. [emphases added]

As the following discussion will show, my own reading of the history leads to opposite conclusions: the Commission has long adhered to bifurcated analysis; judicial precedent does bind the Commission to that approach, and legislative history does confirm its use.

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[4] "Dissenting Views of Vice Chairman Ronald A. Cass," Rails, supra, at 126, 151.

[5] Rails, supra, at 29-70.

[6] 3.5" Microdisks and Media Therefor from Japan, Inv. No. 731-TA-389 (Preliminary), USITC Pub. 2076 (April 1988), at 64-65.

History of Commission Adherence to Bifurcated Approach

For approximately twenty years Commissioners have utilized the dual-requirement approach to injury and causation analysis. In Rails I presented a lengthy discussion of Commission adherence to the bifurcated approach during the 1970s pursuant to requirements of the Antidumping Act of 1921.[7]

Here is a brief summary of those conclusions:

(1) By 1972 the Commission regularly applied bifurcated injury and causation analysis. Indeed, in twenty-nine of fifty-seven cases decided between May 1972 and December 1975, the bifurcated criteria were explicitly stated in the Commission's majority opinion. Moreover, in twenty-four of the twenty-nine cases the Commission said that use of the bifurcated approach was required under terms of the Antidumping Act of 1921. In the remaining five cases, the Commission used similar language: "The Antidumping Act, 1921, as amended, imposes two conditions which must be satisfied before an affirmative determination can be made...."[8]

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[7] Rails, supra, at 29-70.

[8] (1) Asbestos Cement Pipe from Japan, Inv. No. AA1921-91, TC Pub. 483 (May 1972), at 3;
(2) Pentaerythritol from Japan, Inv. No. AA1921-96, TC Pub. 508 (September 1972), at 2;
(3) Bicycle Speedometers from Japan, Inv. No. AA1921-98, TC Pub. 513 (September 1972), at 3;
(4) Cast-Iron Soil-Pipe Fittings from Poland, Inv. No. AA1921-100, TC Pub. 515 (September 29, 1972), at 2;
(5) Northern Bleached Hardwood Kraft Pulp from Canada, Inv. No. AA1921-105, TC Pub. 530 (December 1972), at 3;
(6)(7)(8) Perchlorethylene from Italy, Japan, and France, Inv. No. AA1921-106,-107,and -108, TC Pub. 531 (December 1972), at 3;
(9) Canned Bartlett Pears from Australia, Inv. No. AA1921-110, TC Pub. 551 (March 1973), at 3.
(10) Roller Chain from Japan, Inv. No. AA1921-111, TC Pub. 552

(2) Over the last twenty-one years a group of twenty-two Commissioners regularly utilized bifurcated analysis and made separate findings of injury and causation. Except for Commissioner

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(March 1973), at 2;
(11) Stainless Steel Plate from Sweden, Inv. No. AA1921-114, TC PUb. 573 (May 1973), at 3;
(12) Synthetic Methionine from Japan, Inv. No. AA1921-115, TC Pub. 578 (May 1973), at 3;
(13) Impression Fabric of Manmade Fiber, Inv. No. AA1921-116, TC Pub. 577 (May 1973), at 3;
(14) Stainless Steel Wire Rods from France, Inv. No. AA1921-119, TC Pub. 596 (July 1973), at 3;
(15) Ceramic Glazed Wall Tile from the Philippines, Inv. No. AA1921-120, TC Pub. 599 (August 1973), at 3;
(16) Deformed Concrete Reinforcing Bars of Non-Alloy Steel from Mexico, Inv. No. AA1921-122, TC Pub. 605 (August 1973), at 3;
(17) Steel Wire Rope from Japan, Inv. No. AA1921-124, TC Pub. 608 (September 1973), at 3;
(18) Cold-Rolled Stainless Steel Sheet and Strip from France, Inv. No. AA1921-126, TC Pub. 615 (October 1973), at 3.
(19) Calcium Pantothenate from Japan, Inv. No. AA1921-131 (December 1973), at 3.
(20) Metal Punching Machines, Single-End Type, Manually Operated, from Japan, Inv. No. AA1921-133, TC Pub. 640 (January 1974), at 3;
(21) Racing Plates (Aluminum Horseshoes) from Canada, Inv. No. AA1921-137, TC Pub. 645 (January 1974), at 3;
(22) Hand-Operated Plastic Pistol-Grip Liquid Sprayers from Japan, Inv. No. AA1921-138, TC Pub. 662 (April 1974), at 3;
(23) Wrenches, Pliers, Screwdrivers, and Metal-Cutting Snips and Shears from Japan, Inv. No. AA1921-141, TC Pub. 696 (October 1974), at 3;
(24) Tapered Roller Bearings and Certain Components Thereof from Japan, Inv. No. AA1921-143, USITC Pub. 714 (January 1975), at 3;
(25) Welt Work Shoes from Romania, Inv. No. AA1921-144, USITC Pub. 731 (June 1975), at 3;
(26) Portable Electric Typewriters from Japan, Inv. No. AA1921-145, USITC Pub. 732 (June 1975), at 3;
(27) Lock-in Amplifiers and Parts Thereof from the United Kingdom, Inv. No. AA1921-146, USITC Pub. 736 (July 1975), at 3;
(28) Vinyl Clad Fence Fabric from Canada, Inv. No. AA1921-148, USITC Pub. 744 (October 1975), at 3;
(29) Chisels, Punches, Hammers, Sledges, Vises, C-Clamps, and Battery Terminal Lifters from Japan, Inv. No. AA1921-149, USITC Pub. 748 (December 1975), at 3.
In several other cases, there were separate views in which one or more Commissioners cited explicitly the bifurcated criteria. One case was terminated without Commission views.

Cass, no member of the Commission since 1970, who served more than a few weeks, failed to employ this pattern of analysis.[9]

Judicial Precedent for Bifurcated Approach

I believe that careful legal research and a thorough reading of the case law demonstrate that there is substantial judicial precedent for the proposition that all Commissioners are required to perform a bifurcated analysis which answers two questions: (1) Is the domestic industry producing a like product experiencing material injury? (2) Is that material injury caused by less-than-fair-value imports? Accordingly, any affirmative injury determination that fails to include both a finding of injury and

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[9] My review of Commission findings indicates that the following Commissioners have used the bifurcated approach: (1) Glenn W. Sutton; (2) James W. Culliton; (3) Dan H. Fenn, Jr.; (4) Stanley D. Metzger; (5) Will E. Leonard, Jr.; (6) George M. Moore; (7) J. Banks Young; (8) Catherine Bedell; (9) Joseph O. Parker; (10) Italo H. Ablondi; (11) Daniel Minchew; (12) Paula Stern; (13) William Ralph Alberger; (14) Michael Calhoun; (15) Alfred E. Eckes, Jr.; (16) Eugene Frank; (17) Veronica Haggart; (18) Seeley Lodwick; (19) Susan Liebeler; (20) David Rohr; (21) Anne Brunsdale; and (22) Don Newquist. The only other exception in the last twenty years was Chairman Chester L. Mize, who served less than three months, and did not participate in any antidumping investigation.

a finding of causation is legally insufficient.[10] [11]

In reviewing Commission actions under the 1921 Antidumping Act, our appellate courts on numerous occasions confirmed the Commission's use of the bifurcated approach injury and causation analysis. In a 1979 decision, Pasco Terminals v. United States, Judge Maletz of the U.S. Customs Court explicitly approved use of the dual-standard approach.[12] He stated:

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[10] This is not to suggest that the particular form of bifurcated analysis that other Commissioners and I have employed is the only permissible method for fulfilling the Commission's legal requirement. Other permissible methods may exist, but these must always include specific findings of both injury and causation to satisfy the statute and case law.

[11] Those individuals who find fault with the traditional bifurcated approach appear to have overlooked the precedential value of Pasco Terminals, Inc., v. United States, 477 F. Supp. 201 (Customs 1979), aff'd, 634 F.2d 610 (CCPA 1980); and Armstrong Bros. Tool Co. v. United States, 483 F. Supp. 312 (Customs 1980); aff'd, 626 F.2d 168 (CCPA 1980). These cases show that the Commission's first line of review in the 1970's, the Customs Court, and its appellate court, the Court of Customs and Patent Appeals, both affirmed use of the dual-requirement method.

[12] A subsidiary of the Mexican producer, Azufrera, had appealed the Tariff Commission's unanimous affirmative determination in Elemental Sulfur from Mexico, Inv. No. AA1921-92, TC Pub. 484 (May 1972). Commissioners Bill Leonard and J. Banks Young explicitly used bifurcated analysis in their "statement of reasons," at 8:

> The Antidumping Act, 1921, as amended, requires [emphasis added] that the Tariff Commission find two conditions satisfied before an affirmative determination can be made.
>
> First, there must be injury, or likelihood of injury, to an industry in the United States, or an industry in the United States must be prevented from being established. And second, such injury (or likelihood of injury or prevention of establishment) must be 'by reason of' the importation into the United States of the class or kind of foreign merchandise the Secretary of the Treasury determined is being, or is likely to be, sold at less than fair value.

> [I]t is evident from the Statement of Reasons of Commissioners Leonard and Young that the Commission correctly construed the applicable law. See 37 F.R. 9418. Thus, this statement rightly concluded that the Antidumping Act required that the Commission find two conditions satisfied before an affirmative determination could be made: First, there must be injury, or likelihood of injury, to an industry in the United States; and second, such injury (or likelihood of injury) must be 'by reason of' the importation in the United States of the class or kind of foreign merchandise the Secretary of the Treasury determined was being or was likely to be sold at less than fair value.[emphases added] [13]

Pasco appealed this judgment to the Court of Customs and Patent Appeals, but that Court in 1980, after considering the arguments of parties and reviewing the record, affirmed "the judgment of the Customs Court, and adopt[ed] the court's opinion as our own."[14]

Another jurist, Judge Newman, approved this approach and repeated this language in Armstrong Bros. Tool Co. v. United States, a 1980 decision. Armstrong, a manufacturer of certain hand tools, had contested the unanimous negative determination of the Commission in Wrenches, Pliers, Screwdrivers, and Metal-Cutting Snips and Shears from Japan, a case where the Commission employed bifurcated analysis.[15] In its opinion the Court described use of bifurcated analysis as a "correct legal theory." The Court said:

> That the Commission proceeded on a correct legal theory is evident from the following excerpts from the Statement

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[13] 477 F. Supp. 201, 219.

[14] 634 F.2d 612. Five judges heard the appeal: Markey, Rich, Baldwin, Miller and Nies.

[15] 483 F. Supp. 312. Wrenches, Pliers, Screwdrivers, and Metal-Cutting Snips and Shears from Japan, Inv. No. AA1921-141, TC Pub. 696 (October 1974), at 3. Commissioners Bedell, Parker, Moore, and Ablondi signed the views quoted by the Customs Court.

of Reasons:

> The Antidumping Act, 1921, as amended, requires [emphasis added] that the Tariff Commission find two conditions satisfied before an affirmative determination can be made. First, there must be injury, or likelihood of injury, to an industry in the United States, or an industry in the United States must be prevented from being established. Second, such injury or likelihood of injury or prevention of establishment of an industry must be 'by reason of' the importation into the United States of the class or kind of foreign merchandise which the Secretary of the Treasury has determined is being, or is likely to be, sold at less than fair value (LTFV)....

In summarizing its position the Customs Court stated that "the Commission considered reasonable criteria in determining whether injury, or the likelihood thereof, existed. The short of the matter is that the Commission found no harm to American industry by reason of the LTFV imports." Moreover, Judge Newman concluded that "the Commission's findings amply demonstrate that the domestic industry was healthy, robust, and noninjured."[16]

It is important to note that the Customs Court holding was reviewed and affirmed in the Court of Customs and Patent Appeals, where a five-judge panel, composed of Judges Markey, Rich, Baldwin, Miller and Re, heard the appeal. They said that the CCPA "has conducted its review upon the record made before the [Tariff] Commission and has held that such review is limited to determining 'whether the Commission has acted within its delegated authority, has correctly interpreted [pertinent] statutory language, and has correctly applied the law.'"[17]

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[16] 483 F. Supp. 323.

[17] 626 F.2d 169, 170.

The appellate court concluded:

> [1] Our review of appellants' arguments and portions of the record relating thereto persuades us that the Customs Court's holding is correct.
>
> [2] In affirming the judgment of the Customs Court, we adopt the court's opinion as our own, [emphasis added] with the single modification that we would state the sole standard of review of factual determinations of injury or likelihood of injury in antidumping cases to be whether the Commission's determination is supported by substantial evidence.

In passing, it is appropriate to note that judicial constructions of the Customs Court and Court of Customs and Patent Appeals [CCPA] have precedential value. Decisions of the Customs Court, the predecessor to the Court of International Trade, "are decisions of the same court," the Federal Circuit has held. The Court of Appeals for the Federal Circuit, which succeeded the CCPA, refers to these holdings as precedents of a prior court.[18]

In other more recent cases under the 1979 Trade Agreements Act, the Commission's present reviewing courts, the Court of International Trade and the Court of Appeals for the Federal Circuit, have confirmed that the Commission still is required to employ bifurcated analysis. I have discussed these precedents more fully in Rails.[19]

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[18] Algoma Steel Corp., Ltd. v. United States, 865 F.2d 240 (Fed. Cir. 1989), at 243.

[19] Rails, supra, at 62-66.

Let me summarize these points briefly: In American Spring Wire Corporation, a reviewing court affirmed the required use of bifurcated analysis, and its decision was in turn affirmed by a second reviewing court. In his holding Judge Maletz of the Court of International Trade twice discussed the dual standard test. He said in a footnote, which is frequently overlooked by cursory readers of the opinion:

> As indicated previously, an affirmative injury finding requires [emphasis added] both [sic] (1) that the domestic industry be materially injured (or threatened with material injury), and (2) that such that such injury be by reason of the unfairly traded imports."

The Court elected to expand upon its initial discussion of the material injury standard, and to indicate in unmistakable terms that the bifurcated standard is required.[20]

Subsequent to American Spring Wire, the use of dual-factor analysis has been addressed in several cases before the Court of International Trade. Each time the Court has invoked American

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[20] On this point there are two key passages in American Spring Wire Corporation v. United States, 590 F. Supp. 1273 (CIT, 1984). The first appears at 1276; the second in footnote 9, at 1281. Interestingly, the Court of International Trade used bifurcated analysis in its own views, affirming the Commission's negative determination, at 1281:

> Since the court has concluded that there is substantial evidence to support the Commission's conclusion that the domestic industry was not materially injured or threatened with material injury, such findings are dispositive of this litigation. Hence, the court does not reach the other issues raised by plaintiffs, i.e., that the Commission (1) erred in failing to cumulate the injurious effects of imports from the four countries under investigation, and (2) erroneously determined that even assuming arguendo the existence of material injury, such injury was not caused by the subject imports.

Spring Wire.[21]

Based on this review of court decisions over the last decade, I can only conclude that the overwhelming weight of judicial precedent does, in fact, bind the Commission to bifurcated analysis.

Legislative History Confirms Bifurcated Approach

As noted earlier, some seem to think that the bifurcated approach is "fundamentally at odds with the legislative history of Title VII."[22] To make this argument, one writer quotes from a "1967" report of the Senate Finance Committee:

> In 1967, when Congress was considering changes in the international obligations of the United States that might conflict with U.S. antidumping law, the Senate Finance Committee issued a report that explicitly stated:
>
> > An industry which is prospering can be injured by dumped imports just as surely as one which is foundering although the same degree of dumping would have relatively different impacts depending upon the economic health of

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[21] In other litigation, the Court of International Trade dismissed an appeal contesting the International Trade Commission's determination that the mirror industry was not materially injured or threatened with material injury. The Court said: "...when the statutory factors which the Commission considers indicate that the domestic industry is healthy, the Commission may indeed determine that the domestic industry is not experiencing or facing material injury." National Association of Mirror Manufacturers v. United States, 696 F. Supp. 642, 647 (CIT, 1988).

Another recent Court decision in Roses Inc. v. United States also conforms to the pattern of appellate decisions holding that bifurcated analysis is required. The Court stated: "An affirmative injury determination by the ITC pursuant to 19 U.S.C. 1673d(b)(1) requires both the existence of material injury, or threat thereof, to an industry in the United States and a causal connection between such injury or threat and imports determined to be sold at less than fair value." [emphasis added] Roses, Inc. v. United States, No. 89-115, slip op. at 9 (CIT, August 23, 1989).

[22] Rails, supra, at 151.

> the industry.[footnote omitted]
>
> Subsequently, in revising the antidumping law under the Trade Agreements Act of 1979, the Senate reaffirmed its commitment to this approach.[23]

Having reviewed the actual Senate report, I am doubtful that the above passage can be interpreted properly as congressional rejection of bifurcated analysis. Nor, is it convincing evidence that Congress intended that Title VII relief be provided a domestic industry that is improving relative to some other period or is "healthy" compared to other domestic industries.[24]

First, the passage in question must be read in the context of congressional consideration of the controversial 1967 International Antidumping Code, drafted under auspices of the General Agreement on Tariffs and Trade. It is apparent to me that the Finance Committee comment was directed not at the situation some hypothesize - when a healthy industry might obtain no relief from dumping - but at a quite different situation emerging from implementation of the draft Code.

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[23] The passage quoted above actually was published July 26, 1968. See S. Rep. 1385, 90th Cong., 2d Sess., pt. 2, at 1.

Quote from Digital Readout Systems and Subassemblies Thereof from Japan, Inv. No. 731-TA-390 (Final), USITC Pub. 2150 (January 1989), at 104 [hereinafter "Digital Systems"]. Similar or identical language is used in other cases. Among them: 12-Volt Motorcycle Batteries from the Republic of Korea, Inv. No. 731-TA-434 (Preliminary), USITC Pub. 2203 (July 1989), at 31; New Steel Rails from Canada, Inv. No. 701-TA-297 (Final), USITC Pub. 2217 (September 1989) at 151; Industrial Belts from Israel, Italy, Japan, Singapore, South Korea, Taiwan, the United Kingdom, and West Germany, Inv. No. 701-TA-293 (Final), USITC Pub. 2194 at 106; 3.5" Microdisks and Media Therefor from Japan, Inv. No. 731-TA-389 (Preliminary), USITC Pub. 2076 (April 1988), at 61 [hereinafter "Microdisks"].

[24] Digital Systems, supra, at 104-105.

That international agreement apparently would have altered then existing U.S. antidumping law by directing the Tariff Commission to weigh the causes of injury and to determine whether injury caused by dumped imports exceeded that from all other causes. Senate Finance Committee Chairman Russell Long

> observed that the weighing factor in the code (a technique which does not appear in the act): suggests that picture of a pure woman standing there blindfolded with a scale in her hands and on one side of the scale there is what can be said for dumping and on the other side what can be said for all other causes. If the scale is heavier on this side than it is on the other, then this is the side on which justice must go.[25]

In light of this concern, the Senate Finance Committee report objected that the proposed Antidumping Code "purports to require a far greater degree of injury to a domestic industry before a dumping duty may be assessed."[26]

With this controversy in mind, it now is possible to understand what the Senate Finance Committee was saying when it wrote the sentence which has been quoted repeatedly. So that any interested reader can evaluate that passage within a broader context, I quote the following two paragraphs from the Senate report:

> "Two observations are called for. First, the statute--the Antidumping Act of 1921--does not restrict its remedy to instances where injury actually exists. Rather it is specifically applicable even in situations where there is no present injury but where there 'is likely to be' injury from the dumped imports. In large measure the code appears to completely neutralize this 'likely to be injured' concept. Second, under the statute, the question to be explored is whether the dumped imports cause (or threaten) injury, not the extent to which other factors unrelated

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[25] S. Rep. 1385, 90th Cong., 2d Sess., pt 2, at 7.

[26] Id., at 7.

> to the dumped imports may discount the effects of dumping. An industry which is prospering can be injured by dumped imports just as surely as one which is foundering although the same degree of dumping would have relatively different impacts depending upon the economic health of the industry. [Emphasis added to passage quoted by Commissioner Cass.]
>
> "Applying the literal language of article 3 [International Antidumping Code of 1967] could lead to the absurd result that an industry which is suffering reverses for reasons unrelated to dumping could get no relief from dumping because other factors were causing its troubles; and that an industry which is prospering despite dumping could get no relief because it is not suffering. Thus, under the code it would appear that relief from dumping would be available only in the rare instance where an industry is found to be in excellent economic health immediately before the dumping begins and to be suffering losses soon after the dumping begins, and no other reason can be found to account for the reversal. Such a sharp change from the concept in present law of finding injury when it is more than de minimis cannot be effected without a change in the law."[27]

It is clear to me that the Senate Finance Committee was not embracing unitary analysis, or rebutting bifurcated analysis, in its "1967" report. Rather it was addressing a specific situation occasioned by the proposed International Antidumping Code. Some members of Congress were concerned that the so-called "weighing provision" in the Code would invite Tariff Commissioners to deny relief to domestic industries. Thus, the language inserted in the report related to a specific situation and was not a more general statement applicable to bifurcated analysis for several reasons. Those who use a bifurcated analysis do not weigh the causes of injury, such as the Senate Finance Committee anticipated would happen if the International Antidumping Code of 1967 were adopted. Rather, those who employ this dual-requirement method seek only to screen

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[27] Id., at 11.

out petitioners representing industries that cannot demonstrate material injury from any cause, before proceeding to analyze whether such material injury may be caused by a class or kind of merchandise the Department of Commerce has determined to be unfairly traded.

Second, assuming for a moment the sentence quoted earlier does correctly interpret the Finance Committee report, one must observe that this language has little relevance for the administration of Title VII. Congress as an institution did not embrace this interpretation in the special statute passed to prevent consideration of the Code. The House Ways and Means Committee Report on the same bill did not address the same so-called weighing provision, nor did the Conference Report on the legislation.[28]

There is another reason to believe that Congress was not addressing the appropriateness of bifurcated analysis as it is used today. Not until 1972, several years after the report was released in 1968, did a majority of the Commission begin to employ the dual-requirement approach. In May 1972, the Commission first made an affirmative determination using this pattern of analysis, and in September 1972 a Commission majority first adopted the dual-requirement type of analysis in a negative determination.[29] Then, as I have demonstrated in Rails, between May 1972 and December 1975, the Commission explicitly employed bifurcated analysis in twenty-

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[28] H. Rep., No. 1398, 90th Cong., 2d sess. (1968); H. Rep., No. 1951, 90th Cong., 2d sess. (1968).

[29] See Asbestos Cement Pipe from Japan, Inv. No. AA1921-91, TC Pub. 483 (May 1972), at 3, and Pentaerythritol from Japan, Inv. No. AA1921-96, TC Pub. 508 (September 1972), at 2, 6.

nine of fifty-seven cases.[30]

If the Finance Committee, or Congress in general, was concerned about bifurcated analysis, the subject should have arisen in the context of revisions to the antidumping law in 1974 and 1979. This did not occur. On the contrary, it is important to note that subsequently, in revising the Antidumping Law in both 1974 and 1979, Congress reviewed Commission practice and did not object to or question the use of dual-standard analysis. In 1979, for instance, the Senate Finance Committee stated that "ITC determinations with respect to the injury criterion under existing law which have been made in antidumping investigations from January 3, 1975 to July 2, 1979, have been, on the whole, consistent with the material injury criterion of this bill and the Agreement. The material injury criterion of this bill should be interpreted in this manner." [31]

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[30] Rails, supra, at 67-69.

In Microdisks, supra, at 64, one critic of traditional Commission analysis said that he would:

> not lightly disregard Commission practice if ... the legislative history of congressional enactments subsequent to Commission decisions taking this approach indicated a congressional intent that subsequent legislation, although silent on this matter, be construed as confirmation of the bifurcated approach to decisions under Title VII.

In light of the above statement about legislative history subsequent to Commission decisions taking this approach, I do not think it is consistent, or logical, for anyone to contend that a single Senate Finance Committee Report from 1968, which was written before a Commission majority employed bifurcated analysis, can be cited to demonstrate that Congress did not want Commissioners to employ bifurcated analysis.

[31] S. Rep. No. 96-249, 96th Cong., 1st Sess., at 87 (1979). See also, H.R. Rep. No. 96-317, 96th Cong., 1st Sess., at 46 (1979).

Further evidence that Congress has accepted the legitimacy of bifurcated analysis can be found in House Committee on Ways and Means,

To summarize, my review of the case law, the judicial precedents and legislative activity shows that the Commission has a long history of adherence to the bifurcated approach. Moreover, there is in fact substantial judicial precedent binding the Commission to this approach. Finally, the legislative history of congressional enactments subsequent to Commission decisions taking this approach can be interpreted as indicating that congressional intent that subsequent antidumping legislation be construed as confirming the bifurcated approach under Title VII.

Controversy Over Causation

In examining the issue of causation in this investigation I have followed the traditional Commission practice of seeking to determine whether a class or kind of foreign merchandise the Department of Commerce has found to contain unfairly traded products is materially injuring the domestic industry. It is established Commission practice not to look behind Commerce Department determinations. Judicial decisions, such as American Permac, Inc. v. United States, take the

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Overview and Compilation of U.S. Trade Statutes, WMCP 100-1, 100th Cong., 1st sess. (1987), at 43, 52:

> The ITC determination of injury basically involves a two-prong inquiry: first, with respect to the fact of material injury, and second, with respect to the causation of such material injury.

While this volume is not legislative history as such, it does reflect congressional understanding of the statute. Interestingly, identical language was used in the 1989 edition, thus suggesting strongly that the Omnibus Trade and Competitiveness Act of 1988 did not contain provisions modifying use of the bifurcated approach. House Committee on Ways and Means, Overview and Compilation of U.S. Trade Statutes: 1989 Edition, WMCP 101-14, 101st Cong., 1st sess. (1989), at 49, 58.

view that the statute contemplates a strict division of labor between Commerce and the Commission.[32] According to the statute, legislative history, and case law, Commerce has the responsibility for determining which imports are sold at LTFV. This clear division is reflected in the statute, section 731, 19 U.S.C. Sec. 1673 (1982):

> Sec. 731. ANTIDUMPING DUTIES IMPOSED
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> If --
>
> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> 2) the Commission determines that --
>
> (A) an industry in the United States --
>
> (i) is materially injured, or
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> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise, or by reason of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.

New Critique

Recently, a different view of Commission practice has been articulated. In Rails it is argued that the traditional Commission approach "is, on its face, wholly inconsistent with the GATT. The parties to the GATT have undertaken to impose antidumping duties only when it is demonstrated that 'dumped imports [sic], are through the effects of dumping [sic], causing injury'."[33] Moreover, some

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[32] American Permac, Inc. v. United States, 831 F.2d 269 (Fed. Cir. 1987), at 274-275.

[33] Rails, supra, at 127.

claim that "an interpretation of our trade law that dispenses with any effort to assess the effects of unfair trade practices on domestic industry is no less inconsistent with U.S. law...." [34]

From my vantage point this critique has a fatal flaw. It ignores altogether the judicial precedent that shapes Commission practice. The same issues were raised and rejected in the Algoma case.[35]

Indeed, the novel interpretation outlined above seems to conflict with both the Court of International Trade and the Court of Appeals for the Federal Circuit's interpretations of the statute. For example, some interpret Section 731, 19 U.S.C. Sec. 1673, as not authorizing the Commission to examine a "class or kind of merchandise" because such an analysis would conflict, it is believed, with GATT, and "the structure and legislative history of the statute indicate that, in so providing, Congress did not intend anything substantively different from GATT."[36]

That the Commission must examine only dumped sales is an interpretation used by plaintiffs in Algoma, and one that Judge Restani firmly rejected.[37] She stated:

> Plaintiffs' basic misunderstanding [emphasis added] is reflected in their continual use of the phrase 'LTFV sales' as if the statute says that ITC must find that injury is attributable to particular sales found to be at LTFV. The statute refers instead to imports which are sold at LTFV. ITC is basing its decision on the

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[34] Rails, supra, at 128.

[35] Algoma Steel Corp., LTD. v. United States, 688 F. Supp. 639 (CIT 1988); aff'd, 865 F.2d 240 (Fed. Cir. 1989), at 241; cert. denied, 109 S. Ct. 3244 (1989).

[36] Rails, supra, at 129.

[37] 688 F. Supp. 639, 645.

> affects [sic] of relevant imports from companies determined to have sold the subject merchandise at LTFV. Obviously, it is unlikely that every sale is at LTFV, and Congress may be presumed to have perceived this.

Later the Court of Appeals for the Federal Circuit also rejected the same argument. It held that "an injury determination, not confined to the LTFV sales alone" is not "arbitrary, capricious, or otherwise contrary to the law."[38] First, in reviewing Section 731, 19 U.S.C. Sec. 1673, the Court said:

> The statute seems to us to speak in plain language and to be unambiguous. .... If a 'class or kind' of that merchandise is sometimes sold at LTFV, the terms of any individual sale do not matter. .... Some LTFV sales must be found, but if they occurred, the ITC is not required to pursue details as to the chain of causation of every instance where the foreign supplier supplanted the domestic one.[39]

This holding from the Court would appear to reject in unmistakable terms the argument that the Commission's traditional practice of examining the effects of a class or kind of merchandise the Department of Commerce has found to be unfairly traded is inconsistent with U.S. law.

Second, both Courts also considered the argument that the requirements of the statute differed from GATT, and rejected that argument as well. The Court of International Trade stated:

> Whatever the ideal embodied in GATT, Congress has not simply directed ITC to determine directly if dumping itself is causing injury. .... Perhaps Congress believed that such a standard was not sufficiently specific or that it involved a type of analysis that was unworkable. In any case, Congress opted to direct ITC to determine if imports of a specific class of merchandise, determined by ITA to have been sold at LTFV, are causing injury. This seems

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[38] 865 F.2d 241.

[39] 865 F.2d 242.

to be Congress' way of implementing GATT.[40] [41]

In the subsequent appeal of the CIT's decision, the Federal Circuit said:

> Congress no doubt meant to conform the statutory language to the GATT, but we are not persuaded it embodies any clear position contrary to ours. Should there be a conflict, the United States legislation must prevail. 19 U.S.C. Sec. 2504(a).[42]

To summarize, although some Commissioners may debate whether the Commission is to assess the impact of dumped imports or to assess the impact of a class or kind of merchandise found to be sold at less than fair value on the domestic industry, our reviewing courts are in harmony. In Algoma both the Court of International Trade and the Court of Appeals for the Federal Circuit held the Commission is to examine the class of merchandise, not simply dumped imports.

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[40] 688 F. Supp. 639, 645.

[41] Advocates of the alternative view discussed in this section appear to have given inadequate attention to the implications of Algoma. In Rails, the following reference to this case appears at 135:

> Our reviewing courts have concluded that Congress did not limit the Commission to examining only the particular imports specifically determined by Commerce to have been unfairly traded, but in allowing the Commission to examine other imports that may be swept into the class or kind or merchandise that Commerce found to have been unfairly traded, the Court of International Trade cast this decision as consistent with examination of the effects of the unfair trade practice.

To my knowledge, advocates of the alternative view have never sought to reconcile their own position with holdings of the Court of International Trade and the Court of Appeals for the Federal Circuit in Algoma.

[42] 865 F.2d 240, 242. See also Timken Co. v. United States 673 F.Supp. 495, 520-21 (CIT 1987). "The court cannot agree that the ITA [Commerce Department] should follow a Code provision not incorporated into United States law. The Code has no independent force as law."

Contributory Cause Debate

Another analytical issue that has generated considerable heat over the years of trade law administration at the Commission pertains to the degree of linkage required between imports and injury to the domestic industry. Over time, as a result of prior Commission decisions, statutory enactment, and court review most Commissioners have adopted the view that imports need not be the principal, substantial, or significant cause of material injury. Rather, an affirmative determination requires only that imports be a contributing cause to the material injury experienced by the domestic industry. It is my reading of prior Commission decisions and judicial interpretations that a contributing cause is something the Commission must assess on a case-by-case basis. However, a contributing cause is clearly more than a de minimis cause and less than a sole or major cause of injury. Indeed, in some cases a small quantity of imports can have an impact on the domestic industry, whereas in other cases a small quantity of imports might have an insignificant impact.[43] In attempting to draw a line where Congress has deliberately been vague, the Courts have apparently used the terms "minimal cause" and "slight cause" synonymously with "contributing cause." It is evident that a low threshold was intended, because Congress has repeatedly advised the Commission not to weigh causes of injury.[44]

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[43] S. Rep. No. 96-249, 96th Cong., 1st sess. (1979), at 88.

This contributory cause is not to be confused with discussion of a contributory effects test for cumulation. On the latter point, see H. Rep. No. 98-1156, 98th Cong., 2nd sess. (1984), at 173.

[44] For more specific discussion of the case law, see infra at notes 67-73.

Recently, within the Commission, some dissent has emerged. It has been asserted: "... there is no persuasive authority supporting the contention of certain of my colleagues that ... U.S. trade law requires an affirmative injury determination in any case where it can be shown that the domestic industry is experiencing difficulties to which the subject imports may have contributed minimally."[45] Elsewhere in the same opinion, it is claimed:

> Those Commissioners who believe that the Commission must examine the effects of imports, rather than the effects of dumping or subsidization, also appear to believe that 'even a slight contribution' to material injury from the imports subject to investigation is a sufficient basis for an affirmative determination.... In other words, if the condition of the industry is such that it is deemed 'materially injured' by these Commissioners, ... the causation requirement is considered met as long as imports subject to investigation made a 'slight contribution' to that condition -- even if that 'contribution' was made by fairly traded [sic] imports subject to investigation. Applied literally, this standard would require an affirmative determination if the domestic industry lost any sale to the subject imports, irrespective of whether that sale was lost to imports that were fairly traded. The inconsistency between this standard and the GATT requirement that antidumping or countervailing duties be imposed only when the effects of dumping or subsidization have caused material injury to a domestic industry is so patent as to obviate the need for further discussion of that issue.[46]

From my standpoint, this type of analysis appears to contain several errors. First, it is again asserted that the Commission's responsibility is to assess the impact of dumping or countervailing duties, despite court holdings that the Commission is to consider the entire class or kind of merchandise that the Department of Commerce

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[45] Rails, supra, at 142.

[46] Rails, supra, at 137-138.

has found to contain unfairly traded merchandise.[47]

Second, it is presumed that the contributing cause standard conflicts with U.S. obligations under the General Agreement on Tariffs and Trade. If, on the one hand, one believes such conflict comes from assessing the contributing impact of a class or kind of merchandise, rather than simply dumped merchandise, then this conclusion conflicts with Algoma. If, on the other hand, one also suggests that use of a contributing cause standard conflicts with the GATT codes, one is, I believe, again mistaken. As a leading Canadian authority on GATT has observed: "There is no guidance in the GATT history as to what 'cause' means in the various Articles, such as XVI, VI, XIX. It is necessary to look at national practice and at legislative intent."[48] From my vantage point, neither the GATT, nor its Codes, addresses directly the requisite level of causation required. However, unlike the 1967 International Antidumping Code, these agreements do not permit a weighing of causes.

With respect to U.S. administrative practice, Canadian expert Grey points out, that "a weak causal link [emphasis added] between dumping and the condition of the domestic producers of a like product has been virtually established in U.S. law implementing GATT Article VI."[49] But, that approach is arguably a discretionary administrative

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[47] Infra. at 19-23.

[48] Rodney de C. Grey, "Trade Policy and the System of Contingency Protection in the Perspective of Competition Policy," (unpublished manuscript), February 1, 1986, at 26.

[49] Id., at 27. One legal scholar who has carefully studied this issue is Edwin A. Vermulst, Antidumping Law and Practice in the United States and the European Communities: A Comparative Analysis (1987), at 559-560. He writes about the contributing cause standard: "Indeed, the Commission has traditionally interpreted the causation

convenience for facilitating U.S. compliance with GATT antidumping and countervailing duty codes. Certainly, even if there were conflict between U.S. law and the GATT, it only is the responsibility of the Commission to administer existing U.S. law, which the U.S. Executive, Congress, and the Judiciary have said is in compliance with international obligations.[50]

Despite eloquent argumentation to the contrary, I remain persuaded that the weight of Commission decisions, legislative instruction, and judicial review is squarely on the other side of the issue; that is, favoring the traditional contributory cause standard.

It is useful to look now at how the contributory cause standard emerged in Commission practice. Under the Antidumping Act of 1921 the Treasury, which administered the injury test until 1954, and the Commission had few specific instructions from Congress regarding the concepts of injury and causation. Indeed, the Commission tended to lump the two issues together for analytical purposes, and only with the evolution of bifurcated analysis in the early 1970s were the two concepts examined separately.

The 1921 Act employed the term "injury" broadly in unmodified form, and only through administrative practice did the concept of material injury emerge. As Commissioner Sutton observed in Cast Iron Soil Pipe from Poland, "The word 'injury' in the Antidumping

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standard this way. Furthermore, it is supported by both judicial precedent and by the legislative history of the 1974 Trade Act."[footnotes omitted]

[50] Vermulst, supra, at 560, addresses the question of whether the contributory cause standard "is in violation of the 1979 Code." He concludes: "In our view, this is not the case." [footnote omitted]

Act has been construed by the Commission as meaning 'material injury'. Any injury which is more than de minimis is material injury. When the Congress used the word 'injury' in the Act without qualification of degree the only exception that one might reasonably apply to the word is the old legal maxim that 'the law does not concern itself with trifles'."[51]

During the first decade of Commission injury analysis, Commissioners seem not to have regarded the amount or quantity of imports as a controlling factor. Commissioner Sutton noted in Cast Iron Soil Pipe that:

> Argument has been advanced in this case that the volume of the subject imports amounted to less than one-half of one percent of U.S. consumption of comparable pipe and that, therefore, there could be no injury within the meaning of the Antidumping Act. Such argument, standing alone, is untenable. The Antidumping Act contemplates possible affirmative determinations in situations where there have been no imports. When importers undersell domestic producers by means of less than fair value imports and thereby disrupt market patterns and depress prices, injury to an industry is not to be equated solely on the market penetration of such imports nor on the number of lost customers.[52]

As a practical matter, specific formulation of the contributing cause standard seems to have emerged from debate over the 1967 International Antidumping Code. Article 3(a) of that Code provided:

> A determination of injury shall be made only when the authorities concerned are satisfied that the dumped imports are demonstrably the principal cause of material injury or of threat of material injury to a domestic industry

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[51] Cast Iron Soil Pipe from Poland, Inv. No. AA1921-50, TC Pub. 214 (September 1967), at 6-7.

[52] Id., at 7. See also views of Commissioner Clubb, June 29, 1968, included in International Antidumping Code: Hearing before the Senate Committee on Finance, 90th Cong., 2d sess. 72 (1968).

> or the principal cause of material retardation of the establishment of such an industry.[53]

Article 3(c) introduced a weighing of causes:

> In order to establish whether dumped imports have caused injury, all other factors which, individually or in combination, may be adversely affecting the industry shall be examined, for example: the volume and prices of undumped imports of the product in question, competition between the domestic producers themselves, contraction in demand due to substitution of other products or to changes in consumer tastes.[54]

In its report to the Finance Committee, the Tariff Commission majority [composed of Commissioners Sutton, Culliton and Clubb]

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[53] Id., at 265. See, at 286, for a June 19, 1968, analysis prepared by the Executive Branch [prepared by General Counsel of the Special Representative for Trade Negotiations in collaboration with legal counsel of the Departments of Treasury and State] arguing the "principal cause" provision is consistent with the Antidumping Act and present U.S. practice.

> The concept of 'the principal cause' is consistent with the Act and present practice. The Tariff Commission has always considered the causal relationship between dumped imports and injury in terms of something real and substantial. In published decisions, Commissioners have indicated that terms such as 'primarily' are a proper characterization under the Act of the degree of causality required to establish injury. The term 'the principal cause' is susceptible of such interpretation and, indeed, does not require that dumped imports be that cause which is greater than all other causes combined of material injury. It therefore allows injury determinations consistent with the requirements of the Act.

[54] Id., at 288-289. According to the Executive Branch:

> Paragraph (c) provides that in order to establish whether dumped imports have caused injury, all other factors which, individually or in combination, may be adversely affecting the industry shall be examined and then gives several examples of such factors. This provision is a logical elaboration [emphasis added] of the concept of the principal cause, which necessarily requires comparison with other identifiable causes.

differentiated the weighing requirement of the Code from existing practice under the 1921 Antidumping Act. They noted:

> The Commission in making its determinations with respect to injury under the Act has not weighed the injury caused by such imports against other injuries that an industry might be suffering. The injury test has always been whether the imports at less than fair value were causing, or were likely to cause, material injury, i.e., any injury which is more than de minimis.[footnotes omitted] [55]

A Commission minority, composed of Chairman Metzger and Commissioner Thunberg, noted that the Treasury Department and the Commission had not attempted to define or qualify the term "by reason of", which was the causation provision.

> Formulations which have been used from time to time in other statutes, such as 'caused in whole or in part', or 'have contributed substantially', or 'caused in major part', have not been employed. The Commission has made an overall judgment, after considering all the relevant facts and circumstances, whether there has been injury 'by reason of' less than fair value imported merchandise.[56]

It is clear that the Senate Finance Committee believed that the proposed International Antidumping Code restricted the Tariff Commission's discretion and "in a number of important respects and substantially neutralize[d] these laws as bulwarks against predatory price fixing...." Indeed, the weighing provision "... casts serious doubt on whether dumping could ever be found to cause injury to an industry which otherwise exhibits any sign of economic health."[57]

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[55] Id., at 331-332.

[56] Id., at 373.

[57] S. Rep. No. 1385, 90th Cong., 2d sess., part 2, at 11, 13.

It is apparent from discussions of the proposed Code that Commissioners gradually sought to define the causation provision, and at this point the contributory cause formulation emerged. In a May 1971 case, Pig Iron from Canada, Finland and West Germany, the Commission found that in a declining market "the effect of the LTFV imports was to displace some of the domestically produced cold pig iron that would have been sold in the absence of such LTFV imports." Thus, the Tariff Commission concluded:

> In earlier investigations the Commission has pointed out that it is not necessary to show that imports were the sole cause nor even the major cause of injury as long as the facts show that LTFV imports were more than a de minimis factor in contributing [emphasis added] to the injury.[58]

Throughout this period, Commissioners continued to elaborate the contributory cause standard. For instance, in their negative dissent in Clear Sheet Glass from Taiwan, Commissioners Bill Leonard and Jefferson Banks Young stated the causation standard for an affirmative determination this way:

> For an affirmative decision under the Antidumping Act, 1921, any injury that may have occurred to a domestic industry must be at least in part [emphasis added] by reason of the importation of the LTFV merchandise. In the instant investigation, if there is any injury to the industry in the United States which we define as twelve establishments owned by five firms producing clear sheet glass, it is not caused to any recognizable degree [emphasis added] by the LTFV clear sheet glass imported from Taiwan.[59]

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[58] Pig Iron from Canada, Finland, and West Germany, Inv. No. AA1921-72 to 74, TC Pub. 398 (May 1971), at 6.

[59] Clear Sheet Glass from Taiwan, Inv. No. AA1921-76, TC Pub. 407, (July 1971), at 6. See also the dissenting negative views of Commissioners Parker, Leonard and Young in Sheet Glass from France, Italy, and West Germany, Inv. Nos. AA1921-78 to 80, TC Pub. 431 (November 1971), at 8.

In Elemental Sulfur from Mexico, a May 1972 case, the Tariff Commission found that the domestic industry's difficulties were caused by a number of factors, but it concluded that "LTFV sales and offers of Mexican sulfur have contributed to the general depression of prices and to market disruption in Tampa ... and along the east coast of the United States." From the legal standpoint "all that is required for an affirmative determination is that LTFV imports be a cause [emphasis added] of significant injury to an industry (i.e., an injury greater than de minimis)."[60]

By this point a reasonably consistent Commission practice had emerged. Less-than-fair-value imports must be a cause of injury,

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[60] Elemental Sulfur from Mexico, Inv. No. AA1921-92, TC Pub. 484 (May 1972), at 3. In concurring affirmative views, at 9, Commissioners Leonard and Young suggested that a contributory cause must be an "identifiable" cause. "All that is required for an affirmative determination is that the less than fair value sales be a cause of injury to an industry. The causation between sales at less than fair value and injury must be identifiable, i.e., the injury must result from the less than fair value sales." [emphasis added]

Similar language appears in a number of other Commission opinions written under the 1921 Act.

See: Melamine in Crystal Form from Japan, Inv. No. AA1921-162, USITC Pub. 796 (December 1976), at 6. "Even where several factors that may cause injury, other than LTFV sales, are present, all that is required for an affirmative determination is that the LTFV merchandise contributed to more than an inconsequential injury."

Parts for Self-Propelled Bituminous Paving Equipment from Canada, Inv. No. AA1921-166, USITC Pub. 824 (July 1977), at 4-5. "Even when several factors that may cause injury, other than LTFV sales, are present, all that is required for an affirmative determination is that the merchandise sold at LTFV contributed [emphasis added] to more than an inconsequential injury to the domestic industry."

See also Railway Track Maintenance Equipment from Austria, Inv. No. AA 1921-173, USITC Pub. 844 (Nov 1977) at 3-4; Bicycle Speedometers from Japan, Inv. AA 1921-98, TC Pub. 513, (Sept 1972) at 6-7; Water-Circulating Pumps, West-Motor Type, from the United Kingdom, Inv. No. AA1921-152, USITC Pub. 777 (May 1976), at 10-11.

but not the most important cause, the sole cause, or even a principal cause of injury. Moreover, it is clear that Commissioners envisaged circumstances where imports could be a de minimis cause of injury.

The first judicial comment on this contributory cause standard came in the appeal of Elemental Sulfur to the Customs Court. And, Judge Maletz confirmed this approach in 1979:

> ... so long as there was a causative link [emphasis added] between Azufrera's LTFV sales and offers and the injury to domestic industry, the Commission was correct in finding injury to domestic industry 'by reason' of these LTFV sales and offers. To establish the necessary causation, LTFV sales do not have to be the sole cause, the major ca[u]se, or greater than any other single cause of injury. Hence, once the commission found a causative link [emphasis added] between LTFV sales and offers and injury to domestic industry, its task in this respect was finished. [footnote omitted. See below] It simply had no reason to discuss the other causes which had contributed to the injury, be it Duval's entrance as a major producer or some other factor. In short, when the Commission found that the LTFV sales and offers of Mexican sulphur had contributed to [emphasis added] the general depression of prices and to market disruption in Tampa and along the East Coast of the United States, it in effect, found that Duval was not the sole cause of injury.[61]

In a footnote to the above passage, where he discussed the "causative link," Judge Maletz noted "that the Commission's view regarding cause of injury for antidumping purposes has been subsequently endorsed by the Senate Finance Committee in connection with the Trade Act of 1974...."[62]

He then proceeded to quote from the report, including the following passage:

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[61] Pasco Terminals, Inc., v. United States, 477 F. Supp. 220-221 (Customs, 1979).

[62] Id., at 220.

> ... the law does not contemplate that injury from less-than-fair-value imports be weighed against other factors which may be contributing to injury to an industry. The words 'by reason of' express a causation link but do not mean that dumped imports must be a (or the) principal cause, a (or the) major cause, or a (or the) substantial cause of injury caused by all factors contributing to overall injury to an industry.[63]

As noted earlier, a five judge panel of the Court of Customs and Patent Appeals affirmed this decision "and adopt[ed] the court's opinion as our own."[64] Basically, then the Commission's appellate courts had ratified the traditional practice of the administering agency.

It is important to note that the U.S. causation standard did not change with writing of the 1979 Trade Agreements Act. Legal scholars indicate that in the course of Tokyo Round negotiations, other governments abandoned the "principal cause" and "weighing" provisions, and implicitly approved lowering the international causation standard to the level established in U.S. practice and law.[65] In preparing domestic legislation for the implementation of these agreements, the Senate Finance Committee observed that the new U.S. law "contains the same causation term as is in current law...." Moreover,

> Current law does not, nor will section 735, contemplate that the effects from less-than-fair value the imports be weighed against the effects associated with other

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[63] S. Rep. No. 93-1298, 93d Cong., 2d Sess. (1974), at 180.

[64] 634 F.2d 612 (1980).

[65] See Vermulst, supra, at 559-560. Also, Edmond McGovern, International Trade Regulation: GATT, the United States and the European Community (1986), at 372. See also, J. F. Beseler and A.N. Williams, Anti-dumping and Anti-Subsidy Law: The European Communities (1986), at 166-167.

> factors (e.g., the volume and prices of nonsubsidized imports, contraction in demand or changes in patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry) which may be contributing [emphasis added] to overall injury to an industry. Nor is the issue whether subsidized imports are the principal, a substantial, or a significant cause of material injury. Any such requirement has the undesirable result of making relief more difficult to obtain for industries facing difficulties from a variety of sources; such industries are often the most vulnerable to subsidized imports."[66]

Thus, by 1980 both the Commission's two reviewing courts in Pasco and Congress had confirmed the Commission's traditional practice of requiring that imports be a contributing cause of material injury.

Subsequently, in reviewing decisions made under the 1979 law, four judges of the Court of International Trade, the Commission's initial court of review, have each separately reiterated the contributing cause standard. In a 1984 case British Steel Corp. v. the United States, Judge Newman cited the legislative history of the 1979 Trade Agreements Act, and then stated:

> "As the legislative history makes clear, imports from a particular country need not be the sole or even principal cause of material injury, but need only be a contributing cause [emphasis added]. Since the test of causation is whether the imports from a particular country are contributing [sic] to the injury being suffered by the domestic industry, plaintiffs' correlation analysis is flawed due to the fact that a significant volume of imports can contribute to price depression, whether that volume happens to be increasing or decreasing during a

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[66] S. Rep. No. 96-249, 96th Cong., 1st sess. (1979), at 57, 74-75. Similar language appears in the H. Rep. No. 96-317, 96th Cong., 1st sess. (1979), at 46-47. "The bill contains the same causation element as present law...." Also, included are references to the contributory cause standard.

particular period of time.[67]

Several other judges and cases have repeated the essence of this language in only slightly modified form. Their holdings confirm Commission practice that a contributing cause must be more than de minimis in the judgment of the Commission. In Maine Potato Council, Judge Restani indicated that for an affirmative determination the facts must "show that LTFV imports are more than a de minimis factor in contributing to the injury."[68]

In two other recent cases, the CIT has cited British Steel and approved Commission use of the contributing cause standard. In Citrosuco Judge DiCarlo stated that Comm. Rohr's conclusion that the "Brazilian dumped imports are a cause [emphasis added] of material injury to the domestic industry" was "according to law and supported by substantial evidence on the record...."[69] And, in Florex Judge Restani said that "imports need not be the only cause of harm.... The record does not show that weather, and not imports, contributed

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[67] British Steel Corp. v. United States, 593 F. Supp. 405 (CIT, 1984), at 413. In its brief to the court, the U.S. International Trade Commission had stated: "... the causation standard is satisfied if the subsidized imports are even minimally related to the condition of the domestic industry." For this conclusion, it cited S. Rep. No. 249, 96th Cong., 1st Sess. 57 (1979), a passage that Judge Newman reiterated in the Court's opinion.

[68] In Maine Potato Council v. the United States, 613 F. Supp. 1237 (CIT 1985), at 1243, Judge Restani cited British Steel and stated "that it is not necessary for plaintiff to show that the imports are the sole cause, nor even the major cause of injury, as long as the facts show that LTFV imports are more than a de minimis factor in contributing to the injury."

[69] Citrosuco Paulista, S.A., v. United States, 704 F. Supp. 1075 (CIT 1988), at 1101, 1103.

to the material injury observed. ITC could conclude based on this record that both caused harm."[70]

The CIT decisions also confirm that the contributing cause standard involves only a low causation threshold. Judge Restani indicated that "the Commission must rule in the affirmative if it finds even slight contribution [emphasis added] from imports to material injury," in Gifford-Hill Cement.[71] Judge Carmen repeated a version of this formulation in Hercules, Inc., v. United States. He said: "If the ITC finds material injury exists due to an even slight contribution [emphasis added] from imports, the ITC may not weigh this contribution against the effects of other factors that are not used in the determination."[72]

Judge DiCarlo has articulated the minimal contribution test. In LMI-La Metalli Industriale v. United States, he wrote: "... the Commission is not to weigh causes of injury, but is to determine whether imports contribute to conditions of the domestic industry.... It is sufficient that the imports contribute, even minimally, [emphasis added] to material injury."[73]

With respect to the degree of causal connection needed for an affirmative determination it is plain, as a colleague has said,

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[70] Florex et al. v. United States, 705 F. Supp. 582 (CIT 1989), at 593.

[71] Gifford-Hill Cement Co. v. United States, 615 F. Supp. 577 (CIT 1985), at 585-586.

[72] Hercules, Inc., v. United States, 673 F. Supp. 454 (CIT 1987), at 481.

[73] LMI-La Metalli Industriale, S.p.A. v. United States, slip op. 89-46 (CIT 1989), at 31.

that the causation requirement "does not say that any harm from imports, however trivial, satisfies the causation standard of Title VII...."[74] But, in my view it is also clear, based on some twenty years of Commission precedents and Court opinions, that the causal threshold is very low. It is sufficient for an affirmative determination, the Courts have said, for imports to contribute "minimally" or even "slightly."

In light of these precedents and case law, I have difficulty understanding how responsible trade law administrators could claim "there is no persuasive authority supporting the contention ... that ... U.S. trade law requires an affirmative injury determination in any case where it can be shown that the domestic industry is experiencing difficulties to which the subject imports may have contributed minimally."[75]

Conclusion

These additional views respond to several misconceptions about the legal standards for administering antidumping and countervailing duty law.

First, they demonstrate that the bifurcated approach to Commission analysis of injury and causation has acquired a legitimacy rooted in Commission practice, case law, and the statutory process.

Second, these views demonstrate that the Commission's reviewing courts have examined and affirmed Commission practice of examining

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[74] Rails, supra, at 139.

[75] See note 45, supra.

the impact of the class or kind of foreign merchandise that the Department of Commerce has found to contain unfairly traded products.

Third, these views trace the development of the contributory causation standard in Commission practice, case law, and statutory enactment. The record shows that the traditional practice of a majority of the Commissioners has a sound legal basis.

In my opinion, those who wish to advance alternative approaches have an obligation, and a burden, to reconcile their methods with previous Commission practice, judicial precedent, statutory enactment and legislative intent. New approaches, if they are to acquire similar legitimacy, must rest on careful legal research and sound analysis, not simply on enthusiasm for change.

DISSENTING VIEWS OF CHAIRMAN ANNE E. BRUNSDALE

Small Business Telephone Systems and Subassemblies Thereof
From Japan and Taiwan
Investigation Numbers 731-TA-426 and 731-TA-428 (Final)

Based on the information gathered in these investigations, I join Vice Chairman Cass and Commissioner Lodwick in dissenting from the Commission's affirmative determination that an industry in the United States is materially injured, or threatened with material injury, by reason of dumped imports of small business telephone systems from Japan and Taiwan.[1] I concur with the Commission's finding of a single domestic industry producing one like product consisting of all equipment dedicated for use in a small business telephone system. I also concur in the Commission's discussion of the issues relating to the definition of the domestic industry, related parties, and cumulation.

I believe that the plurality opinion adequately describes the condition of the domestic industry during the period of the investigation. That opinion addresses each of the financial and production indicators relevant to the Commission's determination as set forth in 19 U.S.C. § 1677(7)(C)(iii), including, among other things, output, sales, market share, products, productivity, capacity utilization, cash flows, inventories,

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[1] 19 U.S.C. 1673d(b). Material retardation is not an issue in these investigations and will not be discussed further.

wages, employment, and development and production efforts. As the plurality points out, the data collected during the investigation paint a less than encouraging picture of the domestic industry over the period of investigation. The question on which I differ with the plurality's views, both in methodology and in result, is whether the industry is materially injured "by reason of" the dumped imports. I address that issue in the remainder of my views.[2]

Material Injury By Reason of Dumped Imports

The Problem with Examining Changes in Industry Performance. The problems inherent in using changes in industry performance to determine whether dumped imports have materially injured an industry are particularly well illustrated in the current case. By far the largest domestic producer of small business telephone systems is the American Telephone and Telegraph Company (AT&T),[3] which formerly provided local telephone service and rented small business telephone equipment under a strict regulatory regime.[4]

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[2] In an Appendix to these views, I attach a statement in response to the comments of Commissioner Eckes in a recent case regarding my approach to the relevance of the condition of the industry in Title VII cases. The comments in the Appendix are for the sake of debate and do not affect and did not contribute to my decision in these investigations.

[3] Staff Report, p. A-17.

[4] For a brief discussion of the history of AT&T, including government regulation of the company, see David S. Evans, "Introduction," in Breaking Up Bell: Essays on Industrial Organization and Regulation, David S. Evans, editor, North-Holland, 1983, pp. 1-3.

Since the Federal Communications Commission's (FCC's) Carterfone decision in 1968, it has been at least theoretically possible to use telephone equipment that was not rented from the local telephone company.[5] However, two events in the early 1980s radically changed the market for small business telephone equipment. First, as part of its Computer II decision in 1980, the FCC decided that telephone equipment located on the customer's premises -- such as the equipment that makes up small business telephone systems -- would no longer be subject to regulation. Such equipment could henceforth only be offered on a deregulated, competitive basis.[6] Second, in 1982, a Modified Final Judgment was entered in a long-running antitrust case against AT&T.[7] Under the terms of this agreement, beginning January 1, 1984, local telephone service was to be provided not

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[5] Staff Report, p. A-5. While the Carterfone decision established the principle that businesses could use non-AT&T equipment on the phone system, the regulatory battles related to these issues lasted at least another ten years as AT&T sought to limit access of competing equipment to its telephone network by requiring various devices allegedly needed to protect the integrity of the network. (Robert W. Crandall, "The Role of the U.S. Local Operating Companies," in Changing the Rules: Technological Change, International Competition, and Regulation in Communications, Robert W. Crandall and Kenneth Flamm, editors, The Brookings Institution, 1989, pp. 127-128. See also Joint Pre-Hearing Brief on Behalf of Fujitsu, Hasegawa, Hitachi, Iwatsu, Matsushita, Meisei, Nakayo, NEC, Nitsuko, and Toshiba, October 26, 1989, p. 72)

[6] Staff Report, p. A-6.

[7] United States v. American Telephone and Telegraph Co., 552 F.Supp. 131 (D.D.C. 1982) affirmed in Maryland v. United States, 460 U.S. 1001 (1983).

by AT&T, but rather by one of several Regional Bell Operating Companies, all of which would be completely independent of AT&T.[8]

Within a period of less than four years, the market for small business telephone services was significantly transformed. Prior to these changes, AT&T owned and operated a firm's local telephone service and provided business telephone equipment at regulated rates. After the changes, AT&T was no longer affiliated with the provider of local telephone service and had to sell its equipment in an unregulated, competitive market.

Given such a radical change in the operation of the market, I would not be at all surprised to see AT&T's fortunes declining as it adjusted to the new competitive market.[9] This period of adjustment could last a number of years and thereby extend into the period of the Commission's investigation. And indeed, there is evidence on the record of significant adjustments being made by AT&T during the period of the investigation.[10] As a result, I find it virtually impossible to determine from a review of trends

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[8] Staff Report, p. A-6.

[9] This situation is similar to that in Generic Cephalexin Capsules from Canada, USITC Pub. 2143, Inv. No. 731-TA-423 (Preliminary) (December 1988) at 19,32 (Dissenting Views of Acting Chairman Anne E. Brunsdale), in which a patent for the antibiotic cephalexin expired and competition from generic drug manufacturers ensued. In that case, I noted that the market had behaved as one would expect when moving from a monopoly to a competitive condition, and thus reached a negative determination.

[10] See Gus Blanchard "Rumor Killer" Letter #2, submitted by counsel for Executone in a letter dated October 26, 1989. Among other changes discussed in this document is the introduction in 1988 of a sales force that would visit potential customers at their location and a reduced reliance on telephone marketing.

alone -- even after my careful evaluation of the financial and production factors required by the statute -- whether any losses incurred by the domestic industry were the result of dumped imports or were the natural result of adjustment to changes in the market.

The Market for Small Business Telephone Systems: Background. I now turn to the task of identifying the attributes of the SBTS market that will permit me to determine whether the industry producing small business telephone systems has indeed been injured by imports sold at less than fair value.[11]

First, for the great bulk of sales in this market, the imported product does not compete directly with the domestic like-product.[12] Rather, before the domestic product competes with imports, domestic service firms known as interconnects add a

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[11] A business telephone system is defined as an SBTS on the basis of the size of the system (systems having between 2 and 256 non-blocking ports (Staff Report, p. A-7)) rather than because they are sold to small businesses.

[12] While this description is an accurate depiction of the vast majority of transactions in this industry, there are exceptions. First, AT&T sells a small percentage of its product through independent dealers. (Staff Report, p. A-20). Second, domestic producers, other than AT&T generally sell through interconnects. (Staff Report, p. A-76) However, these firms account for less than *** percent of domestic shipments. (Staff Report, p. A-17) Third, importers sell a small fraction of their systems direct to end users. However, such sales are usually to larger, national firms who will be buying a large number of systems. (Staff report, p. A-22) Finally, there has been some movement recently by importers to buy interconnects and establish their own distribution networks. However, at present, this represents only a fraction of total import sales. (Staff report, p. A-77)

significant amount of service to the imported product. The largest domestic producer -- AT&T -- sells the vast majority of its SBTSs directly to the businesses that will use them -- the end user -- through its General Business Systems Division. In contrast, end users rarely purchase imported SBTSs directly from the manufacturer. Instead, they buy them through service companies called interconnects which provide the marketing, installation, and maintenance services AT&T itself provides for its products. Thus, the direct competition between the domestic product -- at least that large part for which AT&T accounts -- and imported products includes substantial services being provided by AT&T on the one hand and by the interconnects on the other.

This can have important implications for an analysis of this case. Customers in the end user market do not segregate the cost and quality of the services portion of the package from the cost and quality of the equipment. The customer's decision is based on the price and quality of the entire package, not just one part. Furthermore, the likelihood that the interconnect will remain in business to provide service over the lifetime of the phone system can be more important in deciding from whom to buy than is the brand of hardware that interconnect offers.[13] Finally, because imported systems are sold through interconnects, importers are unable to provide data on the number or value of

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[13] Staff report, p. A-78.

systems sold. The importers generally sell subassemblies, e.g., control-and-switching units and telephones, which the interconnects then assemble in variable proportions into complete systems that meet the needs of the business buying the system.[14]

The second characteristic that distinguishes the market for small business telephone systems from many others is the importance of post-sale service -- including what is known in this industry as "moves, adds, and changes." During the five to seven years that the average firm keeps an SBTS,[15] the firm's needs for telephone services can change substantially. Thus, businesses frequently purchase SBTSs that are able to handle more telephones than they currently need.[16] Evidence in the record suggests that moves, adds, and changes to existing small business telephone systems may account for as much as half of the revenues generated by SBTSs.[17]

Unlike the sale of new SBTS systems where there is substantial competition among domestic and foreign products, there is little or no competition for moves, adds, and changes.

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[14] Memorandum to the Commission from the Applied Economics Division, Office of Economics, entitled "Economic Memorandum, Small Business Telephone Systems and Subassemblies Thereof from Japan, Korea, and Taiwan, Invs. 731-TA-426-428 (Final)", dated November 17, 1989 (INV-M-114) (Economics memorandum), p. 3.

[15] Staff Report, p. A-81.

[16] The average SBTS is initially configured at about half of its capacity. (Economics memorandum, p. 3)

[17] Gus Blanchard "Rumor Killer" Letter #2, p. 4., Posthearing Affidavit of Kenneth Michael Munsch, November 6, 1989, p. 1, Posthearing Affidavit of John Cosgrove, November 6, 1989, p. 5.

Equipment that has been designed for use in one manufacturer's small business telephone system cannot be used with a system produced by another firm.[18] Thus, once a firm has sold a system, it has guaranteed itself future business in moves, adds, and changes. This business tends to be more profitable than the initial sale.[19]

A third important factor in understanding this market is the cost of installation and service, which is provided by the interconnects, relative to the cost of hardware, which may be manufactured abroad. While interconnect-provided labor accounts for a significant amount of the initial cost of a phone system, it is an even larger share of the cost of moves, adds, and changes. Interconnects reported that installation and other related services accounted for as much as 50 percent of the total price of a small business telephone system, with the average being about 27 percent.[20] In other words, on average, equipment accounts for 73 percent of the cost of a system. However, because of the higher percentage of labor costs in providing

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[18] The equipment subject to this investigation is defined as equipment that can only be used to its full potential with a particular small business system. (Staff Report, p. A-12, especially notes 21, 22, and 23.)

[19] Staff Report, pp. A-80 - A-81.

[20] Staff report, p. A-78.

moves, adds, and changes, equipment may account for 50 percent or less of the total operating costs of the average interconnect.[21]

That labor accounts for such a large percentage of total cost is particularly significant in interpreting the effect of dumped imports on the domestic industry. Because the labor supplied by interconnects is domestic, the cost of labor would not increase with the imposition of dumping duties. As a result, an increase of, say, 50 percent in the price of the imported hardware for a small business telephone system will not lead to a 50-percent increase in the final price of such a system. Indeed, if labor and other domestic components account for 50 percent of total cost, the total cost of purchasing and maintaining a system will increase by only 25 percent.[22] As a result, the effect of a given dumping margin is smaller in the SBTS market, ceteris

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[21] See, e.g., figures on national average operating costs from the Sixth Interconnect Industry Survey submitted by American Telephone & Telegraph in its Responses to Questions, November 6, 1989, pp. 72-74. See, also, Affidavit of Seth Downs, President of Business Telephone Systems, Norcross, Georgia, October 25, 1989, paragraph 15; Affidavit of John Cosgrove, President of Executone Business Systems, Troy, Michigan, October 25, 1989, paragraph 13; Affidavit of Kenneth Michael Munsch, President of ATCOM, Inc., Research Triangle Park, North Carolina, October 25, 1989, paragraph 8; and Affidavit of Rudy Straub, President of E&H Electronics, Inc., Louisville, Kentucky, October 25, 1989, paragraph 11. (All of these affidavits were submitted as part of Attachment B to the Joint Pre-Hearing Brief on Behalf of Fujitsu, Hasegawa, Hitachi, Iwatsu, Matsushita, Meisei, Nakayo, NEC, Nitsuko, and Toshiba, October 26, 1989.)

[22] In choosing among small business telephone systems, a firm will consider not only the immediate cost of purchasing a system, but also the costs of maintaining the system over its lifetime and the cost of any expansion or reconfiguration that the purchaser anticipates needing.

paribus, than it would be in a market where the competition of imports involved only the purchase of an imported good.

Economic Analysis. My analysis of causation differs in important respects from that used by some of my colleagues. I do examine the information in the record concerning changes in the performance of the domestic industry over the period of the investigation in my consideration of the condition of the domestic industry. I then turn to an assessment of the factors pertaining to causation, viz., the effect of the subject imports on the volume and price of the domestic like product and the overall impact of the imports on the domestic industry.[23]

Several of my colleagues rely on the existence of dumped imports along with anecdotal evidence of underselling or lost sales to answer the causation question. However, this analysis does not permit me to separate the effect of dumped imports from the many other factors that may have had a positive or negative effect on the domestic industry.[24] The solution to this problem

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[23] 19 U.S.C. 1677(7)(B).

[24] The Commission has often noted the legislative history of the 1979 Act, which states that when determining whether there is material injury "by reason of" the imports subject to investigation, the Commission may consider factors other than imports, but does not weigh causes. (See S. Rep. No. 249, 96th Cong., 1st Sess. 74-75 (1979).) My understanding of this language is that it differentiates between causation analysis in Title VII, in which the imports must cause material injury before there can be an affirmative determination, and Section 201 analysis, in which imports must be a "substantial" cause -- more than any other cause -- of serious injury. Under the language of the statute, we still must find a causal connection between the

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lies in the well-recognized tools of economics.

Economic analysis allows me to gauge with reasonable certainty, using the information gathered during the Commission's investigation, the reactions of producers and consumers to the changing conditions in the marketplace brought about by the dumped or subsidized imports. This type of analysis, now known as elasticity analysis, presents a framework within which one can assess the causal (as opposed to coincidental) relationship between the import statistics and the condition of the industry. By using economic analysis, one can determine directly --as our governing statute requires -- whether the imports in question affected the domestic industry; if so, how they affected the industry; and whether that effect constitutes material injury.

Application of the tools of economics involve little more than an organization and evaluation of the evidence in the record in a manner that permits me to assess the impact of dumped imports in a rigorous fashion. These are not surrogates for the statutory factors. Rather, these tools permit me to analyze in a direct fashion the volume effect, the price effect, and the overall impact of the dumped imports on the domestic industry as required by law.[25]

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[24](...continued)
imports and material injury -- i.e., the imports must cause material injury -- notwithstanding what other factors may be contributing to the state of the domestic industry. The language of the statute and the standard rules of English grammar permit no other reading.

[25] 19 U.S.C. 1677(7)(B),(C)

In analyzing the effect of dumped imports, I must determine how they have affected demand for the domestic like product. I know from economic theory that the imports will tend to reduce demand for the domestic product. However, I must determine how large this effect is. Having determined the change in demand, I can then ascertain how this reduction in demand for the domestic like product affects the price of the domestic like product and the quantity of the domestic product that is sold.[26]

Consumers make purchasing decisions based on a variety of factors, e.g., price, quality, reliability of supply, and terms of sale. The interrelationship of all of these factors in the domestic market for the domestic like product, the subject imports, and imports not subject to investigation is somewhat complicated and the evidence on the record is often unwieldy. Economic analysis allows me to organize the evidence in a fashion that describes the market in a systematic way. First, I can look at the evidence on the record to determine the degree to which consumers purchase the subject imports because they are unfairly priced rather than because of other attributes -- quality, better terms of sale -- that the domestic like product does not have.

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[26] The factors considered when describing the condition of the industry are directly related to the volume and price of the domestic like product. For example, if output declines substantially, employment will likewise decline; if the output decline is small, the employment effect will be small. Similarly, if output and price levels decline and are expected to remain at reduced levels, this will reduce the profitability of investment in the domestic industry, with the result that less investment will be undertaken.

Using evidence about the products and sound judgment, economists can gauge this characteristic of the market by a principle known as the elasticity of substitution. A similar exercise can describe consumers' perceptions about differences between fairly traded and unfairly traded imports.[27]

The magnitude of the subject imports' impact on the domestic industry also depends on the degree to which low import prices actually generate additional sales. If domestic consumers will only purchase a relatively fixed quantity of the product under investigation during a given period, it is reasonable to assume that the unfair imports, other things being equal, obtained sales at the expense of the domestic industry. On the other hand, if the market is such that consumers will purchase more of the product if presented with a lower price, a substantial share of the increase in sales of imports resulting from the dumping may be sales to customers who would otherwise not buy the product. The subject imports' impact on the domestic industry is therefore much less. Economists, again using evidence on the record and sound judgment, can assess the effect of the price on the volume

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[27] The elasticity of substitution is defined as the percentage change in the relative quantities of two goods resulting from a 1 percent change in their relative prices. Consideration of the elasticity of substitution provides insight into the impact of the dumped imports on the domestic industry. A low value suggests that few purchasers of imports would shift to the domestic product if the price of imports rose, indicating in turn that the impact of imports on the domestic product is muted; a high value suggests that customers view the products as sufficiently good substitutes that the domestic industry could gain substantial sales from existing import customers if the price of imports rose.

of a product sold. This assessment is known as the aggregate elasticity of demand.[28]

We can determine the nature of any impact of the subject imports on the domestic industry by considering the elasticity of domestic supply.[29] If domestic producers could produce no more of the product even if all imports disappeared, then, assuming consumers still demanded the same quantity of the product, the price would rise. On the other hand, if imports could easily be replaced by increased domestic production, the domestic price would stay low and output would expand. By assessing this aspect of the domestic industry, we can evaluate whether, in light of the other factors discussed, the industry is materially injured by reason of the subject imports.

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[28] The aggregate elasticity of demand is defined as the percentage decline in the total purchases of a good, both domestic and imported, resulting from a 1 percent increase in the price of each producer's product. By examining the elasticity of demand, we gain insight into the degree to which the increase in the demand for imports resulting from a low, "dumped" price is the consequence of an increase in the total demand for the product rather than reduced sales by the domestic producers. All other things equal, the higher the elasticity of demand, the higher the percentage of the increase in imports that results from new sales rather than sales captured from domestic producers.

[29] The elasticity of supply is the percentage increase in the quantity of a product supplied as the result of a one percent increase in the price of that good. A large elasticity of domestic supply means that any adverse effect dumping may have on the domestic industry will be mainly on the quantity of the good produced by the domestic industry rather than on the price received by domestic producers. That is, in the absence of dumped imports, domestic producers may increase the level of their production. However, this would not result in a significant increase in the prices they receive.

I therefore examine the record in order to develop a view regarding (1) the degree of substitutability between the subject imports and the domestic products, (2) the degree of subsitutability between the domestic product and other imports, (3) the extent to which overall demand in the market is responsive to price (i.e., the aggregate elasticity of demand), (4) the responsiveness of the supply of fairly traded imports to a change in price, and (5) the responsiveness of domestic supply to changes in price.[30] Specifically, the effect of the dumped imports on the demand for the domestic like product will be revealed by consideration of the first four factors. How this change in demand affects the price and volume of the domestic product will be determined by the fifth factor, the elasticity of domestic supply.

Congress has explicitly required the Commission to explain its analysis of all factors considered in the material injury

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[30] A more thorough discussion of the use of elasticities is contained in Internal Combustion Forklift Trucks from Japan, Inv. No. 731-TA-377 (Final), USITC Pub. 2082, at 66-83 (May 1988) (Additional Views of Vice Chairman Anne E. Brunsdale); see also Color Picture Tubes from Canada, Japan, the Republic or Korea, and Singapore, Inv. Nos. 731-TA-367-370 (Final), USITC Pub. 2046, at 23-32 (December 1987) (Additional Views of Vice Chairman Anne E. Brunsdale); Cold-Rolled Carbon Steel Plates and Sheets from Argentina, Inv. No. 731-TA-175 (Final) (Second Remand), USITC Pub. 2089, at 31-51 (June 1988) (Additional Views of Vice Chairman Anne E. Brunsdale). The Court of International Trade has also discussed with approval the use of elasticities. See Copperweld Corp. v. United States, No. 86-03-00338, slip op. 88-23, at 45-48 (Ct. of Int'l Trade February 24, 1988); USX Corp. v. United States, 12 CIT _____, slip op. 88-30, at 19 (March 15, 1988): Alberta Pork Producers' Marketing Board v. United States, 11 CIT ____, 669 F.Supp. 445, 461-65 (1987).

determination.[31] Explicit examination of the mechanism through which imports affect domestic producers of the like product using simple elasticity analysis provides the degree of insight into my reasoning process that Congress sought when it amended the dumping statute.

Elasticity of Substitution. One of the parameters that has attracted the most debate in this proceeding is the degree to which purchasers of small business telephone systems would alter their choice of an SBTS in response to a change in the relative prices of two systems. This is captured by the elasticity of substitution in demand. Petitioner's economic expert argues that the elasticity of substitution is very high, having a numerical value of between 4 and 9.[32] Respondent's economic expert places the elasticity of substitution at 2,[33] while the ITC's Applied Economics Division puts it in the range of 3 to 5.[34]

In my analysis of the elasticity of substitution, I distinguish the substitutability between the products of AT&T and

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[31] Omnibus Trade and Competitiveness Act of 1988, Section 1328, 102 Sat. 1107, 1205, amending 19 U.S.C. 1677(7). In addition, the Commission must explain the relevance of each non-mandatory factor it considers in reaching its determination. Id.

[32] Post-Hearing Statement of Bruce P. Malashevich Responding to Questions of the Commission and Staff Concerning Economic Issues, November 6, 1989.

[33] Pre-Hearing Economic Submission of Economists Incorporated, October 26, 1989, Part II, p. 31.

[34] Economics memorandum, p. 13.

those of other producers from the substitutability among the products of other producers. The record contains strong evidence that the substitutability of different systems is far from perfect. Further, AT&T's SBTSs are less substitutable for those produced by other manufacturers than are the systems of other producers substitutable for one another.

That AT&T appears to be able to price its products at a premium is evidence that AT&T's products are not highly substitutable for others.[35] At least in part, AT&T's ability to charge premium prices appears to be the result of customer recognition of AT&T's corporate brand name and the brand names of specific AT&T models, especially the Merlin system.[36] In addition, petitioner's witnesses offered testimony that, in customer surveys, AT&T's products are consistently rated better for certain product attributes than those of competitors.[37]

Furthermore, AT&T's products are distributed and serviced by its own employees while other manufacturers generally sell through unrelated interconnects. Interconnects may be viewed by purchasers as having different strengths and weaknesses than

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[35] Staff Report, p. A-83; Joint Pre-Hearing Brief on Behalf of Fujitsu, Hasegawa, Hitachi, Iwatsu, Matsushita, Meisei, Nakayo, NEC, Nitsuko and Toshiba, October 26, 1989, pp. 54-55; and Pre-Hearing Economic Submission of Economists Incorporated, October 26, 1989, p. I-9.

[36] Testimony of Mr. Blanchard at pp. 35-37 of the hearing transcript.

[37] Testimony of Mr. Blanchard at p. 39 of the hearing transcript.

AT&T.[38] Thus, even if the equipment sold by interconnects and AT&T is of the same quality, some businesses may prefer to deal with AT&T based on their perceptions of the quality of service available, while others may prefer to deal with an interconnect. However, if a business wishes to obtain AT&T's service, it must purchase an AT&T system. In contrast, interconnects generally carry a number of different brands,[39] so that customers who prefer the service offered by a particular interconnect can often select among several manufacturers' hardware. Again this suggests that the substitutability among non-AT&T products is likely to be greater than that between AT&T and other manufacturers.

Other factors support the conclusion that the substitutability among non-AT&T products is also far from perfect. The most significant factor here is moves, adds, and changes. As already noted, moves, adds, and changes can generate as much revenue as the initial sale of the system. When a business wishes to change its existing system, it must obtain equipment manufactured for that system.[40] As a result, for as

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[38] Joint Pre-Hearing Brief on Behalf of Fujitsu, Hasegawa, Hitachi, Iwatsu, Matsushita, Meisei, Nakayo, NEC, Nitsuko, and Toshiba, October 26, 1989, pp. 70-71.

[39] Staff Report, p. A-77.

[40] Technicians familiar with the particular system are also likely to be better able to install the additional equipment and make other needed changes.

much as one-half of the revenue generated from sales and service of SBTSs, the elasticity of substitution is virtually zero.[41]

In addition, testimony at the hearing pointed to the importance of particular system features in a customer's selection of an SBTS.[42] There is also evidence that when a business has an existing SBTS, it is likely to purchase additional or replacement systems from the firm that manufactured its original one. Indeed, interconnect witnesses indicated that they receive repeat business from 80 to 90 percent of businesses having systems that they installed.[43] All of these factors strongly suggest a limited degree of substitutability even among systems not manufactured by AT&T.

For the above reasons, I find the elasticity of substitution offered by petitioner's economic expert to be unrealistically high.[44] While the elasticity values proposed by the Applied

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[41] The only way in which the price of a competitor's equipment can affect purchase decisions in the moves, adds, and changes area is if a competitor's low price for a new system induces the customer to purchase a new system rather than add to or otherwise alter an existing system.

[42] See, e.g., Testimony of John Cosgrove, President, Executone Business Systems, pp. 249-250 of the hearing transcript.

[43] Hearing transcript, p. 286.

[44] In a post-hearing filing, petitioner's expert attempted to justify his high elasticity of substitution by tying it to the estimated cross-elasticity of demand of 2.0 between AT&T products and those of competitors that was offered by Mr. Woodard based on the McKinsey study. (See, Post-Hearing Statement of Bruce P. Malashevich Responding to Questions of the Commission and Staff Concerning Economic Issues, November 6, 1989, Appendix A. The estimated cross-elasticity of 2.0 can be found in the Statement of Thomas M. Woodard, Director, McKinsey & Co., Inc., August 18,

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Economics Division may be appropriate for producers other than AT&T, they are also too high with regard to the degree of substitution between AT&T's products and those of other manufacturers. Based on a correct application of the cross-elasticity offered by AT&T itself, I conclude that the elasticity of substitution between AT&T and non-AT&T products probably lies in the range of 1.9 to 2.3.[45]

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[44](...continued)
1989, p. 14) However, there are significant errors in the expert's execution of this calculation. First, no account was taken of the share of revenue resulting from moves, adds, and changes where the cross elasticity of demand would be virtually zero. Instead, it was assumed that the cross elasticity of 2.0 applied to all business. This is clearly incorrect since the McKinsey study, submitted by AT&T and from which the cross-elasticity estimate cited by Mr. Woodard is derived, examined only the sales of new small business systems. Second, the estimated elasticity of substitution was increased to account for an aggregate elasticity of demand of - 0.5. However, in conducting the McKinsey study it was assumed that the aggregate elasticity of demand was essentially zero (Statement of Thomas M. Woodard, p. 10). Therefore, such an adjustment is not appropriate.

Finally, Mr. Malashevich uses as his estimate of the share of value accounted for by AT&T's competitors, the figure for the market penetration of allegedly unfair imports reported in the Preliminary Staff Report. There are two problems with this approach which lead to an overstatement of the degree of substitutability. First, the value share used in this calculation should include fair as well as unfair imports. This would increase the share of competing products by another 3.4 percentage points. Further, the figures reported there probably understate the market share of importers because importers and AT&T provided data at different levels of trade. (See, Preliminary Staff Report, p. A-81.) For all of these reasons, I do not believe that one can rely on the estimates offered by Mr. Malashevich.

[45] According to the Applied Economics Division, the value of shipments reported by importers should be multiplied by 1.67 to make it comparable to the figures reported for the domestic industry. (Memorandum from the Applied Economics Division, Office of Investigations, to Chairman Brunsdale and Vice Chairman Cass

(continued...)

The evidence on the record thus considered in a fashion that accords with basic economic principles suggests that only a limited number of purchasers would shift to AT&T's products in response to an increase in the price of imports. Those customers currently purchasing from AT&T have a clear preference for those products. Relatively few of the businesses that would currently purchase non-AT&T products would switch to AT&T because of a modest increase in the price of the other products.

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[45](...continued)
entitled "Estimation of the Effects of Dumping on Price and Volume of the Like Product in Small Business Telephone Systems and Subassemblies Thereof from Japan, Korea, and Taiwan, Invs. Nos. 731TA-426-428 (Final)," dated November 17, 1989 (CADIC memorandum), pp. 1-2) Making this adjustment, we find that imports accounted for 53.0 percent of U.S. apparent consumption in 1988. Because moves, adds, and changes account for 40 to 50 percent of the volume of business in this market and the cross-elasticity of demand for this part of the business is nearly 0, I use a cross-elasticity of demand for all business of 1.0 to 1.2. Combining these two pieces of data, I arrive at an elasticity of substitution between domestic and foreign SBTSs of between 1.9 and 2.25.

I am aware that there has been much discussion of the reliability of the McKinsey study. (See, e.g., Posthearing Brief of NEC Corporation and NEC America, Inc., Attachment 2 and Pre-Hearing Economic Submission of Economists Incorporated, October 26, 1989, Part I.) However, in spite of possible shortcomings, I find the cross-elasticity figure from the McKinsey report to be informative. The McKinsey study looks specifically at the market for new small business telephone systems in the United States -- the market being investigated in the current proceedings. Thus, the study provides us with unusually detailed data on the specific market with which we are concerned -- a luxury rarely available in our cases. Further, it was conducted for marketing purposes, not as part of developing petitioner's case in the current matter. Finally, because the McKinsey report is not particularly helpful to AT&T's case, it can be treated much as an admission or statement against interest would be in a judicial proceeding -- with the associated indicia of reliability.

The Aggregate Elasticity of Demand. The other parameter that is especially important in evaluating the current case, and about which there has been substantial disagreement, is the degree to which the demand for small business telephone systems responds to a change in price -- the aggregate elasticity of demand. Petitioners' economic expert argues that the demand for SBTSs is inelastic and employs a value of -0.5 for the aggregate elasticity of demand.[46] Respondent's expert, on the other hand, argues that demand is moderately elastic and urges a value of -1.5.[47] The Applied Economics Division recommends a value in the range of -1.0 to -1.5.[48]

Petitioners are correct in suggesting that the decision to open a new business and the subsequent decision to install some type of telephone system for that business are not going to be greatly affected by the price of telephones.[49] It would be extremely difficult, if not impossible, for most businesses to operate without a telephone. Further, the cost of a phone system is a relatively small percentage of the total cost of operating the business.

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[46] Evidentiary Submission of American Telephone and Telegraph Company, October 24, 1989, Volume I: Statement of Bruce P. Malashevich, p. 70.

[47] Pre-Hearing Economic Submission of Economists Incorporated, October 26, 1989, Part II, p. 31.

[48] Economics memorandum, p. 18.

[49] Evidentiary Submission of American Telephone and Telegraph Company, October 24, 1989, Volume I: Statement of Bruce P. Malashevich, p. 77.

However, the inelastic nature of the demand for business telephones is not the only important determinant of the elasticity of demand for newly manufactured small business telephone systems, the product in the current investigation. The other primary consideration is the availability of alternatives to the purchase of a new SBTS. There has been considerable debate in this case concerning the availability of substitutes, particularly the degree to which Centrex and refurbished equipment serve as substitutes for new SBTSs. Petitioner argues that Centrex and refurbished equipment account for too small a share of the market to provide effective competition for new SBTSs.[50]

Contrary to the assertions of petitioners, two factors lead me to conclude that Centrex and refurbished equipment are competitors for new small business telephone systems and contribute to making the aggregate demand for new SBTS equipment moderately elastic. First, and most important, the fact that a product accounts for only a small share of a market at existing prices does not establish that it is not a good substitute for other products in the market. The question of substitutability relates to how market shares would change if relative prices changed. I see no reason to believe that businesses would not look more seriously at Centrex and refurbished equipment if the price of new equipment were to increase by a significant amount.

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[50] Prehearing Brief of American Telephone and Telegraph Company, October 24, 1989, pp. 88-89.

Certainly, there should be no shortage of used equipment. Testimony indicates that 60 to 70 percent of new SBTS purchases involve the replacement of an existing system, and about one-quarter of these replacement customers seek to trade in their old systems.[51] If the demand for refurbished systems were to expand, the trade-in value of old systems would increase and an even larger share of customers would be expected to trade in.

Second, Centrex and refurbished equipment have become increasingly important factors in the SBTS market during the period of the investigation. Between 1986 and 1988, Centrex's share of lines shipped in the under-100 line market rose from 2.3 percent to 3.9 percent, an increase of almost 70 percent, while the share of refurbished equipment rose from 2.7 percent to 7.9 percent, almost a triple.[52]

Petitioners have also argued that Centrex is not a substitute for small business telephone systems because businesses frequently use key systems -- one type of SBTS -- together with Centrex services.[53] For example, it is reported that "[a] typical user of Centrex services is a bank, which will use Centrex to communicate between different branches, but will

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[51] This is the estimate of both AT&T and of Northeastern Communications. See AT&T Responses to Questions, November 6, 1989, pp. 25-26.

[52] Eastern Management Report, p. 41.

[53] Staff Report, p. A-13; Prehearing Brief of American Telephone and Telegraph Company, October 24, 1989, p. 89; AT&T Responses to Questions, November 6, 1989, p. 28.

use a key system for its telecommunications needs within each branch."[54]

Petitioners' assertions to the contrary, the fact that many subscribers to Centrex have chosen to use key systems in conjunction with Centrex does not establish that Centrex and SBTS are not substitutes.[55] While a business using both Centrex and a key system does have an SBTS on its premises, just as it would without Centrex, the SBTS is much smaller and less complicated than the system that would be needed without Centrex. The system that would function without Centrex would cost more and involve more productive activity than the key system used behind Centrex. Thus, while a count of the number of small business telephone systems sold may not decrease when a customer chooses Centrex with a key system, this merely shows the shortcoming of counting the number of units sold. Manufacturers of SBTS equipment have clearly suffered decreased sales revenues as a result of the choice of Centrex services, and this establishes that Centrex and SBTS are substitutes.[56]

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[54] Staff Report, p. A-80.

[55] Further, technological changes currently being introduced are reducing the need for using a key system in conjunction with Centrex. (Staff Report, p. A-80)

[56] Indeed, it is possible that the number of units purchased would be greater if Centrex was used with a number of key systems rather than purchasing a single larger system to handle all of the businesses needs. Producers of SBTS would nonetheless be worse off if the business chose Centrex.

In addition to the substitutability resulting from the availability of Centrex and refurbished equipment, the possibility of simply delaying the purchase of a new SBTS or of postponing or going without certain moves, adds, and changes will lead to a greater aggregate elasticity of demand. As noted, 60 to 70 percent of small business telephone systems are bought to replace an existing phone system. Further, the average business replaces its SBTS after five to seven years, even though the replaced system is still working. New systems are purchased because they have new features or will better serve the current needs of the business.[57] I have also discussed how substantial moves, adds, changes are made during the time a business owns a system. However, if the price of new systems were to increase significantly, I would expect that customers would delay the purchase of new systems or delay making changes to existing systems.[58]

Given the availability of Centrex and refurbished equipment as alternatives to the purchase of a newly manufactured small business telephone system, and given the possibility of delaying the replacement or modification of an existing system, I agree with respondents' expert and place the elasticity of aggregate

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[57] Staff Report, p. A-81.

[58] Of course, if a business delays the purchase of a new telephone system, it may have to undertake some further moves, adds, or changes on its existing system. This would still involve less productive activity, however, than the purchase of a new system and would therefore still indicate a reduced demand for SBTS equipment in response to a price increase.

demand in the upper end of the range proposed by the Applied Economics Division -- that is, - 1.5, meaning that a 1 percent increase in the price of SBTSs will lead to 1.5 percent decrease in the quantity of SBTS equipment purchased.

Because aggregate demand for SBTSs is moderately elastic, much of the increase in the sales of imports resulting from low dumped prices comes from businesses that would not purchase a new SBTS if the price were higher. Ceteris paribus, the higher the value of the aggregate elasticity of demand, the fewer the sales of imported products that come from customers which would have bought the systems of domestic producers if the price of the imports had been higher.

Elasticity of Supply. There is much less disagreement among the parties concerning the two elasticities of supply -- the degree to which imports or domestic production would expand in response to an increase in price. Considering first the elasticity of import supply, all parties agree that it is close to, if not actually equal to, infinity.[59] I find no reason to disagree with

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[59] See Evidentiary Submission of American Telephone and Telegraph Company, Volume I: Statement of Bruce P. Malashevich, October 24, 1989, p. 70 and Post Hearing Brief of Nitsuko Corporation in Opposition to the Petition for the Imposition of Antidumping Duties, November 6, 1989, pp. 3-4. While the Applied Economic Division's Economics memorandum merely says the elasticity is greater than five, they use an infinite elasticity in their CADIC estimations. (See Economics memorandum, pp. 9-13, CADIC memorandum, and Memorandum from the Applied Economics Division, Office of Economics, to Chairman Brunsdale and Vice Chairman Cass, entitled "Revised estimates of the Effects of Dumping on Price and Volume of the Like Product in Small Business Telephone

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this assessment.

Small business telephone systems are currently imported from several countries not subject to the current investigations: Canada, Hong Kong, Israel, Singapore, and West Germany.[60] Imports from these non-subject countries could increase. Imports could also appear from countries not currently exporting small business telephone systems to the United States. In particular, several of the importers -- including EXECUTONE Information Systems, Inter-Tel, and TIE/communications, Inc. -- design their equipment in this country and then contract with foreign manufacturers to produce to their specifications.[61] The production of SBTS equipment does not require complex, advanced technology.[62] Thus, at least for these firms it should be relatively easy to shift to new sources of supply.

Because the elasticity of supply of imports from alternative countries is very high, purchasers who prefer the imported products to those produced by AT&T should be able to expand the quantity of SBTSs purchased from countries other than those subject to these investigations without causing the price of

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[59](...continued)
Systems and Subassemblies Thereof from Japan, Korea, and Taiwan, Invs. Nos. 731-TA-426-428 (Final), dated November 20, 1989 (Revised CADIC memorandum).)

[60] Staff Report, p. A-19.

[61] Staff Report, p. A-18.

[62] Staff Report, pp. A-14 - A-15.

those imports to rise by a significant amount. As a result, there will be little benefit for the domestic producers.

Turning to the elasticity of domestic supply, there is general agreement that it is elastic. As a result, the impact of dumping on the demand for the domestic product will manifest itself mainly in terms of a reduction in the quantity of sales rather than a decrease in the price of the domestic product.

While there is general agreement that domestic supply is elastic, different parties select different values for this elasticity. Petitioner's economic expert selects a value of 5, but provides no discussion of what leads to that value.[63] Respondent's expert places the elasticity at "no less than between 10 and 20," pointing to the relatively low levels of capacity utilization among domestic producers and the possibility that equipment used to produce other electronics products could be shifted to the production of SBTSs.[64] The Applied Economics Division places the elasticity of domestic supply in the elastic range, most likely greater than 5.[65]

I agree that domestic supply is elastic. There is considerable production capacity that is currently unused.[66]

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[63] Evidentiary Submission of American Telephone and Telegraph Company, Volume I: Statement of Bruce P. Malashevich, October 24, 1989, p. 70.

[64] Pre-Hearing Economic Submission of Economists Incorporated, October 26, 1989, Part II, pp. 6-7.

[65] Economics memorandum, p.6.

[66] Staff report, p. A-29.

Furthermore, the production process for small business telephone systems is such that it may be possible to shift equipment used to produce other consumer electronic goods into the production of small business telephone systems.[67] However, I doubt that values above 15 to 20 are realistic.[68]

Market Shares, Dumping Margins, and the Effect of Dumped Imports. The Department of Commerce's final dumping margins in this case are extraordinarily large for the Japanese firms, where the average value is 157.85 percent, and for the one Taiwan firm having a positive margin, Taiwan Nitsuko, whose margin is 129.73 percent.[69] The dumping margins for Korea are considerably smaller, averaging only 7.79 percent.[70]

The very high margins for the Japanese producers and for Taiwan Nitsuko may be the result of Commerce's use of best

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[67] Staff Report, pp. A-14 - A-15.

[68] With an elasticity of 20, a five percent increase in price would result in a 100 percent increase in quantity. A doubling of output from such a small increase in price seems unlikely given the levels of capacity utilization in this industry. (See Staff Report, p. A-30.)

[69] Staff Report, pp. A-2 - A-3. Taiwan producers other than Taiwan Nitsuko were either dismissed from this proceeding (Sun Moon Star) or were assessed a dumping margin of 0.0.

[70] These are the Department of Commerce's preliminary margins with respect to Korea, since release of the final margins with respect to this country have been delayed until December 18, 1989. (Staff Report, p. A-3) However, our statute requires that we cumulate the effect of Korean dumping with the effect of dumping from Japan and Taiwan in reaching our decision in the current case. (19 U.S.C. 1677(7)(C)(iv))

available information rather than actually calculating margins. In any event, such large margins would result in a finding of material injury in most cases.

The large market share of the less-than-fair-value imports also suggests the likelihood of injury.[71] Data on the quantities of control-and-switching units shipped show that unfairly traded imports accounted for 54.4 percent of U.S. apparent consumption in 1988, with slightly less than half of these imports coming from Japan. The bulk of the remainder came from Korea, with Taiwan accounting for less than 10 percent of total imports. A similar picture exists in imports of telephone sets. Unfairly traded imports from the three countries accounted for 59.4 percent of U.S. apparent consumption in 1988, with Japan and Korea each accounting for approximately half the total. Taiwan again accounted for less than 10 percent.[72] As would be expected, the market penetration of unfairly traded imports of small business telephone systems is lower if share is measured in

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[71] Because imports are sold at a different level of trade than are the products of the largest domestic producer, it is unclear whether value or quantity measures provide the best indicator of import penetration in the current case. Data on the quantities of subassemblies avoid the problems resulting from sales at different levels of trade. However, quantity numbers cannot capture the effect of AT&T's equipment selling for higher prices than comparable equipment produced by others. Further, quantity measures give the same weight to all size of SBTSs. Given the problems with either quantity or value measures, I consider both below.

[72] Staff Report, Tables 31 and 33, pp. A-71 and A-74. Note that the figures include the imports from Taiwan firms that were assigned a zero margin, but not those of Sun Moon Star which was eliminated from the investigation.

value terms. However, the share is still significant, amounting to 34.0 percent of U.S. apparent consumption in 1988.[73]

Given the high levels of the dumping margins and the market shares in this case, imports clearly are having some impact on the domestic industry. However, the statute does not ask whether there is any injury by reason of the dumping, but rather whether there is material injury.[74] I find the question of whether the injury in this case is material to be extremely close.

However, I am ultimately persuaded that the injury does not cross the threshold for materiality. First, the moderately elastic aggregate demand for new small business telephone systems limits the effect of the dumped imports on the domestic industry. The lower price resulting from dumping is increasing the total demand for newly manufactured SBTSs. This, in turn, reduces any loss of sales by the domestic industry, ceteris paribus.

Second, as I have discussed, there is only a limited degree of substitutability between the product of AT&T -- the domestic producer accounting for the vast majority of domestic production -- and imported products. There is more substitutability among the non-AT&T products, which are primarily the imports. This suggests that, even if the Japanese producers and Taiwan Nitsuko are dumping by the amount of the margins calculated by the Department of Commerce, the main effect is borne by suppliers

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[73] Staff Report, Table 30, p. A-70.

[74] 19 U.S.C. 1673d(b)(1)(A)(i).

other than AT&T -- primarily by other actual and potential sources of imports. Higher prices for the Japanese and Taiwan products would have led most businesses currently purchasing from these firms to look for an alternative non-AT&T product rather than select AT&T equipment. That a firm would select non-AT&T equipment in the current market suggests that they do not find the advantages of dealing with AT&T, including the AT&T service (which is only available if they purchase AT&T equipment), to be worth the price premium charged by AT&T.

Eliminating dumping could lead to a substantial improvement in AT&T's sales only if the price of all non-AT&T producers were to rise substantially. However, this seems unlikely. It would not be difficult for interconnects currently handling Japanese and Taiwan equipment to find non-AT&T alternative sources of equipment. As noted above, all parties agree that the elasticity of supply of alternative imports is very high. Imports from non-subject countries can be expected to expand and alternative sources of supply are likely to be developed. An additional alternative would be to purchase from Korean producers, whose preliminary dumping margins are much lower.[75]

Finally, Commerce's dumping margins reflect only the degree to which imports of the hardware that makes up an SBTS is priced at an unfairly low level. However, domestic labor supplied by

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[75] I do not intend to suggest that the price of imports would be no higher if dumping were not occurring, only that the price effect would be fairly small. As a result, the effect on the demand for the domestic product would be small.

the interconnects may make up as much as 50 percent of the total cost of an imported system. As a result, the percentage increase in the total cost of purchasing and operating an SBTS imported from Japan or Taiwan will be much smaller than the dumping margin may appear to suggest.

Thus, while the case is close, I conclude that the domestic industry is not materially injured by the dumped imports.

Threat of Material Injury

My approach to threat determinations is fully outlined in my recent opinion in Fresh, Chilled, or Frozen Pork from Canada.[76] This approach is captured in three propositions. First, Congress has explicitly indicated in the statutory language and the legislative history that "threat analysis" should not be used to avoid difficult judgments on actual injury. Second, the statutory standard for an affirmative threat determination is high. That is, an affirmative determination must be based on evidence that "the threat of injury is real and actual injury is imminent," and may not be based on supposition or conjecture.[77] Our reviewing courts have ruled that the mere possibility of future injury does not meet this standard.[78] Finally, the threat factors listed in 19 U.S.C. § 1677(7)(F), together with

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[76] Inv. No. 701-TA-298 (Final), USITC Pub. 2218 (September 1989).

[77] 19 U.S.C. 1677(7)(F)(ii).

[78] Alberta Gas Chemical Corp. v. United States, 515 F.Supp. 781, 791 (Ct. of Int'l Trade 1981).

information obtained from the inquiry into actual injury, are to form the basis of our threat inquiry. These factors focus on two issues: the likelihood that the foreign industry will sustain or increase its penetration of the U.S. market to levels that would produce material injury in the relatively near future and the sensitivity of the domestic industry to imports.[79] Threat analysis, which necessarily involves prognostication, is a very difficult task.

As an initial matter, I would note that the parties in this investigation have devoted little attention to the issue of threat. Petitioner's prehearing brief devotes slightly more than two out of 110 pages to the issue.[80] In these two pages, no direct reference is made to any of the factors Congress directs the Commission to consider in making threat determinations. Nonetheless, I turn to a consideration of the statutory factors relevant to this investigation.

Sensitivity of the Domestic Industry to Imports. I have treated the issue of the sensitivity of the domestic industry to imports at length in my analysis of the elasticity of substitution.[81] As

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[79] I address the pertinent threat factors here. Factors not specifically mentioned are either inapplicable, were discussed in connection with present injury, or have no material bearing on my decision.

[80] Prehearing Brief of American Telephone and Telegraph Company, October 24, 1989, pp. 107-109.

[81] See pp. 116-122, above.

discussed there, there is only limited substitutability between small business telephone systems produced by AT&T and those produced by other manufacturers, including importers. Since AT&T accounts for the vast majority of the domestic industry, I am led to conclude that the domestic industry is not highly sensitive to imports.

Likelihood of Increased or Sustained Penetration by Subject Imports

Cumulation. In addressing the threat of material injury, the Commission is permitted, but not required, to cumulate imports from different countries.[82] In the instant case, I choose not to cumulate imports from Korea, which are subject to an ongoing investigation,[83] with imports from Japan and Taiwan. I do this because of differences in the levels of the dumping margins and differences in the trends of imports from the various countries. Japanese producers and the one Taiwan producer with a positive margin -- Taiwan Nitsuko -- have been found to have very high dumping margins -- in excess of 120 percent. On the other hand, the preliminary margins for the Korean producers are much, much smaller -- averaging less than 8 percent.[84] Further, over the

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[82] 19 U.S.C. 1677(7)(F)(iv). Contrast with 19 U.S.C. 1677(7)(C)(iv) which states that the Commission must cumulate in determining whether an industry has actually been materially injured.

[83] Inv. No. 731-TA-427 (Final).

[84] Staff Report, pp. A-2 - A-3.

period of the investigation, imports of small business telephone systems and subassemblies from Japan and Taiwan have declined while those from Korea have increased substantially.[85] As a result, the implications for the threat of future injury are very different for imports from Korea than for imports from Japan and Taiwan. The Court of International Trade has approved of the practice of not cumulating in cases where there is a "disparity in the patterns of volume increases and decreases among imports from the various countries."[86]

Foreign Production Capacity. Because the issue of threat received so little attention in the current investigation, I am forced to rely almost exclusively on the data collected by the Commission and reported in the Staff Report in making my threat determination. These data indicate a decline in Japanese capacity to produce control-and-switching equipment and telephone sets during the period of the investigation. The Japanese producers' capacity to produce control-and-switching equipment fell from 654,000 units in 1986 to an estimated 575,000 units in 1989, similarly, Japanese capacity to produce telephone sets for SBTSs fell from 5.16 million in 1986 to an estimated 4.56 million in 1989. While Japanese capacity utilization was not particularly high in 1988, it is projected to rise in 1989 and

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[85] Staff report, Table 24, p. A-59.

[86] See Asociacion Colombiana de Exportadores de Flores v. U.S. 704 F.Supp. 1068 (Ct. of Int'l Trade 1988).

1990 and to be above 80 percent in both control-and-switching equipment and telephones in the latter year.[87]

Taiwan capacity to produce control-and-switching equipment increased during the period of the investigation. However, no further increase in capacity is projected and the available capacity is projected to be fully utilized in spite of a significant decline in projected exports to the United States. Taiwan capacity to produce telephones for small business telephone systems declined sharply from 1986 to 1987 and has increased since then. However, capacity was still below the 1986 level at the end of the investigatory period, and it is projected to remain below that level for the next two years. Capacity utilization rates for Taiwan have been, and are projected to remain, above 85 percent.[88]

Thus, neither projected increases in capacity nor the existence of significant excess capacity suggest that the U.S. domestic industry is threatened with imminent injury.

Likelihood of Increased Import Shipments. In its Prehearing brief, AT&T suggests that it is threatened with injury from projected increases in shipments of imports. The crux of the argument is that it will lose future business in moves, adds, and changes on sales of systems that were lost to the importers

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[87] Staff Report, Table 21, pp. A-54 - A-55.

[88] Staff report, Table 23, p. A-58.

because of dumping. In addition, petitioner argues that it will suffer future losses because of the greater likelihood that a business which purchased an imported system because of the dumping will buy future systems from the same manufacturer.[89] While this argument has a certain amount of intuitive appeal, that is not enough. According to our statute, any determination that an industry is threatened with material injury "shall be made on the basis of evidence that the threat of material injury is real and that actual injury is imminent. Such a determination may not be made on the basis of mere conjecture or supposition."[90]

Petitioner provides no evidence to support its claim of future injury. Indeed, such evidence as is available in the staff report seems inconsistent with the theory. If petitioner's argument were correct, at least with regard to moves, adds, and changes, it would have been reflected in increasing market shares over the period of the investigation.[91] However, as previously

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[89] Prehearing Brief of American Telephone and Telegraph, October 26, 1989, pp. 107-108.

[90] 19 U.S.C. 1677(7)(F)(ii).

[91] The record indicates that sales of Japanese small business telephone systems have accounted for a substantial share of the U.S. market since at least 1985. (Evidentiary Submission of American Telephone and Telegraph, October 24, 1989, Volume I: Statement of Bruce P. Malashevich, p. 44) Thus, the impact of moves, adds, and changes should have begun to appear at least during the latter part of the period of investigation. When combined with the supposed output expansion effects of the dumping, this should have led to substantial increases in sales for the importers.

(continued...)

noted, imports of small business telephone systems and subassemblies from Japan and Taiwan have declined over the period of the investigation.[92]

Increased Inventories in the United States. With one exception, there has been no significant increase during the period of investigation in importers inventories of Japanese or Taiwan switching-and-control units or telephone sets held in the United States. The level of inventories of Japanese switching-and-control units was higher at the end of June 1989 than at any other date for which data are provided.[93] I do not find this particularly significant, however, as it may be merely an attempt to avoid anticipated dumping duties. I also note that inventories of the Taiwan products expressed as a percent of sales have increased during the period of the investigation.[94] However, this appears to be the result of decreased shipments rather than increased inventories and I would not expect the needs for inventories to necessarily decline in proportion with a decline in shipments. Inventories must be held to satisfy an

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[91](...continued)
As regards the supposed repeat business advantage, the ability of the respondents in the current case to capture a substantial share of the U.S. market in spite of the previous dominance of AT&T provides evidence that this advantage is not so great as to be insurmountable.

[92] Staff Report, Table 24, p. A-59.

[93] Staff Report, Table 20, pp. A-51 - A-52.

[94] Staff Report, Table 20, pp. A-51 - A-52.

uncertain pattern of sales and must be greater as a percentage of sales when sales are smaller. Thus, again, I do not find this increase in the ratio of inventories to shipments indicative of a threat of future injury.

For all of the above reasons, I conclude that there is no evidence of the threat of material injury as a result of imports of small business telephone systems from Japan or Taiwan.[95]

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[95] As imports from Korea are not involved in the present decision and I have decided that it is preferable not to cumulate those imports, I reach no decision about threat of material injury by reason of imports from that country. I will deal with that issue at the time the Commission considers imports of small business telephone systems from Korea.

APPENDIX

I have followed with great care and enthusiasm the debate between Commissioner Eckes and Vice Chairman Cass regarding their different approaches to injury analysis in Title VII cases. Debate of this kind would of course be enhanced if it occurred before Commissioners voted rather than after.[96] Nonetheless, I believe that this exchange between my two colleagues has provided those of us on the sidelines with ideas and information that enrich our views.

As I see it, Commissioner Eckes would have the Commission conduct a two stage analysis. In the first stage, the Commission would analyze the industry's performance during the period of investigation in order to decide whether the relevant domestic industry was materially injured; in the second, it would decide whether imports caused that injury. Vice Chairman Cass, on the other hand, would seek to isolate the impact of the dumped imports notwithstanding the condition of the industry during the period of investigation.

I am inclined to address the issues regarding the so-called bifurcated and unitary approaches because, in a broader discussion of Commission precedents that purportedly support his bifurcated approach, Commissioner Eckes has raised my record as a Commissioner (as well as my career before joining the ITC) as an

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[96] One approach would be for Commissioners to prepare and circulate their views for comment before they vote and then conduct a public briefing and vote on the date the opinions are due.

example of prior use of his approach.[97] I am delighted by any scrutiny of my views. The important issue Commissioner Eckes' review of Commission history raises for me, however, is the role of precedent in Commission decision making.

The fact of the matter is that a review of Commission precedent will reveal support for almost any position on the question at hand. One need only be persistent in the search and selective in the reporting to find "precedent" for any point. For example, in an old case that Commissioner Eckes does not cite, one finds a view contrary to his:

> There is also a question of whether and to what extent the condition of the alleged victim should be taken into account in appraising injury. Is an extremely strong person less injured or his rights less violated by a given loss than is a weak person? Men are likely to become more incensed at an attack upon one who is weak than one who is strong and may even be tempted to forgive the first attack on the strong because the immediacy is less apparent. On the other hand, condoning continued attacks on the strong is likely to lead to eventual material injury even to the strong.[98]

That same year, in a case Commissioner Eckes does cite, the Commission expressed its view on the role of dumping margins in injury analysis:

> For the Commission to find injury to a domestic industry in an antidumping case, it must be satisfied that there is material injury and that it is being caused by the sales-below-fair-value aspect of the

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[97] See New Steel Rails from Canada, Inv. Nos. 701-TA-297 and 731-TA-422(Final), USITC Pub. 2217 (September 1989) at 56-57 & n.46 (Additional Views of Commissioner Eckes).

[98] Steel Reinforcing Bars from Canada, AA1921-33, TC Pub. 122 (March 1964).

> goods in question rather than by their mere importation.[99]

Commissioner Eckes' discussion of the role of precedent neglected this part of the opinion even though the propriety of considering dumping margins in injury analysis has also been a matter of dispute among Commissioners. The only possible conclusion is that a selective review of history will support any particular argument.

More to the point, a lack of strict adherence to precedent should not be viewed as a failing on the part of the Commission or any Commissioner. Rather, it is an accepted characteristic of the administrative process. Clearly, an administrative agency should apply the law fairly -- which concept includes some consistency in interpretation.[100] However, the administrative process does not admit mechanical adherence to precedent. The Supreme Court has on various occasions noted that "[t]he use by an administrative agency of the evolutional approach [to statutory construction] is particularly fitting."[101] It explained in another case:

> The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the [agency] has more or less

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[99] Carbon Steel Bars and Shapes from Canada, AA1921-39, TC Pub. 135 (September 1964).

[100] As Professor Davis points out, however, consistency can give way to new points of view so long as the agency explains the reasons for its change. K. Davis, 4 Administrative Law Treatise § 20:11 (1983).

[101] NLRB v. Weingarten, Inc., 420 U.S. 251, 265 (1975).

> felt its way . . . and has modified and reformed its standards on the basis of accumulating experience.[102]

In a broader statement, the Court observed:

> Cumulative experience begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.[103]

Thus, insistence on doctrinal consistency in the administrative process in the face of methods or arguments that map out a better path is unfaithful to the role of the administrative agency in the legal system.

I therefore concede Commissioner Eckes' premise -- that my views have evolved over time as my experience as a Commissioner has led to new "understanding and insights." At the time I joined the Commission, for example, rigorous microeconomic analysis played no role in Commission Title VII determinations. When I introduced such analysis, our reviewing court noted my departure from prior methodologies but, consistent with proper administrative procedures, opined that the new 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."[104]

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[102] Electrical Workers v. NLRB, 366 U.S. 667, 674 (1961).

[103] NLRB v. Seven-Up Co., 344 U.S. 344, 349 (1953).

[104] USX Corp. v. United States, 682 F. Supp. 60, 69 (Ct. of Int'l Trade 1988), emphasis added.

Rather than citing precedent from my own opinions or those of others, the Commission should be building on the improved foundation thus begun. I expect my approach to Title VII to continue to evolve as better methods become available. I view this not as a repudiation of precedent, but as the obligation of a participant in the administrative process.

DISSENTING VIEWS OF VICE CHAIRMAN RONALD A. CASS

Certain Telephone Systems and Subassemblies
Thereof from Japan and Taiwan
Inv. Nos. 731-TA-426 and 428
(Final)

These investigations provide the occasion for an extremely difficult and close decision respecting the effects of sales of imported merchandise at less-than-fair-value ("LTFV") on the domestic industry producing small business telephone systems. The Commission's evenly-divided vote in these investigations certainly reveals that different judgments can be reached respecting the appropriate final disposition of the Petition before us. Less readily plumbed from the division among the Commissioners is the source of the differing judgments. Two distinct bases for disparate judgments are present here.

First, the record evidence before us does not resolve cleanly several critical factual issues. Although we have been presented with considerable evidence, including much testimony from the parties to these investigations, at the end of the day, we are left with numerous factual disputes and little common ground on which to base our determination. In my view, as explained below, on the most important factual issues the evidence before us is most consistent with inferences that together support the conclusion that no domestic industry is materially injured by reason of the unfairly traded imports subject to these investigations, or is threatened with material

injury by those imports.1/ Accordingly, I dissent from the Commission's affirmative determination in these investigations.

Before discussing the evidence of record and the reasons for believing that the record ultimately should be read in this manner, a second source of the differing judgments about these investigations should be noted. As all observers of Commission decisions are well aware, Commissioners have taken quite different views of the meaning of the statutory provisions that govern these investigations. My understanding of the relevant law is, in certain respects, fundamentally different from that of each of the Commissioners who have voted in the affirmative in these investigations.2/ In my view, these Commissioners

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1/ Material retardation of the formation of a domestic industry in the United States, which is an alternative ground for relief under the statute, is not an issue in these investigations.

2/ Two caveats should be offered here. One concerns the nature of the views generally taken by these Commissioners. The second concerns the positions they have taken in the present investigations.

Given the non-transparent manner in which Commission opinions are often written, it is not possible to say with certainty whether each of the Commissioners who have voted in the affirmative embrace each of the particular analytical constructions that I discuss infra and that I believe to be contrary to U.S. law as well as relevant provisions in international law. Commissioner Eckes, who has at times addressed these issues for himself directly, has quite clearly adopted those positions (see New Steel Rails from Canada, USITC Pub. 2217, Inv. Nos. 701-TA-297, 731-TA-422 (Final) (Sept. 1989) ("New Steel Rails Final") (Additional Views of Commissioner Eckes); Sewn Cloth Headwear from the People's Republic of China, USITC Pub. 2096, Inv. No. 731-TA-405 (Preliminary) (July 1988) (Additional Views of Commissioner Eckes) ("Sewn Cloth Headwear")), and it appears that Commissioner Newquist shares his views (see Martial Arts Uniforms from Taiwan, USITC Pub. 2216, Inv. No. 731-TA-424

have misinterpreted the law in important respects, and are, as a consequence, employing a legal standard that I believe is contrary to the governing statute, Title VII of the Tariff Act of 1930,3/ to the legislative understanding inherent in that statute, and to our international obligations under the General Agreement on Tariffs and Trade ("GATT"), which are implemented through Title VII.

Although in the majority of investigations undertaken by the Commission the different legal standards employed by various Commissioners do not generate different determinations respecting the appropriate disposition of the investigations, in some instances, especially in close cases such as these, differences in legal interpretation as much as in evidentiary

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(Final) (Aug. 1989) (Dissenting Views of Commissioners Eckes and Newquist)). It is less clear whether Commissioner Rohr subscribes entirely to this view of the law; at times he has reached conclusions that seem incompatible with it. See, e.g., Martial Arts Uniforms from Taiwan, USITC Pub. 2216, Inv. No. 731-TA-424 (Final) (Aug. 1989) (Views of Commissioner Rohr and Lodwick); but see Nitrile Rubber from Japan, USITC Pub. 2090, Inv. No. 731-TA-384 (Final) (June 1988) ("Nitrile Rubber"); New Steel Rails, supra (Additional Views of Commissioner Rohr).

Further, in reacting to the legal interpretations embraced by these Commissioners, I cannot with confidence describe the positions actually taken in these investigations. As in other investigations, critical portions of the majority opinion prepared by the General Counsel's office for the Commission have not been made available to me. Notwithstanding explicit judicial criticism of this practice (see Borlem S.A. v. United States, Ct. No. 87-06-00693, slip op. 89-93, at 24, note 4 (Ct. Int'l Trade, June 29, 1989)), the Commissioners who have voted in the affirmative in these investigations will not make opinions (or parts of opinions) to anyone deemed not likely to concur in that opinion (or portion of the opinion).

3/ 19 U.S.C. §§ 1671-1677.

evaluation may explain why different Commissioners reach different conclusions. For that reason, the proper legal standard was a subject of discussion by parties' counsel both in briefs to the Commission and in the hearing before the Commission.

While many of the issues relevant to the governing legal standard have been addressed previously,4/ in light of the possible importance of these issues to disposition of the investigations now before us, and the significance of the outcome of these investigations for the national economy, I believe that renewed attention to these issues might be useful here. I turn first to the legal standard, and subsequently address the factual issues presented in the instant investigations.

I. MATERIAL INJURY BY REASON OF UNFAIRLY TRADED IMPORTS: DISAGREEMENT OVER THE ESSENTIAL ELEMENTS OF THE INQUIRY

In antidumping or countervailing duty investigations under Title VII, the Department of Commerce is instructed to determine whether imports have been dumped (sold or offered for sale in the United States at less than fair value) or subsidized in a countervailable manner, and the Commission is directed to determine whether a domestic industry in the United States is suffering material injury by reason of the dumped or

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4/ See, e.g., New Steel Rails from Canada, USITC Pub. 2217, Inv. Nos. 701-TA-297, 731-TA-422 (Final) (Sept. 1989) (Dissenting Views of Vice Chairman Cass).

subsidized imports. The statutory mandate to the Commission under Title VII, as I read this directive, is to determine whether dumping or subsidization of imports, the trade practice labelled as an "unfair trade practice" under U.S. law, has caused material injury to domestic industry.5/

While I do not believe that this mandate should be open to serious question, a number of cases decided by the Commission over the past few years make it quite apparent that some of my colleagues have a radically different understanding of the task that the Commission is to perform. These Commissioners apparently believe that the Commission's initial (and primary) task is to assess the condition of the domestic industry, and to reach a judgment as to whether the data respecting industry profits, employment, capacity utilization, and so on, indicate that the industry is doing sufficiently poorly to be deemed "materially injured," wholly without regard to the impact of the imports (or the trade practice that affects their volumes and prices) that are the subject of our investigation. When these Commissioners conclude that industry conditions are satisfactory,6/ for them, the case is over, and a negative

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5/ See, e.g, 3.5" Microdisks and Media Therefor from Japan, USITC Pub. 2077, Inv. No. 731-TA-389 (Preliminary) (April 1988) (Additional Views of Commissioner Cass) ("Microdisks I"); New Steel Rails Final, supra note 4 (Dissenting Views of Vice Chairman Cass).

6/ Two of my colleagues, Commissioner Eckes and Rohr, appear to have a very different understanding of the nature of the inquiry that this entails. See New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes) (Additional

determination follows automatically, unless some basis for a finding of threat of material injury can be found. If, however, they conclude that the industry is "injured", they then attempt to ascertain whether the imports that are the subject of our investigation -- whether or not fairly traded, and irrespective of the magnitude of dumping or subsidization found by the Department of Commerce -- contributed in part to adverse conditions in the industry.

It has been argued that this approach to Title VII cases is the "traditional" Commission approach, and it has also been argued that it is, in fact, the approach required of us by the statute and by our reviewing courts.7/ As explained in the succeeding sections of these Views, this approach -- which I will refer to as the "minimal causation approach" -- has never been used consistently by a majority of the Commission.8/ More important, this approach is surely not mandated by the statute; indeed, standard principles of statutory construction plainly

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Views of Commissioner Rohr). These differences are discussed in the succeeding section of these Views.

7/ In these investigations, for example, counsel for Petitioner AT&T appeared to take this position. See Transcript of 10/31/89 Hearing ("Tr.") at 115-123.

8/ I do not here refer to this approach as the bifurcated approach, although I have in the past distinguished this two-step approach from a one-step, or unitary, approach to the Commission's statutory task. While the approach discussed here is, indeed, a bifurcated approach, it is plain that by no means have all Commissioners who have used some form of bifurcated approach to decision of Title VII investigations adopted the minimal causation approach. See discussion, infra.

reveal that this approach is contrary to U.S. law and to the understanding of the Congresses that have crafted the governing law, as manifested in both the language and legislative history of Title VII of the Tariff Act of 1930, as amended. The minimal causation approach also is contrary to our international obligations under the GATT, which, given the interrelation of international and domestic law, provides further evidence regarding its lack of consistency with U.S. law.

In order to understand the conflict between the minimal causation approach and governing law, it is necessary to consider three related questions. First, in evaluating the possible existence of material injury by reason of unfairly traded imports, is the Commission expected to evaluate the effects of the unfair trade practices that are the subject of our investigation, or are we to consider the effects of the imports themselves, without regard to whether, or the extent to which, they have been fairly traded? Second, does the law contemplate that, in assessing whether the domestic industry has suffered "material injury" by reason of unfairly traded imports, the Commission will make a threshold assessment of the overall condition of the domestic industry with a view toward determining whether it is "injured", without any consideration of the effects on that industry of the unfairly traded imports that are the subject of our investigation? Third, in evaluating the condition of the domestic industry, is the

Commission required to render an affirmative determination whenever we believe that industry conditions are less than satisfactory and believe that the subject imports may have contributed, even in small measure, to those conditions?

Each of these questions is considered in turn in the succeeding sections of these Dissenting Views. I note here that while the first of these questions poses the most critical interpretive issue for identification of the pertinent legal standard for our determinations, the second and third issues have been subjects of greater mischaracterization and misunderstanding in some recent Commission opinions.

A. Stacking the Deck by Skipping the Basics: Ignoring the Effects of Dumping

Advocates of the minimal causation approach have opined that it is not the Commission's job to determine whether unfair trade practices, such as dumping or subsidization, have materially injured the domestic industry. Rather, according to these Commissioners, the Commission's task is to ascertain whether the imports that were the subject of the Commerce Department's investigation -- whether or not fairly traded -- caused material injury.9/ In other words, in this view, the Commission need not make any effort to assess the effects of the unfair trade practices themselves.

Commission Precedent

9/ See Sewn Cloth Headwear, supra note 2, at 23, n. 10; 26.

At the outset, it should be noted that this view of the law is wholly at odds with decades of Commission precedent. Until the early 1980s, no Commissioner seriously questioned that, in antidumping and countervailing duty cases, the Commission's proper focus is on the impact of unfair trade practices affecting sales of goods subject to our investigation, and not on the impact that may have resulted from the mere importation of those goods. In a 1964 case, for example, Carbon Steel Bars and Shapes from Canada, the Commission made this clear in unambiguous terms with the following language:

> For the Commission to find injury to a domestic industry in a dumping case, it must be satisfied that there is material injury and that it is being caused by the sales-below-fair-value aspect of the goods in question rather than by their mere importation.10/

Similar views were repeatedly expressed in numerous other cases over an extended period of time. For example, in Vital Wheat Gluten from Canada, the Commission stated that:

> [T]o bring the Antidumping Act into play, such injury must be caused by the "dumping" of the product, not merely by the imports per se. In the instant case, since neither the quantities nor the prices of the imports would have been significantly different had the sales been at fair value, the total competitive situation in which the

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10/ TC Pub. 135, Inv. No. AA1921-39 (Sept. 1964) at 2 (emphasis added). Ironically, this case was recently cited by Commissioner Eckes, perhaps the principal advocate of the minimal causation approach, as supporting his approach to analysis of Title VII cases. See New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes) at 37. That said, I agree with my colleague that this case is, in fact, critical to understanding the origins of the approach that he espouses, and discuss it at length, infra.

> industry found itself was unaffected by the less-than-fair-value sales as such.11/

Similarly, in Polychloroprene Rubber from Japan, Commissioner Leonard indicated that he understood that the Commission's central task was to determine whether the effects of dumping have inflicted material injury on the domestic industry:

> The Japanese manufacturers would have probably made few, if any, sales had . . . [the LTFV] sales been made at fair value prices. It is clear that in the absence of the LTFV sales (1) the Japanese would not have enjoyed the same price advantage vis-a-vis the domestic product, (2) the market penetration achieved by Japanese chloroprene rubber would have been appreciably less, (3) sales by the domestic producers would have been reduced slightly, if at all, (4) prices would not have dropped to the extent they did, (5) the profits of the dominant domestic producer would not have decreased to the extent they did, and (6) the losses incurred by the same domestic producer would not have been as severe as they were.12/

11/ TC Pub. 126, Inv. No. AA1921-37 (April 1964) at 4.

12/ TC Pub. 622, Inv. No. AA1921-129 (Oct. 1973) at 7.

I note that, in his recent opinion in New Steel Rails from Canada, Commissioner Eckes stated that:

> Until 1984, no Commissioner used . . . counterfactual analysis . . . to determine what would have been the condition of the domestic industry in the absence of dumping. As I have indicated elsewhere, the latter question is not relevant to the Commission's responsibility.

See New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes) at 46, n. 28.

This statement is similar to numerous others that Commissioner Eckes has made, asserting categorically (but without explanation) that there is no legal basis or precedent for my view that, in Title VII cases, the Commission must compare the conditions that have been experienced in the domestic industry with the conditions that would have obtained had no unfair trade practices occurred. See, e.g., Sewn Cloth Headwear, supra note 2, at 19-36; Certain Brass Sheet and Strip

Accordingly, prior to the 1980s, the Commission as an institution clearly recognized that, in antidumping and countervailing duty cases, the Commission is to be concerned about the effects of dumping or subsidization, not the effects of "mere importation."

The Trade Agreements Act of 1979:
Keeping Precedent, Implementing the GATT

Has the law since changed so as to require a different conclusion? Plainly not. Since 1979, Title VII cases have been governed in all respects relevant to this issue by the version of Title VII that was enacted in large part by the Trade Agreements Act of 1979; since that time, the statute has not been changed in any way that is relevant to the present discussion.

When Congress amended Title VII in 1979 and crafted the particular language that, with minor amendments, governs our determinations in Title VII proceedings today, Congress indicated that it did not intend to make any change in the way

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from Japan and the Netherlands, USITC Pub. 2099, Inv. Nos. 731-TA-379 and 380 (Final) 24 (July 1988) (Additional Views of Commissioner Eckes). Compare these opinions with the views that I expressed in Microdisks I, supra note 5, at 71-74. The excerpts from Commission opinions quoted above -- notably the excerpt from the opinion of Commissioner Leonard, whom Commissioner Eckes has claimed in other contexts is one of the progenitors of the approach that Commissioner Eckes purports to use (see New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes) at 39-42) -- demonstrate conclusively that these statements by Commissioner Eckes are simply wrong. While I am flattered by my colleague's attribution to me of originality as well as consistency (see id., at 45, n. 28), I am afraid I must demur to the first of these compliments.

the Commission interpreted the antidumping and countervailing duty laws.13/ As the Commission's approach to antidumping and countervailing duty investigations prior to that time, while not uniform in all respects, asked what injury was caused by dumping or subsidization, as reflected in the margins set by Commerce (or the Treasury Department, in earlier years when that agency was responsible for dumping and subsidization determinations), and what injury instead was caused by other attributes of the imports, resting its disposition of the investigation on the former alone,14/ it would be anomalous to see the 1979 act as altering the law in a direction consistent with the minimal causation approach. The abandonment of concern with the effects of unfair trade practices that is evident in the determinations of certain of my colleagues in these and other investigations represents a significant departure from the types of Commission practice approved by Congress.15/

13/ See, e.g., S. Rep. No. 249, 96th Cong., 1st Sess. 57, 74 (1979).

14/ See, e.g., Metal-Walled Above-Ground Swimming Pools from Japan, USITC Pub. 821, Inv. No. AA 1921-165 (June 1977); Welded Stainless Steel Pipe and Tube from Japan, USITC Pub. 899, Inv. No. AA 1921-180 (July 1978).

15/ Our reviewing courts have stated that the Commission may choose to rely explicitly on dumping and subsidy margins or to eschew reliance on margins. See Hyundai Pipe Co., Ltd. v. United States Int'l Trade Commission, 670 F. Supp. 357, 360 (Ct. Int'l Trade 1987). This judicial authority does not, however, suggest that we are free to abandon altogether any effort to determine whether dumping or subsidization has in fact injured domestic industry.

Moreover, the impetus for the revision of our trade laws enacted in 1979 makes plain beyond cavil the absence of any legislative intent to alter the understanding that had previously informed the Commission's effects analysis and that accounted for the focus on effects of dumping or subsidization, as conveyed through the effects of the dumped or subsidized imports. The Trade Agreements Act of 1979 contained antidumping and countervailing duty laws that were specifically and explicitly intended to implement and be consistent with the GATT and the relevant GATT implementation and interpretation agreements.16/ Even a casual perusal of the relevant provisions of GATT law negate any argument that these can be read as contemplating evaluation of the effects of imports irrespective of the effects of the trade practices that alone provide the occasion for uncompensated GATT-consistent imposition of trade restraints.

The text of the GATT is both the most important datum in this regard and the clearest statement of the permitted scope of sanctions against the trade practices at issue in our Title VII investigations. For example, Article VI of the GATT provides as follows:

16/ See S. Rep. No. 249, 96th Cong., 1st Sess. 57, 87 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 49 (1979); Statement of Administrative Action for the Trade Agreements Act of 1979, H.R. Doc. No. 153, Part II, 96th Cong., 1st Sess. 388, 389-393 (1979); Algoma Steel Corp. v. United States, 688 F. Supp. 639, n. 6 (Ct. Int'l Trade 1988), aff'd, 865 F.2d 240 (Fed. Cir. 1989).

> No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.17/

Similarly, the GATT Antidumping Code states that:

> It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Code. There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports.18/

In cases where subsidization is at issue, the GATT Subsidies Code likewise provides that it must be demonstrated that "the subsidized imports are, through the effects of the subsidy, causing injury within the meaning of this Agreement."19/ As other nations implementing these provisions have recognized,20/

17/ Article VI of the General Agreement on Tariffs and Trade.

18/ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, art. 3, § 4 (emphasis added).

19/ Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, art. 6, § 4 (emphasis added).

The relevant provisions of both the Antidumping Code and Subsidies Code contain a footnote indicating that, in assessing the effects of dumping or subsidization, the contracting parties are to take into account a non-exhaustive list of specified factors contained in other provisions of the relevant Code as well as "all relevant economic factors". The specifically identified factors are similar to those now set forth in Title VII.

20/ See, e.g., Special Import Measures Act, Can. Stat. ch. 25, §42(1)(1984); On Protection Against Dumped or Subsidized Imports from Countries Not Members of the European Economic Community, Council Reg. (EEC) No. 2176/84. See also Subsidized

there is no doubt that these undertakings require an analysis of the effects of the unfair trade practice(s) at issue and not of imports whether or not dumped or subsidized.

Of course, in any instance where GATT and Title VII of the Tariff Act of 1930 diverge, it is the U.S. law that controls our decisions.21/ In general, however, Title VII is to be construed as being consistent with GATT, for the intention of Congress to alter such international agreements to which the United States is a party "is not to be lightly attributed to Congress".22/ There is no basis to suppose that Congress intended that Title VII would have the GATT-inconsistent meaning that advocates of the minimal causation approach have ascribed to it and certainly no basis for belief that Congress understood its 1979 amendments to the Tariff Act of 1930, designed expressly to implement the Antidumping and Subsidies Codes negotiated in the Tokyo Round of the GATT, to have altered settled U.S. law to render it GATT-inconsistent. I am not aware of any statement to that effect in the history

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Grain Corn Originating in or Exported from the United States of America, Inquiry No. CIT-7-86 (Canadian Import Tribunal 1987); Colour Television Receiving Sets Originating in or Exported from Korea, Inquiry No. CIT-13-85 (Canadian Import Tribunal 1986); Certain Rail-Car Axles Originating in or Exported from Japan and the United States, Inquiry No. CIT-5-85 (Canadian Import Tribunal 1985).

21/ 19 U.S.C. § 2504(a).

22/ See United States v. Payne, 264 U.S. 446, 448 (1924); United States v. White, 508 F.2d 453, 456 (8th Cir. 1974).

of the 1979 law, and none has been advanced by advocates of the minimal causation approach.

Statutory Instruction:
Context and Legislative History

The historical record, which is strongly adverse to the base predicate for the minimal causation approach, is not referenced for this aspect of that approach. Far from it, the argument that the Commission's task under U.S. law comprehends attention only to the effects of imports and not to the effects of a more restricted category of dumped or subsidized imports or to the effects of dumping or subsidization does not trace its source back to any history of congressional statements or administrative practice.

Instead, this argument apparently is grounded in a peculiar reading of the text of the U.S. law. There is no doubt that the text of a statute is the best source of information about the meaning of a law, and, where the text is clear, it should control statutory construction.

Unlike other aspects of the instruction given to the Commission by Title VII, however, the language chosen by Congress to charge the Commission with respect to the basic issue discussed here does not plainly and unambiguously command a particular resolution of this issue. The text of Title VII does not explicitly command the Commission to examine directly the effects of the unfair trade practice at issue nor does it expressly dictate an inquiry into the effects of imports

without respect to dumping or subsidization. Instead, Title VII directs the Commission to examine the effects of the class of merchandise that the Department of Commerce has determined to be dumped or subsidized.23/

Read alone, divorced from the context in which it appears and the administrative process it addresses, this instruction might be taken to countermand the approach traditionally taken by the Commission before 1979. Read in context, however, no such meaning can be attributed to the members of the Ninety-Sixth Congress. The structure and legislative history of the statute indicate that in crafting this language Congress did not intend anything substantively different from GATT.

The most basic point in reading the legislative history is the absence of any clear direction consistent with the minimal causation approach. One would expect a serious change from a GATT-consistent to a GATT-inconsistent U.S. antidumping and countervailing duty law would have provoked considerable, direct discussion, especially given that the Congress now purported to implement the GATT Antidumping Code and Subsidies Code. Yet no legislative apprehension of such a change is apparent in the documents available to us.

To the contrary, as noted above, the legislative history of the 1979 law is replete with evidence that Congress intended the Commission to continue to examine the effects of the unfair

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23/ See 19 U.S.C. §§ 1671, 1673.

trade practice at issue, rather than the effects of "imports" whether or not dumped or subsidized, and that Congress appreciated the GATT-consistency of this approach. In the Report that the Senate Finance Committee issued in conjunction with the Trade Agreements Act of 1979, the Committee, plainly referencing the apposite provisions of the GATT, the Committee stated:

> Article 1 of the [Subsidies Code] requires countervailing duties to be imposed on the products of any country signing the [Subsidies Code] "in accordance with the provisions of Article VI" of the GATT and the provisions of the [Subsidies Code]. Article VI of the GATT prohibits the imposition of a countervailing duty on the product of any country which is a party to the GATT unless "the effect of the subsidization . . . is such as to cause or threaten material injury to an established domestic industry, or is such as to retard the establishment of a domestic industry". Section 705 implements the requirements of Article 1 of the [Subsidies Code] for the United States".24/

The same Report contained additional language indicating that Congress understood that the Commission's material injury analysis was to focus on the effects of unfair trade practices, and not the effects of imports whether or not dumped or subsidized. The Committee noted that:

> In determining whether injury is "by reason" of subsidized imports, the ITC now looks at the effects of such imports on the domestic industry. The ITC investigates the

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24/ S. Rep. No. 249, 96th Cong., 1st Sess. 57 (1979) (emphasis added).

Section 705 of the Act was the provision that set out how the Commission is to make final determinations in countervailing duty investigations. There have been no changes to that provision that are relevant for the purposes of this discussion.

> conditions of trade and competition and the general condition and structure of the relevant industry. It also considers, among other things, the quantity, nature, and rate of importation of the imports subject to investigation, and how the effects of the net bounty or grant relate to the injury, if any, to the domestic industry. Current ITC practice with respect to which imports will be considered in determining the impact on the U.S. industry is continued under the bill.25/

Virtually the same language was also used by the Committee to describe its understanding of the manner in which the Commission was to perform its material injury analysis in antidumping cases. The only difference relevant for present purposes is that the phrase "effects of the margin of dumping" was used instead of the phrase "effects of the net bounty or grant".26/

25/ S. Rep. No. 249, 96th Cong., 1st Sess. 57 (1979) (emphasis added).

26/ S. Rep. No. 249, 96th Cong., 1st Sess. 74 (1979).

The operative paragraph reads as follows:

> In determining whether injury is "by reason of" less than fair value imports, the ITC now looks at the effects of such imports on the domestic industry. The ITC investigates the conditions of trade and competition and the general condition and structure of the relevant industry. It also considers, among other factors, the quantity, nature and rate of importation of the imports subject to investigation, and how the effects of the margin of dumping relate to the injury, if any, to the domestic industry. Current ITC practice with respect to which imports will be considered in determining the impact on the U.S. industry is continued under the bill.

Id. (emphasis added)

There are, to be sure, phrases in the legislative history that could, taken by themselves, spawn confusion respecting the effects analysis anticipated for Commission investigations under Title VII. Any reading of the legislative record will reveal that the legislative history contains references other than those clearly contemplating evaluation of the effects of the unfair trade practice, dumping or subsidization. That history also is replete with references to ITC examination of the effect of dumped imports or subsidized imports as well as to examination of the effects of dumping or subsidization.

That does not, however, indicate congressional ambivalence as to whether the Commission's analysis would consider the effects of dumping or subsidization or, instead, would consider the effects of imports without regard to the unfair trade practice. For one thing, while reference to analysis of the effects of dumping or subsidization plainly commands attention to the unfair trade practice, reference to analysis of the effects of the dumped or subsidized imports does not command inattention to the unfair trade practice. The latter set of statements, in other words, cannot be taken as cancelling out the former.

Further, the most natural reading of the entire legislative history, as well as the one most consistent with Commission precedent at that time, would not see these statements as presenting any tension, much less outright opposition. The reason, quite simply, is that, as the very

language of the GATT's Antidumping Code recognizes, the unfair trade practices can only affect U.S. industry through imports.

The scope of our international agreements plainly follows this line from unfair trade practice to imports to effects that justify imposition of duties designed to offset the trade practice, not to eliminate all imports from the country in which such practice occurred. Hence, that an industry sells at a higher price in its home market than it charges for sales to the U.S. market is significant to U.S. businesses only insofar as they must compete with lower-priced imports. It is not a matter of legitimate U.S. interest whether consumers in other nations pay more for certain products than they otherwise might. The trade practice becomes a legitimate matter of U.S. interest under international law only through the effects of sales of lower-priced imports into the United States.

So, too, the Subsidies Code plainly sets outside any contracting party's purview the effects of another country's subsidies on its own citizens or even the effects of subsidies on businesses seeking to export to the subsidizing nation. Thus, our only legitimate concern with subsidies under GATT agreements and under U.S. law is the subsidies' effect in our domestic markets, and those effects can only be transmitted by imports from the subsidizing country.

In this light, the juxtaposition of approaches based on concern over the effects of imports poses a false dichotomy. The difference in approaches to application of Title VII is not

between one that looks for the effects of imports, without regard for the effects of unfair trade practices, and another that looks for effects of unfair trade practices without regard to the role played by imports. Rather, the difference is between two approaches both of which look at imports. The dominant approach taken by the Commission before 1979, and the approach I have taken since joining the Commission, examines the way unfairly traded imports affect the U.S. industry, in contrast to the effects that would be felt if the unfair practice did not exist. The minimal causation approach examines the effects of imports of the general class found to have been unfairly traded, but the examination is without regard to the degree to which they are unfairly traded. The difference is between examining the effect of unfairly traded, as opposed to fairly traded, imports or, instead, examining the effect of imports that coincidentally may (or, as noted below, may not) have been unfairly traded.

One easy way of capturing the difference is to examine the relevance of differences in the nature of the trade practice involved in a given investigation. While the historically accepted approach is sensitive to the degree to which Commerce has found imports to be sold below fair value or subsidized, under the minimal causation approach, the effect of a .05% subsidy to imported widgets is not distinguishable from that of a 50% subsidy. The critical fact for this approach, so far as causation is inquired into at all, is the total number of

widgets imported, whether the subsidy affected that number by a trivial or a massive amount.

Congress quite clearly disapproved this view. Not only is that the evident basis for stressing the inquiry into effects, not of imports, but of unfairly traded imports. More directly, Congress distinguished the analysis it believed appropriate and underscored its understanding that the Commission's material injury analysis would focus on the effects of dumping or subsidization of imports, rather than on the effects of imports generally. Specifically, the Senate Finance Committee noted that the Commission should consider "the price differential resulting from the amount of the subsidy or the margin of dumping," and emphasized that, not only would these dumping and subsidy margins differ from case to case, but the effect of any given margin would have to be assessed in light of the degree to which it affected import prices and the degree of price sensitivity in the U.S. market for the particular products at issue.27/

The Senate Report also plainly separated analysis of the effects of fairly traded imports from the effects of dumped or subsidized imports; the Commission is only to assess the effects of the dumped or subsidized imports and should treat other imports, i.e., fairly traded imports, as an "other factor" affecting the performance of the domestic industry.

27/ Id. at 88.

The effects of fairly traded imports were not to be added to those of dumped or subsidized imports in determining whether the latter had materially injured the domestic industry, nor were the effects of fairly traded imports to be compared with the effects of dumped or subsidized imports:

> Section 735(b) contains the same causation terms as in current law, i.e., an industry must be materially injured "by reason of" less-than-fair-value imports. The current practice by the ITC with respect to causation will continue under section 735.
>
> Current law does not, nor will Section 735, contemplate that the effects from less-than-fair-value the [sic] imports be weighed against the effects associated with other factors (e.g., the volume and prices of imports sold at fair value, contraction in demand or changes in patterns of consumption . . . .).28/

The Report that the House Ways and Means Committee issued in connection with the 1979 legislation contained the following comparable language:

> The bill contains the same causation element as present law, i.e., material injury must be "by reason of" the subsidized or less than fair value imports. In determining whether such injury is "by reason of" such imports, the ITC looks at the effects of such imports on the domestic industry. The law does not, however, contemplate that injury from such imports be weighted against other factors (e.g., the volume and prices of nonsubsidized imports sold at fair value, contraction in demand, or changed patterns in consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of

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28/ Id. (emphasis added).

Section 735 of the Act was the provision that set out how the Commission is to make final determinations in antidumping investigations. There have been no changes to that provision that are relevant for the purposes of this discussion.

the domestic industry) which may be contributing to overall injury to an industry.29/

The inescapable inference is that Congress did not intend that the Commission seek to determine the effects of imports that were not dumped or subsidized, and did not intend to substitute some other standard for the basic GATT requirement that antidumping and countervailing duties be imposed only when there is evidence that the effects of unfair trade practices have caused material injury to a domestic industry.

Statutory Interpretation:
Institutional Context

Additionally, the statutory language requiring the Commission to examine the effects of the class of merchandise that the Commerce Department has found to be dumped or subsidized must be understood in the particular institutional context in which administrative decisions under Title VII are reached. Critical to intelligent interpretation of this Title is the fact that, in contrast to most other administrative processes in this country and to similar proceedings in many other countries, responsibility for antidumping and countervailing duty proceedings under U.S. law is divided between two separate, coordinate (but not invariably coordinated) agencies of the federal government. Title VII bifurcates authority over such proceedings, vesting some

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29/ H.R. Rep. No. 317, 96th Cong., 1st Sess. 47 (1979) (emphasis added).

functions in the Commission and others in the Department of Commerce.

Putting aside questions of the purpose of this bifurcated design, it should be appreciated both that this division presents some obstacles to legislative drafting and that the statute under which the two agencies function appears to have been framed with some care, in spots at least, to minimize the possible frictions such a process might engender. For instance, having committed to the Department of Commerce the responsibility for determining whether imports have been dumped or subsidized, which imports, and by what amounts, the statute's draftsmen faced certain constraints on the manner in which the ITC could be directed to conduct its effects inquiry. Had the statute simply directed the Commission to assess the effects of dumping or subsidization, this arguably would leave open the possibility that the Commission might construe its mandate to include authority to assess for itself the very issues included within the delegation to Commerce. A direction to the Commission to assess the effects of dumped or subsidized imports might admit the same possibility. By directing the Commission in final investigations to assess the effects of the imports found by Commerce to have been dumped or subsidized, Title VII sensibly is drafted in a manner that should assure that in assessing the effects of dumping or subsidization the Commission does not duplicate Commerce's determinations but instead bases its evaluation on the degree of dumping or

subsidization found by Commerce with respect to the imports Commerce investigated for those practices.30/

Those unfamiliar with Commerce's investigations might at first glance find it odd that this instruction is phrased in terms of the class of imports determined by Commerce to have been dumped or subsidized, rather than simply the imports found to have been dumped or subsidized. In many dumping investigations, however, Commerce is unable to evaluate the relative prices of all sales relevant to the dumping determination, instead basing its determination on findings with respect to a sufficient proportion of those sales. Similarly, in subsidy investigations, Commerce may not trace subsidies through to specific imports, finding simply that subsidies to types of goods from particular firms have benefitted from countervailable subsidies.

This in part persuaded our reviewing court that Congress did not limit the Commission to examining only the particular imports specifically determined by Commerce to have been unfairly traded in Algoma Steel Corp. v. United States.31/ I would caution first against making too much of this decision, given the standard of deference to administrative action

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30/ In a preliminary investigation, of course, the Commission is instead instructed to determine, inter alia, whether there is a reasonable indication that the merchandise subject to investigation by Commerce has materially injured a domestic industry, or threatens domestic industry with such injury.

31/ See 688 F. Supp. 639 (Ct. Int'l Trade 1988), aff'd 865 F.2d 240 (Fed. Cir. 1989).

employed in reviewing our decisions.32/ But it is noteworthy that, in allowing the Commission to examine other imports that may be swept into the class or kind of merchandise that Commerce found to have been unfairly traded, the Court of International Trade cast this decision as consistent with examination of the effects of the unfair trade practice.33/ The Court noted that Commerce in calculating its dumping and subsidy margins reduces the margins to account for sales made at fair value. Taking the margins together with the volume of the "class or kind or merchandise" that was considered by Commerce in arriving at those margins, the Court has said, should give the Commission a suitable basis for assessing the effects of the unfair trade practice.

Although one may question whether Commerce properly accounts for fairly traded goods, the Court surely was correct in suggesting that to assess the effects of unfair trade practices both the magnitude of the practice and the volume of imports over which that magnitude was distributed are relevant data. Put another way, it would, for example, be impossible to evaluate the significance of large dumping or subsidy margins

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32/ For a general discussion of standards of judicial review of administrative decisions, see R. Cass & C. Diver, Administrative Law 103-80 (1987). See also R. Diamond, The Just Resolution of Litigation: How Much Deference to the Agency is Too Much?, presented at the Fifth Annual Judicial Conference of the U.S. Court of International Trade, held on November 18, 1988.

33/ 688 F. Supp. 639.

without knowing whether dumped or subsidized imports (the class of imports for which the particular margins were determined) have occurred in sufficient volume to affect domestic prices, sales, profits, employment and so on.

In sum, while the statutory text is less than crystalline on this issue, there is clear evidence in legislative history, in the context in which the statutory text was adopted, in the institutional context to which it applies, and in Commission precedent, that the Commission's mandate under U.S. law and in conformity to the GATT is to analyze the effects of dumping or subsidization, as transmitted through dumped or subsidized imports. Our duty is not, as the minimal causation approach would have it, to analyze instead the effects of imports, putting aside the nature of the trade practices that bring those imports within our statutory ambit.

B. Statutory Analysis by Assertion: Bifurcation Defining the Controversy

The second question critical to identification of the legal standard appropriate to our disposition of Title VII investigations concerns the extent, if any, to which the law contemplates that, in assessing whether the domestic industry has suffered material injury by reason of unfairly traded imports, the Commission will make an initial assessment of the overall condition of the domestic industry with a view to determining whether that industry is "injured," without regard

to the effects on that industry of the unfairly traded imports that are the subject of our investigation. This is the essence of bifurcated approaches, including the minimal causation approach discussed above. While other bifurcated approaches may avoid some of the errors inherent in the minimal causation approach, all bifurcated approaches purport to assess the existence of an injury to the domestic industry separately from inquiry into the source of that injury.

In these investigations, as in a number of other investigations over the past several years, certain of my colleagues quite plainly divide the question posed by Title VII into these two independent inquiries.34/ They ask first whether conditions in the domestic industry are satisfactory, by whatever standard the particular Commissioner chooses to use in evaluating that question.35/ Depending on the answer to that question, they characterize that industry either as "injured" or "not injured." If the industry is considered to be injured, the source of that injury is addressed (in the

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34/ On this issue, Commissioner Rohr is clearly of the same view as Commissioners Eckes and Newquist. See, e.g., Generic Cephalexin Capsules from Canada, USITC Pub. 2211, Inv. No. 731-TA-423 (Final) (Aug. 1989) ("Cephalexin Capsules"). Put another way, Commissioner Rohr uses some kind of bifurcated analysis, although it is not entirely clear whether he uses it in the same manner as advocates of the "minimal causation" approach. Some of the apparent differences between Commissioner Rohr and advocates of the minimal causation approach are discussed in greater detail, infra.

35/ It appears that Commissioners Eckes and Rohr have a clear difference of opinion over the content of this standard. See discussion, infra.

minimal causation approach, this is in form an analysis of the effect of imports of the general class under investigation).

I should note initially that some aspects of this bifurcated analysis clearly vary among Commission members and, perhaps, for a given Commissioner over time. In some investigations, Commissioners have assessed the condition of the pertinent domestic industry in relation to the financial or employment performance of other industries in the United States, although the Commission has not, to my knowledge, ever gathered, much less carefully evaluated, information on other industries with which systematically to compare the particular domestic industry before us.36/ For some Commissioners, this first inquiry refers not to the absolute condition of an industry but to its condition relative to some earlier period. Commissioners using some form of bifurcated analysis also differ considerably in the means used to evaluate the cause of injury and in the standard applied to that evaluation to reach decisional outcomes in particular investigations.

For all who use this approach, however, the question first addressed is whether the industry has suffered some adversity over the period examined in our proceeding. If conditions in the industry are deemed to be poor or declining, the adherents to this approach conclude that "material injury" exists. Only

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36/ See Cephalexin Capsules, supra note 34 (Additional Views of Vice Chairman Cass) at 61-62. Certainly, I can find no such evidence in the record of these investigations.

in such cases do adherents to a bifurcated approach attempt to ascertain whether unfairly traded imports caused material injury to domestic industry. In other words, if the industry is deemed "not injured", the bifurcated approach does not address at all the effects of unfairly traded imports on the domestic industry.37/

I believe that, while some forms of bifurcated analysis arguably can produce results functionally quite similar to those I would advocate, all forms of bifurcated analysis misconceive the question put to us by Title VII. In my view, that law contemplates a unitary approach to the analysis of causation of material injury. Such a unitary approach asks only the single question resolution of which is delegated to us by the statute: "Has a domestic industry been materially injured by reason of dumped or subsidized imports?" The statute does not ask the Commission in Title VII investigations to explore how the industry has performed over time or whether the industry is performing better or worse than some composite set of U.S. firms in cognate lines of endeavor or in unrelated businesses. The statute asks that we answer one question: has dumping or subsidization of particular goods imported into the

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37/ Digital Readout Systems and Subassemblies Thereof from Japan, USITC Pub. 2150, Inv. No. 731-TA-390 (Final) (Jan. 1989) ("Digital Readout Systems") (Views of Commissioners Eckes, Rohr, Lodwick and Newquist); Light Duty Integrated Hydrostatic Transmissions and Subassemblies Thereof, With or Without Attached Axles, from Japan, USITC Pub. 2149, Inv. No. 731-TA-425 (Preliminary) (Jan. 1989).

United States from particular countries inflicted a material injury on a domestic industry or has its impact fallen below that threshold?

In other opinions, I have spelled out at length my reasons for concluding that bifurcated approaches are not consistent with, and certainly do not follow the preferable interpretation of, Title VII.38/ I have explained, inter alia, that the text, structure and legislative history of Title VII do not support such a reading of the statute. I have also explained that Commission and judicial precedent, although ambiguous, or perhaps more accurately ambivalent, in certain respects, do not support a bifurcated reading of the statute.

Recently, in another case, New Steel Rails from Canada, apparently in response to my earlier opinions, two of my colleagues, Commissioners Eckes and Rohr, issued lengthy opinions in defense of bifurcated approaches.39/ Although they occasionally touched on other points, Commissioners Eckes and Rohr argued, in essence, that a bifurcated approach has been consistently applied for some time by the Commission, and that this approach has been endorsed, either explicitly or

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38/ See Certain All-Terrain Vehicles from Japan, USITC Pub. 2163, Inv. No. 731-TA-388 (Final) 35-38 (Mar. 1989) (Additional Views of Commissioner Cass); Microdisks I, supra note 5 (Additional Views of Commissioner Cass) at 59-70; Digital Readout Systems, supra note 37 (Concurring and Dissenting Views of Commissioner Cass) at 98-108.

39/ See New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes) (Additional Views of Commissioner Rohr).

implicitly, by our reviewing courts. Both of my colleagues also took issue with views that I expressed respecting the significance of certain amendments to Title VII contained in the Omnibus Trade and Competitiveness Act of 1988. Finally, Commissioner Eckes asserted that Congress has endorsed the bifurcated approach.40/ (Commissioner Rohr, on the other hand, took the position that Congress has expressed no views on this subject.)41/

A reprise of my views on the deficiencies of the bifurcated approach would perhaps be useful here for two reasons. First, the differences between the bifurcated approaches employed by my colleagues and the unitary approach that I employ may have a direct bearing on the different conclusions reached by the various Commissioners concerning the ultimate disposition of the Petition before us.42/ Second, the statements of my colleagues, Commissioners Eckes and Rohr, giving their reasons for believing that a bifurcated approach is appropriate, deserve a response.

Statutory Interpretation and the Role of Precedent

40/ See id. (Additional Views of Commissioner Eckes) at 60-61.

41/ See id. (Additional Views of Commissioner Rohr) at 80.

42/ I assume this to be true in light of past decisions by the majority of my colleagues. As in other investigations, however, portions of the majority opinion prepared by the General Counsel's office for the Commission have not been made available to me. See note 2, supra.

As a threshold matter, I believe that it is important to place the arguments advanced by my colleagues in the proper context by offering a few general observations. I explained my disagreement with bifurcated approaches in a lengthy opinion that I wrote in a Title VII investigation that came before us shortly after I joined the Commission, 3.5" Microdisks and Media Therefor from Japan.43/ In that opinion (which, for short, I will reference as Microdisks I), I outlined at length the reasons why I believe that a unitary construction of the relevant provisions in Title VII cases is appropriate.

I began my analysis of Title VII's commands in Microdisks I with the text and structure of the statute (as it existed prior to the amendments contained in the Omnibus Trade and Competitiveness Act of 1988), stating that these argued forcefully in favor of a unitary approach and against a bifurcated reading of the statute. It is a commonplace of statutory construction that these materials, most critically the statutory text, must be the starting point in any assessment of the appropriate interpretation of the statute.44/ I also noted that certain legislative history clearly indicated that Congress did not wish the Commission to employ a test that

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43/ See Microdisks I, supra note 5, at 59-70.

44/ See, e.g., Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459, 465 (1968).

would deny relief to a domestic industry simply because that industry is, in our view, prospering.45/

These arguments were not mere prefatory remarks, intended to draw attention to the later comments respecting administrative and judicial precedent. They are, rather, the core of any sound statutory interpretation. While administrative and judicial precedent are surely instructive, the essential predicate in analysis of any law must be what the law says. Where that is unclear, other guides, beginning with legislative history and concluding with administrative practice, can be looked to for guidance, but the latter authorities should never be given primacy in interpreting the law.

It is noteworthy in this regard that neither Commissioner Eckes nor Commissioner Rohr have offered any arguments in defense of their bifurcated approaches that are based on the text or structure of the statute. It is also noteworthy that they have not said anything suggesting why it would be

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45/ The material in question was contained in a Senate Finance Committee Report issued when Congress was considering changes in this country's international obligations, and reads as follows:

> An industry which is prospering can be injured by dumped imports just as surely as one which is foundering although the same degree of dumping would have relatively different impacts depending upon the economic health of the industry.

S. Rep. No. 1385, 90th Cong., 2d Sess. pt. 2, at 11 (1968), reprinted in 1969 U.S. Code Cong. & Admin. News 4548-49.

appropriate for us to disregard the legislative history that I cited in Microdisks I.

In defense of the bifurcated approach, Commissioners Eckes and Rohr have instead relied virtually exclusively on the fact that bifurcated approaches supposedly represent the long-standing Commission interpretation of the law (supposedly blessed by the courts and, according to Commissioner Eckes, by Congress). As I stated in my opinion in Microdisks I, I would not lightly disregard Commission practice, as reflected in the bifurcated approach, if the Commission had a "long history of consistent adherence to such an approach . . . ."46/ As discussed in more detail below, the opinions of Commissioner Eckes and Commissioner Rohr and the Commission cases cited in their Views do not reveal a long-standing history of consistent adherence to the bifurcated approach. Indeed, if anything, a careful review of these authorities reinforces my previously-stated conclusion that such a history simply does not exist.

46/ See Microdisks I, supra note 5, at 64.

In a footnote to his New Steel Rails opinion, Commissioner Eckes correctly noted that I originally made this statement in my Microdisks I opinion in April 1988. New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes), at 34, n. 9. Inexplicably, however, Commissioner Eckes characterized the statement as a "potentially damaging concession" that I allegedly made in response to arguments advanced by counsel for one of the parties to another case that came before the Commission more than six months later, Digital Readout Systems and Subassemblies Thereof from Japan, USITC Pub. 2150, Inv. No. 731-TA-390 (Final) (Jan. 1989). Such characterizations may add an element of dramatic flavor to Commission opinions; however, they do nothing to enhance their credibility.

But it is no more sensible to proceed to discuss these precedents in the abstract than it is to read a statutory phrase out of context. Any effort at statutory interpretation designed to actually understand what a legal directive means, as opposed to "interpretive" efforts intended only to reveal support for previously announced constructions, would appreciate why the existence of a long history of consistent adherence to a bifurcated approach by the Commission might be significant. Such a history by itself (that is, in the absence of endorsement of the approach by the courts or by Congress) would be meaningful only insofar as it might cause our reviewing courts to give some weight to the Commission's interpretation of the law; the federal courts have sometimes (but not always) deferred to an administrative agency's interpretation of those laws that they are responsible for administering.47/ However, this is by no means an iron-clad rule. The actual weight given to the agency's interpretation depends critically on a number of factors, including "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors that give it power to

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47/ See Gray v. Powell, 314 U.S. 402, 411 (1941); Federal Election Commission v. Democratic Senatorial Committee, 454 U.S. 27 (1981); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

persuade . . . ."48/ If measured by these standards, for the reasons explained below, I believe that, even were the record as it is characterized by my colleagues (a proposition that is manifestly unsupportable), the Commission's use of a bifurcated approach would be entitled to no significant weight in evaluating statutory meaning.

To place the Commission's precedent in its proper context, I briefly review what the text, structure and legislative history of the statute suggest about the use of a bifurcated approach to Title VII cases. Following that, I turn to the administrative and judicial precedents.

The Text and Structure of the Statute

For a number of reasons, I believe that the text and structure of our trade laws strongly suggest that Congress intended that a unitary, rather than a bifurcated, approach be used in analyzing the question of causation of material injury in Title VII cases. The simplest and most important argument is that this reading is consistent with a straightforward rendition of the text of the statute; the text cannot be made consistent with a threshold evaluation of the overall condition of the industry without substantial linguistic contortions.

The statute instructs the Commission to determine whether "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an

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48/ SEC v. Sloan, 436 U.S. 103 (1978). See cases and materials collected in R. Cass & C. Diver, supra note 32 at 120-141.

industry in the United States is materially retarded, by reason of" imports determined by the Department of Commerce to have been sold at less than fair value or to have been subsidized in a manner that is countervailable.49/ The statute sets out clearly numerous factors that are to guide the Commission in determining what effects less than fair value ("LTFV") or subsidized imports had on the domestic industry, but it does not attempt to describe separately the factors that are relevant to "injury" and the factors that are relevant to "causation."50/ This is significant because it suggests that Congress did not intend for the Commission to conduct independent inquiries into "injury" and "causation."

The textual argument for a unitary approach is particularly strong if one credits statutory draftsmen with basic command of the English language. The statute instructs the Commission to determine whether "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of" imports determined by the Department of Commerce to have been sold at less than fair value or subsidized.51/ In order to read this statutory

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49/ 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1).

]50/ In Microdisks I, cited supra note 5, I noted that the fact that these factors are set forth under a heading labelled simply "Material Injury" appears plainly to be a sensible convenience only. See Microdisks I at 62-63.

51/ 19 U.S.C. §§ 1671b, 1671d, 1673b, 1673d.

instruction as mandating a bifurcated analysis, one would have to interpret "injury" to mean "poor health" or otherwise unsatisfactory industry conditions (rather than "harm from some given action") and treat the phrase "by reason of" the relevant class of LTFV or subsidized imports as though it were introducing a concept separate from injury. The instruction, however, is a single sentence asking us to determine if there was material injury by reason of the subject imports, not two sentences asking for disjunctive determinations.

As I have pointed out in other cases,52/ injury appears to be used in the statute in its normal sense, as the nominative form of a transitive verb, connoting a change in condition consequent to some action. The dictionary definition of injury clearly frames its meaning in these terms, as "an act that damages, harms, or hurts; a violation of another's rights . . . compare TORT."53/ The law's provision of both a subject (the imports found or alleged to have been sold at LTFV or subsidized) and an object (an industry in the United States) for "injury" appears to provide ample evidence of congressional understanding that the term was used here in accord with its plain meaning.

52/ See, e.g., Light Duty Integrated Hydrostatic Transmissions and Subassemblies Thereof, With or Without Attached Axles, from Japan, USITC Pub. 2149, Inv. No. 731-TA-425 (Preliminary) (Jan. 1989) (Dissenting Views of Commissioner Cass).

53/ Merriam Webster's Third Unabridged Dictionary 1164 (1961).

It is an accepted rule of statutory interpretation that, at least in the absence of compelling evidence to the contrary, statutes should be accorded their plain meaning when one can be derived from the text. Here, there is no compelling basis for doing otherwise. Indeed, far from qualifying the initial textual instruction in a manner that raises doubt about its meaning, other relevant provisions support the construction offered above.

As noted earlier, the definitions section of Title VII does not separately define meanings for "material injury" and "by reason of" the LTFV imports but instead, under the title of "Material Injury," details factors that might be relevant to determining the connection between industry performance and the imports subject to investigation. These provisions clearly evidence an understanding of the term "injury" as comprehending something other than an absolute decline in industry performance and also as necessarily the product of some particular source of injury. For example, the statute does not direct the Commission to consider absolute changes in prices but instead directs the Commission to consider "the effect of imports of such merchandise [the unfairly traded imports] on prices in the United States for like products."54/ More pointedly, the statute instructs the Commission to consider

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54/ 19 U.S.C. § 1677(7)(b)(ii).

whether sale of LTFV or subsidized imports "prevents price increases which otherwise would have occurred."55/

Such language is very difficult to square with a notion of injury as incorporating a freestanding requirement that industry trends decline in absolute terms. Instead, it appears fully to support a reading of the statute as comprehending a single inquiry into the effect of the LTFV or subsidized imports on the domestic industry.

Additional support for this conclusion is provided by contrasting Title VII of the Tariff Act with Section 201 of the Trade Act of 1974.56/ As initially drafted, Section 201 commanded an inquiry similar to that now contained in Title VII, differing only in the particulars of the required causal predicate and the level of injury from that predicate necessary to support relief. In that form, the "escape clause," as it is known, required that the petitioning U.S. industry be found to have suffered serious injury from increased imports consequent to a U.S. tariff concession. As in Title VII, the use of injury in that context followed its normal, everyday usage, with both a causative subject and a defined object for the transitive verb "injure."

Amendments to Section 201, however, removed the requirement that the injury be caused by increases in imports

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55/ 19 U.S.C. § 1677(7)(C)(ii)(II).

56/ Pub. L. No. 93-618, § 201, 88 Stat 1978, 2011 (1974) (codified at 19 U.S.C. § 2251).

traceable to trade concessions and softened the requisite causal link to increasing imports, allowing relief when increasing imports are a substantial cause of serious injury.57/ These revisions, although doing some violence to ordinary usage of the word "injury," which was retained in the law, suggest a very different analytical task. The Commission now under Section 201 must find that something, independent of the effects of increased imports, constitutes serious injury to a domestic industry and then find that the effect of the increased imports alone was great enough to constitute a substantial cause of that serious injury.58/

In keeping with the apparent meaning of this revised text, Section 201, unlike Title VII, now separately describes elements relevant to the determination of injury and elements relevant to the causation determination. The statute first lists various specific factors, in addition to any other relevant economic factors, that are to be taken into account in determining whether serious injury has occurred or is threatened.59/ After describing these factors, the statute then proceeds to discuss separately certain factors that should

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57/ Pub. L. 93-618, Title II, ch. 1, § 201, 88 Stat. 2011 (1974).

58/ 19 U.S.C. § 2251(a)(1).

59/ See 19 U.S.C. § 2251(b)(2)(A)-(B). These factors include, with respect to actual serious injury, the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or underemployment within the industry.

be considered in determining whether imports are a substantial cause of serious injury.60/ For that reason, among others, a bifurcated analysis of injury and causation is appropriate in Section 201 cases.61/ The fact that Title VII, unlike Section 201, does not categorize separately the factors deemed relevant to injury and those considered relevant to causation suggests precisely the opposite inference for Title VII -- namely, that a unitary, rather than a bifurcated, approach is the one intended by Congress.

There are several other aspects of Title VII that also argue strongly in favor of the unitary approach and against a bifurcated approach. First, bifurcated approaches -- which mandate a negative determination whenever the domestic industry is deemed to be, in absolute or relative terms, in satisfactory condition -- are inconsistent with the express statutory direction that

> "the Commission, in each case,
>
> (i) shall consider --
>
> (I) the volume of imports of the merchandise which is the subject of the investigation,
> (II) the effect of imports of that merchandise on prices in the United States for like products, and

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60/ 19 U.S.C. § 2251(b)(2)(C). These factors include an increase in imports, either actual or relative to domestic production, and a decline in the proportion of the market supplied by domestic producers.

61/ See Certain Knives, USITC Pub. 2107, Inv. No. TA-201-61, at 53-54 (Sept. 1988) (Additional Views of Commissioner Cass).

> (III) the impact of imports of such merchandise on domestic producers of like products 62/

The statute further directs that the Commission in each case also explain its analysis of each of these factors in the notification to the parties to our investigation and the Commerce Department that the Commission is required to provide under the statute.63/

The Commission cannot credibly claim to have considered or analyzed the effect of unfairly traded imports on the prices in the United States for like products when it disposes of a Petition after deciding simply that an industry's financial and employment performance are good enough so that the industry cannot be deemed "materially injured." And only by a considerable stretch of ordinary language can the Commission claim in such cases to have considered or analyzed the impact of the unfairly traded imports on domestic producers of the like products. Certainly, the Commissioners who employ a bifurcated analysis cannot be said to have explained their analysis of these factors when they reach a negative determination on a finding of no material injury, irrespective of the effects of the unfairly traded imports under investigation.

62/ 19 U.S.C. § 1677(7)(B) (emphasis added). The emphasized phrase "in each case" was added by the 1988 Omnibus Trade and Competitiveness Act, Pub. L. 100-418 (Aug. 23, 1988). This emphasis makes plain what I had argued previously was intended under the law antedating the 1988 Act.

63/ Id.

Commissioners Eckes and Rohr both recently dismissed these aspects of the statute as irrelevant to their use of bifurcated approaches. According to my colleagues, the legislative history of the Omnibus Trade and Competitiveness Act of 1988 indicates that the mandatory language contained in the statute was directed at certain specific (but unnamed) Commissioners who were deemed by some Congressmen not to have been following then-existing law.64/

This is, at best, a curious argument. If the provision was not intended to alter existing law, that suggests that the pre-1988 law already contained such an instruction by implication. It surely does not indicate that the explicit instruction is to be read out of the post-1988 statute. Even more implausible would be the contention, with which I would be loth to credit my colleagues, that the legislation only binds the Commissioners deemed malfeasant by the amendment's progenitors. The law applies as written to all Commissioners, not only to certain Commissioners (some or all perhaps no longer sitting on this Commission) that my colleagues divine Congress to have had in mind when this proviso was added.

Commissioner Rohr also "surmises" that Congress may have intended the phrase "in each case" to be read as saying that the Commission is to consider the effect and impact of unfairly

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64/ See New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes) at 62, n. 55; (Additional Views of Commissioner Rohr) at 72, n. 4., 79-81.

traded imports only in cases "in which causation is an issue".65/ I take this suggestion to have been offered in a playful spirit, not as a serious proposition respecting statutory interpretation, for I cannot imagine how that view can be plausibly squared with the fact that the law provides in unambiguous terms that the effects and impact of such imports are to be considered in each case. Congressmen certainly are capable of distinguishing the term "each" from "some." If Congress intended to create a loophole in the law as gaping as that suggested by Commissioner Rohr, it surely would have said so less coyly.

Commissioner Eckes takes a different tack in attempting to explain how his bifurcated approach is consistent with the statute. He asserts that the Commission has always "examined" the effect and impact of imports when using bifurcated analysis.66/ As previously discussed, I do not think that it can be credibly asserted that these statutory factors have in fact been "considered," as the statute requires, when the Commission disposes of a Petition solely on the grounds that the overall condition of the domestic industry is such that it is not "materially injured." Certainly, if the consideration is to no end, given its irrelevance to the outcome under such

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65/ See New Steel Rails Final, supra note 2 (Additional Views of Commissioner Rohr) at 80.

66/ See id. (Additional Views of Commissioner Eckes) at 62, n. 55.

an analysis, it is difficult to credit its occurrence. In the same vein, it is difficult to understand why Congress would have mandated consideration of these factors if it contemplated that the Commission's exploration of them would be meaningless. Congress has been accused of extravagance with the public fisc, but invariably in service of some goal. Mandating that this agency engage in meaningless work is hard to square with even the most jaundiced view of lawmaking. This argument is doubly perplexing, given the defense of a bifurcated approach by Commissioner Rohr as promoting efficiency.67/

Putting that issue to one side for the moment, Commissioner Eckes' argument ignores the other statutory directive to us added by the 1988 law, directing the Commission in each case to explain its analysis of each of these factors in the notification of our decision that we are required to provide to parties and the Commerce Department. Even a cursory review of recent Commission decisions where a bifurcated approach has been used to dismiss a Petition on the grounds that the condition of the industry is not unsatisfactory (no injury) reveals that this requirement is not met by the bifurcated approach, as currently employed by Commissioners Eckes and Rohr.68/

67/ Id. (Additional Views of Commissioner Rohr) at 71.

68/ See, e.g., Cephalexin Capsules, supra note 34.

I also note that the Statement of Administrative Action that was transmitted to Congress by the President in connection with the agreements negotiated with our trading partners under the GATT that led to the Trade Agreements Act of 1979 made clear that the "material injury" to be evaluated under the antidumping and countervailing duty laws is not to be determined by assessing the overall condition of the industry. This document expresses the U.S. government's official understanding of the obligations imposed under the law. In that document, the following guidance was provided with respect to the meaning of the term "material injury":

> In determining whether material injury is "by reason of" subsidized or dumped imports, the Commission will look at the effect of such imports on the domestic industry. The words "by reason of" express a causation link, but do not involve a weighing of injury by reason of subsidized imports or sales at less than fair value against the effects of other factors which may, at the same time, also be injuring the industry. The injury caused by subsidized imports or sales at less than fair value need not be the "principal" or a "major" or "substantial" cause of overall injury to an industry.69/

This language makes two things abundantly clear: (1) the "material injury" to be evaluated under the statute is not the same thing as "overall" injury to an industry; and (2) the injury caused by subsidized imports or sales at less than fair value is to be assessed separately and not in relation to other factors that may be contributing to overall industry injury. Bifurcated approaches presently employed by certain of my

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69/ Statement of Administrative Action, Trade Agreements Act of 1979, at 46.

colleagues are wholly inconsistent with both of these principles.

The final aspect of the language of Title VII that argues in favor of a unitary, rather than a bifurcated, approach is that, under Title VII, we can, and indeed must, reach an affirmative determination in cases where we determine that the establishment of an industry in the United States has been "materially retarded" by reason of unfairly traded imports.70/ This is wholly inconsistent with any claim that Congress wanted us to provide relief only in circumstances where we are able to identify an industry that is considered to be in "poor condition" or in imminent danger of falling into such a condition. What it instead suggests is the insight that lies at the heart of a unitary approach: Congress intended that relief be afforded in any situation where we determine that unfairly traded imports have caused material harm to domestic investment or employment, irrespective of whether, in our view, investment or employment conditions in the domestic industry are satisfactory.

Legislative History

As I explained in Microdisks I, bifurcated approaches also are fundamentally at odds with the legislative history of Title VII.71/ In 1968, when Congress was considering changes in the

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70/ See 19 U.S.C. §§ 1671b, 1671d, 1673b, 1673b.

71/ See Microdisks I, supra note 5, at 61.

international obligations of the United States that might conflict with U.S. antidumping law, the Senate Finance Committee issued a report that explicitly stated:

> An industry which is prospering can be injured by dumped imports just as surely as one which is foundering although the same degree of dumping would have relatively different impacts depending upon the economic health of the industry.72/

Subsequently, in revising the antidumping law under the Trade Agreements Act of 1979, the Senate reaffirmed its commitment to this approach.73/

These expressions of Congressional intent clearly indicate that Congress did not intend that Title VII relief be denied to an industry that is improving relative to some other period or is satisfactory (by whatever measure) compared to other domestic industries.74/ Interpretation of the law in keeping with the congressional understanding, however, is flatly inconsistent with the use of a bifurcated approach. Plainly, if we may not deny relief to a domestic industry solely because we believe that industry conditions are satisfactory, it is inappropriate for us to employ a standard that also allows

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72/ S. Rep. No. 1835, 90th Cong., 2d Sess. pt. 2, at 11, reprinted in 1968 U.S. Code Cong. & Admin. News 4548-49.

73/ See, e.g., S. Rep. No. 249, 96th Cong., 1st Sess. 87 (1979).

74/ They also suggest, however, that the Commission may take the condition of the industry into account in some other fashion. As I have explained in other opinions, I believe that Congress intended that we consider the health of an industry in determining what constitutes "material" injury in a particular case. See, e.g., Digital Readout Systems, supra note 37, at 117-119.

affirmative determinations to turn principally on evidence of overall injury rather than on evidence of the effects of dumped or subsidized imports. The minimal causation form of bifurcated analysis, used by at least some of the Commissioners voting in the affirmative in these investigations, not only requires negative determinations where the threshold requirement of "injury" is not met, but also, given its virtually non-existent causal requirement, clearly makes the overall condition of the industry the one critical factor in affirmative determinations.

Notwithstanding the relevance and importance of this legislative history to the issue at hand (a datum I have repeatedly cited as supporting my reading of the statute as at least permitting, and more likely commanding, the unitary approach),75/ my colleagues, Commissioners Eckes and Rohr, in their defense of bifurcated approaches, have said nothing at all about this history. Commissioner Rohr, perhaps recognizing that the available legislative history is, on balance, not helpful to his point of view, has taken the position that Congress has been "well aware" of the debate between unitary and bifurcated analysis, but has chosen not to reject either

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75/ See, e.g., Digital Readout Systems, supra note 37, at 104; 12-Volt Motorcycle Batteries from Korea, USITC Pub. 2203, Inv. No. 731-TA-434 (Final) 31, n. 14 (July 1989) (Additional Views of Vice Chairman Cass).

approach.76/ Although I do not read the legislative history as neutral to this debate, Commissioner Rohr has offered the reading of legislative history that best fits his argument in favor of bifurcation.

Commissioner Eckes, on the other hand, has taken a different approach, arguing that the Commission has consistently used the bifurcated approach, and that Congress, although it has never mentioned the bifurcated approach by name, has expressed general approval of the Commission's treatment of Title VII investigations when considering amendments to Title VII.77/ This argument has two defects. First, it dramatically overstates the weight of congressional silence in the face of longstanding administrative practice as a tool for statutory interpretation.78/ Second, the argument would, in all events, have force only if it could be shown that the Commission has, in fact, consistently and explicitly used the bifurcated approach and that Congress was aware of this when considering changes to Title VII. In the succeeding section of these Views, I will discuss the Commission precedent that shows that the Commission's use of the bifurcated approach has, until recently, been anything but consistent or explicit.

76/ See New Steel Rails Final, supra note 2 (Additional Views of Commissioner Rohr) at 80.

77/ Id. (Additional Views of Commissioner Eckes) at 61-62.

78/ See, e.g., Thompson v. Clifford, 408 F.2d 154, 164 (D.C. Cir. 1968).

Commission Precedent

There are two issues to be considered respecting the Commission's past practice with respect to bifurcation of its Title VII analysis. One, just noted, is the degree to which congressional intent respecting this mode of analysis can be inferred from silence in the face of a consistent Commission practice of bifurcating Title VII analysis. The other issue, noted earlier, is the weight that should be given to the Commission's practice, without regard to any subsequent implied congressional ratification. In the latter context, the weight appropriate to the Commission's practice would depend not only on the consistency of Commission use of a bifurcated approach but also on the extent to which that approach represents a carefully reasoned view of the meaning of the law.

In New Steel Rails from Canada,79/ Commissioners Eckes and Rohr independently attempted to demonstrate that bifurcated approaches do, in fact, represent the Commission's consistent, long-standing practice. In the process, they reviewed an extraordinary number of Commission cases dating back to the mid-1960s. This was clearly an enormous undertaking for which the Commission (and historians) should be grateful. I believe that my colleagues' opinions and the cases cited therein tell an important story, and I would encourage anyone interested in the debate over the merits of the unitary and bifurcated

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79/ Cited at note 2.

approaches to read carefully those opinions and the cases which they cite. Read in their entirety, I believe that these opinions and the Commission precedent that they discuss demonstrate conclusively that the Commission's use of bifurcated approaches has been neither reasoned nor consistent. Hence, neither for implied congressional consent nor for their own authority can the Commission's precedents be said to provide solid ground for bifurcation.

Before discussing the history of the Commission's use of bifurcated approaches, there is one important point to be made concerning the current use of bifurcated approaches at the Commission. The recent opinions by Commissioners Eckes and Rohr make clear that, even today, there is no agreement among the proponents of bifurcated approaches as to the content appropriate to such an approach. Commissioner Eckes has explained that the essence of the first step in the approach -- the inquiry into whether the domestic industry is "materially injured" -- is to determine whether the industry is "healthy" and should therefore be denied relief for that reason alone.80/ Commissioner Rohr, on the other hand, asserts that any claim that the bifurcated approach that he employs assesses industry health to determine the existence of "material injury" -- or that even relates industry health to the concept of "material injury" -- is "totally unfounded" and reflects "woeful

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80/ New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes) at 63. See also id. at 41.

ignorance."81/ A comparison of these opinions is instructive. They illustrate that, even if one found agreement on the notion that analysis of Title VII should be bifurcated, that verbal consensus would provide no assurance that the consenters understood any particular set of analytical predicates to be subsumed within their analysis. The first question that might be asked in delving into the Commission's history is, if bifurcated approaches do not connote some consistent meaning to its principal advocates today, what likelihood is there that Commissioners will have applied a consistent approach over time?82/

81/ Id. (Additional Views of Commissioner Rohr) at 73.

It is not entirely clear to me how Commissioner Rohr does, in fact, define the term "material injury". Commissioner Rohr has stated that he considers indicators of an industry's production levels and employment and financial performance in assessing the existence of material injury, but cautioned that:

> [I]t is only when an industry's indicators are evaluated in the particular context of the industry that a definitive judgment can be made. The question is not simply that the indicators are going down, nor is the question why they are going down. The question is whether it is a bad sign for a particular industry that its indicators are going down. Id. at 73, n. 7.

Thus, when faced with declining performance indicators, Commissioner Rohr does not believe that it is appropriate to ask why the industry's indicators are declining, but believes, at the same time, that the real question is whether it is a bad sign that the industry's indicators are declining. At best, this explanation of the process by which the existence of "material injury" is to be determined is less than clear.

82/ For that matter, it is somewhat unclear whether Commissioner Rohr believes that the bifurcated approach actually represents an interpretation of the meaning of the statute. In his recent views in New Steel Rails, he explained

Indeed, the historical record is no more consistent that the recent opinions of my colleagues. Put more bluntly, the Commission's use of bifurcated approaches to Title VII cases over the years has been anything but consistent. More seriously, almost none of the authorities cited in support of bifurcated analysis in fact evidence the use of such analysis, as opposed to the inclusion of a sentence that, taken out of context, could be offered as support for the proposition that the authoring commissioners (the adjectival qualifier used here in its well-understood governmental sense, as distinguished from its meaning in copyright cases or other fora where true authorship is put in issue) might have engaged in such analysis.

Commissioner Eckes traces the origins of the bifurcated approach to a Commission opinion in a 1964 case, Carbon Steel Bars and Shapes from Canada.83/ Commissioner Eckes does not discuss what actually was at issue in that case; he merely quotes the following language from the Commission's opinion:

> For the Commission to find injury to a domestic industry in a dumping case, it must be satisfied that there is material injury and that it is being caused by the sales-below-fair-value aspect of the goods in question rather

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at one point that the bifurcated approach, as he understands it, "is simply a means of organizing the consideration of the statutory factors in Title VII investigations into logical groupings which permit an efficient exposition of what is happening to an industry and the role of imports in these events". See id. at 71.

83/ TC Pub. 135, Inv. No. AA1921-39 (Sept. 1964).

than by their mere importation.84/

A full examination of the opinion reveals unambiguously that this sentence was intended to make a point very different from the proposition for which Commissioner Eckes has cited it, a point that is, in fact, wholly at odds with the approach to Title VII cases that he espouses. In the opinion, there is not the slightest indication that the Commission thought it appropriate to assess separately the overall condition of the domestic industry without regard to the effects of unfairly traded imports.

In fact, the opinion shows that the Commission performed a unitary analysis of the effects of dumping on the domestic industry, and wished to emphasize in the statement quoted above not that injury and causation are separate elements, but that the appropriate focus of Commission investigations is on the effects of dumping, and not of "mere importation." The following statement -- contained later in the opinion after the sentence quoted by Commissioner Eckes -- summarized the Commission's ultimate conclusions and made this point unmistakably clear:

> The successful penetration of the market was therefore due directly to the less-than-fair-value pricing policy, not the mere availability of the goods. Thus, the producers in the Pacific Northeast were materially injured as evidenced by a substantial loss of sales which, under

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84/ Id. at 2.

reasonable competitive circumstances, they could have expected to make, and by a severe price depression.85/

Other cases contemporaneous with the Carbon Steel case indicate that the Commission generally recognized that a unitary analysis of the effects of dumping was appropriate.86/ Thus, the only possible relevance of the language quoted by Commissioner Eckes to the debate between unitary and bifurcated approaches is that it may have served as a possible source of later misunderstanding and mischaracterization.

The next opinion cited by Commissioner Eckes is the statement of dissenting views of Commissioner Stanley Metzger in a 1968 case, Pig Iron from East Germany, Czechoslovakia, Romania and the U.S.S.R..87/ Commissioner Eckes suggests that Commissioner Metzger's opinion in this case represents perhaps the first "formalization" of the bifurcated approach. The full extent of this "formalization" is the following statement quoted by Commissioner Eckes:

85/ Id.

The fact that Commissioner Eckes apparently read this case, yet nevertheless repeated his earlier unsupported assertions that no Commissioner prior to 1984 attempted to determine what the condition of the domestic industry would have been in the absence of dumping is, to say the least, curious. See New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes) at 46, n. 28.

86/ Vital Wheat Gluten from Canada, TC Pub. 126, Inv. No. AA1921-37, TC Pub. 126 (April 1964); Titanium Dioxide from Japan, Inv. No. AA1921-36 (April 1964).

87/ TC Pub. 265, Inv. Nos. AA1921-52-55 (Sept. 1968).

> [T]he evidence does not show injury to a domestic industry, however defined, and does not show that LTFV imports have been the cause of any dislocation falling far short of injury. Therefore, neither of the two elements required under the statute for affirmative determination by the Commission is present.88/

This statement is, on its face, somewhat confusing, for the "two elements" to which Commissioner Metzger referred appear to be (1) injury to a domestic industry; and (2) causation by LTFV imports of dislocation falling short of injury. Causation of "dislocation falling short of injury" is, of course, not an "element required under the statute." However, for purposes of this discussion, I am prepared to conclude, arguendo, that Commissioner Eckes is correct and that Commissioner Metzger intended to say that material injury and causation of material injury by LTFV imports are two separate concepts.

What is truly interesting about this "formalization" of a bifurcated approach is that Commissioner's Metzger's opinion contains no discussion of the language, legislative history, or purpose of the statute. Indeed, the statement respecting the "two elements required under the Act for affirmative determination" reflects no reasoning whatsoever; it is merely an assertion that the statute has two elements. In this respect, Commissioner Eckes is perhaps more correct than he knows in asserting that Commissioner Metzger's opinion represents the first formalization of the bifurcated approach.

88/ Id. at 34.

Commissioner Metzger's statement is, in fact, representative of subsequent statements by certain Commissioners asserting that the statute calls for a bifurcated approach. As we will see, these statements, too, were nothing more than unsupported assertions, reflecting literally no consideration of the language, legislative history or purpose of the statute.

The next case cited by Commissioner Eckes is a 1969 case, Plastic Mattress Handles from Canada.89/ Commissioner Eckes suggests that Commissioner Clubb's opinion in that investigation reflects a recognition that the bifurcated approach was the Commission's "consistent injury test." I am surprised to see Commissioner Clubb's opinion cited for that proposition. The "consistent injury test" to which Commissioner Clubb's opinion referred clearly was the quantum of injury that the Commission regarded as sufficient to warrant relief (i.e., more than de minimis); both the opinion itself and the cases cited therein leave no doubt whatsoever on that point.90/ Commissioner Clubb's opinion contains no discussion whatever of anything that could even be remotely characterized as similar to the bifurcated approach. Indeed, to the contrary, apart from the previously-described discussion of the requisite quantum of injury, the opinion consists entirely of a discussion of Commissioner Clubb's reasons for concluding that

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89/ TC Pub. 296, Inv. No. AA1921-57 (Oct. 1969).

90/ Id. at 7.

sales at less-than-fair value, as reflected in the dumping margin, did not cause material injury to the domestic industry.

The first case cited by Commissioner Eckes in which it is clear that Commissioners were in fact articulating a bifurcated approach is Ferrite Cores from Japan, a case decided by the Commission in 1971.91/ In that case, Commissioners Leonard and Banks dissented from the Commission's affirmative determination and issued an opinion that contained the following passage:

> The Antidumping Act, 1921, as amended, requires that three conditions be satisfied before an affirmative determination can be made.
>
> First, there must be dumping. Unless the Secretary of the Treasury has determined "that a class or kind of merchandise is being, or is likely to be, sold in the United States or elsewhere at less than fair value", the Tariff Commission has no basis upon which to institute an investigation.
>
> Second, there must be injury, or likelihood of injury, to an industry in the United States, or an industry in the United States must be prevented from being established. The quantum or description of injury is not disclosed in the statute.
>
> And, third, there must be a connection between the first two conditions, that is, the injury (or likelihood of injury or prevention of injury) must be "by reason of" the importation into the United States of the class or kind of foreign merchandise the Secretary of the Treasury determines is being or is likely to be sold at less than fair value. Although few determinations in the past have dealt explicitly with this third condition, it is an integral part of the law which must be fulfilled before an affirmative determination can be made.92/

91/ TC Pub. 360, Inv. No. AA1921-65 (Jan. 1970).

92/ Id. at 9-10.

This opinion is noteworthy in two respects. First, the opinion, like that of Commissioner Metzger in Pig Iron, contains no discussion whatever of the language, legislative history or purpose of the statute. The statement suggesting that "injury" and "causation" are two separate conditions that must be met before an affirmative determination may be made is nothing more than an unsupported assertion, based on no consideration whatsoever of the meaning of the statute. Yet, as Commissioner Eckes points out, it is this opinion that appears to have served as the source of other, subsequent formulations of the statutory requirements "in the classic bifurcated form."93/ These subsequent "formulations" contained in numerous later opinions cited by Commissioner Eckes are equally devoid of any consideration of the meaning of the statute, consisting only of the naked assertion that injury and causation are separate requirements that must be met as a predicate for an affirmative determination.

Second, the majority opinion in Ferrite Cores from which Commissioners Leonard and Banks dissented reflected a very different understanding of the meaning of the law than that reflected in bifurcated approaches. The majority opinion contained a statement that made it quite clear that a majority of the Commission believed that a unitary analysis of the effects of dumping on the domestic industry was appropriate:

93/ New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes) at 40-41.

> [Petitioners] claim that if the degree of injury caused solely by the dumping practice is more than de minimis the Commission must determine that there is injury. We agree with this premise.94/

Furthermore, the Commission majority stated explicitly that any injury suffered by the industry that was not attributable to dumping was irrelevant to the Commission's inquiry.95/ Thus, as of the early 1970s, a majority of the Commission was on record as favoring a unitary approach, and rejecting the essence of the bifurcated approach.

On what basis, then, do my colleagues assert that the Commission has had a long history of consistent adherence to the bifurcated approach? Primarily, this claim appears to rest on the fact that during the 1970s a majority of the Commission joined in opinions containing boiler-plate language like the following:

> The Antidumping Act, 1921, as amended, requires that the Tariff Commission find two conditions satisfied before an affirmative determination can be made.
>
> First, there must be injury, or likelihood of injury, to an industry in the United States, or an industry in the United States must be prevented from being established.
>
> And second, such injury (or likelihood of injury or prevention of establishment) must be "by reason of" the importation into the United States of the class or kind of foreign merchandise the Secretary of the Treasury

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94/ Id. at 4.

95/ Id. at 3-4.

determined is being, or is likely to be, sold at less than fair value.96/

In Digital Readout Systems, I took note of this language, but stated that, in the great majority of these cases, irrespective of the use of boiler-plate language such as that quoted above, the Commission in fact performed a unitary analysis rather than a bifurcated analysis of the causation of material injury.97/ Commissioner Eckes has said that he disagrees with this statement,98/ but his disagreement appears to be predicated largely, if not entirely, on the fact that the opinions in question contain the boiler-plate language at issue that no one has ever questioned that they in fact contain.

Beyond considering that language, however, I suggest that it might be useful to consider the discussion in each case that reveals how the Commission actually analyzed the record before it. It is particularly instructive to consider those cases cited by Commissioner Eckes in which the Commission rendered an

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96/ From Asbestos Cement Pipe from Japan, TC Pub. 483, Inv. No. AA1921-91 (May 1972). See also cases cited in New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes) at 43-44, n. 26 (Additional Views of Commissioner Rohr) at 75, n. 10.

97/ Digital Readout Systems, supra note 37, at 110.

98/ See New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes) at 45, n. 28.

affirmative determination during the period from 1972 to 1977.99/

If Commissioner Eckes is correct about the nature of the analysis performed by the Commission, one would expect to find in those cases an indication that the Commission found that the domestic industry was "injured" without regard to the impact of LTFV imports. This is, of course, the first test that must be met in order to satisfy the requirements of the bifurcated approach for an affirmative determination. Accordingly, if the Commission were making an affirmative determination based on use of the bifurcated approach, one would at least expect to find some discussion of evidence indicating that this first requirement was met.

The fact is, however, that the overwhelming majority of these cases contain no indication whatever that the Commission performed such a freestanding assessment of the condition of the domestic industry. Typically, the cases are confined to a discussion of how LTFV imports depressed or suppressed prices of the domestic like product, caused the domestic industry to lose sales, or otherwise inflicted damage on the domestic industry.100/

99/ Many of these cases are cited in New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes) at 44, n. 26.

100/ See, e.g., Northern Bleached Hardwood Kraft Pulp from Canada, TC Pub. 530, Inv. No. AA1921-105 (Dec. 1972); Canned Bartlett Pears from Australia, TC Pub. 551, Inv. No. AA1921-110 (Mar. 1973); Roller Chain from Japan, TC Pub. 552, Inv. No.

Many cases in which the Commission rendered a negative determination during this period likewise were exclusively devoted to a discussion of the impact of LTFV imports on the domestic industry, with little, if any, separate discussion of the condition of the industry divorced from such imports.101/ It might be argued that this is less relevant because it is possible that the Commission might have been applying a bifurcated approach, but chose only to talk about the element that it found dispositive, i.e., the causation element.

AA1921-111 (Mar. 1973); Stainless Steel from Sweden, TC Pub. 573, Inv. No. AA1921-114 (May 1973); Synthetic Methionine from Japan, TC Pub. 578, Inv. No. AA1921-115 (May 1973); Stainless Steel Wire Rods from France, TC Pub. 596, Inv. No. AA1921-119 (July 1973); Steel Wire Rope from Japan, TC Pub. 608, Inv. No. AA1921-124 (Sept. 1973); Calcium Pantothenate from Japan, TC Pub. 630, Inv. No. AA1921-131 (Dec. 1973); Tapered Roller Bearings and Certain Components Thereof from Japan, ITC Pub. 714, Inv. No. AA1921-143 (Jan. 1975); Electric Golf Cars from Poland, USITC Pub. 736, Inv. No. AA1921-147 (Sept. 1975); Certain Railway Track Maintenance Equipment from Austria, USITC Pub. 844, Inv. No. AA1921-173 (Nov. 1977).

This is not to say, however, that certain individual Commissioners did not use a bifurcated approach on occasion. Commissioner Leonard in particular explicitly used such an approach in several cases, notably in certain cases where he dissented from the determination of the Commission majority. See Tapered Roller Bearings and Certain Components from Japan, TC Pub. 714, Inv. No. AA-1921-143 (Jan. 1975) (Dissenting Views of Commissioner Leonard); Primary Lead Metal from Australia and Canada, TC Pub. 639, Inv. No. AA1921-134-135 (Jan. 1974) (Dissenting Views of Commissioner Leonard). See also Birch Three-Ply Door Skins from Japan, USITC Pub. 754, Inv. No. AA1921-150 (Jan. 1976) (Statement of Reasons for the Affirmative Determination of Commissioner Leonard) (Statement of Reasons for the Affirmative Determination of Commissioner Minchew).

101/ See generally cases cited in New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes) at 43-44, n. 26.

However, the almost total absence of discussion of industry conditions divorced from LTFV imports in most of these cases appears more significant when one also considers the notable paucity of cases decided during this period in which the Commission rendered a negative determination predicated only on the basis of a finding of no "injury" as opposed to "no causation."

The relative absence of such cases apparently also struck Commissioner Eckes for he stated in his New Steel Rails opinion that "[d]uring the 1970s Commissioners seemed reluctant to vote negative exclusively on the basis of no injury".102/ In the same opinion, however, Commissioner Eckes did cite a number of cases -- seven in all -- in which he asserted that the Commission made a negative determination based on a finding of absence of injury. In reality, a careful examination of these cases suggests that the Commission's determination was predicated solely upon an assessment of the condition of the industry, without regard to the impact of unfairly traded imports, in only one of these cases -- Saccharin from Japan and the Republic of Korea.103/

102/ New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes) at 40, n. 20. Perhaps in order to avoid more obvious inferences, Commissioner Eckes speculated that this may have been due to the fact that the Commission had adopted a de minimis test for material injury. Id.

103/ USITC Pub. 846, Inv. No. AA1921-174-175 (Dec. 1977).

In two of the cases cited by Commissioner Eckes -- Wrenches, Pliers, Screwdrivers and Metal-Cutting Snips from Japan 104/ and Welt Work Shoes from Romania 105/ -- I can discern no basis whatever for Commissioner Eckes' statement that a negative determination was reached based on a finding that the industry was not injured. Both cases are replete with discussion of the fact that the evidence before the Commission failed to show that LTFV imports had caused damage to industry profitability, depressed prices or otherwise injured the domestic industry. Discussion of those issues dominates the opinions; the one or two stray statements relating to overall industry performance contained in the opinions that have been cited by Commissioner Eckes hardly form the basis for a reasoned conclusion that the Commission determination was predicated on the absence of evidence of an injured industry.

In the remaining cases cited by Commissioner Eckes, the Commission opinion stated at the outset that the Commission was reaching a negative determination because the requirement of "injury" was not satisfied. The opinion then proceeded to discuss the absence of evidence that the subject LTFV imports caused material injury to the domestic industry.106/ Each of these cases is more consistent with any of several alternative

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104/ TC Pub 696, Inv. No. AA1921-141 (Oct. 1974).

105/ USITC Pub. 731, Inv. No. AA1921-144 (June 1975).

106/ See USITC Pub. 732, Inv. No. AA1921-145 (June 1975).

inferences -- that commissioners did not in fact intend by their statement to indicate a disjunctive analysis of injury and causation, that insofar as they accepted a bifurcated approach they understood that approach to mean something quite different from what Commissioner Eckes imports into the term "bifurcated analysis," or that the commissioners were less careful in attending to the language contained in the opinion than we might hope -- than with an inference that the Commission was disposing of these cases solely on grounds of the condition of the domestic industry without regard to the causal relation of dumped or subsidized imports to that condition.

In the first case cited by Commissioner Eckes, Deformed Concrete Reinforcing bars of Non-Alloy Steel from Mexico,107/ the Commission stated that it failed to find the first condition for an affirmative determination satisfied. It then proceeded to discuss the fact that imports were small and declining, that there was no evidence of price suppression or depression from LTFV sales, and that domestic prices and the profitability of the domestic industry were highest during those periods in which the volume of imports was at its lowest.108/ This discussion would have been surplusage had the

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107/ TC Pub. 605, Inv. No. AA1921-122 (Aug. 1973).

108/ Id. at 5.

Commission in fact premised its decision solely on the condition of the domestic industry.

In Portable Electric Typewriters from Japan,109/ after stating that the injury requirement was not satisfied, the Commission noted that the industry's performance was better during the period in which the Treasury Department found that dumping had occurred than it was during previous periods covered by the Commission's investigation. The Commission also explained that it found no evidence that LTFV sales had a "measurable impact" on prices of domestically produced typewriters.110/ Again, the discussion of price effects of LTFV sales appears directed to consideration of the impact of dumping on the domestic industry, an unnecessary concern if the condition of the domestic industry was dispositive.

The Commission's opinion in Vinyl Clad Fence Fabric from Canada was similarly structured.111/ After stating that the requirement of injury was not satisfied, the Commission went on to describe evidence indicating that the industry had performed better, in terms of shipment levels and profitability, during the period when Treasury found that LTFV sales were occurring, implicitly contradicting assertions that the effects of LTFV

109/ USITC Pub. 732, Inv. No. AA1921-145 (June 1975) at 5.

110/ Id.

111/ USITC Pub. 744, Inv. No. AA1921-148 (Oct. 1975).

sales were sufficient to justify antidumping duties.112/ The Commission also noted that the evidence before it suggested that other factors, such as competition from other domestic firms and from fair value imports, were responsible for any difficulties that the certain members of the industry was experiencing, further undermining the purported causal nexus.

Finally, in Sorbates from Japan,113/ the Commission stated that the injury condition was not satisfied, and proceeded to discuss the case in terms of the Petitioner's failure to show injury from LTFV imports. The Commission noted, inter alia, that the dumping margins at issue were relatively small, and that, although there was some evidence of price depression, "the evidence does not point to LTFV sales as a cause."114/ Here, too, the Commission's discussion is not consistent with straightforward termination of an investigation on the basis of the domestic industry's condition.

Beginning in 1978 and continuing through 1979, when the Trade Agreements Act of 1979 was enacted, the analysis employed by the Commission became, if anything, more plainly unitary, with less and less attention paid to even the formal boiler-plate language that is said to be indicative of use of the

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112/ Id. at 5-6.

113/ USITC Pub. 915, Inv. No. AA1921-183 (Sept. 1978).

114/ Id. at 6.

bifurcated approach.115/ In 1978 and 1979, Commission decisions generally contained the standard boiler-plate language in prefatory form, and then proceeded to discuss the various statutory factors in an intermingled fashion under a single heading, such as "Injury by Reason of LTFV Sales" or "The Question of Injury or Likelihood By Reason of LTFV Sales." Apart from the standard boiler-plate language, virtually all of these decisions contain not the slightest indication that Commissioners regarded "injury" and "causation" as separate elements.116/

115/ Commissioner Leonard, the Commissioner that Commissioner Eckes describes, perhaps with good reason, as the principal proponent of the bifurcated approach, left the Commission in June 1977.

116/ See, e.g., Ice Hockey Sticks from Finland, USITC Pub. 871, Inv. No. AA1921-177 (Mar. 1978) (Statement of Reasons for the Negative Determination of Chairman Minchew and Commissioners Moore, Bedell, Ablondi and Alberger); Polyvinyl Chloride Sheet from the Republic of China, USITC Pub. 878, Inv. No. AA1921-178 (April 1978); Carbon Steel Plate from Japan, USITC Pub. 882, Inv. No. AA1921-179 (April 1978) (Statement of Reasons for the Affirmative Determination of Chairman Minchew and Commissioner Alberger) (Statement of Reasons for the Affirmative Determination of Commissioners Moore and Bedell); Portland Hydraulic Cement from Canada, USITC Pub. 918, Inv. No. AA1921-184 (Sept. 1978) (Statement of Reasons of Commissioner Bedell) (Statement of Reasons of Vice Chairman Alberger); Certain Nylon Yarn and Grouped Nylon Filaments from France, USITC Pub. 922, Inv. No. AA1921-185 (Oct. 1978) (Statement of Reasons of Chairman Parker and Commissioners Alberger, Moore and Bedell); Rayon Staple Fiber from Belgium, USITC Pub. 914, Inv. No. AA1921-186 (Sept. 1978) (Statement of Reasons of Chairman Parker and Commissioners Moore and Bedell); Motorcycles from Japan, USITC Pub. 923, Inv. No. AA1921-187 (Nov. 1978) (Statement of Reasons of Chairman Parker and Commissioners Alberger, Moore and Bedell); Steel Wire Strand for Prestressed Concrete from Japan, USITC Pub. 928, Inv. No. AA1921-188 (Nov. 1978) (Statement of Reasons Of Chairman Parker and Commissioners Moore and Bedell) (Statement of Reasons of

Following passage of the Trade Agreements Act of 1979, early Commission decisions in Title VII cases dispensed with even the boiler-plate language said to be indicative of the use of the bifurcated approach. Instead, these decisions generally discussed causation of material injury in terms of the major factors identified in the statute, that is, the volume of imports, the effects of unfairly traded imports on prices of the domestic like product, and the impact of such imports on domestic producers.117/ They likewise generally did not follow a bifurcated framework for analyzing injury and causation. Instead, a combined discussion of injury and causation was generally set forth under headings such as "Material Injury By

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Commissioner Alberger); Certain Steel Wire Nails from Canada, USITC Pub. 937, Inv. No. AA1921-189 (Feb 1979) (Statement of Reasons for the Negative Determination of Commissioners Alberger, Moore and Bedell); Rayon Staple Fiber from France and from Finland, USITC Pub. 938, Inv. No. AA1921-190-191 (Feb. 1979) (Statement of Reasons of Chairman Parker and Commissioners Moore and Bedell); Bicycle Tires and Tubes from the Republic of Korea, USITC Pub. 958, Inv. No. AA1921-193 (Mar. 1979) (Statement of Reasons of Chairman Parker and Commissioners Moore, Bedell and Stern); Carbon Steel Plate from Taiwan, USITC Pub. 970, Inv. No. AA1921-197 (May 1979) (Statement of Reasons for the Affirmative Determination of Commissioners Moore and Bedell); Sugar from Belgium, France and West Germany, USITC Pub. 972, Inv. No. AA1921-198-200 (May 1979) (Statement of Reasons for the Affirmative Determination of Vice Chairman Parker and Commissioners Moore and Bedell).

117/ See, e.g., Spun Acrylic Yarn from Japan and Italy, USITC Pub. 1046, Inv. Nos. 731-TA-1-2 (Final) (Mar. 1980); Portable Electric Typewriters from Japan, USITC Pub. 1062, Inv. No. 731-TA-12 (Final) (May 1980); Melamine in Crystal Form from Austria and Italy, USITC Pub. 1065, Inv. Nos. 731-TA-13-14 (Final) (May 1980); Certain Electric Motors from Japan, USITC Pub. 1116, Inv. No. 731-TA-7 (Final) (Dec. 1980); Anhydrous Sodium Metasilicate from Japan, USITC Pub. 1118, Inv. No. 731-TA-25 (Final) (Dec. 1980).

Reason of LTFV Imports."118/ There was no separate analysis of the "Condition of the Industry" of the kind now routinely contained in Commission opinions.

In 1980, in Sugar and Sirups from Canada, a minority of the Commission did undertake to consider separately injury and causation. This minority consisted of Commissioner Moore and Commissioner Stern (who would later argue forcefully that bifurcation was inappropriate under the governing law).119/ The majority, however, carried out an integrated inquiry into injury and causation.

118/ See, e.g., Spun Acrylic Yarn from Japan and Italy, USITC Pub. 1046 (Mar. 1980); Unrefined Montan Wax from East Germany, USITC Pub. 1180, Inv. No. 731-TA-30 (Aug. 1981); Strontium Nitrate from Italy, USITC Pub. 1155, Inv. No. 731-TA-33 (June 1981); Certain Amplifier Assemblies and Parts Thereof from Japan, USITC Pub. 1266, Inv. No. 731-TA-48 (July 1982).

119/ USITC Pub. 1047, Inv. No. 731-TA-3 (Mar. 1980). Commissioner Stern explicitly repudiated the bifurcated approach in Cellular Mobile Telephones and Subassemblies Thereof from Japan, USITC Pub. 1786, Inv. No. 731-TA-207 (Final) (Dec. 1985). In her opinion in that case, Commissioner Stern explained that, in her view, the bifurcated approach was contrary to the entire thrust of the statute. Contrary to the assertions made by my colleague, Commissioner Eckes (see New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes) at 53), Commissioner Stern did not fail to give a "full explanation" of her views. Certainly, she offered a fuller explanation of her interpretation of the statute than has ever been offered by any proponent of the bifurcated approach.

I also note that Commissioner Eckes attempts to make much of the fact that Commissioner Stern was allegedly once "an enthusiastic exponent" of the bifurcated approach. See id. at 51-53. Given Commissioner Stern's ultimate rejection of this approach, I fail to see how her initial use of the approach adds anything to an argument aimed at showing that the Commission has consistently used the approach.

Beginning in 1983, Commission opinions began to incorporate a section entitled "Condition of the Industry." Those decisions continued for some time, however, the integrated analysis of injury and causation evident in earlier Commission opinions. The condition of the industry section merely contained a factual discussion of the performance of the industry without reaching any conclusion as to whether the industry was "injured".120/

To sum up, then, as I stated in the Microdisks I opinion in which I first explained in detail my disagreement with the Commission's use of the bifurcated approach,121/ until relatively recently, the Commission's practice does not establish a consistent pattern of adherence to a bifurcated approach (or even to a congeries of varied bifurcated approaches). Prior to the mid-1980s, bifurcated approaches were used by certain Commissioners, but these Commissioners did not at any time articulate any legal basis for such an interpretation of the statute.

Far from establishing the consistent application of bifurcated analysis, itself only the first step in either chain of statutory construction my colleagues would link to

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120/ See, e.g., Stainless Steel Sheet and Strip from the Federal Republic of Germany, USITC Pub. 1391, Inv. Nos. 731-TA-92, 95 (June 1983); Nitrocellulose from France, USITC Pub. 1409, Inv. No. 731-TA-96 (July 1983); Cotton Shop Towels from the People's Republic of China, USITC Pub. 1431, Inv. No. 731-TA-103 (Sept. 1983).

121/ Microdisks I, supra note 5, at 66-67.

Commission precedent, the Commission's decisions show a relatively consistent pattern of unitary analysis. There may be one or more cases that my colleagues and I have not yet uncovered that reveal an occasional Commission decision prior to recent times based on a bifurcated approach such as Commissioners Eckes and Rohr propose. So far as research into the claimed precedents reveals, however, in all cases other than the 1977 Saccharin investigation, a majority of the Commission consistently dealt with causation and injury as an integrated inquiry, notwithstanding the fact that Commission opinions often contained certain boiler-plate language that, taken apart from the rest of the opinion, could be said to suggest a bifurcated approach.

Judicial Precedent

The final asserted support for the bifurcated approach that warrants discussion is judicial authority.122/ Judicial pronouncements do indeed provide the strongest support for bifurcated approaches. Two points should be noted, however, respecting the courts' statements. First, the degree of support for bifurcated analysis of the effects of dumped or subsidized imports to be found in judicial statements often is overstated. Indeed, some of the statements said to provide

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122/ While I have discussed the apposite judicial authorities in other opinions, see, e.g., Microdisks I, supra note 5, at 67-69; Digital Readout Systems, supra note 37, at 112-17, I believe a brief reprise is useful to complete discussion of the issue raised here.

unequivocal support for bifurcated analysis are, when read in context, better support for unitary analysis. Second, even those decisions that are supportive can at most be characterized as accepting bifurcation as permissible under an extremely deferential standard of judicial review. Given the other evidence as to the meaning of the text, its history, and Commission practice, reconsideration of this limited class of judicial pronouncements is by no means implausible.

The Court of International Trade in its recent Mirror Manufacturers decision,123/ relying on dicta in its earlier decision in American Spring Wire Corp. v. United States,124/ accepted the Commission's argument that the "healthy industry" test that this approach incorporates is consistent with the statute. Mirror Manufacturers plainly is authority for the proposition that not all judges would find the health test inconsistent with the dictates of Title VII. The significance of this decision is less plain, however, as American Spring Wire, which provides the only articulated basis for Mirror Manufacturers, is not itself plain authority for such an approach.125/ To the contrary, although the decision contains

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123/ Nat'l Ass'n of Mirror Mfrs. v. United States, 696 F. Supp. 642 (Ct. Int'l Trade 1988).

124/ 590 F. Supp. 1273 (Ct. Int'l Trade 1984), aff'd sub nom., Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985).

125/ Thus, to the extent that the Court's recent opinion in Mirror Manufacturers relied explicitly on American Spring Wire for that purpose, neither can the Mirror Manufacturers opinion be fairly regarded as independent authority for that

language that has been read out of context often over the past several years to suggest such support for a bifurcated analysis, that language yields a very different meaning when read in the context of the case.

In American Spring Wire, the Court stated that the "Commission must make an affirmative finding only when it finds both (1) present material injury . . . and (2) that the material injury is 'by reason of' the subject imports".126/ While, standing alone, this statement's meaning is open to differing interpretation, viewed in the particular factual and legal context in which American Spring Wire was decided, that statement hardly can be characterized as clear support for a healthy industry test. The basis for this assertion has been provided before,127/ albeit not persuasively according to one of my colleagues. Commissioner Eckes deems the context for Spring Wire irrelevant, finding that the passage quoted from the Court's opinion is "unambiguous;" he offers a single datum to buttress that proposition and to refute contrary interpretations, pointing out that the Court's opinion also

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proposition. The same is even more true of the Court's recent decision in Roses Inc. v. United States, 696 F. Supp. 647 (Ct. Int'l Trade 1989), where the Court essentially did no more than essentially repeat the relevant language from American Spring Wire.

126/ 590 F. Supp. at 1276.

127/ See Microdisks I, supra note 5, at 67-69; Digital Readout Systems, supra note 37, at 112-17.

contains a footnote that conveys essentially the same thought as the passage from the Court's opinion quoted above.128/

Given the central place this decision has taken in argument on behalf of bifurcated approaches and the repeated insistence of some colleagues that, notwithstanding any other evidence of statutory meaning, American Spring Wire conclusively establishes either the permissibility of bifurcated analysis129/ or the requirement of such analysis,130/ I will quickly recapitulate the context and import of American Spring Wire so that others might decide whether that opinion constitutes the "unambiguous" authority Commissioner Eckes claims it to be.

In the determinations that were reviewed in American Spring Wire, the Commission declared that "[e]ven assuming that

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128/ See New Steel Rails Final, supra note 2 (Additional Views of Commissioner Eckes) at 65. The footnote in question reads as follows:

> As indicated previously, an affirmative injury finding requires both (1) that the domestic industry be materially injured (or threatened with material injury), and (2) that such injury be by reason of the unfairly traded imports.

590 F. Supp. 1281, n. 9.

Although my colleague appears to believe that this footnote has some special significance, I fail to see how it adds anything to the passage quoted above; it merely expresses the same thought in slightly different words.

129/ New Steel Rails Final, supra, note 2 (Views of Commissioner Rohr) at 78.

130/ Id. (Views of Commissioner Eckes) at 62-66.

[the posited] injury meets the standard of 'material injury', our analysis of the effects of [the subject] imports...from France during that six month period demonstrates that any such injury is not by reason of the subject imports".131/ On appeal of these determinations to the Court of International Trade, petitioners argued that the Commission's decision was not supported by substantial evidence because the Commission had suggested that "material injury" had been shown on the record; petitioners therefore urged that an affirmative determination was required. Counsel for the Commission, on the other hand, argued that the statute required, in addition to a showing of "injury," evidence of a causal link between that injury and the unfairly traded imports. Counsel for the Commission also argued that the Commission implicitly determined that no material injury existed; accordingly, there was no need to consider causation other than in the alternative. Counsel further argued that causation was, in any event, lacking.

The court accepted the argument that both material injury and causation must be present to support an affirmative determination, but it did not suggest that these two elements need be considered in the disjunctive. The court agreed that the statute requires a causal connection between the injury to the domestic industry and the subject imports, and it found

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131/ Prestressed Concrete Steel Wire Strand from France, USITC Pub. 1325, Inv. No. 701-TA-153 (Final) 6 (Dec. 1982) (footnote omitted).

that the Commission had, as counsel for the Commission suggested, implicitly found that the domestic industry was not materially injured.132/

The court thus simply pointed out that the statutory requirement of injury by reason of less-than-fair value imports means not only that an industry must be suffering some harm, such as might be claimed by any declining industry, but also that there must be a showing that LTFV imports were a cause of that harm. Just as the commonplace notion of injury requires the infliction of harm to someone by something or someone, so the statutory injury requirement mandates something more than an independent evaluation of the condition of a domestic industry.

Hence, the essential insight that underlies American Spring Wire's affirmance of the Commission's determination rested on the conclusion that whatever fate had befallen the domestic industry could not have constituted injury by reason of the unfairly traded imports because that concept necessarily requires a nexus between the imports and the domestic industry's changed condition. The court held that a change in the condition of the domestic industry cannot satisfy the statutory standard independent of such a nexus. It manifestly was not asked to decide and did not hold that the law requires a determination, independent of the causal reasons, that the

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132/ 590 F. Supp. at 277.

industry's condition is too good to allow relief against unfairly traded imports or that the industry's condition had over a given period (not related to evidence of LTFV or subsidized sales) changed for the worse. The court was not presented with a Commission determination based exclusively on industry health, and it did not decide that an independent determination of industry health could, in the absence of a Commission determination respecting the effects of unfairly traded imports, itself provide the complete basis for a Commission decision. Instead, the court's decision affirmed that relief cannot be predicated simply on a decision respecting industry condition and can be denied when the Commission has found that the industry is not materially harmed by unfairly traded imports, whatever the industry's condition.

The Spring Wire case, thus, more readily supports a unitary test, which explicitly examines the relation between the dumped or subsidized imports and the industry's condition, than a bifurcated approach, which separates those inquiries. Of course, a bifurcated approach could be structured so that the appropriate nexus was always required; that appears to be the approach understood by the court in American Spring Wire to have been employed by the Commission, perhaps owing more to representations of Commission's counsel on appeal than to the opaque opinion issued by the Commission. As used by a majority of commissioners in some recent cases, however, that has not been the type of bifurcation that has been employed.

It should also be noted that, while the reading of American Spring Wire challenged here has been accepted by one judge of the Court of International Trade in Mirrors, another judge of the same court has taken a position strongly at odds with the requirement of a healthy industry test. In Republic Steel Corp. v. United States,133/ the Court stated that:

> [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 amount to "material injury."

The case was later voluntarily dismissed pursuant to a motion filed by petitioners, and certain aspects of the Court's decision in Republic Steel not relevant here may properly be questioned in light of the Federal Circuit's subsequent opinion in American Lamb Co. v. United States.134/ However, to date, the Federal Circuit has not squarely addressed the particular issue discussed by the court in the portion of its opinion that is quoted above.135/

133/ 591 F. Supp. 640, 649 (Ct. Int'l Trade 1985), reh'g denied, 9 Ct. Int'l Trade 100 (1985), dismissed (Order of August 13, 1985).

134/ 785 F.2d 994 (Fed Cir. 1986).

135/ The fact that the decision in American Spring Wire was affirmed on the basis of the opinion filed by the Court of International Trade in that case does not, in my view, by any means constitute acceptance of a healthy industry test for either affirmative or negative decisions under Title VII. The reasons given above apply equally to the lower court and the Federal Circuit. If the opinion in Spring Wire is not rightly understood to accept a separate health test for Title VII

The most apt characterization of the current state of judicial decisions on the issue of bifurcation, thus, would be that judges on our reviewing courts have not laid the question to rest: one has clearly rejected the essential elements of the bifurcated approach advocated by its most vocal defenders, while another has accepted it, perhaps on the basis of this Commission's eloquent but erroneous argument that the court had already decided to defer to the Commission's own judgment on this issue. In light of the other grounds for statutory interpretation available to resolve this issue, the judicial precedents provide a slender reed on which to rest argument in favor of bifurcation.

C. Making Causation Wholly Irrelevant: Minimal Impact of Imports As A Predicate For An Injury Finding

The final issue that requires discussion is the nature of the causal link between injury and causation that advocates of the minimal causation approach believe is appropriate in determining whether a domestic industry has been materially injured by reason of unfairly traded imports. This was the subject of several discussions between Commissioners and counsel during the hearing in these investigations. Although this issue, which is particularly important to the minimal causation form of bifurcated analysis, frequently is raised in

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investigations, affirmance of that judgment on the basis of the opinion plainly cannot serve as authority for that proposition.

such settings, it should be seen quickly to be the most easily resolved of the legal issues addressed here.

Those Commissioners who believe that the Commission must examine the effects of imports, rather than the effects of dumping or subsidization, also appear to believe that "even a slight contribution" to overall industry injury from the imports subject to investigation is a sufficient basis for an affirmative determination.136/ In other words, if the condition of the industry is such that it is deemed "materially injured" by these Commissioners, the causation requirement is considered met as long as imports subject to investigation made a "slight contribution" to that condition -- even if that "contribution" was made by fairly traded imports subject to investigation.137/

Applied literally, this standard would require an affirmative determination if the domestic industry lost any sale to the subject imports, irrespective of whether that sale was lost to imports that were fairly traded. As a practical matter, this standard effectively reads the entire causation requirement out of the statute. For Commissioners who use this standard, affirmative injury determinations must automatically

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136/ See, e.g., Certain Brass Sheet and Strip from Japan and the Netherlands, USITC Pub. 2099, Inv. Nos. 731-TA-379 and 380 (Final) 17 and n. 45 (July 1988) (Views of Commissioners Eckes and Lodwick).

137/ See Sewn Cloth Headwear from the People's Republic of China, USITC Pub. 2096, Inv. No. 731-TA-405 (Preliminary) 23, n. 10; 26 (July 1988) (Additional Views of Commissioner Eckes)

follow whenever a domestic industry is, in their view, in less than satisfactory condition, and it can be argued that imports from the country whose goods are subject to investigation, whether the particular imports were fairly traded or not, made some contribution, however minimal, to the industry's condition.138/ Given that imports cannot be expected to be helpful to the domestic producers of "like products" (which generally are those competing most closely with the imported products), it would be a very rare case indeed where the Commission could reasonably argue that imports had not contributed, even slightly, to adverse industry conditions.139/

138/ This is at times unclear, as discussion of threatened material injury takes the forms of separate commentary on various factors Title VII identifies as useful indicators of likely changes either in the effect of the unfair trade practice on import prices or in the effect of those imports on the domestic industry. The problem with the separate factor approach is described in 12-Volt Motorcycle Batteries from the Republic of Korea, USITC Pub. 2203, Inv. No. 731-TA-434 (Preliminary) 55-57 (July 1989) (Additional Views of Vice Chairman Cass).

139/ But see New Steel Rails Final, supra note 2 (Views of Commissioners Eckes, Rohr, and Newquist). Given the infrequency with which those who use the minimal causation form of bifurcated analysis cannot find the necessary causal link to industry injury -- a quick review of five years worth of determinations for one such Commissioner did not produce a single instance in which a domestic industry was deemed injured but causation was found wanting -- it is no surprise that the decision referenced above appears strained. Indeed, it reads as if drafted initially to declare that the domestic industry was not injured but was sufficiently vulnerable to be threatened with the sort of injury required for import relief. Unfortunately, for those of us excluded from access to the process pursuant to which the Commission opinion was written, these are only matters of speculation.

This minimal causation standard could be even more problematic where threatened injury is in issue, rather than past or present injury. In such cases, presumably the analytical structure for minimal causation analysis remains constant while the time frame for its application changes. Accordingly, Commissioners who take this approach would view a threatened change in the domestic industry's condition that promises to make the industry unhealthy, and to which imports from the country whose goods are under investigation, whether fairly traded or not, threaten to contribute, in however modest amount, as providing sufficient basis for imposition of antidumping or countervailing duties under Title VII.140/ Thus, for example, in this view, antidumping or countervailing duties might be seen as called for in certain sectors of the domestic economy whenever it is feared that the economy is heading into a recession.

I find it difficult to believe that anyone who had not been immunized by frequent exposure to this argument could accept this standard as consistent with U.S. trade law (or with the provisions of the GATT that the law was intended to implement). The law expressly asks this Commission to

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140/ See, e.g., Certain Light-Walled Rectangular Pipes and Tubes from Taiwan, USITC Pub. 2169, Inv. No. 731-TA-410 (Final) (March 1989) (Views of Commissioners Eckes and Newquist); Industrial Belts from Israel, Italy, Japan, Singapore, South Korea, Taiwan, The United Kingdom, and West Germany, USITC Pub. 2194, Inv. Nos. 701-TA-293 and 731-TA-412-419 (Final) (May 1989) (Views of Commissioner Rohr).

determine whether a domestic industry in the United States is suffering material injury by reason of the imports found by Commerce to have been dumped or subsidized; it does not say that the Commission shall determine whether the domestic industry is materially injured in part by reason of the unfairly traded imports that are the subject of our investigation. The GATT provisions noted above, implemented by Title VII as revised, are equally plain. Consider again Article VI's command that

> [n]o contracting party shall levy any anti-dumping or countervailing duty . . . unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry 141/

Similarly, the legislative history of Title VII in explicit language recognizes the obligation imposed on the Commission to determine whether "the effect of the subsidization [or dumping] . . . is such as to cause or threaten material injury to an established domestic industry . . . "142/ The suggestion is not made that the Commission should determine whether the effect of subsidization or dumping is to contribute in some measure to a material injury; the plain requirement is that the effect of dumping or subsidization be to cause material injury to the domestic industry. Other statements in the legislative history, noted above, are to the same effect.

141/ Article VI of the General Agreement on Tariffs and Trade.

142/ S. Rep. No. 249, 96th Cong., 1st Sess. 57 (1979) (emphasis added).

Given the quite clear statements in domestic law, international law, and supporting legislative history that the dumping or subsidization must cause material injury, where does the minimal causation approach derive its "any contribution" standard? Proponents assert that the standard is recognized in the Senate Finance Committee Report accompanying the Trade Agreements Act of 1979, pointing to language which reads:

> Current law does not, nor will Section 735, contemplate that the effects from less-than-fair-value the [sic] imports be weighed against the effects associated with other factors (e.g., the volume and prices of imports sold at fair value, contraction in demand or changes in patterns of consumption, trade, restrictive practices of and competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry) which may be contributing to overall injury to an industry. Nor is the issue whether less-than-fair-value imports are the principal, a substantial, or a significant cause of material injury. Any such requirement has the undesirable result of making relief more difficult to obtain for industries facing difficulties from a variety of sources; such industries are often the most vulnerable to less-than-fair-value imports.143/

Virtually identical language elsewhere in the Report makes the same point respecting the issue of subsidization.144/

Again, to reach the conclusion suggested by the minimal causation approach, one has to wrench a single sentence out of context, to impute to it a meaning that is by no means plain on its face, and to elevate it above clearer statements to the

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143/ S. Rep. No. 249, 96th Cong., 1st Sess. 74-75 (1979) (emphasis added) cited in Martial Arts Uniforms from Taiwan, USITC Pub. 2216, Inv. No. 731-TA-424 (Final) n. 3 (Aug. 1988) (Dissenting Views of Commissioners Eckes and Newquist).

144/ Id. at 57.

contrary in more authoritative sources and even in the selfsame document. These are contortions for which first-year law students would be censured and for which practicing lawyers would insist on extra pay. Even if one is willing and able to perform the first two feats, the third presents an insuperable challenge to all but the incorrigibly single-minded.

The declaration that the issue for Commission determination is not "whether less-than-fair-value imports are the principal, a substantial, or a significant cause of material injury" might be read as intending that a lower standard than cause of material injury be used -- perhaps asking only that dumped or subsidized imports were an insignificant cause of injury to the domestic industry or even bore no ascertainable relation to the industry's troubles. The sentence might even be read as contemplating two separate determinations, one of material injury and the other of some contribution by dumping or subsidization.

But it equally well can be read as an instruction in limine, not directing us to substitute a new and different standard for that provided elsewhere, but rather cautioning against adding additional requirements. On this view, dumping or subsidization would have to cause injury that passes the threshold of materiality, but that is all. Given the statutory imprecation that material injury is any that is not immaterial, there would likely be ample room for material injury to encompass a range of harms varying from the relatively small to

massive. Having told the Commission to determine whether dumping or subsidization caused material injury, the draftsmen of the Senate Finance Report wanted to guard against the possibility that the Commission would withhold relief if other factors affecting industry performance also inflicted harm that passed the materiality threshold and appeared to have caused injuries as great as or greater than that attributable to the unfairly traded imports. In such circumstances, the Report cautions, it is enough that the unfairly traded imports cause material injury; no weighing of that "against the effects associated with other factors . . . which may be contributing to the overall injury to an industry" is contemplated. The succeeding sentence merely restates that thought.

Some evidence that this is, indeed, what was intended by the Senate Finance Report may be gleaned from the contemporaneous report of the House Committee on Ways and Means. The Ways and Means Report puts the same thought more clearly. Read in context, the House Report is quite difficult to misapprehend, perhaps explaining the more limited role it has played in recent debates.

The relevant section of that Report begins by declaring that, unlike Section 201, the "unfair trade statutes" governing dumping and countervailable subsidies are intended "to prevent such practices" and are "not intended to 'protect or remedy' an

injury from imports."145/ The Report then reiterates the statutory definition of material injury and indicates that inclusion of the qualifier "material" in the 1979 Act to conform to GATT requirements is not thought to bring about any appreciable change in the standard being used by the ITC.146/ The Report next instructs the Commission to continue to look at the factors detailed in the statute to determine whether the unfair trade practices have materially injured the domestic industry and notes that these factors will relate differently to effects from these practices in different circumstances, so that "sales elasticity" may vary from case to case and while "a small price differential resulting from the amount of the subsidy or the margin of dumping" may be of great importance in one case, it may be much less significant in another.147/ Next the Report observes that the 1979 Amendments do not introduce a new causation requirement that would entail comparison of the injury from dumping or subsidization to effects of other factors:

> The bill contains the same causation element as present law, i.e., material injury must be "by reason of" the subsidized or less than fair value imports. In determining whether such injury is "by reason of" such imports, the ITC looks at the effects of such imports on the domestic industry. The law does not, however, contemplate that injury from such imports be weighted

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145/ See H.R. Rep. No. 317, 96th Cong., 1st Sess., at 45-46.

146/ Id. at 46.

147/ Id.

> against other factors . . . which may be contributing to overall injury to an industry. . . .
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> Of course, in examining the overall injury being experienced by a domestic industry, the ITC will take into account evidence . . . which demonstrates that the harm attributed by the petitioner to the subsidized or dumped imports is attributable to such other factors.148/

The manifest meaning of this discussion in the House Report is that the Commission should continue to require that the unfair trade practice cause, not merely contribute to, material injury. Having done so, the agency should not ask what other influences on the overall condition of the domestic industry have been produced by other factors except insofar as those influences negate the causal showing attributed to the unfair practice. A plainer rejection of all the basic tenets of the minimal causation approach would be hard to come by.

There is no evidence that the drafters of the Senate Finance Report sought to express anything different from the thoughts conveyed by the House Report. With only minor changes in language, the thoughts appear to be the same, the order of presentation is similar, and much of the wording is identical. If this is the principal legislative support for the minimal causation approach, its guardians may wish to renounce custody or at least hold out for higher support payments.

While the support for this approach, thus, is wanting entirely in the text of the statute, and very nearly so in the legislative history, judicial decisions again offer some hope

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148/ Id. at 46-47.

for the approach's salvation. Several opinions by our reviewing courts contain dicta suggesting that the Senate Report language may stand for the proposition for which it has been cited by certain of my colleagues -- that is, that an affirmative determination is mandated whenever dumped or subsidized imports make a minimal contribution to adverse conditions experienced by the domestic industry. The following quote from the decision of the Court of International Trade in British Steel Corp. v. United States is representative:

> The statute's causation prerequisite to an affirmative injury determination is satisfied even if the subsidized imports contribute, even minimally, to the conditions of the domestic industry, and the Commission is precluded from weighing the causes of injury.149/

Again, however, the judicial decisions must be read subject to qualification. The first point that must be emphasized about this judicial language is that it does not quite say what it is cited as declaring. The court does not say that any harm from imports, however trivial, satisfies the causation standard of Title VII, much less that harm from any imports, subsidized or not, meets that standard.

What the court does say is that this standard may be met even if the overall condition of the industry is much more affected by other factors. Neither the magnitude of the subsidized imports' contribution to the overall industry

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149/ 593 F. Supp. 405, 413 (Ct. Int'l Trade 1984). See also Citrosuco Paulista, S.A. v. United States, Court No. 87-06-00703, slip op. 88-176 (Ct. Int'l Trade, December 30, 1988).

conditions nor the size of that contribution relative to other effects is dispositive under Title VII. The court's actual words, thus, merely restate the statutory directive that the Commission determine if the domestic industry is materially injured by the dumped or subsidized imports. Given that material injury is defined as "harm which is not inconsequential, immaterial or unimportant",150/ it surely is possible that imports could cause such harm and still have only slight effect -- in both absolute and relative terms -- on overall industry condition. Read carefully, the court has not re-written the law to allow any contribution of imports to an industry's declining fortunes to be the basis for an affirmative decision without regard for whether the subsidized imports themselves cause (or imminently threaten) material injury.

Second, if a less cabined reading of the language quoted above is what was intended by the court in British Steel, or in other cases that cite British Steel, it is noteworthy that this reading would clearly make the court's statement dictum -- that is, in those cases in which it appears, the quoted language was in no way essential to the court's ultimate disposition of the case, and therefore does not constitute a binding statement respecting the meaning of the law. In British Steel, for example, the court ultimately found that there was sufficient

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150/ 19 U.S.C. § 1677(7)(A).

evidence suggesting that increased volumes of subsidized imports had depressed prices of the domestic like product.151/ The court did not decide the case based on a finding that subsidized imports contributed "minimally" to depressed prices or other industry problems. The fact that these cases rest on evidence of material harm from dumped or subsidized imports strongly suggests that a broad reading of British Steel misconstrues that court's statement.

The third and perhaps most important point is that the British Steel language quoted above, if read broadly as eliminating the requirement of a showing of material harm from the subsidized or dumped imports and replacing it with a requirement of any harm from any imports assimilable to those found dumped or subsidized, simply is not an accurate characterization of the meaning of the legislative history in question, much less the law (which is what ultimately must be construed, with the history only a second-hand guide). As set forth above, read in the context of the entire paragraph in which it appears, it is apparent that the Committee's statement that it is irrelevant "whether less-than-fair-value imports are the principal, a substantial, or a significant cause of material injury" was intended to emphasize that the Commission should not weigh causes of injury, and should not decline to rule in favor of the domestic industry merely because unfairly

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151/ 593 F. Supp. at 413-14.

traded imports appear to have been a relatively minor cause of injury when compared to other problems experienced by the industry. Other decisions by the Court of International Trade appear to recognize that this is the essential guidance to be gleaned from the legislative history in question.152/

Admittedly, the reported U.S. case law discussing the relevant legislative history is less than a model of clarity. Nevertheless, one thing is clear: there is no persuasive authority supporting the contention of certain of my colleagues that, whatever GATT may require, U.S. trade law requires an affirmative injury determination in any case where it can be shown that the domestic industry is experiencing difficulties to which the subject imports may have contributed minimally.

In addressing the instant investigations, I have followed a very different approach from that criticized above. I turn now to the approach that comports with my understanding of the law and the application of that approach to the record in these investigations.

II. DOMESTIC LIKE PRODUCT AND DOMESTIC INDUSTRY

152/ See, e.g., Hercules, Inc. v. United States, 673 F. Supp. 454, 481 (Ct. Int'l Trade 1987), wherein the court stated:

> If the ITC finds material injury exists due to an even slight contribution from imports, the ITC may not weigh this contribution against the effects of other factors that are not used in the determination.

Our task in evaluating the existence of material injury (or the threat thereof) in final investigations under the antidumping laws and countervailing duty laws 153/ is to assess the effects of LTFV or subsidized imports on the industry in the United States comprised of "the domestic producers as a whole of a like product or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."154/ Accordingly, in these as in other Title VII investigations, our initial objective is to identify the domestic producers that are affected by the subject imports. In turn, in order to identify those producers, we must first define the domestic product or products that are "like" the imports that are subject to investigation. The term "like product" is defined by the statute as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation."155/

Determining just which imported products are sufficiently similar to constitute a single product category and, concomitantly, which domestic products compete so closely with imports under investigation as to constitute a single like product category are tasks that have bedeviled the Commission

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153/ 19 U.S.C. §§ 1671d(b), 1673d(b).

154/ 19 U.S.C. § 1677(4).

155/ 19 U.S.C. § 1677(10).

for years. The Senate Report accompanying the Trade Agreements Act of 1979 illustrates the problem, delphically instructing the Commission neither to include within a like product definition products that do not compete closely nor to exclude from such definitions products that, while distinguishable, do compete closely with imports.156/ Not surprisingly, the Commission has had difficulty implementing this charge, and like product definitions are frequently sources of dispute. Consequently, commentary has been less than flattering in describing the consistency of various Commission like product determinations.157/

Criticism of our like product determinations, and especially of apparent inconsistency among determinations in different investigations, is better directed at the difficulty we have had integrating the criteria for like product decisions than at the criteria themselves. I believe that the criteria

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156/ As stated in the report of the Senate Finance Committee, S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979):

> The requirement that a product be "like" the imported article should not be interpreted in such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not "like" each other, nor should the definition of "like product" be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under investigation.

157/ Palmeter, Injury Determinations in Antidumping and Countervailing Duty Cases -- A Commentary on U.S. Practice, 21 J. World Trade L. 7 (1987); Note, Economically Meaningful Markets: An Alternative Approach to Defining "Like Product" and "Domestic Industry" Under the Trade Agreements Act of 1979, 73 Va. L. Rev. 1459 (1987).

the Commission traditionally has articulated to guide like product determinations are apposite to the statutory task. The Commission considers several factors in making its like product determinations:158/ (1) product characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer or producer perceptions of the relevant articles; (5) common manufacturing equipment, facilities, and production employees; and (6) the similarity (or disparity) of prices for imports and potential like domestic products.159/

These factors furnish information about two different aspects of our industry definition.160/ Five of the factors provide information about the domestic market for the imported products and for closely competing domestic products. This information is contained in descriptions of product characteristics and uses, interchangeability, channels of distribution, prices, and other indicia of customer perceptions of their similarity or dissimilarity. The remaining factor,

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158/ See, e.g., Fabric and Expanded Neoprene Laminate from Taiwan, USITC Pub. 2032, Inv. No. 731-TA-371 (Final) 4 & note 5 (Nov. 1987).

159/ Although the Commission did not include prices in its traditional list of like product determinants, this factor has increasingly been used along with the other five factors to decide among competing like product and industry definitions. See, e.g., Microdisks I, supra note 5, at 41. See also Asociacion Columbiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1170 & note 8 (Ct. Int'l Trade 1988) (citing use of comparative pricing data as a suitable factor in determining like product issues).

160/ See, e.g., Digital Readout Systems, supra note 37, at 64-65.

assessment of the nature of the manufacturing facilities and employees for the various products potentially assimilable into a single category, informs us about the degree to which firms are integrated into the production of particular, identified end-products and also informs us about the degree to which differentiated end-products are produced by firms that compete with one another in a single market for productive inputs.

Evaluation of these factors should allow us to circumscribe our inquiry into imports' effects in the manner dictated by Title VII, isolating a coherent set of producers of highly similar products that compete closely with the relevant group of imports under investigation. Congress, in adopting amendments to Title VII, has indicated approval of this approach to defining the domestic industry.161/ This approach also has received judicial assent.162/

The traditional criteria, however, do not provide a basis for unified analysis of the industry definition. The Commission never has adopted any explicit basis for integrating these six criteria. The Commission has not required that all six factors support a given like product definition, nor has it provided a determinate basis for decision when the factors suggest divergent like product definitions. The six factors are not lexically ordered (so that higher-order factors "trump"

161/ S. Rep. No. 249, 96th Cong., 1st Sess. 83 (1979).

162/ See, e.g., Badger-Powhatan v. United States, 608 F. Supp. 653 (Ct. Int'l Trade 1985).

lower-ordered factors), and there is no rule that a simple majority of factors inclined in one direction will suffice for a like product determination. The six, basic, like product factors serve simply as a guide to the considerations that should define the domestic product that most resembles, and presumptively competes most directly with, the imports, and to the considerations that define a coherent set of producers for that product.

In some investigations, these basic factors are inadequate to resolution of the like product issue in one or another respect. To deal with particular problems, the Commission over time has identified other factors that may provide more useful information in those contexts. When considering whether "semifinished" or "component" articles are like the finished product, the Commission has also considered a number of additional, and often overriding, factors, including (1) the necessity for, and costs of, further processing the semifinished good or component; (2) the degree of interchangeability of the articles at different stages of production; (3) whether the article at an earlier stage of production is dedicated to use in the finished article; (4) whether there are significant independent uses or markets for the finished and unfinished articles; and (5) whether the article at an earlier stage of production embodies or imparts

to the finished article an essential characteristic or function.163/

In these investigations, we have been presented with essentially three like product questions. First, should the various subassemblies included in a small business telephone system be treated as separate like products? Second, is the "Centrex" service provided by local or regional telephone operating companies part of the same like product as domestically produced small business telephone systems? Third, is refurbished telephone equipment sold for use in small business telephone systems a like product in its own right or part of the same like product as new equipment?

In addition, in order to assess the impact of the subject LTFV imports we must decide what firms, and what activities carried out by those firms, are part of the domestic industry. In that context as well, three questions are presented. First, there are certain domestic firms that import components included in the merchandise under investigation and use those components to make small business telephone systems that they then sell in the United States; do those firms engage in domestic production activities sufficient to make them part of the domestic industry? Second, should any domestic producers

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163/ See, e.g., Light-Duty Integrated Hydrostatic Transmissions and Subassemblies Thereof, With or Without Attached Axles, from Japan, USITC Pub. 2149, Inv. No. 731-TA-425 (Preliminary) (Jan. 1989); 64K Dynamic Random Access Memory Components from Japan, USITC Pub. 1862, Inv. No. 731-TA-270 (Final) (June 1986).

be excluded from the domestic industry as a related party? Third, to what extent should rented small business telephone systems (primarily those of Petitioner AT&T), and the revenues derived therefrom, be treated as part of the domestic industry for purposes of assessing the impact of the subject LTFV imports on that industry?

A. Like Products

Systems v. Subassemblies

When this case was before us in the form of a preliminary investigation, we were faced with a host of difficult like product issues, perhaps the most difficult of which was the question whether certain of the various subassemblies included in a small business telephone system should be treated as separate like products, or whether uninstalled systems (including all of their constituent parts) should be regarded as a single like product. In the preliminary investigations, various Respondents argued vociferously that certain major subassemblies were each separate like products, while Petitioner argued that uninstalled systems were a single like product. The Commission ultimately adopted Petitioner's proposed definition.164/ In these final investigations, however, no Respondent has chosen to revisit that issue.

164/ See Certain Telephone Systems and Subassemblies Thereof from Japan, Korea and Taiwan, USITC Pub. 2156, Inv. No. 731-TA-426-428 (Preliminary) (Feb. 1989) 13-19 (Views of the Commission).

I can discern nothing in the record before us that would lead me to the conclusion that our earlier like product definition was incorrect. Accordingly, I have once again concluded that the various system subassemblies should all be treated as part of the same like product. In the interest of brevity, I will not recapitulate here the factors that led me to that conclusion in the preliminary investigation, but simply note that these factors were discussed comprehensively in the Views of the Commission and in my Additional Views in the preliminary investigation.

Centrex

Petitioner and Respondents agree that Centrex services are a competitive factor in the market for small business systems.165/ Respondents have argued that Centrex offers essentially the same services provided by a small business telephone system and competes directly with customer premises equipment for the business of customers with switching needs. On that basis, they have requested the Commission to treat it as a like product.166/ Petitioners, on the other hand, contend that Centrex cannot be regarded as a like product for several reasons. They assert that Centrex is a "service" and not a product, and argue that the providers of such a service cannot, consistent with the antidumping laws and the GATT, be

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165/ However, as discussed infra, they strongly disagree over how important a factor Centrex is in that market.

166/ See Respondents' Centrex Submission of September 26, 1989.

considered in evaluating whether domestic producers have been injured by reason of the LTFV imports.167/ Petitioners also argue that Centrex would not, in any event, qualify as a like product under the Commission's traditional criteria for like product definition because, inter alia, Centrex has no physical appearance (because it is a service provided out of the operating company's central office) and because Centrex service (and the equipment used to provide it) and small business telephone systems do not have common manufacturing facilities, production employees or distribution channels.168/

In my view, Petitioners have the better of the argument. I believe that it is, at best, highly questionable whether such treatment of a service in these or other investigations would be consistent with our international obligations under the GATT.169/ Furthermore, as Petitioner has suggested, under the traditional like product criteria employed by the Commission, the differences between Centrex and small business telephone systems are substantial. Accordingly, in assessing whether the domestic industry has been materially injured by reason of the subject LTFV imports, I have not treated Centrex as a like product. I note, however, that this does not mean that I have

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167/ Petitioner AT&T's Prehearing Brief at 14.

168/ Id. at 15-17.

169/ I also note that I do not believe that the Commission has ever treated a service such as Centrex as a like product in any previous antidumping or countervailing duty investigation.

not taken account of the role played by Centrex in the domestic market in reaching my ultimate conclusion in these investigations. The availability of Centrex to domestic consumers as a substitute for small business telephone systems is an important aspect of the particular market before us in this case, and I have considered it as such in assessing the extent to which dumping of the subject imports has adversely affected prices and sales of the domestic like product.170/

Refurbished Equipment

Respondents have argued that, measured by the Commission's traditional like product criteria, refurbished equipment is clearly part of the same like product as new equipment.171/ Petitioners do not squarely challenge that assertion; they contend, however, that the sellers of refurbished equipment cannot be regarded as domestic producers, because they perform little, if any, production activity.172/ According to Petitioners, refurbishing often consists of little more than buffing and vacuuming the equipment prior to its resale on the secondary market.173/

170/ See discussion, infra.

171/ Joint Pre-Hearing on Behalf of Fujitsu, Hagesawa, Hitachi, Iwatsu, Matsushita, Meisei, Nakayo, NEC, Nitsuki and Toshiba ("Japanese Respondents' Prehearing Brief") at 26-28.

172/ Petitioner AT&T's Posthearing Brief, Answer to Question 9.

173/ Id.

Unfortunately, the record evidence on this issue is not nearly as well developed as one might wish. The two sides have presented us with sharply differing accounts of the role played by refurbishers and the Commission has, in my opinion, developed little information of record that would allow us to determine with certainty which account is the correct one. That said, as my colleagues who have voted in the affirmative in these investigations have pointed out, we have received some independent evidence suggesting that refurbishers are, for the most part, wholesalers of equipment and suppliers of parts who essentially conduct assembly and repair operations. I also note that, in terms of the Commission's traditional like product criteria, the record contains undisputed information suggesting that there are significant disparities between the prices of refurbished and new small business telephone equipment.174/ Although the issue is, in my view, not free from doubt, this evidence is sufficient to support a conclusion that refurbished equipment should not be included in the same like product as new small business telephone systems. In reaching that conclusion, I note, however, that, as in the case of Centrex, although I have not included refurbished equipment in the like product, I have taken the availability of refurbished equipment as a substitute for new equipment into account in assessing the extent to which dumping of the subject

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174/ Report at A-129-A-130.

imports has adversely affected prices and sales of the domestic like product.175/

B. The Domestic Industry

Domestic Producers or Importers?

In these final investigations, Petitioners have argued that three U.S. firms -- Executone, Inter-Tel, and NEC America -- should not be considered part of the domestic industry because they import subject merchandise, and allegedly do not engage in substantial manufacturing activities in the United States.176/ In the case of Inter-Tel and Executone, although both companies contended in the preliminary investigations that they were domestic producers, neither company has responded to the Commission's producer questionnaire in the final investigations and neither firm has disputed AT&T's claim regarding their non-producer status. Accordingly, in the absence of other information indicating that these firms do engage in substantial domestic production activities, I do not believe that either Executone or Inter-Tel should be treated as

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175/ I also note that, if I had included refurbished equipment in the like product or treated it as a separate like product, this would not have affected my disposition of this investigation. The impact of imported small business telephone systems clearly falls most directly on domestic producers of new systems. If these producers were not materially injured by reason of the subject LTFV imports, there is no reason to believe that refurbishers of equipment have been adversely affected by such imports to a material degree.

176/ See Petitioner AT&T's Prehearing Brief at 30-34.

part of the domestic industry. NEC America, however, clearly should be regarded as a domestic producer. NEC America responded to the Commission's producer questionnaire, and its response contains information sufficient to establish that NEC America does, in fact, engage in substantial domestic production activities.

Related Parties

An additional issue that is contested by the parties in these investigations is whether the Commission should exclude various foreign-owned companies producing small business telephone systems in the United States from the domestic industry under the "related parties" provision of Title VII.177/ That provision authorizes the Commission, in "appropriate circumstances", to exclude from the definition of a domestic industry any producer that either is "related" to an exporter or importer, or is itself an importer of subject imports.178/ The Commission typically uses the term "related party" to describe both firms that import as well as produce the relevant product and firms that are otherwise linked to foreign producers.

177/ 19 U.S.C. § 1677(4)(B) provides:

> Related parties.-- When some producers are related to the exporters or importers, or are themselves importers of the allegedly subsidized or dumped merchandise, the term 'industry' may be applied in appropriate circumstances by excluding such producers from those included in that industry.

178/ See Empire Plow Co. v. United States, 675 F. Supp. 1348, 1352 (1987).

The Commission assesses five factors to determine whether the circumstances are appropriate for excluding a company from a defined domestic industry:

> (1) the position of the related producers to the rest of the domestic industry;
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> (2) the reasons why the domestic producers have chosen to import the product under investigation -- to benefit from the unfair trade practice, or to enable them to continue production and compete in the domestic market;
>
> (3) the percentage of domestic production attributable to the related producers;
>
> (4) whether the domestic company's records are maintained separately from those of the foreign firm from which it imports; and
>
> (5) whether the primary interest of the domestic firm lies in domestic production or in importation.179/

The Commission has generally directed special attention to the second of these factors, focusing on whether the related party imported the subject product primarily to take advantage of the unfair trade practice or, instead, simply to enable that party to compete better in the U.S. market.180/

Petitioners contend that Executone, Inter-Tel and NEC America should all be excluded as related parties. In addition, two other companies, Fujitsu America and Mitel, should be considered for possible exclusion because Fujitsu

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179/ See Electrolytic Manganese Dioxide from Greece and Japan, USITC Pub. 2177, Inv. Nos. 731-TA-406 & -408 (Final) 33-34 (Apr. 1989) (Additional Views of Vice Chairman Cass) (citing Certain All-Terrain Vehicles from Japan, USITC Pub. 2163, Inv. No. 731-TA-388 (Final) 17-18 (Mar. 1989)).

180/ The Court of International Trade has affirmed this approach. Empire Plow, supra note 178, 675 F. Supp. at 1353-54.

America imports the subject merchandise and Mitel is related to another domestic company that imports such merchandise.

Because I have concluded that Executone and Inter-Tel are not domestic producers, I need not address the related parties argument that has been made by Petitioners with respect to those firms. I do not believe that it is appropriate to exclude any of the remaining firms that have been identified as candidates for possible exclusion. Mitel does not itself import the subject merchandise, and no evidence has been presented to us that would suggest any way in which Mitel might have benefited from imports made by its affiliate. As to Fujitsu America and NEC America, both firms engage in significant domestic production activities, and I can discern no evidence in the record that provides a credible basis for an inference that either firm has been shielded from the effects of the unfair trade practices that have taken place, or that either firm imported the subject merchandise to take advantage of such practices.

Rental Equipment

The remaining domestic industry question is how rented small business telephone systems, and the revenues derived from those systems, should be treated in determining what domestic business activities are part of the domestic industry. Although this issue was not raised directly by any of the parties, it is implicit in the different arguments they have advanced with respect to the inferences to be drawn from

information respecting AT&T's rental operations. This appears to be a question of first impression for the Commission, but the answer to it is not difficult.

The antidumping and countervailing duty laws instruct us to consider the effects of unfairly traded merchandise on domestic producers of like or similar merchandise. The performance of Petitioner AT&T's rental operations (and those of other domestic firms renting small business telephone systems, to the extent that such firms exist) are therefore relevant only insofar as they have a bearing on the production activities of those firms (or on the production activities of other domestic producers of small business telephone equipment) within the time frame relevant to our analysis of the unfairly traded imports' effects.

The fact that a domestic producer chooses to rent, rather than sell, telephone systems is not of itself important; disposition of the product by sale to a rental company, with payments to the producer spread out over a period of time would be functionally equivalent, and we would not refuse to consider the harm to domestic producers from dumping or subsidization simply because they chose this means of marketing their products. At the same time, if the producers choose to use their products in another business, say, operating a dating service, the fortunes of that business would not become relevant to our investigation merely because it employed the domestic like product or because it was owned by the producers

of that product. Hence, changes in the profitability of rentals of small business telephone systems or the levels of employment or compensation associated with such rentals are significant only to the extent that it appears that such changes are, or are likely to be, correlated directly with similar changes in production activities.

III. MATERIAL INJURY BY REASON OF LTFV IMPORTS: SMALL BUSINESS TELEPHONE SYSTEMS FROM JAPAN AND TAIWAN

In assessing whether the domestic industry has been materially injured by reason of LTFV sales of the subject small business telephone systems from Japan and Taiwan, our starting point is, of course, the statute itself. Title VII directs the Commission, in assessing the causation of injury by dumped imports, to

> consider, among other factors --
> (i) the volume of imports of the merchandise which is the subject of the investigation,
> (ii) the effect of imports of that merchandise on prices in the United States for like products, and
> (iii) the impact of imports of such merchandise on domestic producers of like products 181/

These three factors are spelled out in greater detail in succeeding portions of the statute.

The text of Title VII, by its own terms, does not purport to identify all of the factors relevant to an assessment of whether LTFV imports have materially injured a domestic

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181/ See 19 U.S.C. § 1677(7)(B).

industry. The statute explicitly contemplates that the Commission will consider relevant economic factors in addition to those identified in the statute.182/ The factors that are listed in the statute and the order in which they are listed nevertheless provide fundamental guidance respecting the essential elements of the analysis that Congress expected the Commission to undertake. The statute identifies three related questions as critical to an assessment of the possible existence of material injury by reason of LTFV imports.

First, the volumes of imports of the merchandise under investigation must be evaluated. The absolute volumes of imports and their magnitude relative to domestic sales of the competing like product are both relevant in such an assessment. The effect of LTFV sales on the prices of the imports are also

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182/ See 19 U.S.C. § 1677(7)(C).

Under Title VII, as amended by the Omnibus Trade and Competitiveness Act of 1988, we are required to explain how these factors affect the outcome reached in any particular investigation. The statute also requires Commissioners to describe the relevance of other economic factors that we consider in addition to those specifically identified in the statute. See Pub. L. No. 100-418, § 1328(1), 102 Stat. 1107, 1205 (to be codified as 19 U.S.C. § 1677(7)(B)(ii)). I have explained in detail in other opinions how the three-part inquiry that I employ considers certain other economic factors relevant to an assessment of the impact of unfairly traded imports on the domestic industry producing the like product -- e.g., dumping margins -- in addition to the specific factors listed in the statute. See, e.g, New Steel Rails from Canada, USITC Pub. 2135, Inv. Nos. 701-TA-297, 731-TA-422 (Preliminary) 35-37 (Nov. 1988) (Additional Views of Commissioner Cass); Generic Cephalexin Capsules from Canada, USITC Pub. 2143, Inv. No. 731-TA-123 (Preliminary) 56-58 (Dec. 1988) (Additional Views of Commissioner Cass).

a matter that must be considered, as the change in import volumes brought about by dumping will be closely related to changes in the prices of the imports that occurred as a result of sales at LTFV prices.

Second, the Commission must assess how the subject imports affected prices, and concomitantly sales, of the domestic like product. In carrying out this inquiry, in addition to examining evidence respecting the prices at which imports and domestic like products are sold,183/ it also is essential to consider the record evidence bearing on three other issues: the share of the domestic market held by the subject imports; the degree to which consumers see the imported and domestic like products as similar (the substitutability of the subject imports and the domestic like product); and the degree to which domestic consumers change their purchasing decisions for these products based on variations in the prices of those products.

Finally, the Commission must, of course, evaluate the extent to which the changes in demand for the domestic like

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183/ Congress explicitly has asked us to look for the existence of significant price underselling. 19 U.S.C. § 1677(7)(C)(ii). This clearly implicates information on relative prices of imported and domestic products. Title VII does not, however, define price underselling. The statute surely does not mean to equate this term to the simple observation of price differences between imports and domestic products. Although information about simple price differences can be useful, such price differences cannot provide a basis for inference of effects of dumping or of LTFV imports on domestic products' prices without, at a minimum, analysis of various product features and sales terms that may differ across products and sales. See, e.g., Certain Granite from Italy and Spain, USITC Pub. 2110, Inv. Nos. 701-TA-289 and 731-TA-381 (Final) (Aug. 1988).

product caused by LTFV imports, as reflected in changes in the prices and sales of the domestic like product, affected the financial and employment performance of the domestic industry. As previously discussed, we must also determine whether these effects are material.184/ Such factors as return on investment and the level of employment and employment compensation in the domestic industry are central to any consideration of that issue.185/

In considering these questions, we also must consider the particular dynamics of the relevant industries and markets.186/ Each of the three inquiries outlined above is undertaken in light of these instructions in the succeeding sections of these Views. Before addressing those inquiries, however, it is necessary to resolve the threshold question whether we should assess cumulatively the volume and effects of the subject imports from Japan, Korea and Taiwan.

A. Cumulation

184/ The judgment as to whether these effects are "material" within the meaning of the statute may be assimilated to the third inquiry or may be seen as a fourth part of our inquiry. See Digital Readout Systems, supra note 37, at 117-19.

185/ In making each of these inquiries under the statute, we are to consider the particular dynamics of the industries and markets at issue. See new Section 771(7)(C)(iii) of the statute (to be codified at 19 U.S.C. § 1677(7)(C)(iii)). See also S. Rep. No. 71, 100th Cong., 1st Sess. 117 (1987).

186/ See new Section 771(C)(iii)(IV) of the statute (codified at 19 U.S.C. § 1677(C)(iii)). See also S. Rep. No. 71, 100th Cong., 1st Sess. 117 (1987).

Title VII requires the Commission to analyze cumulatively the volume and effect of imports subject to investigation from two or more countries if such imports "compete with each other and with like products of the domestic industry in the United States market."187/ Determining whether imports are under investigation has not been difficult, but determining whether products compete with one another sufficiently to support cumulation has at times been problematic. The Commission has generally assessed the following four factors in determining whether the statutory criterion for competition has been met:

(1) the degree of fungibility of imports from different countries and between imports and the domestic like product, including consideration of specific requirements and other quality related questions;

(2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product;

(3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and

(4) whether the imports are simultaneously present in the market.188/

The four factors considered by the Commission do not add to or substitute for the two basic statutory requirements -- that imports (1) are subject to investigation and (2) compete with

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187/ 19 U.S.C. § 1677(7)(C)(iv).

188/ See Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom, USITC Pub. 2185, Inv. Nos. 303-TA-19 and 20 and 731-TA-391-399 (Final) 61-62 (May 1989) (Views of the Commission).

each other and with the domestic like product -- but, instead, are used to assess whether the second of those requirements is satisfied.

In addition, even where consideration of these factors would otherwise indicate that cumulation is called for, the Commission is not required to cumulate imports from a particular country if it determines that imports of the merchandise from that country are negligible and have no discernible adverse impact on the domestic industry.189/ Before concluding that imports from a given country are negligible, we must consider whether the volume and market share of the relevant imports are negligible, whether sales transactions involving those imports are isolated and sporadic, and whether the domestic market for the like product is particularly price sensitive.190/

In these investigations, we are presented with two cumulation questions. First, is there sufficient competition between the subject imports and the domestic like product, and among the imports from the three countries,191/ to invoke the

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189/ 19 U.S.C. §1677(7)(C)(v).

190/ Id.

191/ Plainly, imports from Korea must be taken into account in this context because, although they are not the subjects of the instant determinations, these imports are also "subject to investigation."

cumulation requirement? Second, are imports from Taiwan negligible within the meaning of the statute?192/

The first question is not difficult. The record evidence indicates that the requisite degree of competition is present with respect to the imports from all three subject countries.193/ The Japanese Respondents have not disputed that there is some degree of competition between Japanese imports and other imports and between Japanese imports and the domestic like product, nor have they suggested that the magnitude of such competition is insufficient to meet the cumulation requirement. Because the Commission's final determination in our ongoing investigation of imports from Korea has been postponed, the Korea Respondents have not yet had the opportunity to address that issue. This raises procedural issues that we may, at some time, be called on to address.

In the present case, however, the procedural posture for decision of this issue is not especially troubling, as the record now before us contains sufficient evidence of competition between Korean imports and imports from Japan and

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192/ Imports from Japan and Korea are, of course, significant by any measure.

193/ I note, however, that it is important for us to assess with as much precision as possible the extent to which the subject imports compete with the domestic like product. As discussed in more detail, infra, I believe that the record evidence in these investigations indicates that competition between the subject imports and the domestic like product is, for a number of reasons, sharply circumscribed. However, I do not think that it is so circumscribed as to fall below the minimum level required for cumulation.

Taiwan, and between Korean imports and the domestic like product clearly to warrant the conclusion, on the basis of the best information now available to us, that cumulation of the Korean imports is appropriate. Among other things, one of Japanese Respondents' major contentions in these investigations has been that there is fierce competition between Korean imports and Japanese imports, and the market penetration data collected by the Commission appear to bear out that contention.194/ Furthermore, in the preliminary investigations, Executone and Inter-Tel, both major purchasers of subject equipment from Korea, in fact argued that the products that they have made with parts purchased from Korea should in fact be treated as part of the production of the domestic industry. While these products may differ from the imports made wholly in Korea, there is no record evidence that would suggest substantial differences between the Korean products from other countries from which imports are under investigation or differences of such magnitude between Korean and U.S. products that they could not be said to compete within the meaning of the statute. Accordingly, I find that the Korean imports compete with the domestic like product and the other imports sufficiently to assess their effects cumulatively.

194/ See discussion, infra.

The only remaining issue is whether there is the requisite degree of competition between the subject Taiwanese imports and other subject imports and between Taiwanese imports and the domestic like product. The Taiwanese Respondents claim that there is not the "reasonable overlap" of competition between the Taiwanese imports and the domestic like product that our governing court has recently said is required for cumulation.195/ They argue that Taiwanese imports do not have the same name recognition as the products manufactured by Petitioner AT&T and the Japanese and Korean Respondents.196/ They also argue that imports from Taiwan serve a discrete segment of the domestic market requiring primarily single telephones with intercom capabilities.197/

I do not believe that these arguments are supported by the record evidence before us. For one thing, the data that the Commission has collected show that the Taiwanese imports do not consist only of telephone sets; they include other types of equipment, such as control and switching equipment and circuit cards and modules. Moreover, lack of brand recognition alone is not evidence of a complete lack of competition between the Taiwanese product and other small business telephone systems (including both other imports and the domestic like product),

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195/ See Marsuda-Rodgers International v. United States, 13 CIT __, slip op. 89-106 (July 26, 1989).

196/ Taiwanese Respondents' Prehearing Brief at 7.

197/ Id.

for it is clear that neither all imports nor all domestically produced small business telephone systems consist of widely recognized brands. Furthermore, although competition between systems with widely recognized brand names and systems that do not enjoy such recognition may be circumscribed to some extent,198/ it is not, in my view, circumscribed to the point where it can be plausibly inferred that competition, within the statutory meaning of that term, exists.199/

The question as to whether the Taiwanese imports are negligible is not as easily answered. As a threshold matter, we must determine the volume of Taiwanese imports that is, in fact, subject to these investigations, a task that is not as simple as might first be imagined. Only two Taiwanese producers of the subject merchandise were the subject of the Commerce Department's dumping investigation. One of these producers, Sun Moon Star, was determined not to have engaged in dumping, and was therefore excluded from Commerce's affirmative Taiwan determination.200/ The other Taiwanese Respondent, Taiwan Nitsuko, was assigned a substantial dumping margin based

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198/ See discussion, infra.

199/ Competition plainly is not subject to binary analysis. It is not something that either does or does not exist. Rather, competition is a matter of degree. In framing the statute in terms of the existence of competition, vel non, I believe those who adopted this law understood the instruction to direct cumulation so long as substantial, albeit far from perfect, competition existed among the specified product classes.

200/ Report at A-3.

upon information contained in the Petition because that firm declined to respond to Commerce's multinational corporation questionnaire.201/ All other Taiwanese producers have been assigned a zero deposit rate by Commerce, but Commerce has stated that all Taiwanese producers other than Sun Moon Star are nevertheless covered by Commerce's affirmative determination.202/

In evaluating whether the level of Taiwanese imports is negligible, I have considered the imports of all Taiwanese producers other than Sun Moon Star even though I am troubled by the fact that there is, as Commerce has implicitly recognized, no evidence of dumping by these producers.203/ I have done so primarily because the Commission has consistently deferred to Commerce's determination as to which imports are or are not covered by an antidumping determination.204/ As discussed below, I believe that we are generally constrained to accept Commerce's determinations as to both the existence and magnitude of dumping. Fortunately, so long as one takes account of the magnitude of dumping found by Commerce in analyzing consequent injury, consideration of the volumes of

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201/ Id.

202/ 54 Fed. Reg. 42543 (Oct. 17, 1989).

203/ This implicit recognition is evident in the fact that a zero deposit rate has been assigned to these producers.

204/ See Cellular Mobile Telephones from Japan, USITC Pub. 1786, Inv. No. 731-TA-207 (Dec. 1985) at 18, n. 36.

goods dumped by zero percent will not ordinarily distort the ultimate determination.205/

If one takes into account all Taiwanese imports other than those produced by Sun Moon Star, I am satisfied that Taiwanese imports were not "negligible" within the meaning of the cumulation provisions of the statute. Certainly, if measured in terms of their domestic market share, the Taiwanese imports were relatively small. Depending upon the measure that is used, these imports accounted for as little as 1.4% of the domestic market during 1988, which encompassed the six-month period during which Commerce determined that dumping was occurring.206/ In the aggregate, these imports were valued at an amount in excess of $17 million.207/ Although both the market share and absolute value of the Taiwanese imports are, therefore, by no means overwhelming in the context of this particular market, I do not believe that either is so small as to support the conclusion that Taiwanese imports are "negligible" in the sense that Congress used that term when it recently amended the cumulation provisions of the statute. Furthermore, the evidence before us in these investigations

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205/ Of course, this is not true for decisions made under the minimal causation approach. It also does not account for the administrative costs that may be imposed on one subject to an affirmative determination, on a cumulated basis, and who must then post the appropriate notices along with the bond initially calculated at zero percent.

206/ See Report at Tables 30-33.

207/ Id. at Table 2.

does not support the conclusion that sales transactions involving the Taiwanese imports were "isolated and "sporadic". Although the flow of imports from Taiwan has been small, it has also been continuous.208/

B. Volumes and Prices of Imports

During 1988, which encompassed the six-month period when the Commerce Department determined that dumping was occurring, the total volume of small business telephone systems and subassemblies imported from the three subject countries combined was valued at approximately $310 million.209/ The value of all such imports during earlier periods was significantly higher; it was, for example, approximately $370 million in 1986.210/ These value-based descriptions of import volumes, while not the usual measure for import volumes, better represent the volume of imports in these investigations than do the more standard, quantity-based measurements.

The unreliabilty of quantity-based measurements of import volumes, as compared to value measurements, in these investigations flows from the nature of the products under investigations, their heterogeneity, and the disparity between the basis on which they are imported and the basis on which the

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208/ See Report at Table 2.

209/ Id. at Table 24.

210/ Id.

products are packaged for ultimate use. Although our principal focus in these investigations is on small business telephone systems, importers generally import subassemblies of systems, rather than assembled "systems."211/ Accordingly, the quantity of system imports is not an appropriate measure of the volume of imports subject to these investigations.

Cognizant of this difficulty, the Commission has compiled data respecting imports of the various subassemblies included in the subject telephone systems in order to derive better information on volumes by extrapolating from "harder" information. Unfortunately, the quantity-based data we have been able to obtain by this means also do not give an accurate picture of the volume of imports. Certainly, it is not helpful to look at the aggregate number of subassemblies of all types imported, nor it is particularly useful to look at the data for any of the individual subassemblies. Control and switching equipment probably is the subassembly that provides the closest measure of system imports in that most new systems have only one unit of such equipment.212/ However, that data, too, has severe limitations. Control and switching equipment is not sold only for installation in new systems: it also is sold to expand the capacity of an existing system or to replace a worn

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211/ Id. at A-61.

212/ Id. at A-25.

or defective unit.213/ Accordingly, imports of control and switching equipment cannot in themselves provide a measure of system imports without information respecting the relative shares allocated to the various end uses of these subassemblies.

Moreover, systems can vary enormously in size. The majority of small business telephone systems installed in the United States have under 10 lines;214/ but the subject systems also include those with over 100 lines.215/ Accordingly, even if one were able to look only at the number of "systems" imported, this would provide a very misleading picture of the true volume of imports. Thus, our data for control and switching equipment do not, at the end of the day, provide a very meaningful measure of the volume of the subject imports. In my view, the value data that we have collected provide a far more reliable indicator on that score. In reaching my determination, therefore, I have considered import volumes as indicated by the value of imported products subject to investigation.

Closely related to import volumes is the price change for imports consequent to dumping. The record evidence indicates that the declines in the prices of the subject imports caused

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213/ Id.

214/ See id. at A-12.

215/ Id.

by dumping of those products varied greatly from country to country and, in the case of Taiwan, within that country itself. For Korea, the margins preliminarily determined by the Department of Commerce were uniformly low: 6.09% for Goldstar, 9.33% for Samsung and 7.79% for all other Korean producers.216/ Commerce has not completed its final investigation of Korean imports; the preliminary margins are therefore the best information available for purposes of these investigations.217/

In the case of Taiwan, in its final investigation, Commerce determined that Sun Moon Star was not guilty of dumping, and therefore excluded that firm from its affirmative determination.218/ As previously noted, although Commerce included all other Taiwanese producers in its affirmative determination, no dumping margins were assigned to any of those producers, with the exception of Respondent Taiwan Nitsuko, which was assigned a dumping margin of 129.73%.219/ Taiwan Nitsuko was given such a huge margin because it failed to

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216/ Id. at A-3.

217/ See 19 U.S.C. § 1677e(c). See also Certain Light-Walled Rectangular Pipes and Tubes from Taiwan, USITC Pub. 2169, Inv. No. 731-TA-410 (Final) 36-37 (Mar. 1989) (Views of Chairman Brunsdale and Vice Chairman Cass); New Steel Rails from Canada, USITC Pub. 2135, Inv. Nos. 701-TA-297 & 731-TA-422 (Preliminary) 39-40 (Nov. 1988) (Additional Views of Commissioner Cass). We must proceed on the basis of the evidence before us, and no evidence of the dumping margin more credible than the figures preliminarily determined by Commerce is before us.

218/ Id.

219/ Report at A-3.

respond to the Commerce Department multinational corporation questionnaire.220/ The Commerce Department therefore calculated a margin for Taiwan Nitsuko based on allegations in the Petition respecting the fair market value of merchandise sold in Japan by Taiwan Nitsuko's Japanese parent company.221/

Certain comments that I have made in other cases concerning the use of unusually high constructed value margins are also relevant here when considering similarly high margins based on "best information available" as set forth in the Petition.222/ Such margins are, of course, based on unverified information contained in the Petition, and they generally can be presumed to represent Petitioners' maximum estimate of the magnitude of dumping that has taken place.223/ In most cases, after the alleged margins have been subjected to scrutiny by the Department of Commerce, the actual margin turns out to be far lower. That has certainly been true in this case for all margins other than those that were based on the information set forth in the Petition because the foreign producer elected not

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220/ 54 Fed. Reg. 42544 (Oct. 17, 1989)

221/ Id.

222/ Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom, USITC Pub. 2185, Inv. Nos. 303-TA-19 and 20 and 731-TA-391-399 (Final) 157-159 (May 1989) (Concurring and Dissenting Views of Vice Chairman Cass).

223/ Certainly, a Petitioner has no incentive to assert anything less.

to participate in Commerce's investigation. For example, Petitioners originally claimed that the Taiwanese Respondent Sun Moon Star was selling its products in the United States at a price reflecting a dumping margin of 45.9%.224/ Commerce ultimately determined that no dumping by that company in fact occurred. In the case of Korea, Petitioners originally alleged that the average dumping margin was almost 50%.225/ Commerce has preliminarily determined that the magnitude of dumping was, in all cases, less than 10%.

Nevertheless, in these investigations, as in cases involving unusually high constructed value margins, I have used the full amount of the relevant dumping margin as the measure of the extent to which dumping affected price of the subject imports. In doing so, however, I have kept in mind that this may well have overstated to some degree the extent to which dumping caused the prices of the subject imports to decline. Nevertheless, I believe that such treatment is appropriate in the absence of other credible evidence on that issue.

The same issue is presented in stark terms when considering the dumping margins that have been assigned to the Japanese Respondents. The dumping margins calculated for Japanese Respondent Toshiba, Japanese Respondent Matsushita and all other Japanese Respondents are 136.77%, 178.93% and

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224/ See Petition at 20.

225/ See Petition at 20. See also id. at Exhibit 6.

157.85%, respectively. All of these margins were calculated based on the "best available information", i.e., an average of the highest margins alleged in the Petition, because Toshiba and Matsushita withdrew from Commerce's investigation.226/ Here, too, I have used the full amount of the relevant dumping margin as the measure of the extent to which dumping affected price of the subject imports, with the recognition that this may well have overstated to some degree the extent to which dumping caused the price of the subject imports to decline.

Dumping margins measure the current difference between the price of the imported goods when offered for sale to the home market or for sale to the United States, both on an ex-factory basis.227/ They do not necessarily describe the change in

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226/ 54 Fed. Reg. 42542 (Oct. 17, 1989).

227/ When sufficient information is available, it also is desirable to consider, for the purposes of evaluating the actual differences in prices charged for the foreign product in the U.S. and foreign market, certain "net-backs" that the Commerce Department uses in arriving at ex-factory prices. Where effects on producers transmitted through operation of consumer markets (in which the imports and like product compete) are at issue, it is helpful for Commissioners to consider net-back or other information that was taken into account by Commerce in moving from actual market prices to a "sanitized" ex-factory price, as the incorporation of this information (which is, at best, extraneous to the issue before the Department of Commerce) facilitates evaluation of the effects to which our attention is directed by law.

I note, however, that Petitioner AT&T objected to Respondents' proposed use of information relating to these net-backs as part of Respondents' presentation of estimates of the effects of dumping on the domestic industry that Respondents calculated by using the CADIC model. (The CADIC ("Comparative Analysis of the Domestic Industry's Condition") model generates estimates of changes in the prices and quantities sold of a

domestic industry's like product that occurred, given various data relating to import volumes, dumping margins, and the markets for the imports and the domestic like product. The CADIC model has been fully described in publicly available documents, and copies of the computer program have been available for some time to interested members of the public.) The argument advanced by Petitioner against consideration of such information is unpersuasive. Petitioners argued that Respondents' netback adjustments have the effect of comparing the ex-factory price of the domestic like product with the installed price of the subject imports. See Post-Hearing Statement of Bruce P. Malashevich of Economic Consulting Services Inc., ("Petitioner AT&T's Posthearing Economic Submission") at 24.

This is not a correct description of the netback adjustments performed by Respondents' consultant (or of the adjustments made by the Commission's staff in certain alternative calculations presented by the staff to the Commission (see USITC Memorandum INV-M-115 (November 17, 1989) from the Office of Investigations)). In reality, these adjustments do not reflect any comparison between prices of the domestic like product and the subject imports; they instead facilitate an assessment, at the level at which price competition with the U.S. like product exists, of the effects of the differences in the ex-factory prices of the subject imports in the home and U.S. markets on the prices at which the subject imports are sold in the United States. Congressional direction to evaluate the effects of "price differentials resulting from the amount of the subsidy or the margin of dumping" in the context of the "sales elasticity" of the market for the particular products at issue cannot be squared with any other approach. See, e.g., H.R. Rep. No. 317, 96th Cong., 1st Sess., at 46.

Finally, I note that, in these as in other investigations, Commissioner Newquist asked the Petitioners and other parties to provide the Commission with an estimate of the "fees expended for economic consultants". Tr. 96. Although it appears that we have not been provided with the information that Commissioner Newquist requested (see Petitioner AT&T's Posthearing Brief, Responses to Commission Questions, and Petitioner AT&T's Posthearing Economic Submission), I believe Commissioner Newquist's question should be put in its proper context. To the extent that my colleague may be concerned about costs incurred by parties in advancing arguments based on an application of the CADIC model, such concerns are unfounded. As those who are familiar with the way the model operates are

import prices brought about by sales at LTFV. The actual decrease in the price of subject imports that occurred consequent to the alleged dumping would have been less than the amount of the alleged dumping margin.228/ Where, as here, the alleged dumping margins reflect an assertion that the subject foreign producers/exporters have charged a lower price for

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aware, the model is perhaps the most cost-efficient analytical tool available to the Commission. First, the model is easy to use; a large number of analyses of possible effects of unfairly traded imports on domestic industry, taking account of different views of the evidence respecting the products at issue and the markets in which they are produced and sold, can be completed in a very short time frame. Second, the CADIC model takes into account information that has routinely been collected by the Commission in Title VII investigations for some time; use of the model does not require the Commission staff, or the parties to our investigation, to undertake any significant incremental data collection effort. In contrast, other material routinely collected in Title VII investigations -- for instance, constructing series of historical (and often statistically meaningless) price data or tracking down anecdotal evidence of "lost sales" or "lost revenues" -- invariably require heroic expenditures of time and effort by our staff as well as the parties to our investigations. Although the Commission has never attempted to compare the relative costs incurred in compiling such information with the cost of compiling the data that the CADIC model incorporates, I am confident that any study of that issue would reveal that the cost to the Commission and private parties of collecting and analyzing the information incorporated by the CADIC model -- almost all of which, as previously noted, would be collected by the Commission in any event -- is trivial compared to the cost of approaches that may be preferred by commissioners who do not take into account the estimates produced by the CADIC model. A representative and cogent expression of similar views by an independent observer was contained in a letter to Chairman Brunsdale from Dr. Robert E. Litan, Senior Fellow with the Brookings Institution, dated September 20, 1989. A similar letter was sent to the Vice Chairman.

228/ See, e.g., Certain Telephone Systems and Subassemblies Thereof from Japan, Korea and Taiwan, USITC Pub. 2156, Inv. Nos. 731-TA-426-428 (Preliminary) 75 (Feb. 1979) (Additional Views of Commissioner Cass) at 75.

their product in the United States than the price that they have charged in their home market (or another foreign market used as the surrogate for the home market), the actual decrease in the U.S. price of the subject imports that occurred consequent to dumping will be only a fractional percentage of the dumping margin. This percentage, in turn, will be in large measure a function of the proportion of the total sales of the subject foreign producer(s) in the U.S. and the exporter's home market (or other surrogate foreign market) that is accounted for by sales in the home market. Accordingly, the price decrease caused by the alleged dumping in these investigations would have been less than the full amount of the dumping margins.

Dumping affected prices of the imports from the different countries of origin in these investigations in disparate ways. In the case of Korea, the actual decline in import prices accompanying dumping was quite small both because the Korean dumping margins are small and because the Korean producers made far more sales of the various major subassemblies in the United States than they did in their home market.229/ For Japan, a large decline in import prices necessarily must be inferred as a consequence of the dumping calculated by the Department of

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229/ Report at A-56, Table 22. The subassemblies in question are control and switching equipment, circuit cards and modules and telephones. Shipments of power supplies by the Korean producers were relatively small in both the United States and Korean home markets.

Commerce, because the margins assigned to those producers are, as previously noted, quite high, and because home market sales of the major subassemblies by the Japanese producers substantially outweighed the sales that they made in the United States.230/ The effects of dumping on prices of the imports charged for the only Taiwanese producer for which a dumping margin was found, Taiwan Nitsuko, were similarly great, for essentially the same reasons.231/

The evidence indicates that dumping probably resulted in some increased sales of the subject imports. However, this increase was not nearly as great as one might expect based only on the extent to which the price of these goods decreased consequent to dumping. The extent to which decreases in subject import prices cause increases in subject import sales is, in large measure, a function of the degree to which the imported goods are substitutable for the domestically produced product. Also relevant in this context is the extent to which imports from the subject countries are substitutable for other imports. For reasons explained in more detail in the succeeding section of these Views, the record evidence

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230/ Id. at A-54, Table 21.

231/ However, because Commerce used a measure of the fair market value of the merchandise that Taiwan Nitsuko sold in the United States based on sales made by that company's Japanese parent in Japan, the effect of dumping is a function of the relationship of Nitsuko's Japanese sales to its U.S. sales, rather than the relationship between Taiwan home market sales and U.S. sales.

indicates both that the substitutability of the domestic like product for the subject imports was quite limited and that imports from the different subject countries were much more highly substitutable for other imports than they were for the domestic like product.

B. Prices and Sales of the Domestic Like Product

In determining how the subject imports affected prices, and concomitantly sales, of the domestic like product, it is essential to take into account certain evidence in addition to the record evidence respecting the prices at which imports and domestic like products are sold.232/ It is also necessary to consider the share of the domestic market held by the subject imports; the degree to which domestic consumers change their purchasing decisions for these products based on variations in the prices of those products; the substitutability of the subject imports and the domestic like product; and, in this multi-country investigation, the substitutability of imports from each subject countries for other imports. In these

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232/ The significance of price underselling in this context is discussed supra at note 183. As noted therein, although Title VII does not define price underselling, the statute surely does not equate this term to the simple observation of price differences between imports and domestic products. Information about simple price differences can be useful, but cannot provide a basis for inference of effects of dumping or of LTFV imports on domestic products' prices without, at a minimum, analysis of various product features and sales terms that may differ across products and sales. See, e.g., Certain Granite from Italy and Spain, USITC Pub. 2110, Inv. Nos. 701-TA-289 and 731-TA-381 (Final) (Aug. 1988).

investigations, the record evidence respecting these last three considerations -- the price responsiveness of domestic demand for small business telephone systems and, more importantly, the substitutability of the subject imports and the domestic like product and the substitutability of imports from each subject country for other imports -- indicates that, although LTFV sales may have had some effect on domestic prices and sales, these effects did not rise to significant levels.

As noted earlier in connection with the volume of imports, measuring the share of the domestic market held by the subject imports in these investigations is a far more difficult task than in most other cases that come before the Commission. For the reasons previously suggested, any attempt to measure market penetration based on quantity -- as opposed to value -- is likely to produce misleading results. We do not have meaningful data on the quantity of system imports because importers generally import subassemblies of systems, rather than assembled "systems".233/ Moreover, the available data on the quantity of the various subassemblies imported are likewise not terribly meaningful. Clearly, it would not be useful to simply add up the various units of different imported and domestically produced subassemblies to arrive at the aggregate number of subassemblies accounted for by the subject imports and to compare that number to the aggregate of the

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233/ Report at A-61.

subassemblies produced domestically for this would be, if not comparing apples and oranges, adding apples to oranges in a way that would produce numbers with no meaning.

Furthermore, there are no quantity data for any single subassembly that accurately reflect the relative importance of the subject imports in the domestic market for small business telephone systems. As previously noted, systems can vary enormously in size, a fact that the best available quantity data -- that is, the data for control and switching equipment -- simply fail to capture. As earlier noted, these data also may be misleading if used as a surrogate for system sales because control and switching equipment is often sold to expand existing systems or to replace used equipment, and does not always reflect a sale of a new system.

For all of these reasons, I have used the value data compiled by the Commission with the recognition that this presents a problem in its own right given the manner in which such data have, of necessity, been compiled by the Commission. The value data collected by the Commission indicate that the subject imports accounted for 34% of the domestic consumption of small business telephone systems and subassemblies thereof in 1988, which encompassed the six-month period during which the Commerce Department determined that dumping was occurring.234/ This represented a slight decrease from the 35%

234/ Report at Table 30.

market penetration reported in 1987 (but a slight increase from 1986 levels).235/ During the first six months of this year, import market penetration again declined somewhat, to 31.6% (as compared to 35.9% during the first six months of last year).236/

While I believe that these data more accurately depict the role of the subject imports in the overall market for small business telephone systems, these data, too, are not undistorted. These data do not take into account differences in the levels of trade at which the imports and the domestic like product are sold; the value of U.S. producer shipments represents primarily sales to end users, whereas the value of the import shipments reflects largely sales to distributors.237/ Accordingly, the available data understate the market penetration of the subject imports somewhat, and some adjustment to these data is therefore appropriate.

Unfortunately, the Commission has not been able to develop information that would allow us to determine with any degree of precision the upward adjustment that would be appropriate; importers selling to end users reported that the installation and other costs in selling to end users ranged from as low as

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235/ Id.

236/ Id.

237/ Id. at n. 2.

[*]% to as high as [*]%.238/ I note, however, that Petitioner AT&T has stated that it believes that equipment "tends to provide the major share of variable costs for all interconnects", with equipment and materials costs accounting for anywhere from 60% to 80% of such costs.239/ Accordingly, this suggests that Petitioner AT&T believes that some upward adjustment of the Commission's value market share data is required, but that any such adjustment would not produce radically higher numbers. I also note that this is consistent with the estimates ultimately presented to the Commission by our Office of Investigations.240/

Were one simply instructed to look at a series of disaggregated factors and not endeavor to integrate them analytically to determine what effect dumped imports were having on the domestic industry, the information just discussed would provide ample basis for an affirmative determination. The imports, however measured, surely now account for a substantial portion of the U.S. market for small business telephone systems. Together with the high dumping margins for some Respondents and substantial changes in U.S. selling price

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238/ Report at A-78.

239/ See Petitioner AT&T's Posthearing Brief, Responses to Questions, at 62-63.

240/ See USITC Memorandum INV-M-115 (November 20, 1989) from the Office of Investigations ("CADIC Memorandum") at 4 (wherein values listed therein for parameter "Vu", i.e., the domestic market share of the subject imports, amount to slightly more than 40% for all three subject countries combined).

consequent to dumping, this would suggest a strong likelihood that dumping significantly reduced the prices for and sales of domestically-produced phone systems.

That, however, is not our mandate, as made clear by repeated congressional instruction to consider the dynamics of the particular industry at issue and the particular nature of the markets in which domestic products and imports compete.241/ Although careful analysis pursuant to this instruction does not yield a crystal-clear outcome, it does suggest that, for a number of reasons, in these investigations, this relatively large market share, even when coupled with the large dumping margins calculated by the Commerce Department for certain of the Respondents, does not translate into significant effects on prices or sales of the domestic like product.

As previously suggested, the principal reason why this is so is because the substitutability of the subject imports for the domestic like product was quite limited, while the substitutability of the subject imports from each country for imports from other countries was significantly higher than their substitutability for the domestic like product. In order to understand why this was the case, it is necessary to consider in some detail the dynamics of the particular markets that we are examining in these investigation.

241/ See, e.g., 19 U.S.C. § 1677(7)(C)(iii); H.R. Rep. No. 317, 96th Cong., 1st Sess., at 46.

First, despite the substantial steps taken over the past decade to deregulate the telecommunications industry in the United States, it is evident that a large proportion of domestic consumers do not regard AT&T products and those of its competitors as fully equivalent goods, even where they are technologically almost interchangeable. As demonstrated by a wealth of evidence presented to us in these investigations, AT&T products still enjoy special status and AT&T prices its products accordingly.

In that context, perhaps the most noteworthy evidence presented to us in these investigations is a marketing study that was recently performed for Petitioner AT&T by McKinsey & Co.242/ This study was originally commissioned by AT&T to assist AT&T in developing an appropriate strategy for pricing a new product line of small business telephone systems developed by AT&T in 1987.243/ This study concluded, among other things, that likely customers for small business telephone systems had a "strong preference" for AT&T's products,244/ and that AT&T's "Merlin" systems were the only brand name with significant awareness among such consumers.245/ McKinsey discovered that well over half of potential customers in the marketplace for

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242/ See Statement of AT&T Witness Thomas Woodard ("Woodard Statement") at Appendix H.

243/ Id. at Appendix H at 1-2.

244/ Id. at Appendix H at 3.

245/ Id. at Appendix H at 4. See also Tr. 79.

small business telephone systems had a marked preference for AT&T products based solely on the fact that the product was manufactured and supplied by AT&T.246/

Accordingly, AT&T and McKinsey concurred that AT&T could and should charge a premium in pricing its products; the only question was the appropriate magnitude of the premium.247/ Standing alone, this is clear evidence of substantial limits to the practical, commercial substitutability of AT&T's products for the subject imports.248/ That fact is quite significant, given that AT&T accounts for approximately [*]% of all domestic production.249/ It means that the substitutability of the domestic like product for the subject imports is limited well below the level argued for by AT&T.

However strong the inference that can be drawn from the McKinsey Report, this evidence does not stand alone. The second important body of evidence suggesting limits on the substitutability of the domestic like product concerns

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246/ Id. at Appendix H at 22, 26, 31, 36.

247/ Id. at 11; Appendix H at 3, 6, 7.

248/ Indeed, one can derive a quantitative estimate of the degree of substitutability from the information presented in the McKinsey Report, accepting the predicate information in that report as accurate. The resultant numerical elasticity of substitution is substantially lower than that proposed in this proceeding in behalf of AT&T and far more closely approximates that offered by Respondents' economic expert. See note 258, infra; see also Dissenting Views of Chairman Brunsdale, in these investigations, at note 45.

249/ Report at A-17.

equipment purchased for so-called "moves, adds and changes", that is, additional equipment purchased for an existing system. It is an undisputed fact that subassemblies made by different manufacturers cannot be combined in a single system.250/ Accordingly, for a consumer with a small business telephone system in place who seeks to purchase additional equipment for that system, the substitutability of the domestic like product for the subject imports is vanishingly small.251/

The impact of this restriction on the substitutability of various different systems on the nature of the competition between the imports and the domestic like product depends critically on the extent of sales of the components used in phone systems for moves, adds, and changes as compared to their use in new phone systems. Here, again, the record provides us with terra that is not terribly firma.

The parties have presented us with apparently contrasting estimates of the portion of all small business telephone equipment purchased that represents moves, adds and changes.

250/ See Certain Telephone Systems and Subassemblies Thereof from Japan, Korea and Taiwan, USITC Pub. 2157, Inv. Nos. 731-TA-426-428 (Preliminary) (Feb. 1979) at 12-13 (Views of the Commission); at 61-62 (Additional Views of Commissioner Cass). See also Petitioner AT&T's Prehearing Brief at 48, n. 87.

251/ See USITC Memorandum INV-M-114 (November 17, 1989) from the Office of Investigations ("Elasticities Memorandum") at 14. See also Japanese Respondents' Prehearing Economic Submission at 29. In such a situation, the only time that such substitution might take place is the undoubtedly rare case where the price for the needed additional equipment is so high that the owner is prepared to contemplate disposing of the existing system and replacing it with an entirely new system.

Japanese Respondents state that they believe that approximately 50% of all sales of such equipment stems from moves, adds and changes.252/ Petitioner AT&T, on the other hand, has advised the Commission that only [*]% of its sales of subassemblies is derived from sales of equipment used to expand installed systems.253/ In any event, for present purposes, the important point is simply that a substantial percentage of all small business telephone equipment sold is for uses where the consumer has little, if any, ability to choose between domestically produced equipment or the subject imports.

The third point respecting substitutability -- and a source of rare agreement among Petitioners and Respondents -- is that each producer has an installed base of customers that gives that particular firm whose equipment has been installed significant advantages over its potential competitors in selling new systems to those customers. The evidence on that score, both anecdotal and empirical, is striking. As Petitioner AT&T noted, "Industry experts agree that a customer who is in the market for a new system will more often than not purchase a system of the same brand as its previous system".254/ AT&T subsequently elaborated on this point by quoting the following excerpt from an industry study:

252/ Japanese Respondents' Economic Submission at Part II at 29, n. 82.

253/ Report at A-133.

254/ Petitioner AT&T's Prehearing Brief at 48.

> [A]n established base of customers using the product, regardless of how they obtained it, is the manufacturer's most valuable asset. This gives the manufacturer a distinct marketing advantage in selling that end user a new product. First, the end user is familiar with the product and the service he receives. If he is reasonable [sic] satisfied, there is every reason to believe that he would give serious consideration to replacing the product with a new one supplied by the same manufacturer. Even the most price sensitive customers value familiarity and reliability. When they go to buy an new KTS/PBX product, AT&T will have a distinct advantage on these two counts alone.255/

AT&T's own experience confirms the practical consequences of the existence of installed bases. AT&T reports that its "'win' rate for customers who currently own or rent an AT&T system is approximately [*]%, while its 'win' rate in efforts to sell to customers who own or rent other manufacturers' systems is far lower."256/ AT&T correctly points out that these facts would suggest that, if it could be shown that the domestic industry had lost significant sales due to dumping, the actual impact on the domestic industry might go well beyond the loss of the initial sale.257/ What AT&T has failed to take into account, however, is that the existence of installed bases -- irrespective of their ownership -- serves as a significant limit on the substitutability of the domestic like product and the subject imports and,

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255/ Petitioner AT&T's Posthearing Economic Submission at 9.

256/ Id. at 48, n. 89. Indeed, AT&T reports that its "win" rate for customers outside its installed base is only [*]%. See Prehearing Statement of AT&T Witness Gus Blanchard at 17-18.

257/ Petitioner AT&T's Prehearing Brief at 47-51.

consequently, a market factor that will reduce the likely effects of dumped imports on the domestic market.258/

Evidence respecting the substitutability of the imports from each of the subject countries for other imports (including those

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258/ I note that Petitioner AT&T appears not to have considered this issue in arriving at the estimate of the elasticity of substitution of the domestic like product for the subject imports that it presented to the Commission. See Prehearing Statement of AT&T Witness Bruce Malashevich at 74-76; Petitioner AT&T's Posthearing Economic Submission at 3-7. This also is true of the range of the elasticity of substitution estimated by the Commission's staff. See Elasticities Memorandum at 13-17. For this reason, among others, I believe that Petitioners' estimate of the elasticity of substitution is far too high, and that the staff's estimated range for that elasticity, although more reasonable, is also significantly higher than warranted by the facts presented to us in this case.

In my view, the estimate of the elasticity of substitution suggested to us by Japanese Respondents' economic consultant more closely comports with the record evidence before us. See Japanese Respondents' Prehearing Economic Submission at Part II at 27-32. I note that this estimate also is consistent with estimates that might be reasonably derived from the cross-price elasticity assumed in the previously-discussed marketing study prepared for Petitioner AT&T by McKinsey. See Dissenting Views of Chairman Brunsdale at note 45. I also note that an overestimate of the elasticity of substitution of the magnitude evident here will necessarily cause the CADIC model seriously to overestimate the price and volume effects of dumping on the domestic industry.

Accordingly, in these investigations, in reaching a negative determination, I have not relied on the staff's CADIC estimates (see USITC Memorandum INV-M-115 (November 20, 1989) from the Office of Investigations). However, I believe that the model, if used to calculate effects based on an estimate of the elasticity of substitution that more closely corresponds to my evaluation of the market before us (along with information respecting other relevant considerations corresponding to the evidence of record in these investigations), would generate results consistent with my conclusion that dumping of the subject imports has not caused decreases in prices or sales of the domestic like product sufficient to produce material adverse effects on the domestic industry.

from other subject countries) also points toward an inference that dumping of the subject imports did not result in significantly decreased prices or sales of the domestic like product. This evidence is important because, when imports are more substitutable one for another than the domestic like product is substitutable for the group of subject imports, the effects of dumping by those who export a given telephone system will be visited more on those who produce and sell other imports than on the U.S. industry producing the domestic like product. While this comparison is not significant of itself, it is pertinent to assessment of the magnitude of harm dumping causes to the domestic industry.

The evidence respecting the relatively high degree of substitutability among imports is perhaps not as complete as the other, previously-discussed evidence respecting the substitutability of the domestic like product for the subject imports, but it is nevertheless compelling. As previously noted, the subject imports and the domestic like product are for the most part sold at different levels of trade, with the domestic like product sold for the most part directly to end users and the subject imports sold for the most part to interconnects and others at the wholesale level.259/ The existence of these two

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259/ This statement is qualified because it must be recognized that there are certain domestic firms, such as Comdial, that sell their products in essentially the same manner that the imported product is sold. Still, insofar as AT&T, as previously noted, accounts for the vast majority of domestic production, the above statement is certainly a fair characterization of the market as a

separate level of trade is significant because it suggests, in fairly plain terms, what would have occurred in the marketplace if the subject imports had not been sold at LTFV prices. Put simply, one might begin by asking: what would have happened in the domestic marketplace if imports from one or more of the subject countries were not available at the LTFV prices at which they were in fact sold? Would Petitioner AT&T or other smaller domestic producers have been able to increase significantly their prices or sales or would other imports have filled any resulting gap?260/

On the record compiled in these investigations, it appears highly probable that the result would have been a significant shift among imports and a much less significant shift from imports to domestically produced telephone systems. Certainly, the record evidence before us does not suggest that Petitioner AT&T would have significantly increased its sales to

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whole.

260/ I will, for expositional clarity (at least so much of it as one trained in law and working for the government is permitted to exhibit), discuss these issues as though they were answerable without repeated advertence to the particular magnitudes of dumping, consequent price reductions in imports, market shares, and supply conditions that obtain in each of the relevant markets. In fact, however, resolution of the questions posed in the text is necessarily an iterative process, incorporating information from various factors noted in the statute and elaborated above and reassessing the effects produced by the interrelated operation of various factors as information about other factors changes. The ability to perform such iterative tasks is one feature that makes computable simulation models, such as CADIC (see note 227, supra), especially useful to the statutory task assigned this Commission.

interconnects or others at the wholesale level, for AT&T has a long-standing policy of limiting sales at this level in order to avoid, in effect, competing with itself.261/ Other domestic firms such as Comdial may have been able to increase their sales somewhat. But these firms were and are, in relation to the total volume of domestic consumption, quite small, and their ability to supply any significant amount of domestic demand now served by others in either the short or medium term was therefore necessarily limited. Alternatively, it could be argued that the consequence of fair value pricing of the subject imports would have been that the interconnects would have withered away to a significant extent for lack an adequate supply of telephone system equipment and that small business telephone users would have had no choice but to turn to AT&T (at presumably higher prices than those currently charged). This outcome, too, is highly unlikely given the recent experience of this particular market and the significant availability of imports the prices of which were not appreciably affected by dumping.

More important, the evidence suggests that consumers of small business telephone systems do not regard other systems as sufficiently fungible with AT&T systems to credibly make the case that, absent fairly heroic changes in relative price and other terms of sale, they would shift readily between imports and AT&T's products (which, for all practical purposes, define the

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261/ Petitioner AT&T's Prehearing Brief at 97-99.

domestic like product). Although the market segments are by no means hermetically sealed so that there is no appreciable movement between them, by and large the record suggests that those businesses willing to pay a premium for AT&T's products buy its products, in the ordinary case directly from AT&T, while other businesses buy imported equipment from intermediaries, principally interconnects.

As the import data that the Commission has collected suggest, imports have, to a large extent, been competing with other imports for the business of domestic interconnects. Over the past three years, the domestic market share for U.S. producers has remained remarkably stable.262/ During that same period, however, imports from Korea have risen substantially at the same time as imports from Japan and Taiwan have fallen significantly.263/ During the first six months of the current year, imports from these three countries combined declined somewhat, and the result was not increased market share by the domestic producers, but a marked increase in imports from other countries.264/ The most logical inference to be drawn from these data is that there is a high degree of competition and, therefore, a high degree of substitutability, among imports at the wholesale level.

262/ Report at Table 30.

263/ Id.

264/ Id.

Finally, on this issue, there is ample evidence of the importance to consumers of the particular service relationship, warranty terms, and other aspects associated with purchase of small business telephone equipment. Evidence submitted by Petitioners, by Respondents, and gathered by the Commission staff emphasizes the importance of these other, collateral terms.265/ All participants in these proceedings at some point referred to the role played by these collateral terms in cautioning against particular price comparisons.266/ On this score, too, the weight of credible evidence suggests that AT&T's products differ very substantially from the subject imports. To be sure, one witness on behalf of AT&T did state that it is possible for these collateral terms to differ more as to a given model of import, produced for a single exporting firm in two different foreign markets (both subject to investigation) sold through distributors or interconnects, than the terms would differ between the imports and AT&T.267/ I do not, however, find this speculation that intra-firm divergence on collateral terms would exceed inter-firm divergence credible, especially in light of the differing levels of trade through which AT&T and imports are sold and the other testimony regarding the differences on these terms.

265/ See, e.g., Elasticities Memorandum at 14-16.

266/ See, e.g., Tr. 135-36; 245-246; 249-250; 285-286; 301.

267/ Tr. 226-224.

The evidence in sum suggests that, if dumping had not occurred, there would have been some reallocation of market share among imports from the subject countries,268/ some increase in imports from other countries, and perhaps some increase in sales by the smaller domestic producers. Although the smaller domestic producers, such as Comdial, may have benefited in such a situation, these firms are, as previously noted, a very small part of the domestic industry. Based on all the record evidence before us, I am persuaded that any increases in prices or sales that these smaller producers might have realized would not have been large enough to support an inference that the domestic industry as a whole, or producers whose collective output constitutes a major portion of total domestic production, experienced significantly decreased prices or sales as a consequence of the LTFV sales that have taken place.269/

268/ This appears likely if for no other reason than the fact that there are, as previously noted, notable disparities in the dumping margins calculated by the Commerce Department for the three subject countries.

269/ Under the statute, our task is, of course, to evaluate whether the domestic industry as a whole (or firms constituting a major proportion thereof) has been materially injured by reason of LTFV imports, not whether there may have been individual domestic producers that have been so affected. See 19 U.S.C. § 1677(4) ("The term 'industry' means the domestic producers as a whole of a like product or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product.") The limited substitution, together with other factors discussed in these Views, is such as to reduce price and sales effects of dumped imports on the domestic industry to a point generally inconsistent with material injury.

The remaining issue that requires consideration in evaluating the extent to which LTFV sales of the subject imports affected prices and sales of the domestic like product is the degree to which domestic consumers change their purchasing decisions for these products based on variations in the prices of small business telephone systems. This evidence is important in these investigations in light of the other evidence, previously discussed, that suggests that dumping and subsidization resulted in significant decreases in prices of the imports from some of the subject countries. When consumer demand for the product group in which subject imports are included is highly responsive to changes in price, the effects of dumping on prices and sales of the domestic like product are attenuated, for in that case the lower prices accompanying dumping of the subject imports will stimulate significantly increased domestic demand for the lower-priced product.270/

Evaluating this issue in these investigations is a complex process. On the one hand, virtually all small businesses require some type of telecommunications services. The question is, however, given that demand, what alternatives to small business telephone systems are available to small businesses?

270/ Conversely, much greater effects will be felt by U.S. producers when consumers perceive no difference between the imported and domestic product other than price but their overall purchases of these products are relatively unresponsive to price changes. In the latter case, consumers will simply switch their purchases from U.S.-made to lower-priced imported products, imposing a quite detrimental impact on both prices and sales of the domestic product.

The answer to that question depends to a large extent on whether the business in question already has a telephone system in place. The data available to the Commission indicates that less than 10% of annual domestic consumption of small business telephone systems is accounted for by "new" business systems (new in the sense that the business in question is new).271/ About 70% of annual consumption is for system replacement; the remainder is for expansions to existing systems.272/ Accordingly, most of the demand for small business telephone systems comes from consumers who already have a system in place.

These prospective purchasers can be expected to be much more sensitive to the price of such systems when deciding whether to purchase a new system than those consumers who are starting themselves a new business, and who need a phone system quickly in order to operate that business. In contrast to the eager newcomers, the larger group of business telephone system consumers will be able to evaluate many alternatives when contemplating a system purchase, including the option of continuing to use or expanding the system that they already have.273/

It is important to view in that context the information collected by the Commission in these investigations that suggests

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271/ Report at A-23.

272/ Id.

273/ Other possible options include those discussed, infra, in connection with new business demand.

that there is a "product replacement cycle" for small business telephone systems that runs from five to seven years.274/ This cycle is not a function of physical wear and tear; consumers will typically purchase a new system not because their old system is not functional, but rather because of a desire or need to acquire a system with capabilities, in terms of features, expendability or otherwise, that their existing system does not possess. All this suggests that demand for small business telephone systems by customers who already own such equipment is, if not highly, at least reasonably, responsive to changes in equipment prices.

For the relatively small portion of domestic demand that consists of new businesses without telecommunications system in place, there are fewer alternatives and less responsiveness to price; but, even these consumers have a number of alternatives to purchase of a new small business telephone system. This is an argument pressed vigorously by the Respondents in these investigations.

Respondents asserted that available substitutes for the small business telephone systems that are the subject of these investigations may be as good substitutes for potential consumers of those telephone systems as the imports are for AT&T's products; indeed, Respondents contend that substitutes for the investigated class provide would-be consumers better alternatives than consumers would believe they faced comparing the imports to

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274/ Report at A-23.

AT&T's wares. According to Respondents, the substitutes include non-subject imports, Centrex, refurbished equipment and large telephone systems (which are not subject to these investigations).275/ Respondents assert that the available data, including a great deal of data published in the trade press, indicate that these products and services have made substantial inroads with small business customers in recent years, and that a significant percentage of small businesses now use these products and services rather than a small business telephone system of the type subject to these investigations.276/

Petitioner AT&T, on the other hand, while recognizing the existence of these alternatives, cites its own impressive body of data suggesting that most of these alternatives are a relatively minor factor in the small business marketplace.277/ AT&T also asserts that Centrex is generally used as a complement, rather than alternative, to a small business telephone system.278/

Although other Commissioners may have a different view, I believe that it is difficult to determine, on the basis of the record before us, which version of the facts is closer to the truth. In the case of Centrex and refurbished equipment, for example, the data cited by both sides, if viewed in isolation,

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275/ Japanese Respondents' Prehearing Economic Submission at Part II at 11-27.

276/ Id.

277/ Petitioner AT&T's Prehearing Brief at 86-95.

278/ Id. at 89.

might appear compelling. When scrutinized, none of the evidence makes a plainly persuasive case.

For example, notwithstanding the forcefulness of Respondents' presentation, there is little evidence that large business telephone systems are as important a factor in the small business market as Respondents suggest.279/ Also, while AT&T's own documents, prior to the separation of AT&T from the local exchange carriers that provide Centrex service, suggested Centrex as one of the alternatives suitable to just the class of business telephone users targeted for the systems at issue here, information obtained by the Commission from presumably neutral sources, such as interconnects, suggests that Petitioners are correct in their assertion that most small businesses using Centrex also purchase a small business telephone as a complement to Centrex services.280/ Other information similarly suggests that Centrex is a less important factor in the small business market than it is in the large business sector.281/ Finally, we have received some information from neutral sources suggesting that refurbished equipment, too, is not a major factor in the small business market.282/

279/ See Elasticities Memorandum at 21-22; Report at A-79.

280/ Report at A-80.

281/ Id. at A-79. However, by all accounts, Centrex has recently become a much more important factor in that market recently. Elasticities Memorandum at 21; Report at A-79.

282/ See Elasticities Memorandum at 19.

Taken one by one, then, the alternatives suggested by Respondents cannot be said to present sufficiently good substitutes to reduce price sensitivity so far as Respondents have urged, but what inference should be drawn when all these alternatives are considered together? I do not find that an easy question, but on balance I believe that the weight of the evidence is more consistent with Petitioners' view of the market than it is with Respondents'.

In the end, however, this does not change the overall picture. When considered in conjunction with the other previously-discussed evidence respecting the substitutability of small business telephone systems from different sources, the other, previously-discussed evidence respecting the alternatives available to consumers with existing systems indicates that domestic demand for small business telephone systems is sufficiently price-responsive as to preclude the possibility that dumping of the subject imports significantly affected either prices or sales of the domestic like product.

C. Investment and Employment

As in other investigations, it is extremely difficult, if not impossible, to draw meaningful conclusions respecting the impact of the subject LTFV imports on the domestic industry based only on an examination of the financial and employment data compiled by the Commission. A host of factors wholly unrelated to LTFV sales of the subject imports have inevitably influenced

the performance of the industry during the period covered by these investigations. Among other things, as all parties agree, the industry is strongly affected by the replacement cycle, and the industry is still in the down part of cycle, with an upturn expected shortly.283/ Given Congress' explicit instruction that we are to take the dynamics of the market, including market cycles, into account in our deliberations, I would be extremely hesitant to draw any conclusion based only on the various indicators of industry performance that we have collected.

Moreover, we have been presented with other evidence in these investigations indicating that AT&T recognizes that it has experienced difficulties at least in part because of certain internal problems relating, among other things, to its marketing strategy and its incomplete implementation of cost-containment plans.284/ Although we must not weigh causes in assessing whether the domestic industry has suffered material injury by reason of the subject LTFV imports, we must also be careful not to ascribe to those LTFV sales industry problems whose origins lie elsewhere.

That said, I do not believe that our data respecting the financial and employment performance of the domestic industry are

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283/ Report at A-23. In that context, I note that domestic consumption of small business telephone systems and subassemblies thereof decreased significantly over the period covered by our investigation. Id. at A-25, Table 2.

284/ See Exhibits A and B to Prehearing Brief of Respondent Executone.

in any way inconsistent with the conclusion that LTFV sales of the subject imports have not materially injured the domestic industry. The industry's recent financial performance reveals substantial improvements in certain respects. The industry is incurring operating losses on its sales of small business telephone equipment, but these losses were dramatically lower in 1988, when dumping was occurring, than they were in earlier periods. Total operating losses in 1986 were approximately $[* *]; by 1988, they had fallen to $[* *].285/ A fair reading of these data would suggest that this is an industry whose fortunes are improving rapidly.

This is not the picture that emerges if one focuses on phone rental operations. The operating income reported by Petitioner AT&T on its rental operations, although still substantial,286/ has admittedly declined from earlier reported levels.287/ However, for the reasons previously indicated, rental income is relevant only to the extent that it reflects on current production activities, and it is clear that the vast majority of the revenues that AT&T is deriving from its rental operations revenue are for use of used equipment.288/ Moreover,

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285/ Report at A-47, Table 18.

286/ In 1988, for example, the operating income generated by AT&T from these operations exceeded $[* *]. Report at A-48, Table 19.

287/ See id.

288/ Petitioner's AT&T's Posthearing Brief, Answer to Question 12.

we have been presented with compelling evidence that the downward trend in AT&T's rental revenues is something that AT&T recognized as inevitable all along in a world where consumers increasingly choose to purchase, rather than rent their telephone equipment.289/ Finally, this same evidence indicates that AT&T's rental revenues are declining at about the rate that AT&T expected.290/ For all of these reasons, I do not believe that the decline in AT&T's rental income has any significance for our purposes.

In addition to the decline in rental income, there has been some decline in the producing industry's capital expenditures.291/ However, I do not believe that we have been provided with any credible evidence that would permit us to attribute this decline to LTFV sales of the subject imports. As previously noted, this is a highly cyclical industry. Moreover, so far as the record shows, AT&T's earlier reported higher expenditure levels may reflect nothing more than the development of the new product line that was the subject of the marketing study that McKinsey performed for AT&T.

By all measures -- the number of production and related workers, hours worked, total compensation and hourly compensation -- employment conditions in the industry were better in 1988 than

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289/ See Exhibit A of Prehearing Brief of Respondent Executone at 3.

290/ Id. at 2.

291/ Report at A-49.

they were in 1986, but (with the exception of hourly compensation) these conditions were worse in 1988 than they were in 1987.292/ It is difficult to rest any reasonable decision on these trends, especially as other information collected by the Commission strongly suggest that the decline in employment indicators that occurred from 1987 to 1988 was largely, if not entirely, the product of substantial improvements in productivity.293/

All in all, the available investment and employment data are either mixed or positive. However, given the intrinsic difficulty in using these data alone in evaluating the effects of the subject LTFV imports on the domestic industry, I have not relied primarily on trends reflected in the financial and employment data collected by the Commission, but have instead considered that data in light of the other record evidence that demonstrates that LTFV sales of the subject imports did not significantly affect either prices or sales of the domestic like product.

IV. THREAT OF MATERIAL INJURY BY REASON OF LTFV IMPORTS

Having found that the domestic industry has not been materially injured by reason of LTFV sales of the imports subject to these investigations, it is necessary to determine whether the

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292/ Report at A-44, Table 14.

293/ See id. at A-44, Table 14.

industry is threatened with material injury by reason of such imports.294/ In assessing that issue, it is important to keep in mind the statutory command that the Commission make an affirmative determination only "on the basis of evidence that the threat of material injury is real and that actual injury is imminent,"295/ and that such a determination may not be made on the basis of mere conjecture or supposition.296/

Title VII directs the Commission to consider a number of specific factors in analyzing whether there is the requisite threat of material injury. Specifically, in cases where dumping is at issue, we are instructed us to assess the following factors:

> (1) the ability and likelihood of the foreign producers to increase the level of exports to the United States due to increased production capacity or unused capacity;
>
> (2) any rapid increase in penetration of the domestic market by imports, and the probability that the penetration will increase to injurious levels;
>
> (3) the likelihood that imports will enter this country at prices that will have a depressing or suppressing effect on domestic prices of the merchandise;
>
> (4) any substantial rise in inventories of the merchandise in the United States;

294/ See 19 U.S.C. §§ 1671d(b)(1)(A)(ii), 1673d(b)(1)(A)(ii). Petitioners have not argued that the establishment of any domestic industry has been materially retarded by reason of the subject imports, and no record evidence was developed in these investigations that would support such a finding by the Commission.

295/ 19 U.S.C. § 1677(7)(F)(ii).

296/ Id.

(5) underutilized capacity for producing the merchandise in the exporting country;

(6) "any other demonstrable adverse trends" that indicate that the unfairly traded imports will be the cause of actual injury;

(7) the potential, if any, for product-shifting to the products under investigation from other products subject to a separate antidumping or countervailing duty investigation or final order; and

(8) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop derivatives or more advanced versions of the like products.297/

Collectively, these factors suggest where we might find evidence of changes in the flow of unfairly traded imports that might injure the domestic industry and evidence of special sensitivity of the industry to any increase in such imports. Given the evidence before us, I do not believe that there is any basis -- other than speculation of the kind against which Congress specifically warned us -- on which we might find that these factors, considered individually or collectively, suggest that the domestic industry is threatened with material injury by reason of LTFV sales of the subject imports.298/

297/ 19 U.S.C. § 1677(7)(F)(i). Other factors listed in the statute are not relevant to these investigations.

298/ I note that, to the extent possible and in accordance with the guidance of our reviewing court, I have exercised discretion and assessed cumulatively the effects of the subject imports from Japan, Korea and Taiwan for purposes of determining the existence of a threat of injury. See Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp. 1068 (1988), aff'g Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, Kenya, Mexico, the Netherlands, and Peru, USITC Pub. 2119, Inv. Nos. 303-TA-18, 701-TA-275-278 & 731-TA-327-333 (remand determinations) (Aug. 1988).

Before discussing the record evidence bearing on the various statutory threat factors, I would like to offer a few general observations concerning the fundamental inquiry that the Commission must perform in threat determinations. First, analysis of threatened material injury is a distinct inquiry, not merely an appendage to analysis of injury from LTFV imports. Relief on the basis of a finding of threat can be given only where a clear threat of imminent injury from LTFV imports exists, but no significant effect has yet been felt.

Second, threat analysis requires prediction, an even less precise process than assessment of past effects of LTFV imports. Accordingly, it is important to describe carefully the basis of our analysis, so that our use of threat analysis is not used as an escape valve for difficult cases, where we find threat where we cannot quite find injury.299/ Furthermore, the Commission must be careful not to permit loose analysis of threat to generate affirmative findings where the evidence suggests the absence of injury from LTFV import sales, but we are nevertheless faced with an industry that we believe is experiencing problems and therefore might benefit from relief from imports.

Finally, the threat factors contained in the statute require the same sort of integrated analysis discussed above with respect to actual injury from LTFV sales of imports. The factors are not

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299/ As previously noted, Congress has specifically cautioned the Commission against making affirmative determinations of threat based on conjecture or supposition. 19 U.S.C. § 1677(7)(F)(ii).

a checklist of criteria that should be evaluated on a disaggregated basis, with a negative threat finding ensuing if a majority of statutory factors do not indicate a threat. Rather, the factors suggest where we should look to see whether probable events over the near term will produce the sorts of effects on the domestic industry's prices and sales, and ultimately on its financial returns and employment, that would constitute material injury.

I have reviewed the evidence respecting the statutory threat factors with these considerations in mind. I find nothing in the record of these investigations that suggests the probability that imports small business telephone systems from the three subject countries will cause near-term material injury to the domestic industry.

Information on foreign capacity plainly does not provide support for a threat determination. The production capacity of the subject Japanese producers actually decreased over the period covered by our investigation.300/ Although the Japanese producers report a significant amount of unused capacity, I discern nothing in the record suggesting that this unused capacity will be used to generate additional exports to the United States. Indeed, recent experience has been that Japanese imports have fallen rapidly.301/

300/ Id. at A-54-A-55, Table 21.

301/ Id. at Table 30.

The capacity of the Korean and Taiwanese producers, on the other hand, has grown significantly in recent years.302/ The inferences to be drawn from this fact, in light of other record evidence, are not clear. The record shows that the producers in both countries are operating at or close to full capacity, although these data are subject to question. The record also shows that the increased capacity of these producers is being devoted in large part to exports to other countries, which have been growing at a very rapid rate.303/ While this does not negate the possibility that substantial growth in Korean and Taiwanese exports to the United States could take place, it surely does not provide a strong basis for conclusion that they will.

Over the period covered by our investigation, imports of small business telephone systems from Japan, Korea and Taiwan decreased in absolute terms, but increased slightly relative to total domestic consumption from 1986 to 1988 before falling in the first six months of the current year to below 1986 levels.304/ Certainly, there has been no rapid increase in import penetration, and I do not believe that we have been presented with any record evidence of any kind suggesting that

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302/ Id. at A-56-57, Table 22; A-58, Table 23.

303/ Id.

304/ Report at Table 30.

such an increase in import market penetration is likely to occur in the future.

Other facts relevant to changes in imports likewise provide no basis for concern. In general, inventories of the subject imports held in this country fluctuated irregularly over the period covered by our investigation.305/ For certain subassemblies from certain countries, increases were reported in the first six months of this year, but the current levels are, for the most part, not out of line with their historical levels.306/ Moreover, these inventory levels remain small in comparison to domestic consumption.

Product shifting is not an issue in these investigations. I can discern no basis whatever in the record for a finding that there is a likelihood that imports of the subject equipment will enter this country at prices that will have a depressing or suppressing effect on domestic prices of small business telephone systems or subassemblies thereof. For the reasons previously indicated, I believe that it is apparent that the subject imports have had not significantly done so, even before the imposition of antidumping duties. There is no reason to believe that this will change to the detriment of the industry.

Finally, there is no evidence of any kind that LTFV sales of the subject imports will have actual or potential negative

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305/ Id. at A-51-A-52, Table 20.

306/ Id.

effects on the existing development and production efforts of the domestic industry. No domestic producer has cited any specific development effort that has been impeded by LTFV sales of the subject imports; indeed no producer has provided us with any information respecting specific projects underway or contemplated.307/ Indeed, several domestic producers have specifically stated that they are experiencing no such effects.308/ Certain domestic producers, notably [* * *], have made general assertions to the effect that their current financial condition is such as to impede their ability to raise funds.309/ Even assuming that this is the case, however, such general assertions provide the Commission with no basis upon which we might conclude that LTFV sales of the subject imports are likely to interfere with existing development and production efforts.

CONCLUSION

For all of the foregoing reasons, I have concluded that the domestic industry producing small business telephone systems and subassemblies thereof has not been materially injured by reason of LTFV imports of such products from Japan and Taiwan, and is not threatened with material injury by reason of such imports.

307/ See Report at B-41.

308/ Id.

309/ Id. at B-41.

Concurring and Dissenting Views of Commissioner Seeley G. Lodwick

Investigation Nos. 731-TA-426 & 428 (Final)
Small Business Telephone Systems and Subassemblies Thereof
from Japan and Taiwan

I find that a domestic industry producing small business telephone systems and subassemblies thereof, is not materially injured or threatened with material injury by reason of less than fair value imports from Japan and Taiwan. [1]

I concur with the majority's findings as they pertain to the questions of like product, the domestic industry and cumulation. [2] [3]

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[1] Material retardation is not an issue in this case. I note that since the Commerce Department investigation for Korea has been extended, the final determination for Korea will be January 31, 1990.

[2] I do not consider the loss of rental income from used systems owned by AT&T by reason of sales of LTFV new subassemblies to constitute material injury to "the domestic producers of like products, ... only in the context of production operations in the United States." U.S.C. 1677 (7)(B) Therefore, in my consideration of the condition of the domestic industry, I have excluded both the rental income and related expenses from the domestic industry's income statements. Testimony by AT&T and the record shows few new rental contracts were signed during the investigation period and that 80% of AT&T rentals had been refurbished prior to the contract being signed. Transcript of the Hearing (Tr.) at 56. The few new rentals employing new equipment are part of the domestic industry's production. Based upon the small amount of these new rentals related to domestic production, if there was a manner in which to isolate only the subassembly component of these rentals, as opposed to including complementary services, these new subassemblies would not have affected the performance trends or the industry's condition to any measurable extent.

[3] I agree with the respondent's notion that given the similarities between rentals and Centrex, it is important that both products be treated in a consistent manner. See Tr. at 242.

(continued...)

I. The Business Cycle and the Conditions of Competition.

The statute as recently amended by the Omnibus Trade and Competitiveness Act of 1988 requires the Commission to evaluate the relevant economic factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." [4] In regard to the small business telephone market, I find some particular cyclical, competitive and other issues important to the disposition of this case. [5]

The record for this case is unusually complex because of the changing dynamics of this market since the period of the divestiture, including the shift from a rental to a purchase market, the varying marketing policies employed by the parties subject to the investigation, the presence of complementary products outside of the scope of the investigation, the presence of several imperfect but plausible substitutes, and the many business issues unique to AT&T that are relevant to its performance in this period of investigation. [6]

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[3](...continued)

Although rentals, Centrex services, and used equipment activities are not sufficiently "like" the articles subject to the investigation, they may be seen as substitutes for the "like" product and are thus relevant to the discussion of causation of material injury.

[4] 19 U.S.C. 1677 (7)(C)(iii).

[5] Although some of these issues are only relevant to the question of causation of material injury, and though I have determined that this industry is not materially injured, these points are relevant to competition in the future regarding the question of threat of material injury.

[6] At many points in this opinion, mention is made to issues affecting only AT&T and inferences are made to the issue's relevance to the case. I recognize that there are other domestic producers besides AT&T, however, AT&T

(continued...)

All parties concerned have provided an abundance of documentation to support their positions. It is a difficult task to sift through the record presented to analyze those points relevant to the task before the Commission. Given AT&T's dominant position among domestic producers, much of the arguments have been directed at AT&T's policies and activities. The respondents have contended that AT&T is less competitive than it could be given other business concerns and issues unique to AT&T's size, structure and policies. The petitioner has rebuked most of the specific points and contends that AT&T's marketing methods were "developed long before the investigation and reflect the company's long-term judgment and expertise in distributing its products in this market." [7] [8]

Prior to the Hearing, the respondent Executone submitted to the record an internal AT&T memorandum dated May 24, 1988 from AT&T General Business Systems Group Vice President Gus Blanchard to all GBS (General Business Systems) employees. In this "Rumor Killer Letter #2," Mr. Blanchard makes several points cited later in this opinion that lend credibility to many of the respondents' arguments. Mr. Blanchard testified to the Commission that

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[6](...continued)
is clearly the dominant producer from a market share standpoint. In discussing all issues before the Commission in this case, I recognize the other producers in the market, however, I will not repeat the point that there is a close, but not a perfect correlation between AT&T's performance and competitive position and that of the entire domestic industry.

[7] Transcript of the Conference at 42.

[8] See also Tr. at 29. The petitioner states:

> ...AT&T is not only an efficient and increasingly efficient provider of the services that are a necessary part of the retail end of the business, but it also achieves an extraordinarily high degree of customer satisfaction.

other than displaying "a sense of optimism...proved to be overly optimistic," the comments in the letter have generally proven to be accurate. [9] [10] In this same letter, Mr. Blanchard informs the employees of another McKinsey study (besides the pricing study the petitioner brought to the Commission), termed the Karafin study. From the text of the letter, this "problem identification" study would appear to be most relevant to the issues cited by parties and our analysis of the statutory factors. [11] AT&T did not submit this study,

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[9] Tr. at 61.

[10] The letter from Mr. Blanchard to GBS employees does not provide evidence in itself that the domestic industry is not injured by less than fair value imports. This letter was directed at employees in the context of improving performance with the competitive realities of the market taken as a given. One would not expect Mr. Blanchard to discuss "unfair" competition, since his employees could not do anything about this issue.

[11] See Blanchard letter at 7. The study was commissioned because of the need to do "better with less" that is necessary because of the inevitable loss of rental income.

> ...The objective of which (the Karafin study) was to identify the underlying problems (processes, systems, working relationships, organizational structure and other) which must be corrected for us to provide the very best quality of total customer service in our industry, and do so profitably...Barry's team was to be staffed with top quality representatives from GBS sales, GBS services and MMS, and we engaged the consulting firm of McKinsey & Co. to also work for Barry. I trust you all remember that this team was announced publicly, and that I committed to keep you informed of progress as it developed. (emphasis added.)
>
> The team has spent many long days and nights digging into the guts of GBS' operations...to understand what really goes on at the working level of our business. Team members rode with technicians and AE/AAE's; worked side by side with all our office clerical and administrative positions; studied our order entry and tracking processes; followed orders through their entire life cycle...assessed how well (or poorly) our lead generation and prospecting tools and processes are working. The(y) looked into post-sale maintenance performance; inventory policies and levels, compensation plans, real estate and telephone expenses --- and on and on and on...
>
> ...No quick fixes that buy us a little time but ignore the underlying
>
> (continued...)

although I made it clear at the Hearing that such a submission would be helpful to my disposition of the case. AT&T decided against the submission on that grounds that it would amount to one way discovery and that the petitioner also had Administrative Protective Order concerns. [12] Unfortunately, the

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[11](...continued)
flaws and no kidding ourselves that simply rearranging organizations charts can correct our difficulties; we must alter the basic processes by which we conduct our business and build a GBS for the 1990's based on a solid new foundation that will last. Id. at 9.

[12] In a November 13, 1989 letter to the ITC Secretary, AT&T rejected a formal request for submission from staff based on my statement at the hearing because AT&T felt such a submission would be both inappropriate and of limited usefulness.

The petitioner made the point that it had furnished other studies to the Commission in response to the Questionnaire, but the respondents had not, so furnishing this study would amount to "one way discovery." For the record, I note that the topic of studies was initially brought up by the petitioner, who attempted to show through the McKinsey conjoint analysis study that the LTFV imports had an injurious effect on AT&T. Although the respondents did not provide lists of internal studies, there is no evidence that such studies exist regarding the U.S. market that may be useful to the Commission's determination.

Neither of the studies provided by the petitioner addressed topics nearly as relevant to the fundamental issues before the Commission as the topics addressed by the Karafin study. The consulting firm that developed the study was not an advocate of any one position, but had a responsibility to objectively document the flaws within GBS' operations in a constructive manner, so they could be remedied.

As the footnote above illustrates, this study is extremely relevant given the conflicting testimony and the text of the "rumor killer letter." The Karafin study is the only document whose existence is on the record that may shed further light into two fundamental issues before the Commission, that is, whether issues related to the delivery of AT&T's products to the market make these products less competitive or substitutable for the subject imports and how to interpret the raw operating profits of the domestic industry, given AT&T's marketing strategies and the issues cited by Mr. Blanchard.

Further, the petitioner contends that this document is "extremely sensitive" and does not want to risk leakage of the document, despite Commission procedures protecting such information and the abundance of other highly sensitive information on the record. It should be noted that both the study

(continued...)

record is not as complete as it should be regarding the many issues cited in Mr. Blanchard's letter, so this letter serves as the best available information regarding such issues.

The definition "small business telephone system" (SBTS) does not necessarily imply competition between all parties is more extensive in smaller company segments of the business telephone market, as larger companies may often purchase such systems under investigation. AT&T's lost sales allegations, many of which were large quantity opportunities to large companies and institutions, support this assertion. [13] Therefore, a discussion of competitive conditions and cyclical trends in this market is not limited to the market of small businesses, but the entire market for small business telephones including both large and small institutions. [14]

System Replacement Cycle. In 1989, a large share of subassemblies sold in the U.S. were for upgrades to existing systems. [15] The record suggests that demand for complete systems peaked in 1984-85, coinciding with the

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[12](...continued)
and the problems it attempted to address were described in great detail in a memo to thousands of employees. These memos were supplemented by internal video tapes within AT&T addressing these same concerns.

[13] See Petitioner's Lost Sales exhibits, attached to the petition.

[14] The fact some large institutions use SBTS and some small companies use systems with more than 256 ports complicates the causation analysis. Similarly, it is difficult to derive from the record the extent to which LTFV imports displace not only the domestic product, but the other substitutes such as rentals or products such as Centrex, larger systems, and used products which are alleged by the respondent to be a factor in the same market(s) as the LTFV imports.

[15] The exact percentage of subassemblies sold for upgrade purposes is not available on the record. The maximum estimate of subassemblies for upgrades is in the 50% range, given most customers buy systems at less than half operating capacity. Report at A-81.

divestiture, when "hundreds of thousands" of AT&T rental customers switched to purchase new systems. [16] Parties before the Commission and industry sources expect an up tick in the systems business in 1990-91, corresponding to the practical life that customers keep the same equipment before upgrading to a new system. [17] Therefore, this domestic industry's performance must be considered in the context of the trough of the industry's business cycle.

The Shift from a Rental to a More Competitive Purchase Market. No firms besides AT&T are active in renting systems in the current market and AT&T's ability to sign up new rental contracts since the divestiture has diminished. One respondent asserts that the rental market was a relic of days past when the market was far less competitive, which enabled AT&T to price rentals at a level that is not competitive in today's market. [18] The parties do not contend that the divestiture of AT&T was the sole cause of the erosion of AT&T's rental base. [19] However, the same respondent contends that AT&T's decision to sell much of the installed equipment at below book value prices

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[16] Transcript of the Conference at 80-81.

[17] See INV-M-104 at 1.

[18] See Post Hearing brief of Fujitsu answer to Chairman Brunsdale's Question No. 4.

[19] The petitioner asserts that the 1984 divestiture decree is "simply a red herring that has no real relevance to this investigation." See Post Conference Brief of the Petitioner at 49. The petitioner notes that the FCC had recognized that AT&T no longer had a "monopoly" in this market as early as 1980 when it detariffed those markets. However, the divestiture did unleash the Regional Bell Operating Companies (RBOC's). Due to the divestiture decree's dictum against RBOC's manufacturing Customer Premises Equipment (including SBTS), the RBOC's have re-emphasized the provision of Centrex services and serve as new competition to domestic subassembly producers from large full service vendors.

after a large post divestiture write-off and its raising of rental rates up until 1986, was part of an intentional migration strategy away from rentals. [20] The petitioner adds that tax changes brought about by the Economic Recovery Act of 1981 regarding accelerated depreciation and investment tax credits, made purchases far more attractive than rentals. [21] Thus, current competitive conditions and the tax environment are such that buyers and sellers are not able to negotiate rental contracts in a manner that best serves both sides of the transaction.

The rental systems in place today have mostly been in place for several years or had been refurbished prior to rental. [22] AT&T rental prices for these systems have remained the same since 1986 [23], although the market value of these same systems in the used market has fallen precipitously. [24] Thus, those customers renting are paying the same fee for the use of a product that is of lesser market value as time passes.

Although the petitioner recognizes the inevitability of the rental income erosion, the petitioner asserts the pace was accelerated because of the LTFV imports. [25] However, the record also confirms that the petitioner fully expected the rental base at some point to be virtually non-existent and that the erosion was on track, or as AT&T Group Vice-President Gus Blanchard

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[20] id.

[21] Post Hearing Brief of the Petitioner at 39.

[22] supra 2.

[23] id.

[24] Tr. at 89 and 104.

[25] See Pre Hearing Brief of the Petitioner at 46.

informed his employees:

> ...we won't reach "home" until we've seen most of our embedded rentals go away, and have then built a company which can operate profitably and successfully as a nearly 100% "new" sales and services company. [26]

It is a difficult question as to whether LTFV sales have sped the decline in the rental revenues. To the extent LTFV sales displaced otherwise ongoing rentals, this means that in these cases, LTFV sales displaced a substitute that is not part of the domestic industry's production activities.

The record indicates that AT&T recognized that its higher than optimal costs were a holdover from the pre-divestiture days when the market was primarily a rental market. The company also was aware that it was slow to cut these costs and then has done so only partially, in the transition period from being a rental to a "new sales" company. To the extent that resulting higher post factory costs (represented in either Cost of Goods Sold or Selling,

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[26] See Gus Blanchard letter of May 24, 1988 to all GBS employees at 7. Mr. Blanchard adds:

> As I've told you so many times before, we are eventually going to lose almost all that revenue stream as those customers wear out or grow out of their old systems, are convinced to stop renting and buy a new system by our competitors or us, or go out of business. The big question has always been "when" and at what pace we see the rental stream erode, and how successful we are at "catching" those "eroders"... we've slowed the rate of erosion to about the targeted level (we'd love for it to be better still), and we're now catching 55% of the eroders as they change. But as always, "success" in this category means we don't lose quite as much rental revenue each month and each year as would otherwise be the case. I trust this isn't "new news" and a surprise for any of you, and its good news insofar as the rate of loss is very close to our forecast. Blanchard letter at 3. emphasis added.

These statements support the notion that AT&T's efforts in its rental base is passive, as opposed to competitors. This notion is confirmed by AT&T testimony that salespeople are penalized in converting rental customers to purchases, in that their commissions are reduced by the amount of rental income lost. Tr. at 109. That is, AT&T would prefer to maintain the rentals as long as possible. Thus, the attempt to maintain profits to the rental business has reduced sales and thus profits to the new subassemblies business.

General and Administrative) suppress profits, one can not infer that resulting lower profits represent material injury which may be by reason of the LTFV imports. [27] [28]

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[27] "We are also almost surely going to end the year with higher-than planned expenses. Again, chalk that up to overly optimistic budgeting by GBS' senior management team --- the result of overestimating our ability to provide higher levels of customer satisfaction and support and higher sale levels, while also reducing expenses by a significant amount...we are spending more in '88 than '87, reflecting the new AAE (Associate Account Executive) population and less than expected reduction in administrative people and expense. We know the expense reduction has to come --- embedded rental erosion makes that inevitable ---but we've delayed the expense cuts until we have the tools, systems and procedures in place which can truly enable us to provide better service at less expense.

I would love for us to be able to add hundreds of thousands of new customers, grow revenues rapidly, transform our internal operations radically to reduce costs and improve service, greatly improve customer satisfaction, and provide uniformly satisfying jobs for the largest number of GBS'ers --- all at the same time! But because that did not seem possible, we've tilted our scales toward the sales/revenue component while moving less aggressively (but still moving) toward expense reductions.

...There are literally hundreds of other examples which you've identified or the team has uncovered which today add so much extra cost and inefficiency to our operations that we almost inevitably miss our profit objective and too frequently disappoint our customers and our employees at the same time.

...our intent is not to cut costs first while continuing to do all we did before in the same way except with fewer people and less expense. Rather, we want to fundamentally change those parts of our operation which generate the unnecessary costs, and then remove those costs as intelligently as possible with a careful eye on both customer satisfaction and the well-being of our employees. emphasis added.

Blanchard letter at 3, 8 and 11.

[28] The "costs" issue was hotly contested by both sides. The petitioner contends that the respondent's arguments concerning inefficiencies at AT&T were off the mark, despite the disputes over costs allocations in the financial statements. The petitioner's claims at the hearing regarding the lack of potential cost cutting opportunities to restore profitability and the business itself is flatly contradicted by the internal AT&T Blanchard and Chow

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AT&T's Gus Blanchard sums up the effect of this evolution on AT&T's small business telephone division:

> If some future business historian ever looks back on the odyssey of AT&T's General Business Systems, he or she will have to chronicle one of the most complex and difficult corporate transformations ever undertaken by a multi-billion-dollar company before it finally reached "home" (where "home" means a stable and growing business). [29]

AT&T Embedded Rental Base. The petitioner has asserted that when AT&T loses an installed rental to a subject import, it is "doubly" injured because it loses the stream of rental income and the potential sale of a new system to that customer. [30] I disagree with that assertion because as mentioned, embedded base rental income is not part of the domestic industry producing the like product. In attempting to maintain its installed rentals, AT&T is employing a rational business strategy to seek returns from a substitute product (rental systems) for new subassemblies.

The competition for new systems in AT&T's rental base can be broken down

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[28](...continued)
memorandums. See Chow memorandum. The Karafin Study was directed at exploring how to "do more with less" so it would have been very relevant to the question of costs.

Mr. Blanchard's comments confirm AT&T recognized that it was due to the previous rental business that AT&T had excessive costs that it had resisted cutting. However, AT&T's financials show that as a percentage of sales, SG&A expenses for the rental business and the sales business are different. The allocations of such expenses between the two businesses is somewhat arbitrary, given that the same sales people are compensated to service both rental and new systems accounts.

[29] Blanchard at 7.

[30] Staff Report at appendix E.

into two categories: month to month and longer term leases. [31] The record shows that AT&T rental customers who cancel their long term rental contracts earlier than maturity are subject to potentially significant early termination fees. [32] The record also shows that it is significantly more expensive for the customer over time to rent, versus buying and operating a system. [33] It is also more profitable for AT&T to keep rental customers renting, especially those on a month to month basis, for the longest time possible. [34] Prior to the expiration of a rental, AT&T, relative to all other competitors, has substantial leverage to sell new systems to its rental base. [35] AT&T can offer the customer a waiver of the cancellation fees and substantial savings to purchase a new system. On the other hand, it may not be as cost effective for an AT&T rental customer to pay the termination fee and then buy a competitive system from another domestic firm or an interconnect. Therefore, AT&T pricing of its new systems does not have to be as competitive as the

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[31] See INV-M-118 regarding the share of AT&T month to month versus longer term leases over the period of investigation.

[32] Tr. at 66. See Terms and Conditions of AT&T Fixed Term Lease Agreement sent to ITC investigator Rebecca Woodings by the petitioner on October 30, 1989. Termination fees can be charged up to the lesser of one half of all payments or 70% of remaining payments in the event of a cancellation. Longer term leases are subject to such fees as part of an agreement that provides lower monthly payments.

[33] supra 18.

[34] Several times in the Blanchard letter mention was made of preserving rentals as part of AT&T's strategy. See Staff Report at A-82 regarding the profitability levels of the rental business.

[35] Besides the termination fees for longer term lease terminations, AT&T's America's Choice Program (considered a "frequent flyer" type plan enabling rental customers to accrue purchase credits for an eventual AT&T purchase) makes competitive products relatively less competitive within AT&T's rental base. See Blanchard letter at 2.

competition's during the rental period because of the penalties involved in leaving AT&T prior to the contract expiration. [36]

New versus Used Rentals. The petitioner asserts that to the extent LTFV imports prevent customers from signing new rental contracts for new systems, as opposed to replacing existing rentals, this is "analytically indistinguishable" from the loss of a sale of a system for the purposes of the investigations. [37] [38] Again, a customer's decision to rent does not appear to make sense under current market and tax conditions. Thus, there is no basis to expect significant new rentals delivering new products to the market under fair trade conditions.

In addition, one import can not prevent both a new rental and the sale of a new system by AT&T simultaneously. Assume there are more customers who may have been inclined to sign new rental contracts in this market. It is true that if LTFV imports drive down new system prices, the gap between the price of renting versus owning systems widens and thus makes rentals comparatively less attractive. However, this does not explain why AT&T loses the sale, as well as the new rental. [39]

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[36] One respondent argues, perhaps with some basis, that AT&T's ability to use the termination fee as leverage may discourage customers from buying from AT&T after the contract expires and the leverage no longer exists. Tr. at 250.

[37] supra 25 at 45.

[38] However, as cited previously, the record shows a very small amount of new rentals signed since the divestiture even though sales of new systems from AT&T and other U.S. producers have remained stable. AT&T estimates that 80% of rented systems are refurbished. The record also indicates that AT&T is the only significant source of rentals, including both imported and domestic systems.

[39] The petitioner also points out that AT&T rental customers often decide to buy the used equipment on site, so that if LTFV imports replaced such a sale

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A customer who may have been inclined to rent from AT&T, but declined because of the increased price gap between rentals and new systems, still could have purchased from AT&T. His logical decision then would be whether to purchase a system directly from AT&T or purchase a similar system from either a domestic or imported system dealer. Should the customer chose the import, I consider this a loss of one domestic product, irrespective of how financed.

Direct versus Indirect Market Coverage. AT&T's incentive to protect its embedded base of rental and sold systems is consistent with a direct sales force strategy. This may make AT&T particularly less competitive outside its installed base. [40] The petitioner asserts that along with some foreign

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[39](...continued)
it would not injure domestic production. TR. at 55. The petitioner's testimony supports this point. id. at 62.

[40] AT&T recognized its sales force had to get closer to the customer's premises and that improvements would take time. Mr. Blanchard writes:

> the SBU (small business unit) sales to date have been accomplished by an extremely new premises sales force and sales manager team --- a fact which probably explains part of the (earnings) shortfall and also offers hope for future improvement. Blanchard at 2.

The company further acknowledged that a key aspect of its lead generation efforts, telemarketing, is not successful towards sales outside of its installed base.

> ...we found that telemarketing outside our own customer base was increasingly ineffective as we sought to gain new customers from our competitors who fought back fiercely with a premises sales force to keep their customers... we ...made the determination that GBS must introduce a strong low end customer premises sales force of our own in 1988...While we are having problems with bringing our AAE force up to the productivity levels we feel are needed (as outlined above),... the basic strategy of going after new customers on their premises is the right one --- we just need to implement better. id. at 8.

See also Tr. at 107-8.

I consider the various imported brands more substitutable between themselves
(continued...)

producers, AT&T has adopted a vertical integration strategy for the U.S. market since:

> "it simply makes no sense to distribute products in a way that causes a manufacturer's products to compete with themselves ... a manufacturer requires an orderly distribution strategy that permits it to control the delivery of its products to the marketplace." [41]

The petitioner contends it does not intentionally "sacrifice market share for premium profits." [42] However, the petitioner also recognizes that

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[40](...continued)
than they are with AT&T's product offerings because of the differences in delivery to the market. The imported products have a mature distribution channel in place with multiple dealers directly calling on customer premises, providing the customer with the "eyeball contact" all parties agree is important in this market. AT&T is in the development phases of such a premises approach, as it learned its passive telemarketing approach was not effective. The Karafin study was to address the problems recognized by management in being more productive in this area.

AT&T's policy against serving dealers in geographic areas it can cover directly prohibits it from taking advantage of the large interconnect network to distribute to the market. It is true that to some extent, if lower priced or dumped imports were not available, other domestic producers besides AT&T may increase sales to dealers. However, given the profits that can be obtained by independent businesses by installing and servicing these systems, these independent firms may only marginally increase purchases of domestically produced systems for resale, especially given AT&T's share of the domestic market. Therefore, the intense competition at the end user between AT&T and the interconnects will continue. Tr. at 253.

[41] supra 7 at 42.

[42] Tr. at 36. A vertical integration strategy using equity interests in local dealers is not the same as using a firm's own sale force to sell directly to small businesses in this market. Either a direct sales effort or an equity interest in a dealer enable the manufacturer to reap returns from the nonsubassembly businesses and the related profits. However, a strategy which provides less competition for a specific manufacturer's systems, either through an exclusive direct sales force or exclusive dealer geographies, may limit systems sold, but maintain higher profits through less competition for the seller. The record indicates that AT&T was well aware of the limits in terms of yield of systems sold per salesman. Blanchard at 5.

The record indicates that AT&T was also aware that it had substantial "unnecessary costs." id. at 11. Higher fixed costs in marketing and support
(continued...)

when multiple firms represent the same product, prices and profits are driven down, so the focus is for AT&T is to "minimalize direct competition between two sales people for the same customer with the same product." [43] This strategy does by definition sacrifice market share of new systems for profits because another result of the lower prices brought by this competition is increased sales of systems and thus market share.

The petitioner also suggests that AT&T has also pursued the dealer channels, but has failed in many cases because it has not been competitive on price and margins, and in other cases, dealers have carried the AT&T brand but offered competitive products on a preferential basis. [44] The petitioner can not have it both ways. That is, the petitioner can not state that it (AT&T) pursues a dominantly direct sales strategy based upon lessons learned in passed experiences, to avoid the nonsensical experience of having its products compete with themselves with multiple product sources in a given area, and to control the delivery of its products, yet is still injured to any measurable degree at the dealer level. [45]

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[42](...continued)
may make a firm less able to be responsive to a market where all other competitors use multiple dealers in a territory. Multiple dealers of one manufacturers product who buy at wholesale may provide lower prices and thus more systems to a market, than an exclusively direct strategy.

[43] Tr. at 64.

[44] id. at 44.

[45] The effects of the imports is evaluated at the end user level, where competition is most prevalent. Although some sales of firms such as Comdial may be lost at the interconnect level, it would be double counting to then consider the impact of the same sale again at the end user level. The petitioner recognizes and the record confirms that by far the most competition is at the end user level. Tr. at 28. See INV-M-114 at 2.

AT&T's installed base may indeed make it a rational strategy to maintain a primarily direct sales effort. If AT&T replaced its end user force with dealers, it could not directly service its rental base [46], and it would also lose direct control of its installed base. AT&T confirms it is less profitable for AT&T to sell upgrades (or for that matter systems) into the installed base at wholesale, rather than at retail pricing. [47] [48] [49] In addition, AT&T would also lose control and sales of non subassembly business in these accounts, such as long distance and other services.

AT&T has to balance the returns from SBTS and several other income streams, such as rentals, long distance and other services, used equipment, and larger business telephone sales that are not directly related to "injury" in this investigation. [50] There is no reason to critically evaluate AT&T's

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[46] See Report at A-48 for rental business profit margins.

[47] Tr. at 63.

[48] Unlike the computer market, where manufacturers face stiff competition for upgrades to hardware, i.e. disk drives, memory, etc., in this market there are no legally available "clones" as subassemblies. Thus, upgrade customers have no choice but to call the original manufacturer for the upgrade. See Applied Economics Division memo INV-M-104 at 11.

[49] The petitioner confirms that AT&T dealers can sell upgrades to AT&T accounts at the same commissions or discounts. Tr. at 65.

[50] AT&T recognized it had internal operations problems that affected the delivery of its products to the market.

> I have not visited a branch or FSAC, talked with a group of customers or employees, or read my mail from customers and employees without being reminded that GBS is not as "easy to do business with" as we want (or, I might add, easy to do business in.) This isn't to say that everything is bad and that no customers are receiving top quality service --- but I haven't heard any employee or customer say that we are the best we can or should be.
>
> ...customers are too frequently disappointed: product doesn't arrive on

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activities, but one must realize AT&T faces non SBTS issues that effect its SBTS new sales performance for the purposes of this case.

System Cost and Cost of Ownership. The items subject to this investigation provide only one component of what is necessary to use a small business telephone system. [51] That is, the physical subassemblies are only one part of the phone system, as the sellers in this market also offer a full range of necessary complementary products and services, such as installation, maintenance, training and other support, and long distance service. [52]

If the price of the imported hardware rose by a certain percentage, it

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[50](...continued)
time or is different from what he/she thinks was ordered: phones at GBS offices aren't answered quickly enough, or calls are not returned as promised, bills are incorrect and/or collection agencies are "harassing" customers for products discontinued and removed months before, etc. you all know the stories...unexpected product shortages and lengthened intervals...GBS is in many respects a "giant work-around."

...I don't believe there is a man or woman in GBS who hasn't known (whether you wanted to admit it or not) that our job of transforming a rental-dependent business into a new product sales and services business is not yet finished. Nor can there be any doubt that we must correct many of the operating inefficiencies which have introduced frustration into our efforts...I admire this organization and how proud I am of each of you for the level of sales, service and customer-satisfying performances you have delivered in spite of these many internally generated road blocks. emphasis added.

Blanchard letter at 8, 9 and 12.

[51] The record supports that AT&T considers that the initial sale only represents about one half of what the customer will spend on the system, including add-ons, moves, changes, etc. Blanchard at 4.

[52] The record suggests that the subassemblies may account for less than 50% of the total cost of an installed system. See INV-M-104 at 2. The record is not clear as to a precise percentage of the total cost over the life of a system, including all services and support, that is represented by the costs of the hardware. The lesser the cost of the hardware is of the total costs of ownership of the system over its useful life, the lesser importance of the price of the hardware is to the purchasing decision.

would not increase the price of the entire system containing imported subassemblies by the same percentage. Since the imports are sold at the dealer level and most of the domestic product is sold at the end user level, the subassemblies delivered to the market at lower or dumped prices at the dealer level have a lesser effect in percentage terms on prices and on competition for complete systems at the end user level.

Exchange Rates. Over the course of this investigation, the U.S. dollar has depreciated against the currencies of the countries subject to the investigation and to the greatest extent against the Japanese yen. However, market share of the subject imports have increased slightly. [53]

II. Condition of the Domestic Industry.

In the conduct of its investigations, the Commission collects data regarding several economic factors and financial indices regarding the domestic industry under investigation. The economic factors include apparent consumption, domestic production and shipments, prices, capacity and capacity utilization, productivity, inventories, employment, wages and market share. The financial indices include net sales, profits, return on investments, and cash flow. [54]

The record for this investigation is unusually complex because of the many issues raised in gathering data for the domestic industry under consideration. As far as AT&T is concerned, the domestic like product under

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[53] Report at A-138. Exchange rate movements may have a lesser effect on market shares between the sources of supply in a market such as this, in which the sources of supply are not close substitutes. In a commodity market, they may have greater influence. However the exchange rate movements may still be most relevant to the consideration of threat of material injury.

[54] 19 U.S.C. 1677 (7)(C)(ii) & (iii).

investigation is manufactured and mostly distributed by the separate General Business Systems division (GBS). However, this division also handles the rental business, is allowed to sell larger systems [55], and actively sells and markets complementary services such as maintenance and long distance. In attempting to isolate the like product as a separate product line, the Commission faces several complex cost allocation and other accounting issues. [56] Given the statute's prescription for an "examination of the production of the narrowest group or range of products, which includes a like product, for which necessary information can be provided," I am assessing the condition of the industry producing the like product exclusive of rental sales.

I have examined all of the factors proscribed in (7)(C)(iii)(I) and note that there is a slight decline in net sales, but this has to be considered in the context of the trough of the industry's business cycle. [57] In addition, the industry has seen improvements in production and capacity utilization of most subassemblies from 1986 through 1988. [58] I also note both the greatly improved net profits, net cash flows and productivity of the domestic industry, and that the other economic factors set forth in section (7)(C)(iii)(III) - employment, wages, and growth do not show any significant

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[55] See AT&T Lost sales exhibits.

[56] These include the difficulties in separating out the related services from the hardware as discussed, the treatment of depreciation of obsolete equipment, and the consideration of general selling (or end user) expenses that are only attributable to AT&T.

[57] Report at Table 18, A-47.

[58] Report at Table 5, A-39 (regarding production - output, capacity utilization).

adverse trends. [59] [60] [61] I recognize increases in inventories and decreases in investment, however these factors alone are not determinative of material

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[59] Id. at Table 18, A-47 (gross profits-profits), A-49 (cash flows), Table 15, A-44 (productivity), A-42 (inventories), Table 14, A-44 (employment and wages), A-49 (capital expenditures, i.e. investment). Growth is considered as the same as increase in sales. supra 59.

The trends in capital expenditures must be considered in the context of the AT&T introduction of the new Merlin and Spirit models in 1987. I recognize the improving trend in net profits and especially the improved gross profit levels. Given the improved cash flow position, the division should be more able to invest in derivatives of the like product. One must recognize that the Commission's cash flow numbers only add back depreciation to net income, not all other non cash expenditures, which understates true cash flow. In spite of the improved cash flow position, back in 1987, AT&T was still able to introduce several new systems and also improve the efficiency of its manufacturing operations to reduce manufacturing costs.

Given that the subassemblies are sold as one part of a complete telecommunications packages, there is no evidence that the division producing the subassemblies is restricted in raising capital to develop subassemblies, unless AT&T considers subassemblies as a separate business when funding. supra Chow memorandum.

[60] Although the Commission's mission is not to consider the health of the industry, I consider the gross operating profits of the domestic industry as improving with margins at a level that makes this industry less vulnerable to material injury should AT&T take steps to reduce the "unnecessary costs."

[61] The respondents have asserted that AT&T is not efficient in delivering its product to the market. One must recognize that given AT&T's direct sales posture, SG&A expenses are just one subset of total post factory costs. Costs of Goods Sold also includes other items necessary to deliver and service the product on the customer's premises. The SG&A expenses themselves can not be compared to that of the combined SG&A of the interconnects and that of the foreign producers because in the latter case, there are two sales which occur, one to the wholesaler and another to the customer. In percentage terms, the foreign producer's sale to the interconnect at the wholesale level makes the selling expenses at the wholesale level larger than if considered in relation to the final retail price. Larger interconnects who may have higher overhead buy in large quantities from producers whose selling costs to larger interconnects may be less because of economies of scale. Smaller interconnects who may have smaller overhead buy small quantities from producers whose selling costs may be higher in percentage terms to small dealers. Given these and many other issues cited, it is most difficult to make and "apples to apples" comparisons as to what should be the profits of this domestic industry in any other context.

injury given the stage of the domestic industry's business cycle. [62] I consider this industry's financial condition to be improving in spite of decreased demand and the evidence of higher than necessary costs. [63]

Therefore, I do not consider the performance trends to demonstrate any harm which is more than insignificant, immaterial or unimportant. I recognize that the purpose of our inquiry is not to determine whether the industry is healthy, but only whether it has been materially injured. [64] [65] Given that I consider that this industry has not been harmed from any source which may amount to material injury, I do not address the issue of causation of material injury. [66] [67]

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[62] See Copperweld Corp. v. United States, 682 F. Supp. 552,564 (CIT 1988) (citing Maine Potato Council v. United States, 613 F. Supp. 1237, 1224 (CIT 1985). "Congress has vested the ITC with considerable discretion to make reasonable interpretations of the evidence and to determine the overall significance of any factor or piece of evidence."

[63] supra 27.

[64] See Generic Cephalexin Capsules from Canada, Inv. No. 731-TA-423 (Final), USITC Pub. No. 2211 at 13 - 20. In this case, the Commission found "No material injury" in spite of a few negative trends, due to the inevitable declines resulting from the loss of monopoly power after a patent expires, i.e. the generic drug life cycle. I do not consider any of the declines in trends in this case in themselves as a basis for material injury.

[65] The Senate Report to the trade bill stated "Commissioners are required in every case to address the three factors covered by this section, and to identify and explain the relevance of other factors on which it has relied on a case-by-case basis." See S. Rep. No. 71 at 115. The House report indicates that at present "it is difficult to ascertain, from reading a particular Commissioner's opinion, whether the Commissioner in fact considered all factors required under law, and based his or her decision on such factors." See H.R. Rep. 40, Part 1 at 128. In this opinion, the factors regarding import penetration and price effects are described in the Threat of Material Injury section.

[66] See National Assn. of Mirror Manufacturers v. United States, 12 CIT ___, 696 F. Supp. 642 (1988).

III. No Threat of Material Injury by Reason of the Subject Imports. [68]

In assessing the threat of material injury, the Commission considers a number of factors that provide insight as to the likelihood that unfairly traded imports will be a cause of material injury to a domestic industry in the near future. [69] The threat must be real and actual injury imminent, or

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[67](...continued)
[67] In a case earlier this year, I did not find material injury based upon similar performance trends and levels related to the financial statements of the domestic industry, but then I addressed causation of material injury. See New Steel Rails from Canada, USITC Pub. No. 2217 at 230. In that particular case, the petitioner had provided evidence suggesting that the industry had started the up turn of the business cycle and thus "temporary trends may (have) mask(ed) real harm by imports." See Senate Report No. 71, 100th Cong., 1st Sess. 116 (1987). In this case, the record is clear that the upturn in the business cycle has not begun, so there is no danger that the trends may mask real harm to the domestic industry.

[68] For the purposes of the threat of material injury, I have cumulated the imports from Japan, Korea and Taiwan. I am not asserting that such cumulation is either necessary or more appropriate under the statute and the record for this case. Cumulating all imports provides the best case scenario for the petitioner, so had I decided not to cumulate it would not have changed my determination.

[69] The statute requires a consideration of the following factors:

(1) information as to the nature of the subsidies, particularly whether they are export subsidies;
(2) the ability and likelihood of the foreign producers to increase the level of exports to the United States due to increased capacity or unused capacity;
(3) any rapid increase in penetration of the domestic market by imports, and the probability that the penetration will increase to injurious levels;
(4) the likelihood that imports will enter this country at prices that will have a depressing or suppressing effect on domestic prices of the merchandise;
(5) any substantial rise in inventories of the merchandise in the United States;
(6) underutilized capacity for producing the merchandise in the exporting country.
(7) "any other demonstrable trends" that indicate that unfairly traded imports will be the cause of actual injury;
(8) the potential, if any, for product-shifting to the products under investigation from other products subject to a separate antidumping or countervailing duty investigation or final order; and

(continued...)

"on the point of happening." [70] The Commission's "determination may not be made on the basis of mere conjecture or supposition." [71]

The statute does not suggest that the fundamental analysis of whether unfairly traded imports will be the cause of future material injury is any different than the analysis of whether LTFV imports are a cause of present material injury. The difference is that the time horizon shifts from the present to the near future and the record is expanded to take into account conditions that lend basis to an analysis of the probability of future injury by reason of the unfairly traded imports. The directions to avoid "mere conjecture and speculation" and that there must be an "imminent danger" of actual injury, require a thorough analysis of the probability, not possibility, of increased levels of LTFV imports to the point of being the cause of material injury.

The statutory threat factors enable the Commission to determine whether three conditions exist necessary for an affirmative determination. The Commission must determine if there is a potential for increased sales of LTFV imports to the U.S. market, a likelihood or probability that there will be increased levels of LTFV imports in the U.S. market, and whether such increased levels of LTFV imports will be the cause of material injury.

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[69](...continued)

(9) actual and potential negative effects on the existing development and production efforts of the domestic industry and production efforts of the domestic industry, including efforts to develop derivatives or more advanced versions of the like product.

19 U.S.C. 1677 (7) (F) (i).

[70] Black's Law Dictionary, Fifth Edition.

[71] Id.

A. The Potential for Increased Sales of LTFV Imports.

The record shows relatively flat trends in available excess capacity (in percentage terms) and inventories of the subject subassemblies in the subject countries and in the U.S., however these and other potential sources of imports are sufficient to warrant the possibility of increased levels of LTFV imports to injurious levels. [72]

B. Likelihood of Increased Levels of LTFV Imports to the U.S. [73]

Given the slight increase in subject import penetration during the period of investigation, the subject import penetration is not "rapid." [74] The slight increased market share of the subject imports has occurred despite the decline of the U.S. dollar over the investigation. [75] Given the depreciated U.S. currency, there is less incentive and opportunity for the U.S. to become the target of increased export activities. The high dumping margins based on information supplied by the petitioner associated with some of these imports, demonstrate that the U.S. market is not as lucrative as the

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[72] There is no basis on the record for product shifting based on existing anti-dumping or countervailing duty orders. The record supports the notion that it would not be difficult for the subject producers to either increase production or shift products to the U.S. market. See INV-M-114 at 9.

[73] The record does not indicate that subsidies exist in the subject countries that may provide the basis of threat of material injury.

[74] The market share numbers in value terms are biased downward depending on how one looks at the industry due to the differing levels of trade between imports and the domestic product. A quantity comparison is influenced my multiple bias' given the differing types of subassemblies comprised in the like product.

[75] See The Business Cycle and Conditions of Competition section.

home and perhaps other markets for these producers. [76] It would be most speculative to predict the commencement of increased imports from these countries under these market conditions.

C. Trends Indicating Whether the Presence of LTFV Imports Will Be the Cause of Actual Injury.

In order to assess whether LTFV imports will in the future depress prices, one can look to current market conditions and attempt to determine if there is a basis in the record to infer future price depression due to LTFV imports. One may accomplish this with the same tools one uses in assessing the current market, by examining underselling and basic supply and demand conditions.

The record does show a pattern of underselling of the imports, but this is not in itself indicative of significant price effects of the dumped imports on domestic prices. First, for several reasons as discussed later, the subject imports are not close substitutes for the domestic product. [77] Second, it is extremely difficult to draw price effect inferences from underselling margins from situations when AT&T sells a phone system directly to an end user customer as compared to a dealer's sale to an end user. Dealers buy in volume at the wholesale level. The dealer, who may have much lower sales and services overhead than a large manufacturer, may decide to

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[76] Report at A-3. Dumping margins for Toshiba and Matsushita are 136.77% and 178.93 respectively.

[77] See my views in regards to underselling in New Steel Rails from Canada (Final), USITC pub. 2217, September 1989 at 232. Also, given the substantial evidence that AT&T is aware of its price premium, the gap between imports and the domestic prices will exist regardless of at what level the imports are priced.

sell the imported items at slightly above his costs, especially if for strategic reasons he believes he can make substantial profits in future upgrades and other related services. [78] [79] Fairly priced imports or other domestic producers' dealers may decide to undersell a manufacturer using a direct sales force consistently for these and other reasons. [80] Therefore, the underselling margins themselves do not enable one to draw any inferences regarding the effects of the presence of the LTFV imports on prices of domestic producers in this market. [81]

In these investigations, prices of specific models and subassemblies in general have declined. [82] The petitioner contends that the price declines are

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[78] One respondent argues that interconnects have been able to reduce installation and other costs and are thus much more flexible than AT&T in providing the total package which includes the subassemblies subject to the investigation. Tr. at 250.

[79] Mr. Cosgrove, President of Executone Business Systems, makes a similar point that being a large interconnect and because of its high overhead compared to very small dealers, called "trunkers," it is unable to compete with them if they have access to the same equipment for resale. Tr. at 265.

[80] It becomes somewhat arbitrary how one makes adjustments for the products (isolating the value of features, dealer margins, installation services, the value of the manufacturer's brand name in the market and other terms and services incentives that may effect price) back to the same level of trade.

The record shows that other domestic producers' systems have not only undersold AT&T but the imported systems. This "underselling" by other domestic producers demonstrates how regardless of LTFV selling, a dealer sales posture may undersell a direct sales posture by wide margins. Report at A-145.

[81] See Copperweld Corp. v. United States, 682 F. Supp. 565 (CIT 1988) (citing Maine Potato Council v. United States, 613 F. Supp. 1237, 1224 (CIT 1985). "Congress chose to give the ITC broad discretion in analyzing the significance of the evidence on price undercutting."

[82] Report at A-84.

only the result of declining wholesale prices due to LTFV imports. [83] Decreases in price are not necessarily indicative of significant effects of LTFV imports on pricing, or price depression, especially in a market marked by feature innovation and components using integrated circuit technology. [84] [85] Prices of such a good should decline as the features of newer models make older models less competitive or even obsolete. Price declines also maybe somewhat inevitable in this market due to increasing manufacturing efficiencies. Although the telephone is not of itself a new technology, products are made of modular parts using semiconductor technology which enables cost reductions over time. Another reason may be that the market should be expected to become more competitive, regardless of LTFV imports, due to the post divestiture environment creating new competition from the Regional Bell Operating Companies and the increasing importance of other substitutes in the market. [86]

In order to consider whether the price decreases were and will be caused to a significant degree by the presence of LTFV imports, one may consider certain basic market relationships, including the substitutability of the subject imports for the domestic product, the sensitivity of demand in this market, and domestic supply conditions.

The record supports a finding that the substitutability of the subject

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[83] Tr. at 46.

[84] See INV-M-114 at 8.

[85] Although the telephone is certainly not a "high tech" concept, the market is considerably influenced by constant innovation. See argument below regarding substitutability of the subject imports for the like product.

[86] See discussion infra.

imports for the domestic product is quite low. [87] There is no substitutability between subassemblies sold as upgrades and moderate substitutability between subassemblies sold together as a system, based upon similar characteristics and uses. However, given the different features of competing brands and that there is substantial brand loyalty in this market, also known as the "relationship value," which provides a much higher retention or "win rate" in the installed bases of firms, there is less substitutability between the imported and domestic products. [88]

The many issues unique to AT&T's delivery of products to the market reduces the substitutability of the LTFV imports and the basket of domestic systems. [89] The record supports the notion that AT&T commands a price premium

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[87] Substitutability depends on the differentiation of the products being compared as perceived by the market from the standpoint of economic value. Product differentiation depends upon such factors as quality (e.g. interchangeability of components, performance standards, features, reliability, style and defect rates) and conditions of sale (i.e. price discounts, incentive programs, lead times and other factors related to supplier service).

High substitutability of the subject imports for the like product is necessary for there to be significant price effects caused by the subject imports. In my discussion of the conditions of competition, I examined the relevance of AT&T's rental business and the related issues of an installed base strategy employing a direct sales force. These issues "differentiate" the products to the market and make the basket of domestically produced SBTS less substitutable for the subject imports, than in the case of all domestic production had been offered to the market under similar channels and employing similar strategies.

[88] Petitioner's Pre Hearing Brief at 49. See also INV-M-114 at 15 and 16. The respondent Iwatsu suggests that moves, adds and changes account for 55% of the interconnect's revenues. See Iwatsu's Post Hearing Brief at 7.

[89] See The Business Cycle and Conditions of Competition section.

in this market which implies less substitutability. [90]

At the end user level, the customer buys substantial added value along with the subassemblies. In addition, some dealers perhaps lack the wherewithal to service larger institutions on a national basis, whereas they may be able to work more closely with the smaller customer on his premises. The product itself comprises the hardware, the services, the marketing support and price. The differences between the types of added value and the support associated with them, further illustrate a basis to differentiate the products as perceived by the buyer in this market. [91] All of the above facts on the record support the notion of low substitutability of LTFV imports for the domestic product.

I consider the over-all demand for domestic SBTS in this market to be fairly sensitive to changes in price due to the availability of many, albeit not perfect, substitutes for the subject imports. These substitutes include Centrex, used or refurbished equipment, rental systems, fairly traded imports, and larger systems.

Centrex services are to some extent substitutable, abundantly available, and becoming increasingly important to customers who may buy SBTS, especially given the improved features provided with the service to users with smaller

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[90] Tr. at 35-7, 95, 305-6. The petitioner recognizes the customer is willing to pay more for AT&T than identical competitive system because of its reputation. This advantage is enhanced by better name recognition through aggressive national advertising. See also Chow memorandum at 2.

[91] See INV-M-114 at 14.

numbers of phones. [92] The record suggests that systems being sold with Centrex in tandem are becoming a lesser factor in the market, so these products are increasingly becoming substitutes, not complements. [93]

I consider used equipment to also be an important substitute. It is true that similar to rentals, refurbished equipment tends to be of lesser technology and is therefor not a perfect or very close substitute for the subject imports. However, given the price consciousness of small business phone buyers, in the absence of lower priced import alternatives, many such buyers could meet their needs with refurbished equipment. Each time a new system is sold to replace an existing system, the potential supply of used equipment increases. Phone systems are often replaced long before their practical use is diminished. [94] Used equipment is priced substantially below a new product of a given model and prices of previously introduced models decline precipitously as replacement models are introduced. [95] The record suggests that many dealers are active in this market and that AT&T supports its own refurbished market to generate more after market sales. [96] Given the

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[92] There is an abundant supply of Centrex given the virtually non-existent regulatory and other barriers to entry for companies entering this business. Tr. at 275. See INV-M-114 at 20 for discussion of demand for Centrex.

[93] The respondent makes this point and that Centrex is becoming an increasingly viable alternative in the market to completely replace key systems and that AT&T has not been marketing its products to take advantage of this trend. See Tr. at 257 and 263.

[94] Tr. at 104.

[95] See Post Hearing brief of AT&T at 21.

[96] The record states that there are 90 dealers who control 80% of the secondary market and that there are approximately 230 dealers in the total secondary market. See Post hearing brief of the Petitioner at 20.

abundant supply, lower prices of used equipment even for a given model, the active distribution network, and the practical use of such items to price sensitive buyers, used systems are an important although clearly not a perfect substitute for the imports. [97]

The petitioner has asserted that it has lost substantial installed base rental income to LTFV imports. [98] To the extent this has occurred, rental systems are substitutable for subject imports. [99] In the absence of LTFV imports some renters may have purchased the domestic product. However, the petitioner asserts that a significant number of renters would have continued renting in the absence of LTFV imports. As mentioned previously, there are numerous points on the record supporting AT&T's preference to keep renters renting as opposed to purchasing new systems. [100]

The record shows a small but significant source of fairly traded imports, which are as substitutable for the domestic product as the subject

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[97] Just because the AT&T destroys those used systems of other manufacturers it take in as trade, does not mean these systems do not have value given the activities of other resellers. Tr. at 89. Removing non AT&T systems from the total supply does increase AT&T's market for new systems and upgrades.

[98] The petitioner confirms the notion that rental systems and the subject imports are substitutable and that many renters who purchased subject systems would have continued renting in the absence of LTFV imports. See exhibit 11 of the petition, where the petitioner alleges that over an eighteen month period in 1987-88, a specific number of AT&T rental systems were replaced by systems manufactured in Japan and Korea. The exhibit states "actual losses to these competitors during each period are believed to be much larger."

[99] As mentioned before, I do not consider such losses of rental income "injurious" in the context of this investigation.

[100] Had the rental customers not purchased the subject imports, a logical option for them would have been to purchase the systems they had been renting from AT&T. If the imports had preempted this purchase of used equipment, the imports also would not have displaced any domestic production. supra 39.

imports. [101] Larger systems not subject to this investigation can also be replaced by the subject imports and are thus relevant as substitutes in this case. [102] [103]

If demand was not sensitive to changes in prices, the presence of the lower priced imports would result in a greater impact on prices. That is, a greater supply from subject imports and an insensitive demand could contribute to lower prices. Demand appears to be very sensitive to prices and will continue to be in the near future given the abundance of available substitutes.

Next we turn to the issue of domestic supply conditions. Lower capacity utilization levels for this domestic industry suggest that the presence of the subject imports has a lesser effect on domestic prices. There is also substantial basis on the record that AT&T is not very responsive to increasing supply at lower prices. [104]

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[101] See INV-M-114 at 12. I note a substantial increase in the percentage of the market held by other imports in the interim 1989 period.

[102] See Report at A-17 regarding sales of larger systems.

[103] For example, a configured System 75 may be substitutable for a combination of smaller AT&T phone systems subject to this case in some applications. If the smaller systems were priced too cheaply, users may have an incentive to replace the larger system. This notion is supported in at least one AT&T lost sale allegation. See AT&T Lost Sales Exhibits.

Just as the System 25, which is less expensive, can replace the larger systems in some applications, so can the subject imports. A similar analogy is that a group of small personal computers can sometimes replace a more powerful and feature packed mainframe computer in some applications.

[104] As previously mentioned, the record suggests AT&T recognized it had larger sales or post factory overhead than it should contributing to higher marginal costs. I agree with the respondent's argument that if price was the key determinative factor in AT&T's market, it would not overprice its competitors. Tr. at 249. Price at the margin is determinative of value and if

(continued...)

In spite of the already significant levels of LTFV imports in this market, I do not believe that future LTFV imports will play any significant role in depressing domestic prices. I base this conclusion upon the evidence that the subject imports and the domestic products are not close substitutes, the domestic industry's supply is not very sensitive to changes in price, the high sensitivity of demand in this market, and that LTFV imported subassemblies sold at the dealer level have a lesser effect on prices of complete systems including non subassembly added value, and thus sales at the end user level in percentage terms.

Because of the high sensitivity of demand [105] and that the imported and domestic products are not close substitutes, recognizing the lesser effect of LTFV imports delivered to the market at wholesale trade and competing as part of a package at the end user level, and that there appears to be no reason to expect significant increased quantities of the subject imports, I do not think that in the future, LTFV imports will significantly effect output to the point of being a current threat of material injury. There is also no reason to expect future difficulties to the production efforts of the domestic industry.

It could be argued that once a system is lost, there is a basis for

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[104](...continued)
customers did not appreciate extra value in AT&T's products, they would not pay a higher price for AT&T's products. Further, AT&T's lost sales allegations support the notion that the firm avoids larger discounts and thus lower prices more likely affect output than more prices.

[105] If the sensitivity of demand to changes in price is high, the unfairly traded imports have "created their own market" since consumption is increased due to the presence of unfairly priced imports. This reduces the impact on the output of the domestic industry. On the other hand, if the sensitivity of demand to changes in price is low, then the presence of the subject imports is more likely taking sales away from the domestic producers, not generating new ones.

future injury given the stream of upgrade business lost. Given that the current market is in relative terms more of a replacement market as opposed to a new systems market, there is lesser future injury due to this factor. Given considerable testimony on the record that the 1990-91 time frame will incur a surge in demand for new systems, the primary domestic producer, AT&T, should be able to take advantage of its more competitive products and increasingly efficient operations and premises sales efforts, to maximize share and continue to improve financially, and thus be less vulnerable to material injury by reason of LTFV imports.

Given the lack of a probability of increased levels of LTFV imports to the U.S. market and the lack of reason to believe that at expected levels, such imports will be the cause of material injury, I believe that a domestic industry is not threatened by LTFV imports from Japan and Taiwan. A conclusion to the contrary would violate Congressional admonishment of mere conjecture and speculation.

III. Conclusion.

For the foregoing reasons, I find that the domestic industry producing small business telephone subassemblies is not materially injured or threatened with material injury by less than fair value imports from Japan and Taiwan.

INFORMATION OBTAINED IN THE INVESTIGATIONS

Introduction

On August 2, 1989, the U.S. Department of Commerce (Commerce) notified the U.S. International Trade Commission (Commission) of its preliminary determinations regarding imports of small business telephone systems (systems) and subassemblies thereof (subassemblies)[1] from Japan, Korea, and Taiwan. The Commerce notices were published in the Federal Register on August 3, 1989 (54 F.R. 31978, 31980, and 31987, respectively). Commerce found that the subject imports are being, or are likely to be, sold in the United States at less than fair value (LTFV). Accordingly, effective August 2, 1989, the Commission instituted investigations Nos. 731-TA-426-428 (Final), under the provisions of the Tariff Act of 1930, to determine whether an industry in the United States is materially injured, or threatened with material injury, by reason of imports of the subject products from Japan, Korea, and Taiwan into the United States.

Notice of the Commission's investigations was given by posting copies of the notice of institution in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the Federal Register of August 16, 1989.[2] The public hearing on these investigations was held on October 31, 1989.[3]

The statute directs the Commission to make a final determination within 120 days after notification of Commerce's preliminary determination or within 45 days after receiving notification of Commerce's final determination, whichever is the later date. The Commission received notification of Commerce's final determinations on the subject products from Japan and Taiwan on October 16, 1989. Thus, the Commission is required to make its final determinations in investigations Nos. 731-TA-426 and 428, regarding imports of small business telephone systems and subassemblies from Japan and Taiwan, by November 29, 1989. The briefing and vote on these investigations were held on November 20, 1989.

On August 14, 1989, Commerce published a notice postponing its final determination on subject imports from Korea until December 18, 1989 (54 F.R. 33261). The Commission is scheduled to make its final determination in investigation No. 731-TA-427, regarding imports of the subject products from Korea, on January 31, 1990. The vote on this investigation is scheduled for the week of January 21, 1990.[4]

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[1] For the purposes of these investigations, "small business telephone systems and subassemblies thereof" are telephone systems, whether complete or incomplete, assembled or unassembled, the foregoing with intercom or internal calling capability and total nonblocking port capacities of between 2 and 256 ports, and discrete subassemblies designed for use in such systems. A subassembly is "designed" for use in a small business telephone system if it functions to its full capability only when operated as part of such a system. These subassemblies are defined as follows: control and switching equipment, whether denominated as a key service unit, control unit, or cabinet/switch; circuit cards and modules, including power supplies; and telephone sets and consoles, consisting of proprietary corded telephone sets or consoles.

[2] A copy of the Commission's Federal Register notice is presented in app. A.

[3] A list of witnesses appearing at the hearing is presented in app. B.

[4] This report includes all available information on imports of the subject products from Korea. However, a separate final report will be presented to the Commission in investigation No. 731-TA-427 (Final).

Background

On December 28, 1988, petitions were filed with the Commission and Commerce by counsel for the American Telephone & Telegraph Co. (AT&T), Parsippany, NJ, and Comdial Corp., Charlottesville, VA, alleging that an industry in the United States is materially injured and threatened with material injury by reason of imports from Japan, Korea, and Taiwan of small business telephone systems and subassemblies that were alleged to be sold in the United States at LTFV. Accordingly, effective December 28, 1988, the Commission instituted antidumping investigations Nos. 731-TA-426-428 (Preliminary), under section 733 of the Tariff Act of 1930, to determine whether there was a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of such merchandise into the United States. On February 13, 1989, the Commission determined that there is a reasonable indication that an industry in the United States is materially injured by reason of such imports. These determinations were published in the Federal Register of February 23, 1989 (54 F.R. 7891).

Nature and Extent of the Sales at LTFV[5]

Commerce published its final dumping determinations regarding imports of small business telephone systems and subassemblies from Japan and Taiwan on October 17, 1989. The final dumping determination regarding the subject imports from Korea is due by December 18, 1989. Information presented below with regard to Korean LTFV margins is based on Commerce's preliminary determination, published on August 3, 1989.

In each of the three investigations, Commerce presented questionnaires to two firms that were found to account for "a substantial portion" of the subject exports to the United States during Commerce's period of investigation, July-December 1988. Commerce established four categories of products: systems and three subassemblies--control and switching equipment, circuit cards and modules (including power supplies), and telephone sets and consoles. Where there were no sales of identical products, Commerce compared sales of "such or similar" products, making adjustments as required. However, when the adjustments were "substantial," a constructed value was used to determine foreign market value. Margins were calculated based on fair value comparisons between U.S. prices and foreign market values.

Japan

Commerce presented questionnaires to Toshiba Corp. (Toshiba) and Matsushita Electric Industrial Co., Ltd. and two related companies (Matsushita); however, these companies subsequently withdrew from participation in the investigation.[6] Commerce, therefore, made its dumping determination on the basis of "best information available." Both U.S. price and foreign market value were based on data provided in the petition. Commerce took an average of the highest margins found for products in each of the four classes of merchandise. The final dumping margins are:

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[5] Copies of Commerce's Federal Register notices are presented in app. C.
[6] For Toshiba's position, see app. B of its Posthearing Brief.

Company	Margin percentage
Toshiba	136.77
Matsushita	178.93
All others	157.85

Korea

Goldstar Telecommunications Co., Ltd. (Goldstar) and Samsung Electronics Co., Ltd. (Samsung) are participating in the Korean investigation. Samsung had no sales of subassemblies sold as a system during the period of investigation, and constructed value was used for the foreign market value of sales of systems by Goldstar. Home market sales were sufficient to serve as the basis for the foreign market value in subassembly price comparisons except for sales of circuit cards and modules by Goldstar, where third-country sales were used. Commerce found these preliminary dumping margins:

Company	Margin percentage
Goldstar	6.09
Samsung	9.33
All others	7.79

Taiwan

In the investigation regarding imports of systems and subassemblies from Taiwan, Commerce presented questionnaires to Sun Moon Star, Inc., and Taiwan Nitsuko Co., Ltd. Several months later, on the basis of arguments presented by the petitioner, Commerce presented a multinational corporation questionnaire to Taiwan Nitsuko. Taiwan Nitsuko declined to respond to the latter questionnaire;[7] therefore, the margin for this company is based on best information available, following the methodology employed in the Japanese investigation. Sun Moon Star had sufficient home market sales of subassemblies for the basis of a foreign market value comparison; however, the company had no sales of systems during July-December 1988.

Commerce's final LTFV determination was negative with respect to Sun Moon Star and affirmative with respect to Taiwan Nitsuko and all other producers. The final dumping margins for Taiwan producers are:

Company	Margin percentage
Sun Moon Star	0.00
Taiwan Nitsuko	129.73
All others	0.00

As a result of this determination, product from Sun Moon Star is no longer subject to investigation and is excluded from the data presented in this report for Taiwan. The producers in the "all others" category continue to be subject to investigation, although the cash deposit rate applicable to these companies is 0.00 percent.

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[7] For Taiwan Nitsuko's position, see Yoshihiro Saito's letter to Kenneth R. Mason, dated Nov. 6, 1989.

The Product

Development of the telecommunications industry

Figure 1 presents milestones in the development of the telecommunications industry. The current competitive environment has been shaped by numerous judicial, legislative, and regulatory actions. The 50 years preceding the 1982 consent decree were characterized by the domination of AT&T as a provider of telecommunications equipment and service. The industry and, specifically, AT&T, have been subject to increasing regulation since the 1950s; however, it was the Modified Final Judgement (MFJ) consent decree that led to the divestiture from AT&T of the Regional Bell Operating Companies (RBOCs) in 1984. In recent years, additional regulatory rulings have continued to change the structure of the telecommunications industry. Respondents contend that divestiture created a market in which AT&T was unprepared to compete against the newly independent RBOCs and that these competitors have eroded AT&T's market share.[8] Petitioners maintain that the market for telecommunications equipment was liberalized by the 1968 Carterfone decision and that the industry has been competitive for years.[9]

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[8] Joint Prehearing Brief on Behalf of Fujitsu, Hasegawa, Hitachi, Iwatsu, Matsushita, Meisei, Nakayo, NEC, Nitsuko and Toshiba (Prehearing Brief on Behalf of Japanese Respondents), p. 73.

[9] Prehearing Brief of AT&T, pp. 106-7.

Figure 1.--Milestones of the Telecommunications Industry

1877.--The Bell Telephone Company was formed. (Alexander Graham Bell had invented the telephone the year earlier, but his patents were mired in legal challenges until 1877.)

1898.--Bell's patents expired and a flurry of competition ensued.

1913.--The Bell System, newly reorganized into AT&T, signed the Kingsbury Commitment pact with the U.S. Department of Justice, agreeing to stop purchasing competing telephone companies and divest itself of previously acquired interests in Western Union.

1921.--The Willis Graham Act sanctioned the vertical integration of AT&T.

1934.--The Communications Act of 1934 created the Federal Communications Commission (FCC), which was given comprehensive regulatory powers over the telecommunications industry.

1956.--A consent decree provided for continuation of the vertical integration of AT&T, but only for production of equipment used by the Bell System for telephone service. Also, AT&T was forced to license its inventions, including its recently invented transistor, predecessor of the computer chip.

1956.--The Hush-a-Phone Decision allowed customers to attach non-AT&T manufactured acoustic devices to AT&T telephones, provided they presented no risk of harm to the public network.

1959.--The Above-890 FCC Ruling allowed private point-to-point microwave links.

1968.--The landmark FCC Carterfone ruling allowed customer attachment of all types of telephone equipment to the public network provided they were technically harmless to the network.

1969.--The Microwave Communications, Inc. (MCI) Decision allowed leased private microwave links.

1971.--The FCC Specialized Common Carrier Ruling expanded the MCI Decision and authorized specialized common carriers.

1972.--The FCC Domestic Satellite Ruling expanded the Specialized Common Carrier Ruling and encouraged specialized common carriers to use satellite as a transmission medium.

1974.--The FCC Telerent Decision overruled the North Carolina Public Utility Commission's decision to prohibit non-AT&T customer premises equipment (CPE), unless it was used solely for interstate communications. This decision insured that the States could not adopt network attachment guidelines that would be more stringent than those adopted by the FCC.

1976.--The Mebane Home Telephone Court Decision prohibited local telephone companies (telcos) from infringing upon customer's interconnection of equipment merely because it could be defined as constituting "a substitution for telephone system equipment."

1977.--The Execunet Court Decision allowed indiscriminate dial-up resale of MCI's long-distance network to any customer.

Figure 1.--Milestones of the Telecommunications Industry--Continued

1978.--The FCC's Primary Instrument Ruling overturned an AT&T requirement that at least one telephone per household had to be supplied by the telco.

1980.--The FCC Computer II Decision provided a framework to ensure open and competitive equipment and enhanced-services markets. A sharp distinction was made between basic transmission services, which would be offered under regulation, and nonbasic or "enhanced services" which could be offered along with CPE only on a deregulated, competitive basis. AT&T and the RBOCs could offer unregulated products and services only through fully separate subsidiaries.

1982.--The MFJ provided for the divestiture by AT&T (effective January 1, 1984) of the RBOCs. AT&T was to consist of its manufacturing arm, Western Electric (now AT&T Technologies), and its long distance company, AT&T Long Lines (now AT&T Communications). The RBOCs would be subject to the same separate subsidiary requirement as AT&T for marketing CPE and enhanced services.

1983.--The FCC Inside Wire Decision mandated telcos to offer new inside wiring on a customer's premises--wire inside the network interface--on an unregulated basis.

1983.--The Separate Subsidiaries Decision ruled that spun-off RBOCs would be subject to the same separate subsidiary requirement as AT&T for marketing CPE and enhanced services.

1984.--The FCC Sales Agency Decision required all RBOCs wanting limited relief from Computer II prohibitions on joint marketing to establish Sales Agency programs that involve significant independent vendor participation. Sales Agency programs enabled independent vendors as well as RBOC CPE marketers to sell Centrex and other network services along with CPE.

1985.--FCC AT&T Relief Proceedings allowed AT&T to drop the separate subsidiary requirement for marketing CPE with certain safeguards.

1986.--FCC Computer III ruling allowed AT&T and the RBOCs to drop the separate subsidiary requirement for the marketing of CPE and enhanced services, but required them to retain Centralized Operations Groups, Sales Agency programs, and other nonstructural safeguards to ensure against cross subsidization.

1987.--FCC BOC Relief Proceedings allowed the RBOCs to drop the separate subsidiary requirement for marketing CPE with certain safeguards.

1987.--The Triennial Court Review of the Divestiture Decision left in place many of the safeguards to competition that were included in the 1982 consent decree, most notably the prohibitions against the RBOCs entry into manufacturing and long distance communications, but allowed the RBOCs limited entry into the provisions of information services.

1988.--The FCC accepted the Open Network Architecture plans of the RBOCs with certain refinements due in 1989.

Source: Industry Basics, The North American Telecommunications Association (NATA).

Description and uses

These investigations cover a category of telephone systems specified as having intercommunications (intercom) capability and a total nonblocking[10] port[11] capacity of between 2 and 256[12] ports. These systems, which include key systems, hybrid systems, and small PBXs, are usually designed for customers that require not more than 80-100 stations.[13,14]

Systems.--The subject products are shown diagrammatically in figure 2 and defined further below. The key system in figure 2 is shown connected to the local telephone company (telco) switching equipment ("central office") via ("behind") a PBX. Key systems can be, and more often are, connected directly to the telco central office, without going through a PBX.

Key systems.--The mechanism of a key system allows a limited number of telephone sets to be connected to a limited number of external lines without requiring expensive switching equipment. In many key systems, a person at any telephone location can answer any incoming call or place an outgoing call on any line not in use. This permits considerable communications flexibility at a reasonably low cost. A key system may employ a key service unit (KSU) or the switching function may be performed in the key telephone set. Available data suggest that all key systems are sold in the under-100-line market[15] and that the large majority are sold in the under-40-line market.[16]

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[10] When a network (or system) is unable to make more connections, it responds to additional requests by failing to provide a dial tone to the requesting telephone. This is referred to as call blocking. A system's maximum nonblocking capacity is defined in terms of the capacity at which a communication path will always exist for each attached station, regardless of the number of calls being placed through the system at any given time.

[11] A port is a point of access in a system, whether internal or external.

[12] The 256-port capacity limit for the product definition is based on the general distinction between small business telephones systems and larger private branch exchanges (PBXs). Most PBXs with more than 256 nonblocking ports use more sophisticated and costly switching electronics to ensure that all stations in the system can be guaranteed service simultaneously.

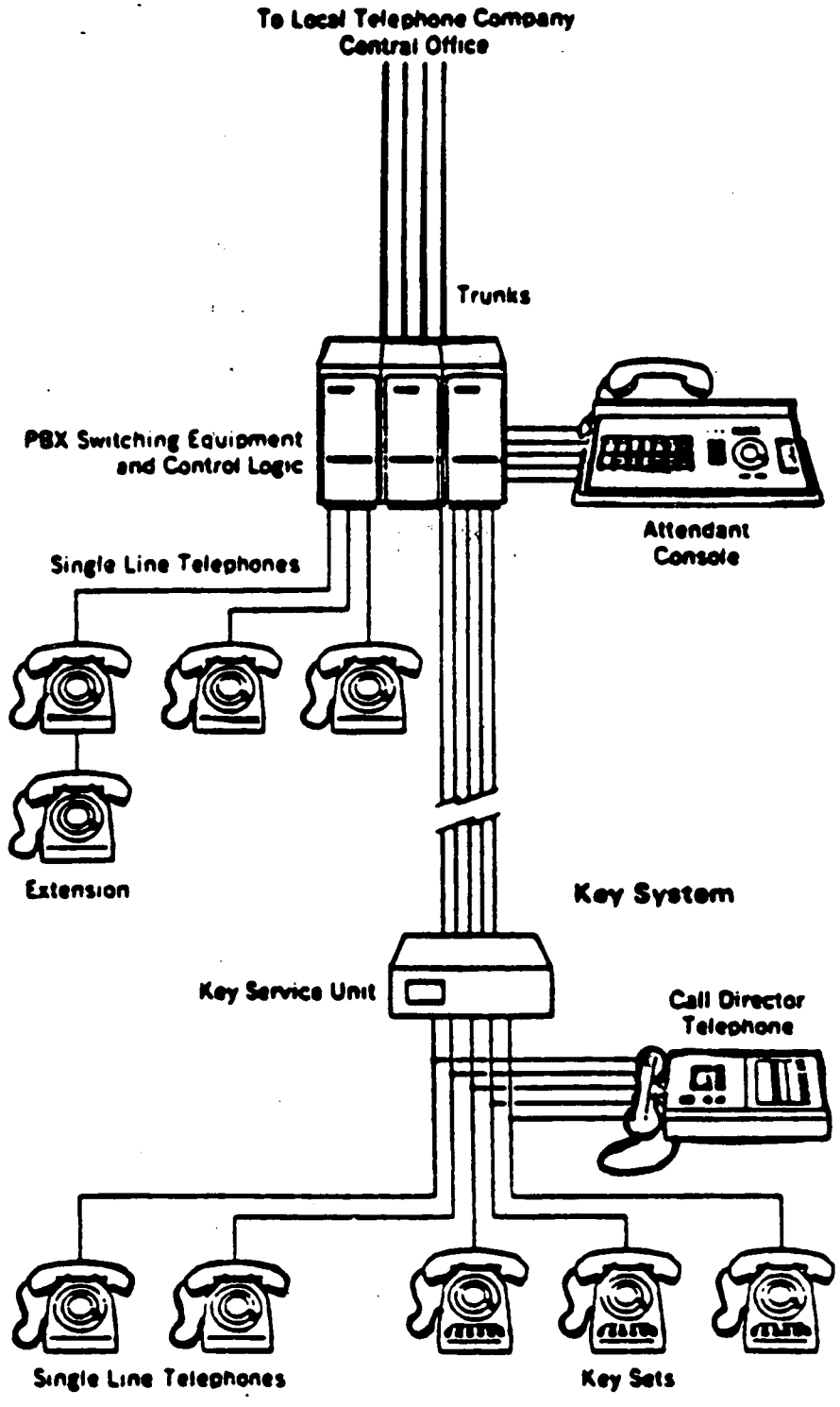
[13] A "station" occupies an internal port; it most frequently is a telephone set but may also be a console, facsimile machine, modem, etc.

[14] See the petition at p. 12. There are some systems with less than 256 nonblocking ports but a significantly higher total port capacity, so that well over 100 telephone sets can be supported. For instance, a hotel generally has one telephone set in each room, but a relatively small volume of calls is placed per telephone, so that the number of nonblocking ports may be small in comparison with the number of total ports. (In comparison, a telemarketing business requires a high ratio of nonblocking ports to total ports.)

[15] In this sense, "lines" denotes the capacity to support stations. ("Lines" is otherwise defined and used in the pricing section of this report.)

[16] PBX vs. Centrex vs. Key: The Future of the Under 100 Line Market, The Eastern Management Group, July 1989 (the Eastern Management study), p. 61.

Figure 2.--Telephones, Key Systems, and PBX



Source: SRI International, Menlo Park, CA

Private branch exchanges.--Small businesses needing more communications capability than that provided by a key system may use a small PBX, but most PBXs are used in larger businesses.[17] A PBX in its simplest form is a small central office, located on the customer's premises, that serves the customer with in-house telephone service and also connects telephone sets and other stations to the public switched network via the telco's central office. The PBX may be provided with an attendant console and may provide an array of special features that can be tailored to the needs of the customer. Such features include automatic call transfer, message waiting, call waiting, restricted service, least-cost routing, and call accounting.[18] In 1988, 27.9 percent of PBX lines shipped were within the under-100-line market, predominantly above 40 lines.[19]

Hybrid telephone systems.--Small business telephone systems that combine features of both key systems and PBXs are known as hybrid systems.[20] Such systems are virtually all within the under-100-line market.

Subassemblies.--The scope of the investigations, as set forth in the Commerce notices, includes complete and substantially complete proprietary[21] subassemblies designed[22] for use in small business telephone systems. These subassemblies are: KSUs and other control and switching units (control and switching equipment); power supplies; other circuit cards and modules; and wire-connected telephone sets and consoles (telephones).[23] In this report, data are presented for these four subassemblies.

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[17] In areas or locations where the number of lines is limited, telcos and other specialized common carriers may equip their central offices with PBXs in lieu of larger switching apparatus. At the same time, some large businesses buy much larger switching equipment, i.e., a telco central office, rather than a PBX since their communications needs are similar to those of one or more towns.

[18] Centrex offers certain of these features using the telco central office switch.

[19] The Eastern Management study, p. 60. Measurements presented in percents of a total will vary greatly, depending on whether the basis of measurement is the number of systems, number of lines or stations, or value. Industry sources most often measure in terms of lines. This report presents what is(are) considered to be the more meaningful measure(s) and the basis for the calculation is specified.

[20] For a more complete description of hybrid systems, see the petition, exhibit 14.

[21] The term "proprietary," as used in the petition, means that the equipment is designed by the overall system manufacturer specifically for the particular system(s) of which it is a part.

[22] "A subassembly is 'designed' for use in a small business system if it functions to its full capability only when operated as part of a small business telephone system." Specifically excluded from the scope of investigation are "dual-use" subassemblies, i.e., subassemblies that can function fully other than in small business telephone systems. (Commerce preliminary and final determinations at the sections entitled "Scope of Investigation.")

[23] Commerce specifically excluded industry standard telephone sets and other subassemblies not specifically designed for use in a subject system, telephone answering machines and facsimile machines integrated with telephone sets, and adjunct software used on external data processing equipment from the scope of investigation.

Control and switching equipment.--Control and switching equipment, in the simplest terms, consists of those components of a key system or PBX that connect telephone sets and other stations to each other and/or to the central office (see figure 2).[24] In those key systems that do not use a KSU, however, the switching function is incorporated directly in the key telephone set. In a PBX, the switching and control logic cards are located in the PBX equipment cabinets.

Data presented in this report for control and switching equipment reflect Commerce's language, which defines this subassembly, whether denominated as a KSU, control unit, or cabinet/switch, to consist of "one or more circuit cards or modules (including backplane circuit cards) and one or more of the following items, when imported or shipped in the same container as the circuit cards or modules, with or without additional apparatus: connectors to accept circuit cards or modules or building wiring." Key telephones that perform the switching operation in a KSU-less system are reported as telephones.

Power supplies.--Power supplies are electrical devices that convert alternating line current (household current) to direct current at specific voltages by transformation and rectification. Most electronic products use direct current internally. A power supply may be designed as an integral part of an electronic apparatus, mounted in the same apparatus as a separate module, or packaged separately and connected by wire to the apparatus. Power supplies inherently generate heat, and when installed in electronic systems, are usually separated from other circuitry. Separate power supplies are often used for larger systems.[25] The power supplies subject to these investigations supply direct current voltages of 5 volts, 24 volts, and 48 volts, and also supply alternating current for telephone ringing of at least 90 volts. The cumulative power output from all of the voltage taps does not exceed 1,800 watts.

Other circuit cards and modules.--Telephone systems contain basic electronic components such as resistors, capacitors, transistors, diodes, integrated circuits, switches, and connectors, which are assembled into functional modules or mounted on printed-circuit boards (often called printed-wiring boards). The modules or printed-circuit boards are then interconnected (if necessary) to form higher functional units in a frame, rack, or cabinet. Subject circuit cards are also incorporated into telephones.

In the design of the final equipment, certain functions are redundant and the same module or printed-circuit board may be used in more than one application. Some of these boards and modules may be interchangeable with each other. In some cases, printed-circuit boards or modules may be used in similar equipment produced by the same manufacturer.[26] It is less likely that a printed-circuit board, or module is sufficiently standardized to be interchangeable with those produced by different manufacturers. However, as

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[24] The most advanced switching systems also permit computers to exchange data when connected to ports. This direct data exchange occurs between machines on the customer's premises, but not beyond.

[25] The term "larger systems," as used in this report, refers to telephone systems with more than 256 nonblocking ports.

[26] However, "dual-use" circuit cards and modules, excluded from investigation, account for only a small portion of the electronic components of the subject products.

the use of digital-type electronics increases in the industry, more interchangeability can be expected.[27]

Telephones.--Telephone sets (also known as telephone instruments) serve the basic functions of terminating a telephone line and converting the acoustic wave energy of the user's voice to electrical signals and vice versa. In addition, the basic telephone set contains either a multifrequency tone generator (or a mechanical dial switch) used to signal the telco central office or PBX to place the outgoing call to the desired destination. A bell or other sound or visual signalling device is contained in the set to indicate an incoming call.

Console telephones (also known as attendant consoles) are used by a receptionist or telephone attendant to control manually (see figure 2) the functions of the key system or PBX. Most often the attendant console is used to answer incoming calls, route the calls, place outgoing calls, or otherwise operate the system.

Key telephone sets are commonly desk-type sets having illuminated push-button switches (keys)[28] (or the equivalent) often arranged in a row below the telephone dial or switch-tone touch pad. The keys connect the telephone set to central office lines (whether telco or PBX), indicate which lines are in use, allow two or more telephones to conference on the same line, and place a call on hold. A single key telephone set may terminate five or more incoming/outgoing lines and, if so wired, intercommunicate (intercom) with other key telephone sets within the same system. The key buttons themselves may connect the telephone directly to the desired line, or, as shown in figure 2, signal a KSU to make the desired connection. The KSU then acts as the switching mechanism.

A system may be designed to accept nonproprietary telephone sets, but proprietary telephones generally enhance the systems' features. Excluded from the scope of investigation are nonproprietary industry-standard telephone sets and proprietary "dual-use" telephone sets and consoles. These products can function fully in other than small business telephone systems and constitute a large portion of the telephone sets that are used with small business telephone systems. * * *.[29]

The petition states that the subject systems have a maximum of 80-100 stations; however, respondents in these investigations argue that "a significant portion" of these systems have more than 100 stations.[30] In the preliminary investigations, respondents suggested that larger systems are sold in the "under-100-line market" and displace sales of the subject products.[31] U.S. producers, importers, and interconnects were asked to report their 1988 U.S. shipments of small and larger telephone systems by the number of

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[27] As an example, printed-circuit boards produced by different manufacturers are currently inserted in personal computer expansion slots.
[28] As many as 20 key buttons may be accommodated, but 6 is the most common.
[29] * * *.
[30] Posthearing Brief of Fujitsu Ltd., Fujitsu America, Inc. and Hasegawa Electric Co., Ltd., p. 2.
[31] Post-Conference Economic Submission on Behalf of Japanese Respondents, pp. VI.20-22.

stations,[32] as first installed. Few importers responded because they generally do not install systems. Also, the data presented for the larger systems exclude firms that do not handle small systems * * *. The responses indicate that more than 99 percent (in terms of quantity) of the systems under investigation were installed with 80 or fewer stations. Although several interconnects reported significant installations of larger systems under 80 stations, overall more than 95 percent (again, in terms of quantity) of larger systems reported were installed with more than 80 stations, as shown in the following tabulation (in percent of the total):

Number of stations	U.S. producers		Importers from Japan, Korea, and Taiwan[1]		Interconnects	
	Quantity	Value	Quantity	Value	Quantity	Value
Subject systems:						
1-10.....	***	***	86.3	45.2	70.2	49.0
11-20.....	***	***	10.3	30.5	***	14.6
21-40.....	***	***	3.0	18.6	***	18.7
41-60.....	***	***	***	***	2.3	7.7
61-80.....	***	***	***	***	.5	4.2
81-100.....	***	***	***	***	.3	2.2
over 100...	***	***	***	***	.2	3.7
Total..	100.0	100.0	100.0	100.0	100.0	100.0
Larger systems:						
under 80...	***	***	***	***	30.1	12.5
80-100.....	***	***	***	***	12.6	6.5
101-120....	***	***	***	***	12.2	6.6
121-150....	***	***	***	***	13.6	10.6
over 150...	***	***	***	***	31.5	63.8
Total..	100.0	100.0	100.0	100.0	100.0	100.0

[1] Excludes the product of Sun Moon Star.

Note: Because of rounding, figures may not add to the totals shown.

These are "as installed" data; many of these systems will "add-on" stations with time, so that, although the number of small systems with more than 100 stations will increase, the number of larger systems configured with less than 100 stations will decrease substantially. Therefore, published data presented in this report for the under-100-line market are believed to be relevant to the market for the subject products.

Digital vs. analog technology.--Telephone systems can employ varying degrees of digital and analog technology. Both types of technology can be found in key, PBX, and hybrid systems. The physical differences between digital and analog equipment are in the switching apparatus and in the type of electronic components found on circuit cards. The circuit cards for both types can be manufactured on the same machinery. Small business telephone systems employing predominantly digital technology have the same general uses as those with predominantly analog technology. Digital-based systems tend to offer more

[32] In fact, the question was phrased slightly differently but conversations with questionnaire respondents and the data reported indicate that the request was correctly interpreted.

features, and are more flexible with regard to reprogramming to accommodate different configurations than are systems with analog components. Both digital and analog technology are capable of providing data as well as voice transfer, although the former may be faster in certain data transfer applications. From the standpoint of demand and use by the small business consumer, the distinction between analog and digital systems is not particularly important. Analog and digital systems have the same physical appearance and are often produced in the same manufacturing facility.

The public telephone network is in the process of being converted from what is still principally an analog-based network to a digital-based network. Through the use of digital technology, the integration of computers and digital switches can offer simultaneous transmission of voice, data, graphics, and other information services over existing telephone lines with greater efficiency and quality. Using compatible interfaces or protocols, the integrated services digital network (ISDN), can provide these information services between regions or between countries.

The initial testing of technical standards for ISDN was undertaken in 1987, and since that time, numerous standards testing trials have been undertaken by U.S. and foreign telecommunications firms. As a result, many ISDN network standards have been established, but standards for the development of the network terminal equipment have not. Therefore, the standardization of ISDN technical requirements represents a major challenge to the industry over the next 5 years, and because of the lack of technical standards, industry sources estimate that ISDN will not become readily available for commercial use for the next 3-5 years, and even later for household use. However, most industry experts agree that ISDN will become a major economic and technological development and a competitive factor in the telecommunications industry.

Centrex.--Centrex is the generic name[33] given to a subscriber switching service that a telco can provide by dedicating telephone lines and a share of the central office switching equipment to an individual (business) customer. The two basic elements of Centrex include intercom services and a package of local processing features similar to those available from a PBX. Consequently, this service, which simulates some PBX features, is provided to businesses directly by the telco from its central office, rather than businesses obtaining this capability through PBXs they have purchased. To receive the service, a business needs only to have a dedicated station in place. A dedicated station can be a key system that can enhance the service, or simply a telephone instrument. In contrast to customer premises equipment that is maintained by the business, Centrex switching is maintained by the telco.

Respondents in these investigations maintain that Centrex has displaced sales of PBXs and is invading the key system market as well. Petitioners argue that Centrex competes primarily with larger systems and that a large majority of Centrex customers also use key systems. Data on Centrex were obtained from a variety of primary and secondary sources, including responses by six of the seven RBOCs to the interconnect questionnaire, and available information is presented in this report.

Refurbished product.--Petitioners and respondents also debate the importance and impact of the market for remarketed (generally used and refurbished) subassemblies of small business telephone systems (refurbished

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[33] Telcos market "Central Exchange" services under various names but, for the purposes of this report, the term "Centrex" will be used.

product). The former suggest that such subassemblies are relatively insignificant in the overall market. Respondents argue that this "secondary market" is not only large, but is also a major factor in explaining any downward pressure on U.S. prices and declines in the performance of U.S. producers. Data on refurbished product were obtained from primary and secondary sources, including major secondary market dealers. Available data are presented where specified in this report.

The manufacturing process

Small business telephone system subassemblies are produced much like consumer electronic products that are designed in modular configurations. The manufacturing process largely includes the fabrication and assembly of printed-circuit boards and their final assembly into an enclosure that interconnects them through the use of a multilayer printed-circuit motherboard. The use of an interconnecting motherboard reduces the amount of manual labor required to assemble a system and the potential for wiring errors. Modular construction through the use of plug-in printed-circuit boards facilitates assembly, testing, and repairs necessitated by component or system failures.

Printed-circuit board fabrication.--The fabrication of a printed-circuit board is divided into three phases. In the initial phase, the locations of the components and interconnections of the circuits on the board are determined. The printed-circuit pattern is then laid out on a grid by a computer and an enlarged artwork master is produced. A grid layout and artwork master are required for each circuit board side, and precise registration between the layouts is required when two or more artwork masters are needed. In the second phase, the enlarged masters are photographed and reduced to the appropriate dimensions of the finished board. The reduced masters are used to create the circuit patterns on the base material laminates from which the circuit boards are made. The final phase covers the actual fabrication of the board. After the appropriate copper-clad laminate is selected and coated with a photo-sensitive resist, it is exposed to ultraviolet light through the reduced master, creating the circuit image on the copper surface of the laminate. The image is developed out and an alloy of lead-tin is electroplated on the exposed circuit pattern. The alloy plating increases the solderability of the circuit board conductors and serves as an acid-resist when the excess copper on the laminate is etched away. Holes are drilled in the locations where components are to be inserted and the board is profiled to the finished dimensions. When the number of components on a printed-circuit board is sufficiently increased, more circuit layers are required to make the necessary crossover connections. In producing boards with two circuit layers, the fabrication sequence is changed. Holes required for component mounting are drilled and plated through with copper prior to the creation of the circuit image on each side. The plated-through holes provide circuit continuity from one side of the board to the other. Machines and equipment required to produce printed-circuit boards for small telephone systems can be used to produce printed-circuit boards for any electronic product.

Multilayer printed-circuit board fabrication.--Multilayer printed-circuit boards consist of a number of individual printed-circuit boards (usually two-sided) that are produced from thin, uncured base material laminates. After these thin boards are etched, they are stacked in an alignment fixture and cured in a heated platen press. The partially completed board is removed from the press, and the fabrication process is completed much like that for any two-sided printed-circuit board. Multilayer boards used as interconnect motherboards on small telephone systems usually require seven or eight layers.

Printed-circuit board assembly.--The assembly of printed-circuit boards in volume is usually accomplished through a combination of machine and manual insertion of components. Components such as resistors and capacitors, which lend themselves to automatic insertion, are first sequenced on tapes in reverse order of insertion by sequencing machines. These tapes are then run through a computer-controlled machine that inserts each component into its proper position on the board. The machine not only inserts each component in its proper position, but also clinches the leads of each component against the conductors on the board to facilitate wave soldering. Components such as power transistors or small transformers, which do not lend themselves to automatic insertion, are installed by hand prior to wave soldering. Sequencing machines and automatic insertion machines used to assemble printed-circuit boards for small business telephone systems can be used to assemble printed-circuit boards for any electronic product. Multilayer motherboards that provide the interconnections for printed-circuit boards are assembled by hand because the assembly consists largely of the installation of mating connectors for the plug-in printed-circuit boards containing the systems' electronic components.

Power supplies.--Power supplies are usually not plug-in devices like the printed-circuit boards that contain the systems' logic and switching circuits. Power supplies contain bulky components, such as power transformers and large power transistors, which either do not lend themselves to printed-circuit board mounting or must be installed on metal surfaces because of heat dissipation requirements. In fact, cooling fans are required for power supplies in certain small business telephone systems where the system power needs exceed certain wattage ratings. Power supplies often contain small printed-circuit boards on which components for regulation and filtering are installed.

Subassembly enclosures.--Enclosures for small business telephone system subassemblies, including telephone housings and handsets, are produced largely as injection-molded plastic parts. Structural members may also be of stamped or extruded metal. The production of each plastic part in the enclosure requires a special mold in which a plastic powder is injected and formed under heat and pressure to the contour of the mold. After the mold is cooled, the formed part is removed. The required circuitry is installed within these plastic and metal housings in the final assembly process.

System installation.--The system is installed at the customer's premise, usually by a trained technician. Some systems requiring little or no additional wiring can be installed by the customer. The KSU or control unit is generally wall-mounted and connected both to the individual stations and to the outside lines. An installed system often includes, in addition to the subject subassemblies, nonsubject hardware such as wire, adapters, plugs, braces, and wall mounts (installation parts). The system may also include nonsubject telephone sets and consoles, facsimile machines, modems, and other equipment.

Installation service costs can vary by the supplier and can be influenced by factors such as the size of the system, the age and condition of the building in which the installation is made, and the number of stations. As a general rule, the installation of smaller systems reflects a greater percentage of the total cost than the installation of larger, more expensive systems. Unless specified, installation services, parts, and other nonsubject products are excluded from the values and prices presented in this report.

U.S. tariff treatment

On the date the petition relating to the subject investigations was filed, telephone switching apparatus and telephones and parts thereof were classified in items 684.57 and 684.58 of the former Tariff Schedules of the United States (TSUS).[34] Key system switching apparatus was statistically reported under item 684.5710 of the Tariff Schedules of the United States Annotated (TSUSA), and other switching apparatus was reported under item 684.5720. Statistics for parts of telephone switching apparatus were reported under TSUSA item 684.5730.[35] Power supplies for small business telephone systems were classified in TSUS item 682.60, and statistics were reported under items 682.6051 and 682.6053, depending on their wattage rating. Statistics for telephones were reported under items 684.5805 through 684.5825, and parts of telephones were reported under item 684.5830. Unfinished or unassembled imported telephone apparatus was classified for tariff purposes in the same item in the TSUS as the finished apparatus, in accordance with general interpretive rule 10(h). Small business telephone systems as set forth in the investigation were not separately provided for in the TSUS.

The Harmonized Tariff Schedule of the United States (HTS) became effective January 1, 1989.[36] Telephonic switching apparatus is provided for in HTS subheadings 8517.30.15, covering central office switching apparatus; 8517.30.20, PBX switching apparatus; 8517.30.25, electronic key telephone systems;[37] and 8517.30.30, other telephonic switching apparatus. Parts of telephonic switching apparatus are classified in three HTS subheadings. Parts of central office switching apparatus are classified in HTS subheading 8517.90.05, and parts of PBX switching apparatus are classified in 8517.90.10. Parts of other telephonic switching apparatus, including electronic key telephone systems, are classified under subheading 8517.90.15. Power supplies are classified as rectifying apparatus under subheading 8504.40.00 in the HTS. Telephone sets are classified in HTS subheading 8517.10.00, and parts of telephone sets are classified in subheading 8517.90.30. Telephone handsets and parts of telephone handsets are classified in HTS subheadings 8518.30.10 and 8518.90.10, respectively.[38]

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[34] The U.S. Customs Service has determined that telephone apparatus that is designed to carry voice-based information is telephone apparatus whether or not it can also carry symbols or numbers representing data or other information.
[35] Parts peculiar or dedicated to telephone switching apparatus are classified in this line item unless they are provided for elsewhere in the schedules by name. A provision for "parts of an article" does not prevail over a specific provision for such part (General Interpretive Rule 10(ij), TSUSA and additional U.S. Rules of Interpretation 1(c), HTS).
[36] The Harmonized Commodity Description and Coding System, known as the Harmonized System or HS, is intended to serve as the single modern product nomenclature for use in classifying products for customs tariff, statistical, and transport purposes. Legislation passed in 1988 replaced the TSUS with an HS-based tariff schedule known as the HTS.
[37] The HTS provides an eight-digit subheading for electronic key systems. This provision may be interpreted by Customs to include KSUs but not key telephone sets, which may be classified by reason of the six-digit (international) text in 8517.10.00 or 8517.81.00. See Explanatory Notes for 8517 at I(C), pp. 1361-2.
[38] The original provisions for telephone apparatus published in the first edition of the HTS were revised extensively following the Canada-United States Free-Trade Agreement (Presidential Proclamation 5923 of Dec. 12, 1988). The

The column 1 general rate of duty (most-favored-nation (MFN) rate) for telephone switching apparatus and parts thereof, telephone sets and their parts, and telephone handsets and their parts is 8.5 percent ad valorem. The column 1 general rate of duty on power supplies is 3 percent ad valorem.[39] This column 1 general rate of duty applies to imports from all countries other than those from certain Communist countries enumerated in general note 3(b) of the HTS.[40] The column 2 rate of duty is 35 percent ad valorem.

U.S. Producers

AT&T is the largest U.S. producer of small business telephone systems and subassemblies, accounting for * * * percent of the value of U.S. producers' reported 1988 U.S. shipments of these products.[41] The design, manufacture, distribution, marketing, installation, and service of the subject products are handled by AT&T's General Business Systems Division (GBS). AT&T retail phone center stores also market a small portion of these systems. Manufacturing facilities are located in Shreveport, LA; Denver, CO; and Dallas, TX.[42]

Comdial Corp., copetitioner in these investigations, also designs, manufactures, distributes, markets, and services small business telephone systems. Its headquarters and manufacturing facilities are in Charlottesville, VA. Comdial supplied * * * percent of U.S. producers' reported 1988 shipments of the subject products.

Other firms[43] that provided data on U.S. production of small business telephone systems and subassemblies during January 1, 1986, through June 30,

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[38] (...continued)
TSUSA item numbers and HTS subheadings for telephone switching apparatus and parts are not comparable.

[39] These rates of duty represent the final stage of rate reductions negotiated during the Multilateral Trade Negotiations, and have been in effect since Jan. 1, 1987. In addition, pursuant to the Omnibus Budget Reconciliation Act of 1986, a user fee (to cover the cost of processing imports by the U.S. Customs Service) of 0.17 percent ad valorem is assessed on most imports. Preferential tariff programs include the Generalized System of Preferences, which affords nonreciprocal tariff preferences to developing countries to aid their economic development; the Caribbean Basin Economic Recovery Act, which grants nonreciprocal tariff preferences to developing countries in the Caribbean Basin area to aid their economic development; and the United States-Israel Free-Trade Area Implementation Act, which applies to products of Israel. Reduced rates of duty apply to eligible goods originating in the territory of Canada.

[40] Col. 2 rates of duty apply to products of these countries, which currently include all Communist countries except China, Hungary, Poland, and Yugoslavia, all four of which are eligible for MFN treatment.

[41] For purposes of data coverage, the market share of domestic producers in this report is expressed as a percent of the total value of 1988 U.S. shipments of systems and subassemblies. These data will overstate the market share of companies that sell primarily at the end-user level and understate the share of companies that sell mostly at the wholesale level. Comparable data are not available in terms of quantity.

[42] * * *.

[43] Where facilities changed ownership during the period of investigation, only the current owner is identified.

1989, are presented in the following tabulation, along with their share of reported 1988 shipments and their position in these investigations:

Company	1988 market share (percent)	Position in these investigations
CSE Telcom	***	***
Corinth Telecommunications Corp	***	***
Crest Industries, Inc	***	***
Eagle Telephonics, Inc	***	***
Fujitsu America, Inc	***	***
Mitel, Inc	***	***
NEC America, Inc	***	***
Northern Telecom, Inc	***	***
Sanbar Corp	***	***
Shared Resources Exchange	***	***
Siemens Information Systems, Inc	***	***
Total	***	

All other producers account for an estimated 10 percent of U.S. shipments.[44]

Producers that support the petition account for the vast majority of reported 1988 U.S. shipments and are all * * *. In these final investigations, the producers that oppose the petition are * * * and represent * * * percent of 1988 shipments. Three producers that take no position in the investigations are * * *;[45] two other firms that stated no position * * *.

Numerous production facilities changed ownership during the period of investigation[46] and several firms reported mergers and reorganizations. Only * * * ceased U.S. production of small business telephone systems, in * * *; these production facilities * * *. Meanwhile, * * *-owned firms entered the market.

* * * * * * *

However, none of this activity significantly affected the data reported. Plants that shut down or started up were each * * *, as were the (unreported) operations of * * *.

Japanese, Korean, and Taiwan exporters of the subject products were asked to report planned U.S. production of such products. * * * reported plans to commence production in * * *.

In addition to the producers identified above, a number of U.S. firms are known to have domestic facilities for the design, distribution, marketing, and service of the subject products (both hardware and software). Among the parties to these investigations are three such firms: EXECUTONE Information Systems, Inc. (EXECUTONE); Inter-Tel, Inc.; and TIE/communications, Inc. (TIE). Several small importers also design the subject products in the United States. The actual U.S. production of these firms generally is limited to * * *--they depend primarily on foreign subcontractors for the manufacture of the products

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[44] Statement of Alan R. Theesfeld, attachment.

[45] * * *.

[46] * * * did not provide data on operations that they acquired from, respectively, * * * prior to such purchases.

they design.[47] * * *.[48] These companies consider themselves, and are perceived by many purchasers to be, U.S. suppliers of small business telephone systems and subassemblies. They will be referred to in this report as "system designers" and, along with U.S. and foreign producers, as "suppliers."

Counsel for AT&T has urged the Commission to exclude from its analysis of the U.S. industry producers without "substantial domestic manufacturing operations," specifically, EXECUTONE, Inter-Tel, and NEC America (NEC).[49] Counsel also asks that the data of these firms be excluded according to the related party provision (19 U.S.C. § 1677(4)(B)).[50] As mentioned above, EXECUTONE and Inter-Tel have no appreciable U.S. production; their operations are not included in the data presented for the U.S. industry. * * * NEC accounts for * * *. * * * reported U.S. production commencing in * * *; however, again, this company accounts for * * *.[51]

Importers

U.S. Customs' sources reported several hundred importers of telephone equipment classified in the tariff items that include small business telephone subassemblies during the period of investigation. The petition named 23 importers of such products from Japan, Korea, and Taiwan, and foreign producers in these countries were asked to identify major U.S. importers of the subject products. On the basis of this information, importers questionnaires were sent to 71 firms that are believed to account for more than 90 percent of the U.S. imports of the subject products during the period of investigation.[52] Fifty-eight companies responded to the questionnaire; of these, 37 reported that they imported systems and subassemblies during the period of investigation. Data presented in this report are estimated to account for over 80 percent of both subject and nonsubject imports. Nonsubject imports were reported from Canada, Hong Kong, Israel, Singapore, Taiwan (Sun Moon Star), and West Germany.

* * * reported the largest share, by value, of subject imports during the period of investigation.

* * * * * * *[53]

* * * reported the second-largest share of overall subject imports * * *. * * *.[54]

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[47] * * *.
[48] * * *.
[49] Prehearing Brief of AT&T, pp. 30-34. In its preliminary determinations, the Commission found EXECUTONE to be a domestic producer; however, * * *.
[50] Prehearing Brief of AT&T, pp. 34-36. Counsel did not request the exclusion of * * * or any of the other producers that imported small quantities of the subject products.
[51] Together, * * * their share of U.S. shipments; however, because this share remained quite small, their data were not excluded from those presented in the body of this report. Selected alternative industry and market penetration data that exclude * * * from U.S. industry data are presented in app. D.
[52] Subsequently, foreign exporters were asked to identify the 10 largest importers of their products during 1988. All but 5 of the named importers had already been sent an importer questionnaire, and * * * of the 5 imported * * * quantities.
[53] * * *.
[54] * * *.

* * * reported the third-largest share of subject imports; however, * * *.

* * * * * * *

The vast bulk of imports from Japan and most nonsubject countries is imported by U.S. subsidiaries of the foreign producers. System designers are the importers-of-record from their foreign subcontractors, located in all three subject countries. U.S.-owned domestic producers account for a very small percentage of imports. The balance of importers consists largely of independent distributors.

The 10 largest U.S. importers of the subject products from Japan, Korea, and Taiwan during the period of investigation are shown in the following tabulation, in order of overall import share, with the value of their 1988 imports (in thousands of dollars) and their primary foreign supplier(s):

* * * * * * *

Channels of Distribution

Small business telephone systems and subassemblies enter the U.S. market through several channels, which are used to varying degrees by different manufacturers (table 1). For the most part, AT&T markets systems directly to the end user through its GBS sales force; however, 5 percent of sales are to unrelated retailers and telcos,[55] a total of some $28 million at the wholesale level in 1988.[56] Another * * * percent of sales are via AT&T retail "phone center" stores. Other U.S. producers sell subassemblies mostly to unrelated wholesale distributors ("supply houses").

Supply houses, the largest of which have sales offices nationwide, sell subassemblies to interconnects, who sell installed systems to the end user. Telcos also act as interconnects. Although many importers sell primarily to supply houses, importers of Japanese products often sell directly to interconnects.[57] Most U.S. producers and other importers also sell small quantities of subassemblies directly to a limited number of select interconnects, including telcos.

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[55] Postconference Statement of John A. Blanchard, p. 1.
[56] Prehearing Brief of AT&T, p. 78.
[57] * * *.

Table 1
Subassemblies of small business telephone systems: U.S. shipments by domestic producers and importers from Japan, Korea, and Taiwan, by markets, 1988

Supplier and market	(Percent of total) Control and switching equipment	Power supplies[1]	Other circuit cards and modules[1]	Telephones
U.S. producers:				
Leased and/or rented	***	***	***	***
Sold to related--				
Exclusive distributors	***	***	***	***
Retailers and interconnects[2]	***	***	***	***
Sold to unrelated--				
Distributors and supply houses	***	***	***	***
Retailers, interconnects, and telephone companies	***	***	***	***
End users[2]	***	***	***	***
Other[3]	***	***	***	***
Total	100.0	100.0	100.0	100.0
Importers from Japan, Korea, and Taiwan:[4]				
Leased and/or rented	0	0	0	0
Sold to related--				
Exclusive distributors	***	***	***	***
Retailers and interconnects[2]	***	***	***	***
Sold to unrelated--				
Distributors and supply houses	35.4	7.9	17.0	31.9
Retailers, interconnects, and telephone companies	54.5	70.3	54.9	57.0
End users[2]	***	***	***	***
Other	***	***	***	***
Total	100.0	100.0	100.0	100.0

[1] Data on power supplies and other circuit cards and modules are less complete because large quantities of these products are shipped as an integral part of control and switching equipment and telephones. Especially in the case of imports, some product was not reported.
[2] * * * reported sales to end users via related interconnects as sales to the related interconnects, whereas * * *. Therefore, the data overstate the dissimilarities between U.S. producers' and importers' channels of distribution.
[3] Includes * * *.
[4] Excludes the product of Sun Moon Star.

Note: Because of rounding, figures may not add to the totals shown.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Available published data from the Eastern Management Group on the distribution channels employed by suppliers of small business telephone system

subassemblies during 1987-89 are presented in the following tabulation (as a percent of the total stations/lines shipped):[58]

Distribution channel	1987	1988	1989[1]
Key and hybrid systems:			
Direct sales to end users	23.9	26.3	21.4
Sales to RBOCs	5.2	6.1	6.7
Other indirect sales	70.9	67.5	71.9
PBXs:			
Direct sales to end users	23.9	28.5	([2])
Sales to RBOCs	13.1	10.2	([2])
Other indirect sales	63.0	61.2	([2])

[1] Estimated.
[2] Not available.

A recent industry trend has been the acquisition by some importers of interconnects to secure distribution networks. A study cited by counsel for AT&T says that 22 percent of interconnects are owned by a supplier.[59] For example, TIE has bought some 35 interconnects.[60] Also, EXECUTONE has an extensive sales network, including 280 direct sales and service personnel, and another 1,000 indirect sales staff.[61] These companies increasingly resemble AT&T in their marketing of systems and subassemblies.

Although, in the aggregate, one-quarter of sales are direct to end users by suppliers, most importers sell very little product in this manner. Such sales are generally to large end users on a long-term, multisystem, contractual basis (national accounts). Typical national account clients include rental car companies, insurance agencies, and retail chains, with nationwide networks of small offices or stores.

U.S. Consumption

The world market[62]

The United States represents the largest telecommunications market in the world. Key systems and PBXs (including larger systems) accounted for 8 percent of expenditures on telecommunications equipment in the 50 largest national markets in 1986 and this same share is projected through 1995. Such telecommunications expenditures for 1986, and projections for 1990 and 1995, are shown in the following tabulation (in millions of dollars):

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[58] The Eastern Management study, pp. 32-33.
[59] Statement of John Henderson, p. 8.
[60] Ibid, p. 83.
[61] The Eastern Management study, p. 67.
[62] Data on world consumption are based on Telecommunications Research Center Marketfile Study, 1986, pp. 84-89.

Country	1986	1990	1995
United States	2,160.8	2,447.2	2,392.0
Japan	566.4	676.5	644.0
Soviet Union	336.0	938.1	1,421.0
West Germany	412.2	614.7	688.0
France	358.6	554.5	612.0
Other top 50 markets	2,434.1	3,624.4	4,180.3
Total top 50 markets	6,268.1	8,855.4	9,937.3

The projected U.S. growth in this market from 1986 to 1995, 10.7 percent, is far below the average of both the top 5 markets, 50.2 percent, and the 50 largest, 58.5 percent.

The U.S. market

AT&T has put the number of end users of small business telephone systems at 3.6 million firms.[63] Annual consumption consists largely of new equipment replacing old (70 percent of lines shipped in 1988); expansions to existing systems accounted for another 15 percent and new business demand for less than 10 percent.[64] A GBS official noted that consumption peaked in 1984-85 when "literally hundreds of thousands of renting customers" left AT&T's "imbedded base" (of renters) and purchased systems.[65] Subsequently, petitioners and respondents agree, there was a "lull" in demand.[66] Respondents suggest that demand is expected to increase as products purchased in 1984-85 reach the end of their "product replacement cycle," which questionnaire responses estimate to be some 5 to 7 years.

There are various published estimates of U.S. consumption of small business telephone systems, which suggest, in consensus, that demand has been slack but is expected to improve. (None of these estimates is directly comparable with each other or with staff estimates because the bases of measurement are different.) The Eastern Management Group estimates that consumption has declined steadily during 1985-88, measured both in terms of the number of stations/lines shipped and by supplier revenues, as shown in the following tabulation:[67]

	1985	1986	1987	1988
Quantity:				
Key/hybrid stations and PBX lines shipped (1,000 units)	5,969	5,848	5,790	5,248
Percentage change	(1)	(2.0)	(1.0)	(9.4)
Value:				
Supplier revenues (millions)	$5,930	$5,335	$5,082	$4,718
Percentage change	(1)	(10.0)	(4.7)	(7.2)

[1] Not available.

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[63] Postconference Statement of George E. Malone, p. 5.
[64] The Eastern Management study, p. 31. The balance of 5 percent is key systems used behind Centrex and PBXs.
[65] Transcript of the conference, pp. 80-81.
[66] Ibid., p. 143, and Postconference Brief of AT&T, p. 29.
[67] The Eastern Management study, pp. 2-3.

This study forecasts marginal growth during 1989-94.[68] NATA, a trade organization representing primarily interconnects, estimates, in its 1988 Telecommunications Market Review, that the value of U.S. consumption of key and hybrid systems decreased from 1984 to 1985 and has since risen incrementally but steadily, as shown in the following tabulation (in millions of dollars):[69]

	1984	1985	1986	1987	1988[1]	1989[1]	1990[1]
Key/hybrid systems..	1,039	955	957	960	965	980	1,000
Percentage change...	(2)	(8.1)	0.2	0.3	0.5	1.6	2.0

[1] Estimated.
[2] Not available.

Based on Dataquest reports, counsel for AT&T submits that consumption, in terms of systems installed, * * *.[70] Data presented by the Japanese respondents in the preliminary investigations, on the basis of lines, showed 1-percent growth from 1985 to 1986 and from 1986 to 1987, no growth from 1987 to 1988, and projected 2-percent growth from 1988 to 1989.[71] The Korean respondents cite (unadjusted) Dataquest studies that compare annual 1.8 percent growth for 1-8 station key systems during 1983-87 with a forecasted average rate of 5.0 percent during 1988-92. Dataquest further estimates that 1-40 line PBXs have experienced a 2.7-percent annual increase during 1983-87 but will achieve 6.9-percent annual growth during 1988-92.[72]

The following apparent consumption data are compiled from producer and importer questionnaire responses. The totals are estimated to be understated by approximately 15 percent due to less-than-complete questionnaire coverage. Also, importers' shipment values were generally measured at the wholesale/retail level and are, therefore, understated relative to U.S. producers' shipment values, which were primarily at the end-user level.

Systems and subassemblies.--Table 2 presents apparent U.S. consumption of systems and subassemblies[73] by value. These data reflect the sum of the value of U.S. shipments of systems and subassemblies by both domestic producers and importers. Apparent consumption declined throughout the period of investigation, by 7.5 percent from 1986 to 1987, by 2.2 percent from 1987 to 1988, and by 9.7 percent from January-June 1988 to January-June 1989. Comparable data on the basis of quantity are not meaningful.

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[68] Ibid., pp. 6-7. This report assumes affirmative determinations by the Commission and, on that basis, forecasts increased supplier revenues in 1990, followed by annual decreases through 1994.
[69] 1988 Telecommunications Market Review, p. 78.
[70] (Prehearing) Statement of Bruce P. Malashevich, p. 43. Dataquest estimates were adjusted to account for installations by AT&T, which were not available to Dataquest.
[71] Post-Conference Economic Submission on Behalf of Japanese Respondents, table V-1. The Japanese respondents have not provided additional data in the final investigations.
[72] (Prehearing) Brief Submitted on behalf of Samsung Electronics Co., Ltd. and Inter-Tel, Inc., p. 40. The basis for these growth rates was not specified.
[73] Data presented in this report for "systems and subassemblies" cover all subject products, whether sold as part of a system, other subassembly, or separately. These data have been requested and compiled in such a way as to eliminate doublecounting.

Table 2
Small business telephone systems and subassemblies: U.S. shipments[1] by producers and importers[2] and apparent U.S. consumption, 1986-88, January-June 1988, and January-June 1989

(In thousands of dollars)

Item	1986	1987	1988	January-June-- 1988	1989
U.S. producers' U.S. shipments	***	***	***	***	***
U.S. shipments of imports from--					
Japan	331,576	276,419	239,313	124,008	119,504
Korea	***	***	168,941	98,659	58,110
Taiwan	***	***	17,737	9,931	6,968
Subtotal	445,710	448,222	425,991	232,598	184,582
All other sources	***	***	***	***	***
Total imports	***	***	***	***	***
Apparent U.S. consumption	1,383,895	1,280,657	1,252,682	648,085	584,922

[1] Includes company transfers and open-market sales.
[2] The product of Sun Moon Star has been excluded from the data presented for Taiwan and is included in "all other sources."

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Systems.--U.S. consumption of small business telephone systems[74] cannot be calculated from available questionnaire data because importers import, ship, and report the products mostly in the form of subassemblies rather than systems. However, most new systems have only one unit of control or switching equipment (although these subassemblies are also sold to expand the capacity of an existing system or replace a worn or defective unit). Thus, apparent consumption of control and switching equipment in terms of quantity somewhat overstates the number of systems consumed, but trends in consumption will be similar.

Control and switching equipment.--As shown in table 3, apparent U.S. consumption of control and switching equipment in terms of quantity decreased during the period of investigation, declining by 8.4 percent from 1986 to 1987, then rising by 3.8 percent from 1987 to 1988, and falling again, by 25.9 percent, from January-June 1988 to January-June 1989. In terms of value, U.S. consumption of control and switching equipment declined most steeply, by 16.3 percent, from 1986 to 1987, followed by a 7.7-percent increase from 1987 to 1988, and, again, a decrease of 14.4 percent from January-June 1988 to the corresponding period of 1989.

[74] "Systems" data presented in this report include only those subassemblies sold as part of a system and, unless otherwise specified, subassembly data include products sold as part of a system or separately.

Table 3
Control and switching equipment for small business telephone systems: U.S. shipments[1] by producers and importers[2] and apparent U.S. consumption, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June-- 1988	1989
	Quantity (1,000 units)				
U.S. producers' U.S. shipments....	***	***	***	***	***
U.S. shipments of imports from--					
Japan.....	183	125	128	62	61
Korea.....	***	***	***	***	***
Taiwan.....	***	***	***	***	***
Subtotal.....	258	271	266	150	95
All other sources.....	***	***	***	***	***
Total imports.....	***	***	***	***	***
Apparent U.S. consumption.....	520	476	494	253	188
	Value (1,000 dollars)				
U.S. producers' U.S. shipments....	***	***	***	***	***
U.S. shipments of imports from--					
Japan.....	81,723	60,885	60,022	28,507	30,689
Korea.....	***	***	***	***	***
Taiwan.....	***	***	***	***	***
Subtotal.....	110,209	101,608	85,402	43,270	38,397
All other sources.....	***	***	***	***	***
Total imports.....	***	***	***	***	***
Apparent U.S. consumption.....	419,110	350,678	377,817	173,111	148,265

[1] U.S. producers' company transfers and open-market sales.
[2] The product of Sun Moon Star has been excluded from the data presented for Taiwan and is included in "all other sources."

Note: Because of rounding, quantity figures may not add to the totals shown.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Power supplies and other circuit cards and modules.--Both U.S. producers and importers had difficulties reporting data for power supplies and other circuit cards and modules for small business telephone systems because these products are usually incorporated into a control unit or telephone set. Producers generally reported the total quantities of these subassemblies but were unable to provide the value of shipments of such products sold as an integral part of another subassembly. Importers were often unable to provide either quantity or value data. Therefore, apparent consumption, presented in the following tabulation in terms of quantity, is greatly understated because it excludes a large portion of the imported products:

Apparent U.S. consumption	1986	1987	1988	January-June-- 1988	1989
Power supplies:					
In 1,000 units.....	284	209	201	100	84
Percentage change[1].....	(2)	(26.3)	(4.1)	(2)	(16.3)
Other circuit cards and modules:					
In 1,000 units.....	3,582	3,243	3,852	2,014	1,583
Percentage change[1].....	(2)	(9.4)	18.8	(2)	(21.4)

[1] Calculated from the unrounded data.
[2] Not available.

Telephones.--Telephone sets and consoles for small business telephone systems experienced stronger demand during 1986-88 than did other subassemblies, but fell similarly in the first half of 1989, as shown in table 4. From 1986 to 1987, consumption rose by 5.5 percent in terms of volume but by only 0.1 percent in terms of value. In 1988, apparent consumption of telephones rose based on quantity and value data, by 2.2 percent and 2.0 percent, respectively. From January-June 1988 to January-June 1989, apparent consumption fell by 18.5 percent in volume and by 14.6 percent in value.

Table 4
Telephones for small business telephone systems: U.S. shipments[1] by producers and importers[2] and apparent U.S. consumption, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June-- 1988	1989
	Quantity (1,000 units)				
U.S. producers' U.S. shipments....	1,757	1,772	1,783	852	774
U.S. shipments of imports from--					
Japan.....	1,372	1,070	1,035	538	506
Korea.....	***	1,170	1,268	729	410
Taiwan.....	***	164	170	77	71
Subtotal.....	2,245	2,405	2,473	1,344	987
All other sources.....	70	118	134	57	75
Total imports.....	2,315	2,522	2,607	1,401	1,061
Apparent U.S. consumption.....	4,072	4,295	4,390	2,253	1,836
	Value (1,000 dollars)				
U.S. producers' U.S. shipments....	***	***	***	***	***
U.S. shipments of imports from--					
Japan.....	133,911	106,333	99,275	53,053	48,056
Korea.....	***	***	105,422	58,992	***
Taiwan.....	***	***	10,468	4,806	***
Subtotal.....	208,015	211,737	215,165	116,851	88,611
All other sources.....	***	***	***	***	***
Total imports.....	***	***	***	***	***
Apparent U.S. consumption.....	612,519	612,877	625,368	319,633	273,016

[1] U.S. producers' company transfers and open-market sales.
[2] The product of Sun Moon Star has been excluded from the data presented for Taiwan and is included in "all other sources."

Note: Because of rounding, quantity figures may not add to the totals shown.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Consideration of Material Injury to an Industry in the United States

The information presented in this section of the report was obtained from responses to questionnaires of the U.S. International Trade Commission. Thirteen producers, accounting for an estimated 90 percent of 1988 U.S. shipments of the subject products, provided usable data; however, no firm was able to answer all parts of the questionnaire and several provided only very limited data. Where the data presented exclude AT&T, reference is made.

Capacity, production, inventories, shipments, employment, and selected financial data were requested separately for systems and each of the four subassemblies. However, the data are presented in this report on the basis that is most meaningful, as explained below: capacity, production, and inventories are on a subassembly basis; financial data mostly present

operations on "systems and subassemblies;" and shipments and employment are presented on several bases.

The period for which data are presented is January 1986-June 1989. Data for 1985 and trends from 1985 to 1986 were presented in the preliminary report.[75]

U.S. producers' capacity, production, and capacity utilization

AT&T reported capacity on the basis of a * * *-hour work week, operating * * * weeks per year.[76] Comdial * * *.[77]

Systems.--Most U.S. producers * * * did not report either capacity or production of systems. Capacity to produce systems is determined by capacity to produce subassemblies of systems. "Production" of systems, as reported by U.S. producers, may be better termed "configuration and/or installation" of a system, and corresponds more nearly to shipments. More meaningful are capacity and production data for subassemblies, presented in table 5. These data suggest that capacity utilization remained relatively low throughout the period of investigation for all subassemblies.

Control and switching equipment.--Reported U.S. average-of-period capacity to produce control and switching equipment for small business telephone systems declined steadily throughout the period of investigation, by 4.8 percent from 1986 to 1987, by * * * percent from 1987 to 1988, and by another 4.8 percent from January-June 1988 to January-June 1989. Production increased by 10.4 percent from 1986 to 1987, then fell by 10.7 percent from 1987 to 1988, and fell again, by * * * percent, from January-June 1988 to January-June 1989. Capacity utilization rose during 1986-88 and declined in the first half of 1989.

Power supplies.--Reported average-of-period capacity to produce power supplies for small business telephone systems increased by * * * percent from 1986 to 1987 and then rose only marginally during the remainder of the period of investigation. Production, however, fell increasingly strongly, declining by * * * percent from 1986 to 1987, by * * * percent from 1987 to 1988, and by * * * percent from January-June 1988 to the corresponding period of 1989. Capacity utilization, therefore, decreased throughout the period of investigation.

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[75] Counsel for AT&T had requested that the Commission obtain 1985 data in the final investigations.

[76] At verification, AT&T officials explained that, during the period of investigation, most production lines operated * * *.

* * * * * * *

[77] At the preliminary conference, Comdial's chief executive officer reported current operations of "generally" one shift, 5 days a week, and estimated that production "easily" could be doubled with no expansion of physical plant. Transcript of the preliminary conference, p. 92.

Table 5
Subassemblies of small business telephone systems: U.S. capacity, production, and capacity utilization, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June-- 1988	January-June-- 1989
Control and switching equipment:					
Capacity (1,000 units)	***	***	491	220	210
Production (1,000 units)	***	***	***	***	80
Capacity utilization (percent)[1]	***	***	***	***	37.6
Power supplies:					
Capacity (1,000 units)	***	***	***	***	***
Production (1,000 units)	***	***	***	***	***
Capacity utilization (percent)[1]	***	***	***	***	***
Other circuit cards and modules:					
Capacity (1,000 units)	***	***	***	***	***
Production (1,000 units)	***	***	***	***	***
Capacity utilization (percent)[1]	***	***	***	***	***
Telephones:					
Capacity (1,000 units)	***	3,670	3,195	1,408	1,400
Production (1,000 units)	1,504	1,878	1,881	927	***
Capacity utilization (percent)[1]	***	50.1	58.6	65.4	***

[1] Calculated from the unrounded figures and computed from data of firms providing both capacity and production.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Other circuit cards and modules.--Reported average-of-period capacity to produce other circuit cards and modules fell steadily, by * * * percent from 1986 to 1987, by * * * percent from 1987 to 1988, and by * * * percent from January-June 1988 to the corresponding period of 1989. Production increased by * * * percent from 1986 to 1987 but declined by * * * percent in 1988. Comparing the partial year periods, production fell by * * * percent. Capacity utilization increased sharply from 1986 to 1987, and improved further in 1988, but dropped in January-June 1989 to near the 1987 level.

Telephones.--Capacity to produce telephones for small business telephone systems fell by * * * percent from 1986 to 1987 and decreased by another 12.9 percent from 1987 to 1988. Production, in contrast, increased by 24.8 percent from 1986 to 1987, and rose again, marginally, from 1987 to 1988. Capacity utilization, therefore, nearly doubled during 1986-88. However, from January-June 1988 to January-June 1989, capacity declined marginally whereas production fell by * * * percent and capacity utilization likewise fell.

U.S. producers' shipments

This discussion is presented in terms of U.S. shipments. Company transfers of systems are * * * and, * * *, transfers of subassemblies constitute less than * * * percent of U.S. shipments. Also, export shipments are * * *. Therefore, trends in domestic shipments and total shipments are similar to those for U.S. shipments.

Systems and subassemblies.--The total value of U.S. producers' U.S. shipments of systems, and subassemblies sold separately from systems and other subassemblies, i.e., all subject products, declined steadily during the period of investigation, as presented in the following tabulation:

* * * * * * *

These data are presented graphically, by product, in figure 3. Comparable data on the basis of quantity are not meaningful.

Systems.--As shown in table 6, reported U.S. shipments of systems fell by * * * percent in volume from 1986 to 1987, then rose by * * * percent in 1988. Such shipments fell by * * * percent during the partial-year periods. The value of U.S. shipments fell steadily during the period of investigation, by * * * percent from 1986 to 1987, by * * * percent from 1987 to 1988, and by * * * percent from the first half of 1988 to the first half of 1989. Unit values declined after 1987 but rose slightly overall.

Table 6
Small business telephone systems: U.S. producers' company transfers, domestic shipments, U.S. shipments, export shipments, and total shipments, 1986-88, January-June 1988, and January-June 1989

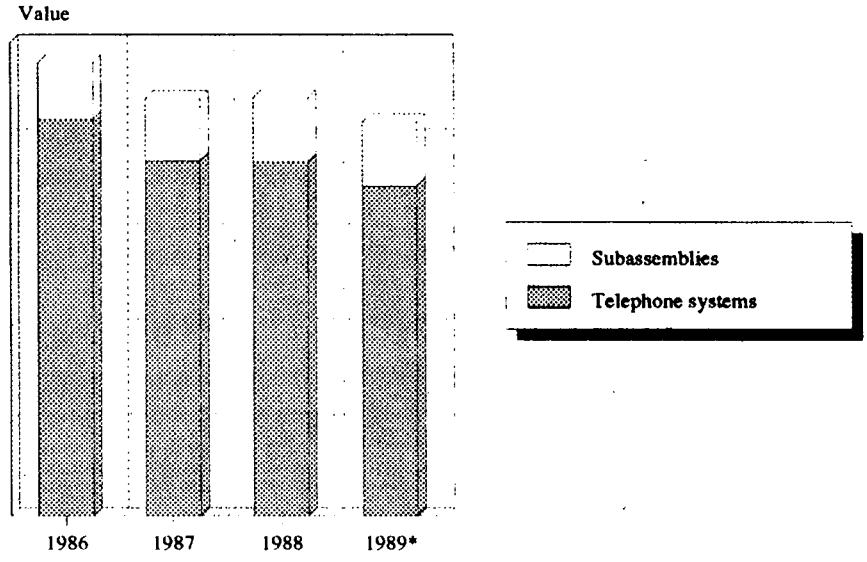
Item	1986	1987	1988	January-June-- 1988	1989
*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Control and switching equipment.--U.S. shipments of control units and switching equipment for small business telephone systems fell by 23.0 percent from 1986 to 1987, then increased by 11.8 percent from 1987 to 1988, but declined again, by 9.4 percent, from January-June 1988 to the corresponding period of 1989 (table 7). The value of such shipments followed a similar pattern, falling by 19.9 percent from 1986 to 1987, increasing by 17.7 percent from 1987 to 1988, and falling by 15.2 percent in the partial-year periods. Unit values declined in the partial-year periods but rose marginally overall, as shown in the following tabulation:

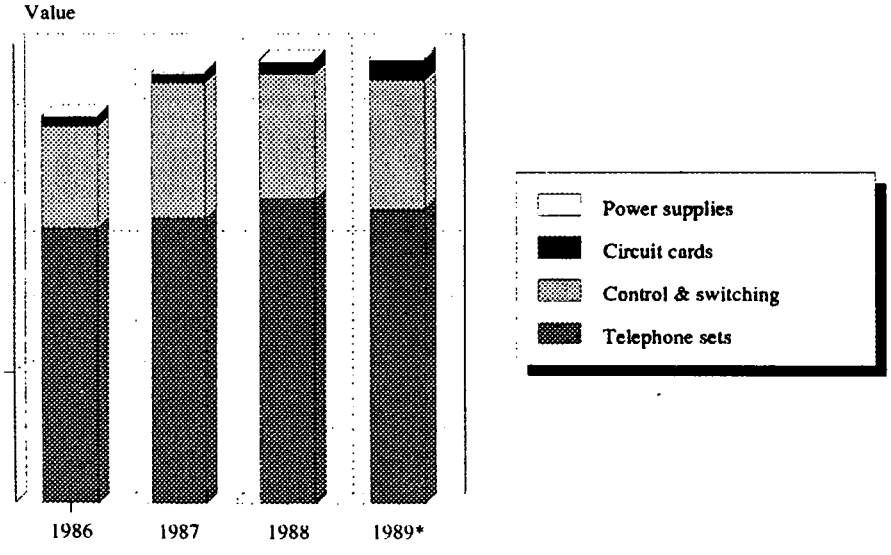
* * * * * * *

Figure 3a.-- U.S. shipments of systems and subassemblies sold separately from systems, 1986-89



* 1989 figure annualized

Figure 3b.-- U.S. shipments of subassemblies sold separately from systems, 1986-89



* 1989 figure annualized
Source: Table 6 and tabulations in "U.S. producers' shipments" section of report

Table 7
Control and switching equipment for small business telephone systems: U.S. producers' company transfers, domestic shipments, U.S. shipments, export shipments, and total shipments, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June-- 1988	1989
	Quantity (1,000 units)				
Company transfers	***	***	***	***	***
Domestic shipments	225	187	186	92	84
U.S. shipments	***	***	***	***	***
Export shipments	***	***	***	***	***
Total shipments	***	***	***	***	***
	Value (1,000 dollars)				
Company transfers	***	***	***	***	***
Domestic shipments	***	***	***	***	***
U.S. shipments	***	***	***	***	***
Export shipments	***	***	***	***	***
Total shipments	***	***	***	***	***

Note: Because of rounding, quantity figures may not add to the totals shown.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Producers were asked to report separately shipments of subassemblies that were sold other than as part of a system. U.S. shipments of such control and switching equipment are presented in the following tabulation:

	1986	1987	1988	January-June-- 1988	1989
Quantity (1,000 units)	68	57	54	25	24
Value (1,000 dollars)	30,676	40,909	37,887	19,288	19,612
Unit value (per unit)	$454	$714	$703	$775	$828

Power supplies.--The volume of reported U.S. shipments of power supplies decreased throughout the period of investigation, falling by 31.3 percent from 1986 to 1987, by 4.0 percent from 1987 to 1988, and by 5.3 percent from January-June 1988 to January-June 1989 (table 8). Available value and unit value data, which are based on only a small portion of shipments by producers, are presented in the following tabulation:

* * * * * * *

Table 8
Power supplies for small business telephone systems: U.S. producers' company transfers, domestic shipments, U.S. shipments, export shipments, and total shipments, 1986-88, January-June 1988, and January-June 1989

(In thousands of units)

Item	1986	1987	1988	January-June-- 1988	1989
Company transfers	***	***	***	***	***
Domestic shipments	***	***	***	***	***
U.S. shipments	228	156	150	69	65
Export shipments	***	***	***	***	***
Total shipments	***	***	***	***	***

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Data reported for U.S. shipments of power supplies sold separately from systems and control and switching equipment are presented in the following tabulation:

* * * * * * *

Producers reported values for only a portion of the quantities shipped.

Other circuit cards and modules.--Reported U.S. shipments of other circuit cards and modules decreased overall during the period of investigation, falling by * * * percent from 1986 to 1987, increasing by * * * percent from 1987 to 1988, and decreasing again in the partial periods, by * * * percent (table 9). Available value and unit value data, which represent only a small part of actual shipments, are presented in the following tabulation:

* * * * * * *

Table 9
Other circuit cards and modules for small business telephone systems: U.S. producers' company transfers, domestic shipments, U.S. shipments, export shipments, and total shipments, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June-- 1988	1989
*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

U.S. shipments of other circuit cards and modules shipped separately from systems and other subassemblies are presented in the following tabulation:

	1986	1987	1988	January-June-- 1988	January-June-- 1989
Quantity (1,000 units).....	65	93	91	43	51
Value (1,000 dollars).....	***	***	***	***	***
Unit value (per unit).....	***	***	***	***	***

Again, producers reported values for only a portion of the quantities shipped.

Telephones.--Reported U.S. shipments of telephones for small business telephone systems increased marginally in volume in both 1987 and 1988, by 0.9 percent and 0.6 percent, respectively. Such shipments decreased by 9.1 percent during January-June 1989 compared with the corresponding period of the previous year. The value of shipments, however, fell from 1986 to 1987 by 2.2 percent before increasing, by 1.0 percent, in 1988. Shipments decreased again in the partial year periods, by 12.1 percent. These data are presented in table 10. Unit values declined steadily.

Table 10
Telephones for small business telephone systems: U.S. producers' company transfers, domestic shipments, U.S. shipments, export shipments, and total shipments, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June-- 1988	January-June-- 1989
	Quantity (1,000 units)				
Company transfers.....	***	214	146	***	***
Domestic shipments.....	***	1,558	1,636	***	***
U.S. shipments.....	1,757	1,772	1,783	852	774
Export shipments.....	***	***	***	***	***
Total shipments.....	***	***	***	***	***
	Value (1,000 dollars)				
Company transfers.....	***	***	***	***	***
Domestic shipments.....	***	***	***	***	***
U.S. shipments.....	***	***	***	***	***
Export shipments.....	***	***	***	***	***
Total shipments.....	***	***	***	***	***
	Unit value[1]				
Company transfers.....	***	***	***	***	***
Domestic shipments.....	***	***	***	***	***
U.S. shipments.....	$227	$219	$219	$229	$222
Export shipments.....	***	***	***	***	***
Total shipments.....	***	***	***	***	***

[1] Based on companies providing both quantity and value data.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Producers were also asked to report shipments of telephones that were sold other than as part of a system. U.S. shipments of such telephones are presented in the following tabulation:

				January-June--	
	1986	1987	1988	1988	1989
Quantity (1,000 units)....	520	628	647	318	288
Value (1,000 dollars).....	84,169	87,182	92,893	46,936	44,812
Unit value (per unit).....	$162	$139	$144	$147	$156

The installed base

The "installed base" includes customers that rent, lease, or have purchased systems, and represents an opportunity for the suppliers of those systems to provide customer support with products and services. NATA data indicate that the installed base has expanded slowly, as shown in the following tabulation (in thousands of stations/lines):[78]

Installed base	1985	1986	1987	1988[1]	1989[1]
Key and hybrid systems....	28,186	28,874	29,105	29,325	29,566
PBXs.....	5,794	5,851	6,077	6,085	5,985
Centrex[2].....	1,032	1,126	1,227	1,454	1,694

[1] Estimated
[2] Key systems are also used with Centrex.

AT&T estimates that its share of the installed base has declined steadily since 1985.[79] Dataquest estimates indicate that AT&T's share of the installed key system base * * * its share of subject system sales in 1988. According to the same source, * * * had the next-largest installed base among U.S. producers (* * * percent); its share of the under-100 market station/line shipments was * * * percent in 1988.[80] Petitioners contend that any reduction in the installed base by LTFV imports causes later injury in the loss of "aftermarket" sales.[81]

The aftermarket.--The aftermarket consists of providing renters, lessees, and owners of systems replacement units (generally to replace worn units), expansion units or "add-ons" (typically additional telephone sets), and other nonsubject products and services. Because virtually all the components of a system are proprietary to the manufacturer, the customer has little choice but to obtain parts manufactured by the original supplier. Suppliers estimated that aftermarket sales accounted for 10-25 percent of the value of product sales. The parties and other industry sources generally agree that aftermarket products tend to carry a higher unit value and be more profitable for the supplier. Also, such "moves, adds, and changes" (MACs) are labor-intensive and therefore enhance service revenues. Suppliers may be willing to win market share with price cuts on new systems, knowing that aftermarket sales will be

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[78] 1988 Telecommunications Market Review, tables 38 and 43.
[79] (Prehearing) Statement of John A. Blanchard, p. 2.
[80] AT&T's Responses to Questions, p. 13 and attachment, and Statement by Alan R. Theesfeld, part 1 of attachment.
[81] Prehearing Brief of AT&T, pp. 47-51.

profitable.[82] The aftermarket will tend to be stronger in the lag period of the product replacement cycle as end users expand rather than replace systems.

The secondary market.--One option available to the buyer is to purchase replacement and expansion units in the secondary market. These dealers or "remarketers" specialize in buying used systems, cannibalizing the subassemblies, and selling refurbished product. Also available in the secondary market are new, but "manufacturer discontinued," models and other almost-new products (often from a company that has gone out of business[83]). Estimates by parties and industry sources of the share of the small business telephone system market supplied by the secondary market average 8 percent, in terms of lines shipped, for 1988, as shown in figure 4.

Respondents contend that the growing secondary market is an alternative cause of injury to the domestic industry.[84] One analysis notes that over 500 vendors supply refurbished product, most of which is consumed within the under-100-line market, and suggests that the availability of secondary expansion units may have delayed new key system purchases.[85] However, industry sources generally agree that the secondary market concentrates in PBXs and offers mostly parts rather than complete systems.[86] The National Association of Telecommunications Dealers (NATD), a trade association representing secondary market dealers and in support of the petition, takes the position that the small volume of refurbished product does not substantially affect the market for new products.[87] * * * U.S. remarketer estimated that only 20-30 percent of parts are for key systems.[88] Another national vendor of refurbished product reported that only 5 percent of its sales are for complete systems.[89]

Petitioner AT&T argues that, rather than injure U.S. producers, the secondary market actually increases the value to the customer of an AT&T system because other suppliers do not offer comparable support for refurbished products.[90]

* * * * * * *[91]

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[82] "Centrex II: The Telco's Revenge," Telephony (July 17, 1989), p. 30 (at app. H of the letter to Kenneth R. Mason from counsel for the Japanese respondents dated Sept. 26, 1989).

[83] * * *.

[84] See letters to Kenneth R. Mason from William E. Perry dated Oct. 3 and Oct. 20, 1989.

[85] The Eastern Management study, pp. 39 and 41.

[86] "Five More Years of Used PBXs" Teleconnect, January 1989, pp. 88-119; and (Prehearing) Brief on Behalf of Samsung and Inter-Tel, attachment D. One study widely cited by respondents, The Secondary Market for PBXs: The Emerging Crisis (Teleos Resources, Inc. and Paul F. Kirvan & Associates, November 1988), does not address key or hybrid systems, which constitute the majority of the subject systems.

[87] Letter from George Taylor, President of NATD, to Kenneth R. Mason, dated Oct. 16, 1989.

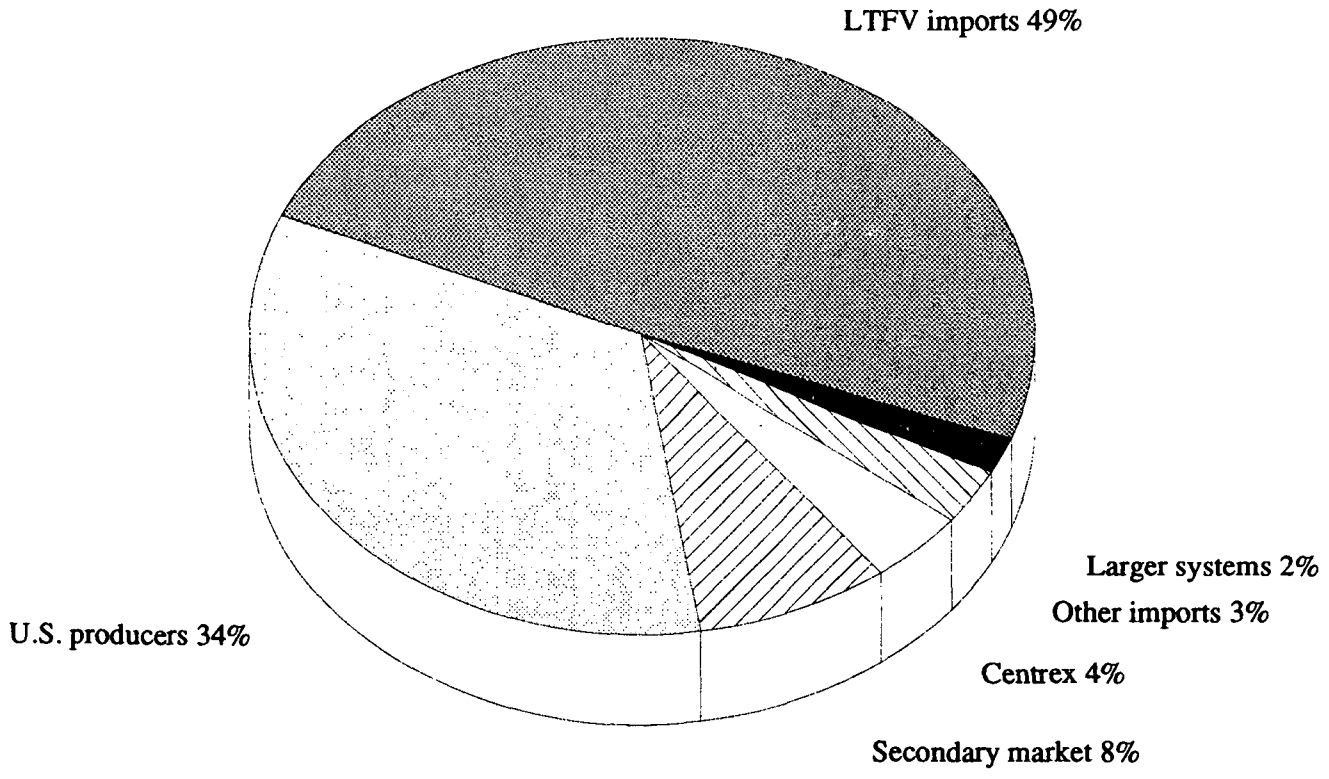
[88] * * *.

[89] * * *.

[90] Prehearing Brief of AT&T, pp. 92-95.

[91] This study is exhibit 1 of the (prehearing) Statement of John A. Blanchard.

Figure 4.-- The U.S. market for small business telephone systems: Market share by segment (in percent), 1988



Source: The Eastern Management Report, p. 41; Table 33; and p. A-12.

Although * * *, a recent study observed continued strong growth in 1988, and forecast expansion well into the 1990s, with increased support from PBX vendors.[92] The currently observed inverse relationship of refurbished sales to new systems sales, during the course of the replacement cycle, is likely to weaken as the secondary market grows.

The embedded base[93]

Petitioner AT&T rents and leases small business telephone systems.[94] Many of these customers, referred to as the company's "embedded base," began renting prior to the period of investigation. Counsel for AT&T asserts that an accelerated pace of erosion of the embedded base and "lost" new rental customers are both indicative of injury to the U.S. industry by the LTFV imports. The embedded base is AT&T's largest source of new sales customers.[95] Respondents contend that the petitioner has failed to prove such accelerated erosion.[96]

U.S. producers were asked to report their rentals of the subject products, as well as to whom any terminated rentals were lost (if known). AT&T provided such data, which are presented in table 11.[97]

Table 11
Small business telephone systems: AT&T's average number of rentals and revenues provided, number of rentals terminated, and number of former renters who bought systems produced by U.S. producers, Japanese producers, Korean producers, Taiwan producers,[1] and others, 1986-88, January-March 1988, and January-March 1989

Item	1986	1987	1988	January-March-- 1988	1989
*	*	*	*	*	*	*

[1] The product of Sun Moon Star was not separately identified and may be included.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

[92] The Eastern Management study, pp. 40-41 and 89.
[93] See also the Prehearing Brief of AT&T, pp. 44-47.
[94] "Rentals," as reported by AT&T, are generally on a month-to-month basis, whereas "leases" incur a longer, even multiyear, contractual obligation. Month-to-month rentals account for * * * of the embedded base (* * * percent in 1986, * * * percent in 1987, and * * * percent in 1988). Rental/lease (rental) data were requested, and are presented, in the aggregate. This discussion excludes "finance leases," which are treated by GBS as sales. Prehearing Brief of AT&T, fn. 81.
[95] (Prehearing) Statement of John A. Blanchard, p. 13.
[96] Posthearing Brief of Fujitsu, p. 6.
[97] * * *.

* * * * * * *[98]

New rentals.[99]--

* * * * * * *[100]

Refurbished product.--U.S. producers and interconnects were asked to report U.S. shipments of refurbished product. AT&T reported * * * (table 12). These data exclude * * * and minimal shipments by interconnects.

* * * * * * *[101]

Table 12
Refurbished product: AT&T's U.S. shipments, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June-- 1988	1989
*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Nonsubject products and services

The end user of an installed small business telephone system generally acquires, in addition to the subject products, a variety of nonsubject products and services offered by the vendor. U.S. producers and interconnects were asked to report the value of all products and services sold as part of a purchased, installed, system. These data, which exclude rentals and include aftermarket activity, were provided by AT&T and 25 interconnects and are presented in table 13.

[98] * * *.
[99] "New rentals" refers specifically to products shipped to new rental customers, although these also tend to be new, rather than refurbished, products.
[100] * * *.
[101] * * *.

Table 13
Installed small business telephone systems: Share of total cost accounted for by various products and services, 1986-88, January-June 1988, and January-June 1989

(As a percent of the total)

Item	1986	1987	1988	January-June-- 1988	1989
AT&T:					
Products:					
New subassemblies	***	***	***	***	***
Refurbished product	***	***	***	***	***
Other products[1]	***	***	***	***	***
All products	***	***	***	***	***
Services:					
Installation	***	***	***	***	***
Maintenance contracts	***	***	***	***	***
Other services[2]	***	***	***	***	***
All services	***	***	***	***	***
Total products and services	100.0	100.0	100.0	100.0	100.0
Interconnects:					
Products:					
New subassemblies	53.0	49.7	43.9	44.1	41.5
Refurbished product	.4	.5	.6	.6	.6
Other products[1]	***	***	***	***	***
All products	***	***	***	***	***
Services:					
Installation	16.0	14.6	13.8	13.9	13.4
Maintenance contracts	5.0	6.5	9.3	9.3	11.6
Other services[2]	***	***	***	***	***
All services	***	***	***	***	***
Total products and services	100.0	100.0	100.0	100.0	100.0

[1] Includes nonsubject telephone sets, wire, and other installation parts.
[2] Includes wire installation and other maintenance.

Note: Because of rounding, figures may not add to the totals shown.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Centrex

Respondents contend that rapidly expanding use of Centrex is displacing sales of small business telephone systems.[102] The petitioners maintain that Centrex is a minor competitive factor, marketed primarily to larger business customers, and that its recent success in the under-100-line market actually has bolstered otherwise flagging key system sales.[103]

[102] Prehearing Brief on Behalf of the Japanese Respondents, pp. 82-92.
[103] Prehearing Brief of AT&T, pp. 88-92 and Prehearing Brief of Comdial Corp., p. 5.

With deregulation, the RBOCs began marketing Centrex as an alternative to PBXs.[104] NATA estimates that, in 1988, Centrex will provide service to 8.9 million telephones, of which 13.9 percent are within the under-100-line market, a share that has not changed appreciably since 1984.[105] Other published data document that Centrex growth has averaged 20 percent a year, concentrated somewhat more in the 40-100-line market, and accounted for 4 percent of lines shipped in 1988 (figure 4).[106]

Centrex requires only a single-line telephone set as its features can be accessed through dial codes.[107] However, a Centrex customer may prefer to use a key system behind Centrex with dedicated feature buttons.[108] Most suppliers reported that they offer Centrex-compatible key systems and some key systems are designed exclusively for use behind Centrex. The mean of the parties' widely varying estimates of the percentage of Centrex users that also use customer premises equipment (CPE) is near 50 percent. Some such CPE is the nonproprietary key equipment that is not subject to investigation.[109] However, the trade press relates that Centrex CPE is "the hottest market niche,"[110] and that "makers of telecommunications gear are beginning to look again to Centrex as a source of buyers for customer premises equipment."[111] Whereas Centrex competes with PBXs, it is more appropriately considered a complement to key systems.[112] Moreover, Comdial noted in its prehearing brief that key systems vendors benefit from Centrex because it offers the opportunity to sell key systems behind Centrex whereas the customer would otherwise purchase only a PBX.

It appears from available data that PBX suppliers are losing some sales to Centrex, even in the small business market in which a minority of PBXs are sold. However, a portion of these customers then buy key systems, many of which are imported, for use behind Centrex.[113]

U.S. producers' inventories

End-of-period inventories of subassemblies of small business telephone systems increased sharply from 1986 to 1987. Inventories of control and

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[104] For the relative advantages and disadvantages of Centrex for the small business customer see attachment H of a letter to Kenneth R. Mason from counsel for the Japanese respondents, dated Sept. 26, 1989.
[105] 1988 Telecommunications Market Review, NATA, table 38.
[106] The Eastern Management study, pp. 41 and 46.
[107] For example, to pick up a call, forward a call, or cancel call forwarding on the Commission's single-line AT&T telephones, one dials, respectively, 174, 172, and 173.
[108] To pick up a call, forward a call, or cancel call forwarding on the Commission's Meridian telephones, one pushes the call pickup button, the call forward button, and the call forward button (second time).
[109] Again, at the Commission, the telephone sets and consoles in most offices are older-style standard key telephone equipment.
[110] "Changing Sides, Places, Names, and Faces," TE&M (May 1, 1989), p. 51 (attachment C to the Samsung prehearing brief).
[111] "Here Comes Centrex--Again," Communications Consultant (January 1989), p. 42 (attachment C to the Samsung prehearing brief).
[112] Questionnaire responses and Prehearing Brief on Behalf of Japanese Respondents, p. 90 (quoting the NATA Sales Agency Report at pp. 30-31).
[113] Questionnaire responses by the RBOCs indicate that they purchase (and sell) primarily imported key systems.

switching equipment, power supplies, and other circuit cards and modules decreased after 1987 but inventories of telephones peaked in 1988. As a percent of total shipments during each period, ending inventories of telephones increased steadily during 1986-88 and then declined in the partial-year periods. The inventory-to-shipments ratios of other subassemblies peaked in 1987 and declined thereafter. End-of-period inventories and inventories-to-shipments ratios are shown in the following tabulation:

* * * * * * *

U.S. purchases and direct imports by U.S. producers

U.S. purchases.--

* * * * * * *[114]

Direct imports.--

* * * * * * *[115]

Foreign-owned U.S. producers reported large quantities of imports from foreign parents or affiliates; and other U.S.-owned producers reported * * *. Generally, producers accounting for the vast majority of production purchased and imported * * * subject product, and importers from Japan, Korea, and Taiwan accounted for a * * * percentage of U.S. production. Reported 1988 subject imports from Japan, Korea, and Taiwan by U.S. producers are presented in the following tabulation, by company and product (in thousands of dollars):

* * * * * * *

In addition to the above, * * * imported product from * * * in * * * and * * *. Also, * * * imported from * * * during the period of investigation and * * * imported from * * *.

Employment

Eight producers, accounting for more than 95 percent of reported 1988 U.S. shipments, supplied data on employment in the production of small business telephone systems and subassemblies. * * *; therefore, data reported for systems are presented as employment in the production of systems and subassemblies (table 14). These data indicate that the number of workers, hours worked by such workers, and total compensation paid to them increased from 1986 to 1987 but fell during the remainder of the period of investigation. Hourly compensation rose slightly and steadily.

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[114] * * *.

[115] * * *.

Table 14
Small business telephone systems and subassemblies: Average number of production and related workers, hours worked, total compensation paid, and hourly total compensation, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June-- 1988	1989
Production and related workers:					
Number	2,953	***	***	***	***
Percentage change	(1)	***	***	***	***
Hours worked:					
Number (1,000)	6,276	***	***	***	***
Percentage change	(1)	***	***	***	***
Total compensation paid:					
Value ($1,000)	91,621	***	***	***	***
Percentage change	(1)	***	***	***	***
Hourly total compensation:[2]					
Value (per hour)	$14.60	***	***	***	***
Percentage change	(1)	***	***	***	***

[1] Not available.
[2] Based on companies providing data on both hours worked and total compensation paid.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Employment data reported on a subassembly basis are presented in table 15. These data indicate that employment in the production of control and switching equipment and power supplies decreased significantly during the period of investigation, whereas employment in the production of circuit cards and modules and telephones declined marginally and rose marginally, respectively. Productivity increased during 1986-88 and declined in the partial-year periods. Unit labor costs generally fell from 1986 to 1988 and increased during January-June 1989 in comparison with the corresponding period of 1988.

Table 15
Subassemblies of small business telephone systems:[1] Average number of production and related workers, hours worked, productivity, total compensation paid, and unit labor costs, 1986-88, January-June 1988, and January-June 1989

Product and period	Number of workers	Hours worked	Productivity	Total compensation paid	Unit labor costs
*	*	*	*	*	*	*

[1] Power supplies and other circuit cards and modules are incorporated into other subassemblies; therefore, employment data will doublecount if added.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

The majority of production and related workers producing subassemblies in the United States are unionized. * * *. Other producers reported no union affiliation on the part of the subject employees.

Six U.S. producers reported the following permanent reductions in production and related workers during the period of investigation, attributing such reductions to declining sales of the subject products:

Company	1986	1987	1988	January-June-- 1988	January-June-- 1989
***	***	***	***	***	***
***	***	***	***	***	***
***	***	***	***	***	***
***	***	***	***	***	***
***	***	***	***	***	***
***	***	***	***	***	***
Total	***	349	***	***	***

Financial experience of U.S. producers

Four producers, accounting for over 95 percent of reported 1988 U.S. shipments of small business telephone systems and subassemblies, provided usable income-and-loss data on their system and subassembly operations as well as on their establishments within which such products are produced.

* * * * * * *

As the result of verification, AT&T provided certain revised financial data, including * * *. These revised data are presented in this report.

Overall establishment operations.--For the period 1986-88, small business telephone systems and subassemblies accounted for * * * percent of total establishment operations (presented in table 16) on the basis of net sales, with AT&T's GBS establishment data representing * * * percent of the total reported during the period. Consequently, statements regarding increases and decreases for financial amounts in overall establishment operations are essentially applicable to systems and subassemblies, and, * * *.

Table 16
Income-and-loss experience of U.S. producers[1] on the overall operations of their establishments within which small business telephone systems and subassemblies are produced, accounting years 1986-88 and interim periods ended June 30, 1988, and June 30, 1989

Item	1986	1987	1988	January-June-- 1988	1989
*	*	*	*	*	*	*

[1] * * *.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Overall establishment net sales showed a steady and significant decrease from 1986 to 1988 and from interim period 1988 to interim period 1989.

* * * * * * *

As a result, there was a steady decline in operating margins * * *.

Selected overall establishment financial data for each of the four U.S. producers are presented in the following tabulation (in thousands of dollars, except as noted):

* * * * * * *

System and subassembly operations.--Income-and-loss data for small business telephone systems and subassemblies are presented in table 17. Financial data include, in addition to sales and rentals of systems and subassemblies, * * *. The industry as represented by the questionnaire responses is one that can be characterized as highly competitive and experiencing rapid technological changes. * * *.

Table 17
Income-and-loss experience of U.S. producers[1] on their operations producing small business telephone systems and subassemblies, accounting years 1986-88 and interim periods ended June 30, 1988, and June 30, 1989

Item	1986	1987	1988	January-June-- 1988	1989
*	*	*	*	*	*	*

[1] * * *.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

* * * * * * *

Net sales, including rental revenues, of systems and subassemblies showed a steady and significant decrease during 1986-88 and from interim 1988 to interim 1989.

* * * * * * *

Decreases in operating margins * * *.

* * * * * * *

Selected financial data on systems and subassemblies for each of the four U.S. producers are presented in the following tabulation (in thousands of dollars, except as noted):

* * * * * * *

The producers were asked to provide condensed income-and-loss data for control and switching equipment, power supplies, other circuit cards and modules, and telephone sets and consoles. Almost all of the producers * * * indicated that they were unable to provide such information accurately due to the nature of their accounting systems.

System and subassembly operations, excluding rental operations.--Income-and-loss data only on systems and subassemblies sold are presented in table 18. Net sales for these operations, * * *, declined * * * during 1986-88 and in interim 1989 when compared to the same period in 1988.

* * * * * * *

Table 18
Income-and-loss experience, excluding rental operations, of U.S. producers[1] on their operations producing small business telephone systems and subassemblies, accounting years 1986-88 and interim periods ended June 30, 1988, and June 30, 1989

Item	1986	1987	1988	January-June-- 1988	1989
*	*	*	*	*	*

[1] * * * *.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

* * *. AT&T indicated in the Management's Discussion and Analysis section of its 1988 Annual Report (total corporation), page 23, "...In both years (1988 and 1986), increases in selling, general and administrative expenses were primarily the result of our efforts to increase revenues...."

* * * * * * *

Telephone system rental operations.--Income-and-loss data for small business telephone system rental operations are presented in table 19.

* * * * * * *

Rental revenues versus revenues on sales of telephone systems is presented in figure 5.

Table 19
Income-and-loss experience of AT&T on its rental operations of small business telephone systems and subassemblies, accounting years 1986-88 and interim periods ended June 30, 1988, and June 30, 1989

Item	1986	1987	1988	January-June-- 1988	1989
*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Figure 5.--U.S. producers' revenues on system rentals vs. system sales, 1986-88, interim 1988, and interim 1989

* * * * * * *

Source: Tables 18 and 19.

* * * * * * *

AT&T's net sales, operating income or (loss), and operating margins are shown below for systems sold and rented (in thousands of dollars, except where noted):

* * * * * * *

During the verification of AT&T, the data were reconciled to the information utilized in the audited financial statements to the gross profit level; * * *.

Value of plant, property, and equipment.--The data provided by the four producers on their end-of-period investment in productive facilities in which small business telephone systems and subassemblies are produced are shown in the following tabulation (in thousands of dollars):

* * * * * * *

Annual rate of net-income-before-taxes return on assets.--The rates of return for total establishment and system and subassembly assets are shown in the tabulation below (in percent):

* * * * * * *

Cash flow from operations.--Cash flow from operations on small business telephone systems is detailed below with negative amounts shown in parentheses. Cash flow is calculated differently for rental operations than for selling operations. Accordingly, the appropriate method of calculating the respective amounts is used and footnoted in the tabulation (in thousands of dollars):

* * * * * * *

Capital expenditures.--The data provided by the U.S. producers relative to their capital expenditures for land, buildings, and machinery and equipment used in the manufacture of small business telephone systems and subassemblies are shown in the following tabulation (in thousands of dollars):

* * * * * * *

Research and development expenses.--Research and development expenses by U.S. producers relating to systems and subassemblies are shown in the following tabulation (in thousands of dollars):

* * * * * * *

Capital and investment.--The Commission requested U.S. producers to describe any actual or potential negative effects of imports of small business telephone systems and subassemblies from Japan, Korea, and Taiwan on their growth, investment, development and production efforts, and ability to raise capital. Their responses are presented in app. E.

Consideration of the Question of Threat of Material Injury

Section 771(7)(F)(i) of the Tariff Act of 1930 (19 U.S.C. § 1677(7)(F)(i)) provides that--

> In determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of any merchandise, the Commission shall consider, among other relevant factors--[116]
>
> > (I) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States,
> >
> > (II) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level,

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[116] Section 771(7)(F)(ii) of the act (19 U.S.C. § 1677(7)(F)(ii)) provides that "Any determination by the Commission under this title that an industry in the United States is threatened with material injury shall be made on the basis of evidence that the threat of material injury is real and that actual injury is imminent. Such a determination may not be made on the basis of mere conjecture or supposition."

(III) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise,

(IV) any substantial increase in inventories of the merchandise in the United States,

(V) the presence of underutilized capacity for producing the merchandise in the exporting country,

(VI) any other demonstrable adverse trends that indicate the probability that the importation (or sale for importation) of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury,

(VII) the potential for product-shifting if production facilities owned or controlled by the foreign manufacturers, which can be used to produce products subject to investigation(s) under section 701 or 731 or to final orders under section 736, are also used to produce the merchandise under investigation,

(VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.[117]

Information on the volume, U.S. market penetration, and pricing of imports of the subject merchandise (items (II) and (III) above) is presented in the section of this report entitled "Consideration of the causal relationship between imports of the subject merchandise and the alleged material injury;" and information on the effects of imports of the subject merchandise on U.S. producers' existing development and production efforts (item (VIII)) is presented in the section entitled "Consideration of material injury to an industry in the United States." Available information on U.S. inventories of the subject imports (item (IV)); foreign producers' operations, including the potential for "product-shifting" (items (I), (V), and (VII) above); any other threat indicators, if applicable (item (VI) above); and any dumping in third-country markets, follows.

U.S. importers' inventories

Inventories of subassemblies held by importers are presented in table 20. These inventories are significantly larger, as a share of reported shipments, than those for U.S. producers. This disparity may be due in part to the

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[117] Section 771(7)(F)(iii) of the act (19 U.S.C. § 1677(7)(F)(iii)) further provides that, in antidumping investigations, ". . . the Commission shall consider whether dumping in the markets of foreign countries (as evidenced by dumping findings or antidumping remedies in other General Agreement on Tariffs and Trade member markets against the same class or kind of merchandise manufactured or exported by the same party as under investigation) suggests a threat of material injury to the domestic industry."

Table 20
Subassemblies of small business telephone systems: End-of-period inventories[1] of Japanese, Korean, and Taiwan[2] products, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June--[3] 1988	1989
Control and switching equipment inventories from--					
Japan:					
Quantity (1,000 units)	38	40	31	34	51
As a share of shipments (percent)	24.7	33.4	26.2	29.9	43.8
Korea:					
Quantity (1,000 units)	***	***	***	***	***
As a share of shipments (percent)	***	***	***	***	***
Taiwan:					
Quantity (1,000 units)	***	***	***	***	***
As a share of shipments (percent)	***	***	***	***	***
Subject inventories:					
Quantity (1,000 units)	62	64	53	63	74
As a share of shipments (percent)	26.4	23.2	20.7	22.1	39.6
Power supply inventories from--					
Japan:					
Quantity (1,000 units)	16	16	11	11	15
As a share of shipments (percent)	37.5	40.4	45.3	37.9	63.5
Korea:					
Quantity (1,000 units)	***	***	***	***	***
As a share of shipments (percent)	***	***	***	***	***
Taiwan:					
Quantity (1,000 units)	***	***	***	***	***
As a share of shipments (percent)	***	***	***	***	***
Subject inventories:					
Quantity (1,000 units)	16	16	15	16	17
As a share of shipments (percent)	37.6	38.3	43.5	41.1	55.2
Circuit card and module inventories from--					
Japan:					
Quantity (1,000 units)	378	376	270	305	236
As a share of shipments (percent)	55.5	72.4	63.1	67.7	59.5
Korea:					
Quantity (1,000 units)	***	***	***	***	***
As a share of shipments (percent)	***	***	***	***	***
Taiwan:					
Quantity (1,000 units)	***	***	***	***	***
As a share of shipments (percent)	***	***	***	***	***
Subject inventories:					
Quantity (1,000 units)	481	462	560	582	517
As a share of shipments (percent)	62.8	56.2	44.0	40.2	61.1

See footnotes at the end of the table.

Table 20--Continued
Subassemblies of small business telephone systems: End-of-period inventories[1] of Japanese, Korean, and Taiwan products,[2] 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June--[3] 1988	1989
Telephone inventories from--					
Japan:					
Quantity (1,000 units)	372	372	365	314	391
As a share of shipments (percent)	36.6	37.8	39.3	33.4	42.6
Korea:					
Quantity (1,000 units)	***	***	***	***	***
As a share of shipments (percent)	***	***	***	***	***
Taiwan:					
Quantity (1,000 units)	***	***	***	***	***
As a share of shipments (percent)	***	***	***	***	***
Subject inventories:					
Quantity (1,000 units)	737	800	828	698	1,143
As a share of shipments (percent)	34.9	33.0	34.0	26.5	59.2

[1] Inventory-to-shipment ratios are calculated using unrounded data and based on responses from firms providing both inventory and shipments data.
[2] Excludes the product of Sun Moon Star.
[3] Partial-year ratios are based on annualized shipments.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

differences in the channels of distribution used by domestic and foreign suppliers. U.S. producers supply end users more directly than do importers.

* * * was unable to report shipments or inventories by country of origin. Shipments by country were estimated on the basis of country-specific imports and aggregated shipments; inventories were calculated from these estimates. These estimates likely progressively overstate the inventory-to-shipments ratios for Taiwan products and understate the Korean ratios correspondingly; however, the ratios for the aggregated imported products are accurate. The aggregated inventories increased during the period of investigation and, as a percent of total annualized shipments, peaked in midyear 1989.

Foreign producers

...ted in the section of this report entitled "The manufacturing process," capacity to produce small business telephone system subassemblies depends largely on the capacity to fabricate printed-circuit boards and assemble them in an enclosure, and the machinery involved can be adapted to the manufacture of a wide range of other products. Many foreign producers reported the ability to shift capacity between the production of the subject products and other, nonsubject, products within a relatively short period of time.[118]

[118] As counsel for Sun Moon Star (since excluded from the scope of

Although the research and development of small business telephone systems and subassemblies requires a high degree of sophistication and advanced technology, a large percentage of the subject imports are produced by O.E.M. subcontractors, with U.S.-based firms providing the design and engineering specifics. Thus, barriers to development of the products are much greater than barriers to production. The data provided in this section account for the vast majority of production by companies who are involved in both the design and marketing of small business telephone systems. Although several of the largest O.E.M. subcontractors also provided data, others did not.

Foreign producers reported capacity on bases that ranged * * * and averaged about 40 hours/week, 48 weeks/year. For several companies, the capacity reported fluctuated greatly from year to year, for the reasons noted above. The capacity utilization ratios computed for these companies were very high. Other firms reported capacity to produce all products and their capacity utilization ratios were much lower.

Most foreign producers forecast a drastic decline in exports to the United States starting in mid-1989, roughly coincident with Commerce's directive to the U.S. Customs Service to suspend liquidations of the subject merchandise.

Japan.--In the final investigations, nine Japanese producers provided usable data on their foreign operations producing the subject products: Fujitsu; Hasegawa Electric Co., Ltd.; Hitachi, Ltd.; Iwatsu; Matsushita; NEC; Nakayo Telecommunications (Nakayo); Nitsuko; and Toshiba. Of these, * * * provided relatively limited data. Other identified Japanese producers are * * *; Meisei Electric; * * *; and Tamura Electric Works, Ltd.[119] Based on available information, coverage of Japanese exports to the United States is estimated to be understated by about 30 percent.

As shown in table 21, rates of capacity utilization, foreign production, and exports to the United States all fell during 1986-88 and then increased from January-June 1988 to January-June 1989. Japanese home-market shipments generally accounted for an increased share of total shipments during 1986-88, whereas exports to the United States declined in importance. Again, however, from January-June 1988 to January-June 1989, these trends reversed. Exports to third countries generally increased throughout the period of investigation.

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[118] (...continued)
investigation) explained, their factory "was constructed with the goal of achieving sufficient versatility to build a wide variety of electronic assemblies . . . In the volatile electronics marketplace, such flexibility is essential to commercial success." Reported current production includes "microwave radio equipment, telephone and communication products, and digital/computer products. It is possible (and not unusual) for the factory to shift from one type of production to another with a minimum adverse effect on plant operations. These changes can occur rapidly . . ." (Letter to Rebecca Woodings from Daniel L. Porter, dated Sept. 5, 1989.) Other producers echoed this explanation for fluctuations in reported capacity.

[119] Tamura Electric Works provided data in the preliminary investigations that showed * * *. The other producers were identified by importers from Japan as their foreign suppliers. * * * but the other producers account for a relatively small quantity of the subject imports.

Table 21
Subassemblies of small business telephone systems: Japanese[1] capacity, production, capacity utilization, home-market shipments, exports to the United States, exports to all other countries, and ratio of end-of-period inventories to total shipments,[2] actual 1986-88, January-June 1988, and January-June 1989 and projected data 1989-90

Item	1986	1987	1988	1989[3]	1990[3]	January-June-- 1988	1989
Control and switching equipment:							
Capacity (1,000 units).....	654	651	647	575	484	319	307
Production (1,000 units)....	587	529	476	460	423	233	277
Capacity utilization (percent)[4].....	89.2	80.7	73.1	79.3	86.4	72.7	89.9
Home-market shipments (1,000 units).....	383	370	356	334	347	186	193
Exports to the United States (1,000 units).....	125	106	79	56	2	35	51
Exports to all other countries (1,000 units).....	64	63	73	107	114	32	53
Inventories to total shipments (percent).....	9.8	9.1	8.7	7.7	6.8	6.4	8.7
Power supplies:							
Capacity (1,000 units).....	248	240	***	***	***	***	77
Production (1,000 units)....	145	143	***	***	***	***	63
Capacity utilization (percent).....	58.6	59.5	46.7	54.3	73.2	47.3	82.5
Home-market shipments (1,000 units).....	***	***	***	***	***	***	***
Exports to the United States (1,000 units).....	72	63	34	26	[5]	16	22
Exports to all other countries (1,000 units).....	***	***	24	22	22	***	***
Inventories to total shipments (percent).....	10.6	8.9	15.1	10.3	12.5	21.5	21.0
Other circuit cards and modules:							
Capacity (1,000 units).....	7,713	7,309	6,088	5,898	5,260	3,080	2,999
Production (1,000 units)....	2,921	2,770	2,288	2,164	1,861	1,106	1,191
Capacity utilization (percent)[4].....	51.1	53.0	49.0	49.4	49.7	46.6	53.1
Home-market shipments (1,000 units).....	1,526	1,580	1,509	1,524	1,496	726	838
Exports to the United States (1,000 units).....	824	555	326	300	16	169	270
Exports to all other countries (1,000 units).....	446	486	464	657	652	243	324
Inventories to total shipments (percent).....	21.3	25.8	25.6	16.3	11.2	24.7	16.4

See footnotes at the end of the table.

Table 21--Continued
Subassemblies of small business telephone systems: Japanese[1] capacity, production, capacity utilization, home-market shipments, exports to the United States, exports to all other countries, and ratio of end-of-period inventories to total shipments,[2] actual 1986-88, January-June 1988, and January-June 1989 and projected data 1989-90

Item	1986	1987	1988	1989[3]	1990[3]	January-June-- 1988	1989
Telephones:							
Capacity (1,000 units).....	5,160	5,306	4,944	4,563	3,850	2,477	2,341
Production (1,000 units)....	3,583	3,410	3,076	3,051	2,731	1,524	1,679
Capacity utilization (percent)[4].....	80.8	74.9	69.4	76.2	83.0	68.6	81.5
Home-market shipments (1,000 units).....	2,224	2,251	2,157	2,197	2,105	1,107	1,140
Exports to the United States (1,000 units).....	806	591	459	244	5	202	212
Exports to all other countries (1,000 units).....	485	583	650	924	889	334	445
Inventories to total shipments (percent).....	12.1	13.9	12.1	9.5	10.8	11.7	11.2

[1] Includes Fujitsu, Hasegawa Electric, Hitachi, Iwatsu, Matsushita, NEC, Nakayo, Nitsuko, and Toshiba. Not all companies provided complete data.
[2] Based on companies reporting both total shipment and inventory data. Partial-year ratios are based on annualized shipments.
[3] Projected.
[4] Based on companies reporting both capacity and production data.
[5] Less than 500 units.

Source: Compiled from data submitted by counsel for the Japanese respondents.

Data sourced from Japan's Ministry of International Trade and Industry regarding production of selected telecommunications equipment are presented in the following tabulation (in millions of dollars):[120]

Product	1985	1986	1987	1988
"Multi-function" telephones.....	166	204	278	365
Key telephones.....	1,442	1,283	973	868
"Private" switching equipment....	580	719	730	847
Total.....	2,188	2.206	1,981	2,080

Korea.--Three Korean producers provided data regarding their production and shipments of subassemblies for small business telephone systems: Goldstar, Oriental Precision Co. (OPC), and Samsung. Other identified Korean producers include * * *. Since * * *, the data presented below are believed to be understated by some * * *; however, the trends in exports to the United States are believed to be representative of greater coverage.

[120] Electronics (September 1989), p. 127.

The sharp increases in reported capacity, production, and exports to the United States from 1986 to 1987 are * * *; however, these trends are all down from 1987 to projected 1990 (table 22). Capacity utilization increased during the period of investigation.

Table 22
Subassemblies of small business telephone systems: Korean[1] capacity, production, capacity utilization, home-market shipments, exports to the United States, exports to all other countries, and ratio of end-of-period inventories to total shipments,[2] actual 1986-88, January-June 1988, and January-June 1989 and projected data 1989-90

Item	1986	1987	1988	1989[3]	1990[3]	January-June-- 1988	1989
Control and switching equipment:							
Capacity (1,000 units)	81	165	135	133	119	67	64
Production (1,000 units)	61	156	134	109	104	61	58
Capacity utilization (percent)	75.4	94.5	99.4	82.0	87.7	90.8	90.9
Home-market shipments (1,000 units)	***	***	***	***	***	***	***
Exports to the United States (1,000 units)	51	128	72	42	25	36	25
Exports to all other countries (1,000 units)	***	***	***	***	***	***	***
Inventories to total shipments (percent)	0.8	4.2	4.8	3.9	5.1	4.0	6.2
Power supplies:							
* * * * * * *							
Other circuit cards and modules:							
Capacity (1,000 units)	200	606	458	327	292	179	141
Production (1,000 units)	103	615	459	297	235	135	139
Capacity utilization (percent)	51.3	101.5	100.1	90.9	80.5	75.5	98.4
Home-market shipments (1,000 units)	6	10	15	23	27	6	10
Exports to the United States (1,000 units)	94	528	360	185	95	96	74
Exports to all other countries (1,000 units)	3	37	91	95	105	42	59
Inventories to total shipments (percent)	***	***	***	***	***	***	***

See footnotes at the end of the table.

Table 22--Continued
Subassemblies of small business telephone systems: Korean[1] capacity, production, capacity utilization, home-market shipments, exports to the United States, exports to all other countries, and ratio of end-of-period inventories to total shipments,[2] actual 1986-88, January-June 1988, and January-June 1989 and projected data 1989-90

Item	1986	1987	1988	1989[3]	1990[3]	January-June-- 1988	1989
Telephones:							
Capacity (1,000 units).....	693	1,833	1,548	1,322	1,198	734	651
Production (1,000 units).....	***	***	***	***	***	***	***
Capacity utilization (percent)[4].....	74.3	89.2	96.6	85.6	93.0	79.0	80.7
Home-market shipments (1,000 units).....	***	***	***	***	***	***	***
Exports to the United States (1,000 units).....	386	1,267	855	534	321	324	281
Exports to all other countries (1,000 units).....	***	***	***	***	***	***	***
Inventories to total shipments (percent).....	1.3	3.1	4.7	2.5	3.9	2.8	3.3

[1] Includes Samsung, OPC, and Goldstar. Not all companies provided complete data.
[2] Partial-year ratios are based on annualized shipments.
[3] Projected.
[4] Based on companies reporting both capacity and production data.

Source: Compiled from data submitted by counsel for the Korean respondents.

Taiwan.--Seven producers, Auto Telecom Co., Ltd.; Bitronic Telecoms Co., Ltd.; Taiwan Nitsuko; Sinoca Enterprises Co., Ltd.; Taiwan International Standard Electronics, Ltd. (TAISEL); Taiwan Telecommunication Industry Co., Ltd.; and TECOM Co., Ltd. reported data on Taiwan production and shipments of the subject products. Four other firms, * * * were also named by importers as Taiwan producers. However, the data presented in table 23 are believed to account for a large majority of subject Taiwan production. For control and switching equipment and power supplies and other circuit cards and modules, capacity increased during 1986-88 at a rate that was slightly greater than the expansion of production; however, the capacity utilization rate remained high for all subassemblies. Exports to the United States have fallen during the period of investigation, with exports to other countries increasing correspondingly. Home-market shipments are minimal.

Table 23
Subassemblies of small business telephone systems: Taiwan[1] capacity, production, capacity utilization, home-market shipments, exports to the United States, exports to all other countries, and ratio of end-of-period inventories to total shipments,[2] actual 1986-88, January-June 1988, and January-June 1989 and projected data 1989-90

Item	1986	1987	1988	1989[3]	1990[3]	January-June- 1988	1989
Control and switching equipment:							
*	*	*	*	*	*	*	
Power supplies and other circuit cards and modules:							
*	*	*	*	*	*	*	
Telephones:							
Capacity (1,000 units)	***	72	242	361	388	93	150
Production (1,000 units)	***	69	211	318	336	84	132
Capacity utilization (percent)	***	96.6	87.2	88.0	86.7	90.3	88.3
Home-market shipments (1,000 units)	***	3	17	58	83	***	28
Exports to the United States (1,000 units)	***	32	68	19	11	32	13
Exports to all other countries (1,000 units)	***	***	***	***	***	***	***
Inventories to total shipments (percent)	***	***	***	38.1	***	2.6	19.8

[1] Includes Auto Telecom, Bitronic Telecoms, Taiwan Nitsuko, Sinoca Enterprises, TAISEL, Taiwan Telecommunication Industry, and TECOM. Not all companies provided complete data.
[2] Based on companies providing both total shipment and inventory data. Partial year ratios are based on annualized shipments.
[3] Projected.

Source: Compiled from data submitted by counsel for the Taiwan respondents.

Consideration of the Causal Relationship Between Imports of the Subject Merchandise and the Alleged Material Injury

U.S. imports

Questionnaires were sent to 71 firms believed to account for 95 percent of U.S. imports of small business telephone systems and subassemblies. Data presented in this report are estimated to account for over 80 percent of imports. The data for control units and switching equipment and telephones are more accurate than those for systems, power supplies, and other circuit cards and modules, as explained below. Although U.S. Department of Commerce official import statistics include nonsubject products, petitioners and respondents have

both cited these data as indicative of the imports under investigation.[121] Both questionnaire data and selected official import statistics are presented below, by product.

From 1986 to 1987, imports from Korea surpassed those from Japan[122] and Taiwan to account for the largest share, by volume, of the subject imports. Imports from Korea increased during the period of investigation, generally in inverse relation to imports from Japan and Taiwan. These shifts are due in large part to * * *. * * *.

Aggregated imports from all other sources were nearly always significantly higher in unit value than the subject imports. These "other imports" consist largely of PBXs manufactured by * * *.

Systems and subassemblies.--Table 24 presents the aggregated value of imports of the subject products into the United States. Aggregated subject imports from Japan, Korea, and Taiwan decreased steadily during the period of investigation, by 2.3 percent from 1986 to 1987, by 14.0 percent from 1987 to 1988, and by another 14.0 percent from January-June 1988 to January-June 1989. The subject imports from Taiwan increased from 1987 to 1988 but dropped sharply overall. Imports from Japan fell by 38.5 percent from 1986 to 1988 and then increased by 18.4 percent in the first 6 months of 1989 compared with the same period of 1988. Imports from Korea, on the other hand, more than doubled during 1986-88, but dropped sharply in the partial-year periods. Imports by product and country are shown graphically in figure 6.

Table 24
Small business telephone systems and subassemblies: U.S. imports from Japan, Korea, Taiwan, and all other sources,[1] 1986-88, January-June 1988, and January-June 1989

(In 1,000 dollars)

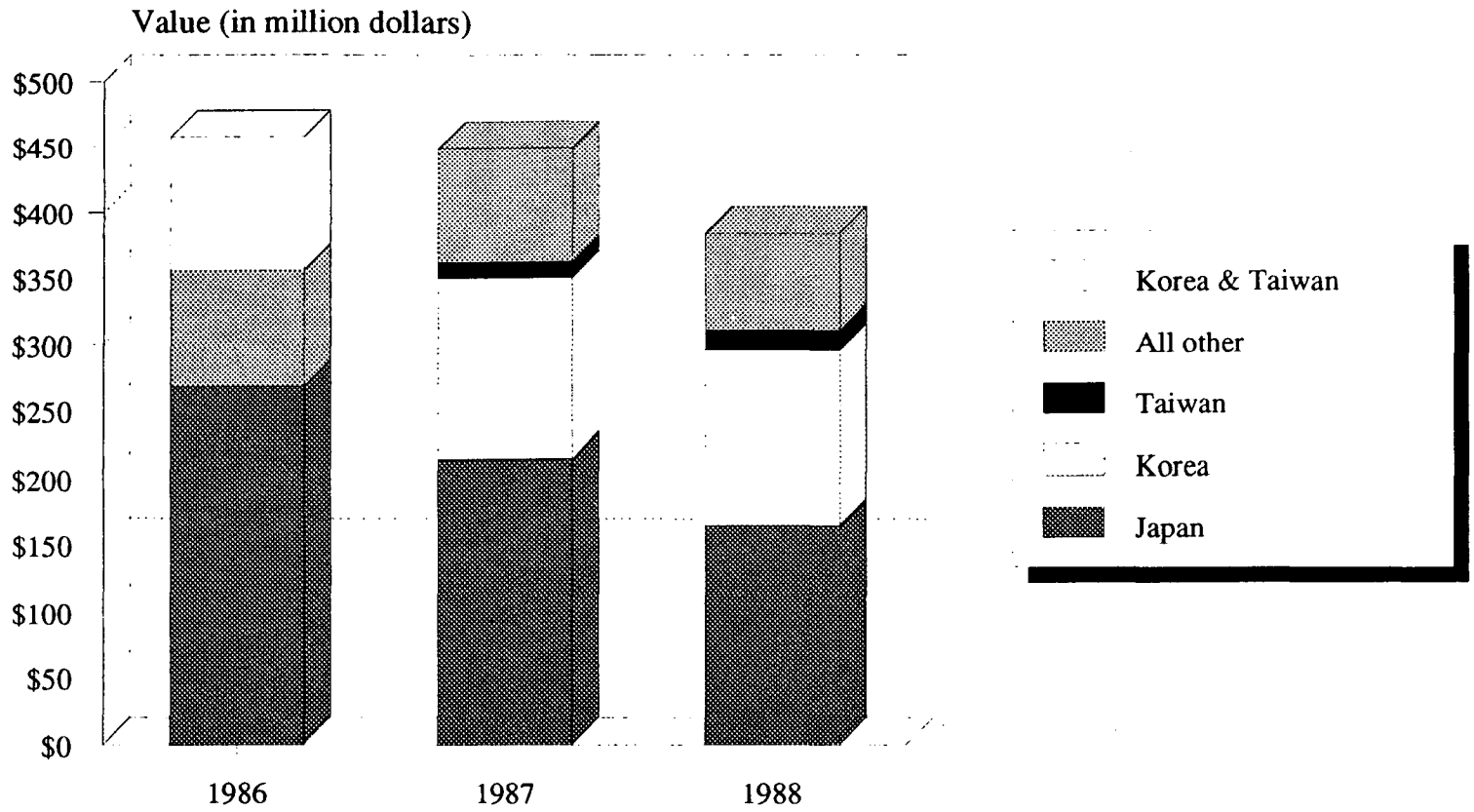
Source	1986	1987	1988	January-June-- 1988	1989
Japan	268,431	215,189	165,116	86,105	101,926
Korea	***	135,184	130,520	97,292	57,923
Taiwan	***	11,830	15,854	8,066	4,829
Subtotal	370,911	362,203	311,490	191,463	164,678
All other sources	87,280	87,635	72,992	28,762	51,154
Total	458,191	449,838	384,482	220,425	215,832

[1] The product of Sun Moon Star has been excluded from the data presented for Taiwan and is included in "all other sources."

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

[121] Petition, p. 17, and transcript of the conference, p. 154.
[122] * * * * * * *

Figure 6.--
Small business telephone systems and subassemblies: Value of U.S. imports, 1986-88



Source: Table 24

Systems.--Importers generally reported that they did not import "systems" but, rather, imported subassemblies of systems. Although some imports of systems were reported, the data shown in table 25 account for only a small portion of subject imports. Reported imports of systems from the subject countries decreased steadily during the period of investigation and unit values increased.

Table 25
Small business telephone systems: U.S. imports from Japan, Korea, Taiwan, and all other sources,[1] 1986-88, January-June 1988, and January-June 1989

Source	1986	1987	1988	January-June-- 1988	1989
*	*	*	*	*	*	*

[1] The product of Sun Moon Star has been excluded from the data presented for Taiwan and is included in "all other sources."

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Control and switching equipment.--Subject U.S. imports of control and switching equipment fell in value by 19.2 percent and 28.4 percent annually during 1986-88, but declined by only 1.7 percent and 8.8 percent, respectively, in terms of quantity (table 26). However, from January-June 1988 to January-June 1989, the value of imports increased by 15.3 percent while the volume continued to fall (by 21.9 percent). Imports from Japan dropped sharply from 1986 to 1988 but rose strongly from January-June 1988 to the corresponding period of 1989. Korean products peaked in 1987 and then fell steadily. The subject product from Taiwan fell 36.3 percent in volume from 1986 to 1987, rebounded in 1988, and then dropped sharply in the partial year periods. These import fluctuations are also depicted in figure 7. The aggregate unit value of imports fell steeply during 1986-88 and increased sharply in the first half of 1989, led by generally greater fluctuations in the unit value of imports from Korea. Unit values of imports from Japan and Taiwan fluctuated, with the former increasing, and the latter declining, marginally overall.

Table 26
Control and switching equipment for small business telephone systems: U.S. imports from Japan, Korea, Taiwan, and all other sources,[1] 1986-88, January-June 1988, and January-June 1989

Source	1986	1987	1988	January-June-- 1988	1989
	Quantity (1,000 units)				
Japan	197	126	116	57	84
Korea	***	***	***	***	***
Taiwan	***	***	***	***	***
Subtotal	288	283	258	155	121
All other sources	***	***	***	***	***
Total	***	***	***	***	***
	Value (1,000 dollars)[2]				
Japan	76,242	52,666	43,145	21,220	33,472
Korea	***	***	***	***	***
Taiwan	***	***	***	***	***
Subtotal	113,530	91,780	65,745	34,835	40,161
All other sources	***	***	***	***	***
Total	***	***	***	***	***
	Unit value (per unit)[3]				
Japan	$386	$419	$372	$376	$399
Korea	***	***	***	***	***
Taiwan	***	***	***	***	***
Average	394	324	255	225	333
All other sources	***	***	***	***	***
Average	***	***	***	***	***

[1] The product of Sun Moon Star has been excluded from the data presented for Taiwan and is included in "all other sources."
[2] Landed, duty-paid value.
[3] Calculated from unrounded data, based on companies reporting both quantities and values.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Figure 7a.--
Control and switching equipment for small business telephone systems: U.S. imports (quantity), 1986-88

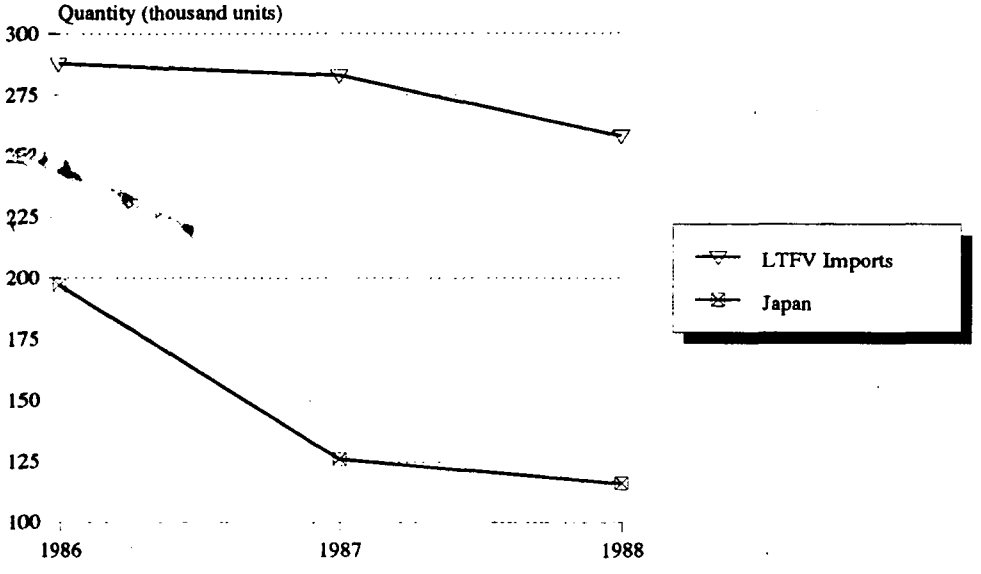
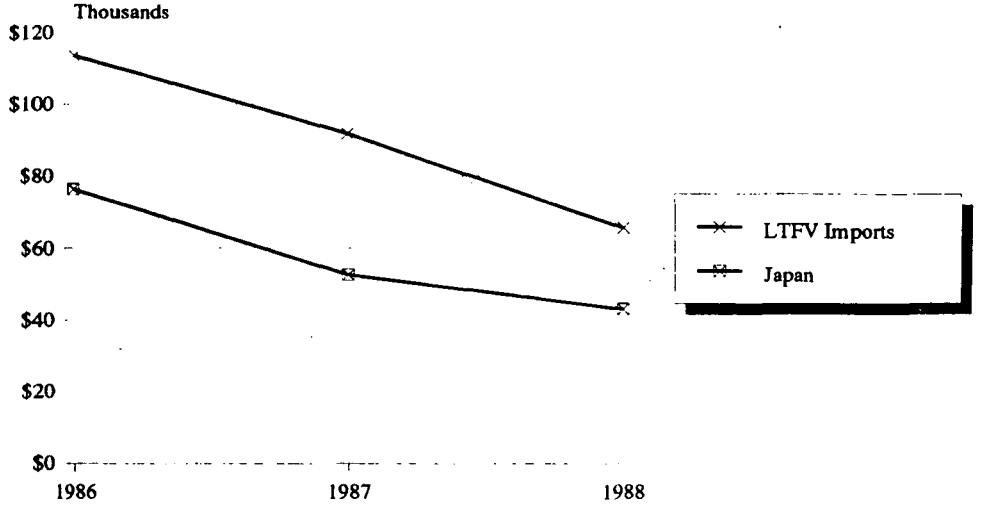


Figure 7b.--
Control and switching equipment for small business telephone systems: U.S. imports (value), 1986-88



Source: Table 26

U.S. imports of telephone control and switching equipment, based on official statistics, are presented in the following tabulation (in millions of dollars):[123]

Source	1986	1987	1988	January-June-- 1988	January-June-- 1989
Japan	67	47	38	18	48
Korea	23	32	34	19	7
Taiwan[1]	9	12	9	5	4
Subtotal	99	91	81	42	59
Other	46	36	31	20	36
Total	146	127	112	62	95

[1] Includes the product of Sun Moon Star.

Note: Because of rounding, figures may not add to the totals shown.

* * * * * * *

Power supplies.--Importers often were unable to report data on power supplies because these subassemblies are generally incorporated into control and switching equipment. Thus, the data reported in table 27 exclude a large percentage of the products. However, the value of such products is included in the value reported for imports of control and switching equipment. Reported imports of power supplies consisted largely of Japanese products. Subject imports decreased steadily during the period of investigation in volume, although the value of January-June 1989 imports marginally exceeded the value of such imports in the corresponding period of 1988.

U.S. imports of power supplies, based on official statistics, are presented in the following tabulation (in millions of dollars):[124]

Source	1986	1987	1988	January-June-- 1988	January-June-- 1989
Japan	119	182	230	116	43
Korea	8	16	23	10	9
Taiwan[1]	79	127	178	82	31
Subtotal	207	324	431	207	83
Other	318	482	647	304	137
Total	525	807	1,078	511	220

[1] Includes the product of Sun Moon Star.

Note: Because of rounding, figures may not add to the totals shown.

---

[123] Comparable data on quantities are not available.

[124] Data for 1986 were adjusted to exclude power supplies larger than those subject to investigation. These products were reclassified in a separate tariff item in 1987.

Table 27
Power supplies for small business telephone systems: U.S. imports from Japan, Korea, Taiwan, and all other sources,[1] 1986-88, January-June 1988, and January-June 1989

Source	1986	1987	1988	January-June-- 1988	1989
	Quantity (1,000 units)				
Japan	41	39	20	9	16
Korea	***	***	***	***	***
Taiwan	***	***	***	***	***
Subtotal	53	44	43	27	19
All other sources	***	***	***	***	***
Total	***	***	***	***	***
	Value (1,000 dollars)[2]				
Japan	9,040	7,881	4,202	1,913	3,123
Korea	***	***	***	***	***
Taiwan	***	***	***	***	***
Subtotal	9,815	8,164	6,178	3,352	3,415
All other sources	***	***	***	***	***
Total	***	***	***	***	***
	Unit value (per unit)[3]				
Japan	$221	$204	$211	$212	$209
Korea	***	***	***	***	***
Taiwan	***	***	***	***	***
Average	186	184	146	123	188
All other sources	***	***	***	***	***
Average	***	***	***	***	***

[1] The product of Sun Moon Star has been excluded from the data presented for Taiwan and is included in "all other sources."
[2] Landed, duty-paid value.
[3] Calculated from unrounded data, based on companies reporting both quantities and values.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Other circuit cards and modules.--Questionnaire respondents often were unable to provide complete data on imports of other circuit cards and modules because a majority of these products are shipped as part of control and switching units or telephones. Reported data, presented in table 28, are believed to reflect mostly products shipped separately.

Table 28
Other circuit cards and modules for small business telephone systems: U.S. imports from Japan, Korea, Taiwan, and all other sources,[1] 1986-88, January-June 1988, and January-June 1989

Source	1986	1987	1988	January-June-- 1988	1989
	Quantity (1,000 units)				
Japan	739	549	370	206	208
Korea	***	***	***	***	***
Taiwan	***	***	***	***	***
Subtotal	854	846	1,308	791	424
All other sources	***	***	***	***	***
Total	***	***	***	***	***
	Value (1,000 dollars)[2]				
Japan	64,225	51,534	33,691	18,982	18,555
Korea	***	***	***	***	***
Taiwan	***	***	***	***	***
Subtotal	73,979	72,296	72,901	46,845	30,786
All other source.s	***	***	***	***	***
Total	***	***	***	***	***
	Unit value (per unit)[3]				
Japan	$87	$94	$91	$92	$89
Korea	***	***	***	***	***
Taiwan	***	***	***	***	***
Average	84	79	56	59	73
All other sources	***	***	***	***	***
Average	***	***	***	***	***

[1] The product of Sun Moon Star has been excluded from the data presented for Taiwan and is included in "all other sources."
[2] Landed, duty-paid value.
[3] Calculated from unrounded data, based on companies reporting both quantities and values.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Led by Korean import fluctuations, reported subject imports increased in volume from 1986 to 1988 and then decreased in the partial year periods. Imports from Japan fell during 1986-88 but rose marginally in the first half of 1989 compared with the same period of 1988. Subject imports from Taiwan dropped steeply in 1987 and declined thereafter as well.

Telephones.--Aggregated U.S. imports of telephone sets and consoles for small business telephone systems increased from 1986 to 1988 and decreased in the partial-year periods (table 29 and figure 8). Again, Korean products[125] led the trend by more than tripling from 1986 to 1987 and then decreasing slightly. Imports from Japan, in contrast, decreased during 1986-88 and then rose in the partial-year periods. Subject imports from Taiwan dropped in 1987 and remained far below 1986 levels thereafter. The unit values of the aggregated subject imports declined steadily during 1986-88 and then stabilized.

Table 29
Telephones for small business telephone systems: U.S. imports from Japan, Korea, Taiwan, and all other sources,[1] 1986-88, January-June 1988, and January-June 1989

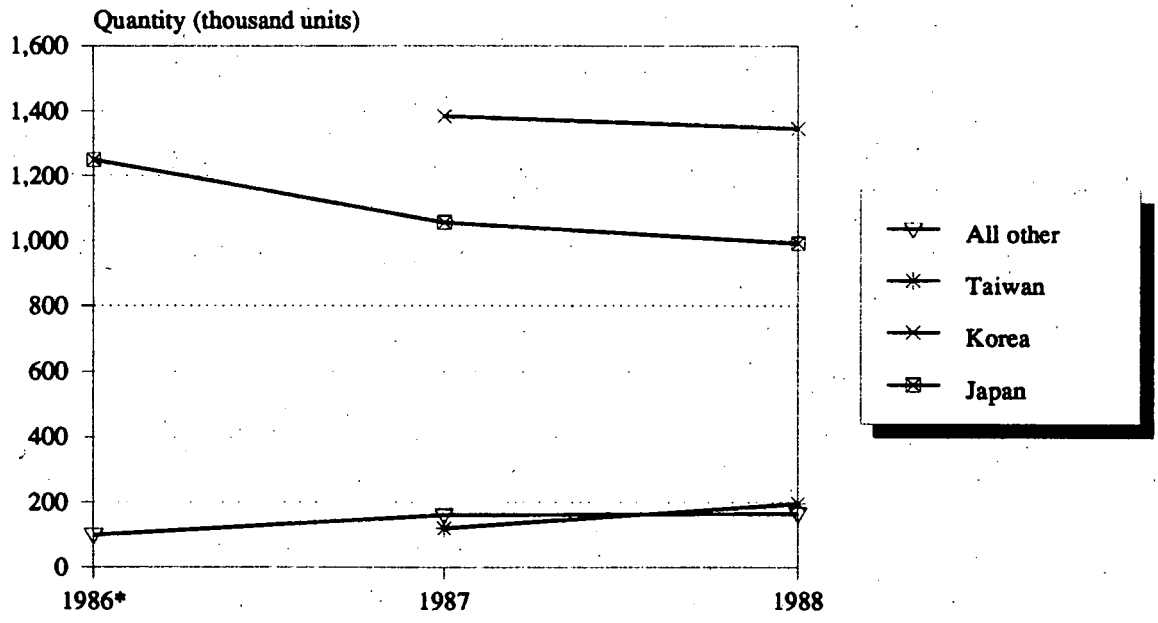
Source	1986	1987	1988	January-June-- 1988	1989
	Quantity (1,000 units)				
Japan	1,249	1,056	992	497	527
Korea	***	1,384	1,346	787	758
Taiwan	***	120	196	73	61
Subtotal	2,142	2,560	2,534	1,357	1,346
All other sources	99	161	165	69	89
Total	2,241	2,720	2,699	1,426	1,434
	Value (1,000 dollars)[2]				
Japan	95,325	81,338	68,074	34,217	37,030
Korea	***	80,098	73,094	58,475	40,535
Taiwan	***	6,562	9,458	3,930	3,005
Subtotal	149,911	167,998	150,626	96,622	80,570
All other sources	10,825	15,491	14,323	6,610	7,012
Total	160,736	183,489	164,949	103,232	87,582
	Unit value (per unit)[3]				
Japan	$76	$77	$69	$69	$70
Korea	***	58	54	54	54
Taiwan	***	55	48	54	49
Average	70	66	59	60	60
All other sources	110	96	87	96	79
Average	72	67	61	65	61

[1] The product of Sun Moon Star has been excluded from the data presented for Taiwan and is included in "all other sources."
[2] Landed, duty-paid value.
[3] Calculated from unrounded data, based on companies reporting both quantities and values.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

[125] * * *.

Figure 8.--
Telephones for small business telephone systems: U.S. imports (quantity), 1986-88



* 1986 data for Taiwan and Korea are confidential
Source: Table 29

U.S. imports of telephones and other terminal equipment, based on official statistics, are presented in the following tabulation (in millions of dollars):

Source	1986	1987	1988	January-June-- 1988	1989
Japan	402	369	278	139	153
Korea	103	153	135	61	68
Taiwan[1]	268	211	160	81	63
Subtotal	772	733	573	281	284
Other	260	317	410	167	263
Total	1,032	1,050	984	448	547

[1] Includes the product of Sun Moon Star.

These data include single-line telephone sets, dual-use telephone sets and consoles, and other terminal equipment and parts that are not subject to investigation.

* * * * * * *

Market penetration by the subject imports

Market penetration as presented in this section is calculated using questionnaire data. With regard to value, the data presented understate import penetration because the reported values are at different levels of trade--the value of U.S. producers' shipments represents primarily sales to the end user, whereas the value of U.S. importers' shipments is largely sales to distributors. Even more obviously than for import volumes and values, changes in market shares for each country correspond to a shift by * * *. * * *.

Market penetration for systems and subassemblies, in terms of value, is presented in table 30. The aggregated market share of the subject countries increased through the first half of 1988 and then declined. Japanese products lost market share during 1986-88 while those from Korea increased theirs. Taiwan lost market share throughout the period of investigation. U.S. producers also lost market share overall. Comparable data are not available in terms of volume.

Table 30
Small business telephone systems and subassemblies: Shares of U.S. consumption supplied by Japan, Korea, Taiwan, all other imports,[1] and U.S. producers, 1986-88, January-June 1988, and January-June 1989[2]

Item	1986	1987	1988	January-June-- 1988	1989
Apparent U.S. consumption (1,000 dollars)	1,383,895	1,280,657	1,252,682	648,085	584,922
Share of apparent consumption supplied by--					
Japan (percent)	24.0	21.6	19.1	19.1	20.4
Korea (percent)	***	***	13.5	15.2	9.9
Taiwan (percent)	***	***	1.4	1.5	1.2
Subtotal (percent)	32.2	35.0	34.0	35.9	31.6
All other imports (percent)	***	***	***	***	***
All imports (percent)	***	***	***	***	***
U.S. producers (percent)	***	***	***	***	***
Total (percent)	100.0	100.0	100.0	100.0	100.0

[1] The product of Sun Moon Star has been excluded from the data presented for Taiwan and is included in "all other imports."
[2] These data understate import penetration because the reported values are at different levels of trade--the value of U.S. producers' shipments represents primarily sales to the end user, whereas the value of importers' shipments is largely sales to distributors.

Note: Because of rounding, figures may not add to the totals shown.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Market penetration for control and switching equipment, other circuit cards and modules, and telephone sets and consoles are presented in tables 31-33, respectively. Market share for subject imports by volume is significantly greater than market share by value.

In terms of volume, subject imports of control and switching equipment increased their market penetration through 1988 and lost share in the first half of 1989 (figure 9). A sharper but similar trend is seen for the Korean products. Japan's market share decreased though 1988 and rose in the first half of 1989. Taiwan's penetration peaked in January-June 1988 but decreased overall. U.S. producers lost the majority of the market in 1987 and did not regain it. In terms of value, LTFV market penetration peaked in 1987. Japan, Taiwan, and U.S. producers increased their market shares slightly overall.

Table 31
Control and switching equipment for small business telephone systems: Shares of U.S. consumption supplied by Japan, Korea, Taiwan, all other imports,[1] and U.S. producers, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June-- 1988	1989
			Quantity		
Apparent U.S. consumption (1,000 units)	520	476	494	253	188
Share of apparent consumption supplied by--					
Japan (percent)	35.2	26.2	26.0	24.6	32.7
Korea (percent)	***	***	***	***	***
Taiwan (percent)	***	***	***	***	***
Subtotal (percent)	49.7	57.0	53.8	59.2	50.5
All other imports (percent)	***	***	***	***	***
All imports (percent)	***	***	***	***	***
U.S. producers (percent)	***	***	***	***	***
Total (percent)	100.0	100.0	100.0	100.0	100.0
			Value[2]		
Apparent U.S. consumption (1,000 dollars)	419,110	350,678	377,817	173,111	148,265
Share of apparent consumption supplied by--					
Japan (percent)	19.5	17.4	15.9	16.5	20.7
Korea (percent)	***	***	***	***	***
Taiwan (percent)	***	***	***	***	***
Subtotal (percent)	26.3	29.0	22.6	25.0	25.9
All other imports (percent)	***	***	***	***	***
All imports (percent)	***	***	***	***	***
U.S. producers (percent)	***	***	***	***	***
Total (percent)	100.0	100.0	100.0	100.0	100.0

[1] The product of Sun Moon Star has been excluded from the data presented for Taiwan and is included in "all other imports."
[2] These data understate import penetration because the reported values are at different levels of trade--the value of U.S. producers' shipments represents primarily sales to the end user, whereas the value of importers' shipments is largely sales to distributors.

Note: Because of rounding, figures may not add to the totals shown.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Figure 9a.-- Control and switching equipment for small business telephone systems: Shares of U.S. consumption (quantity), 1986-89

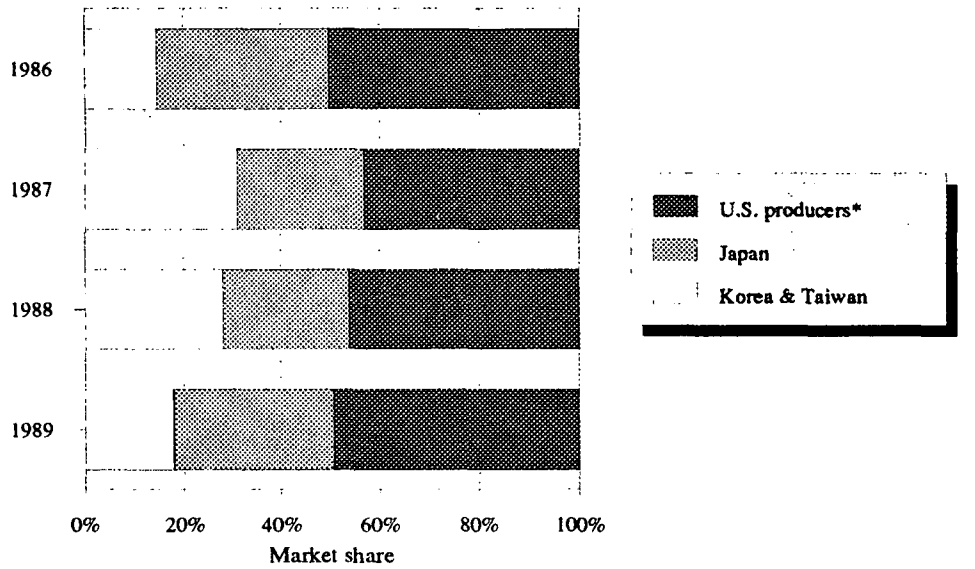
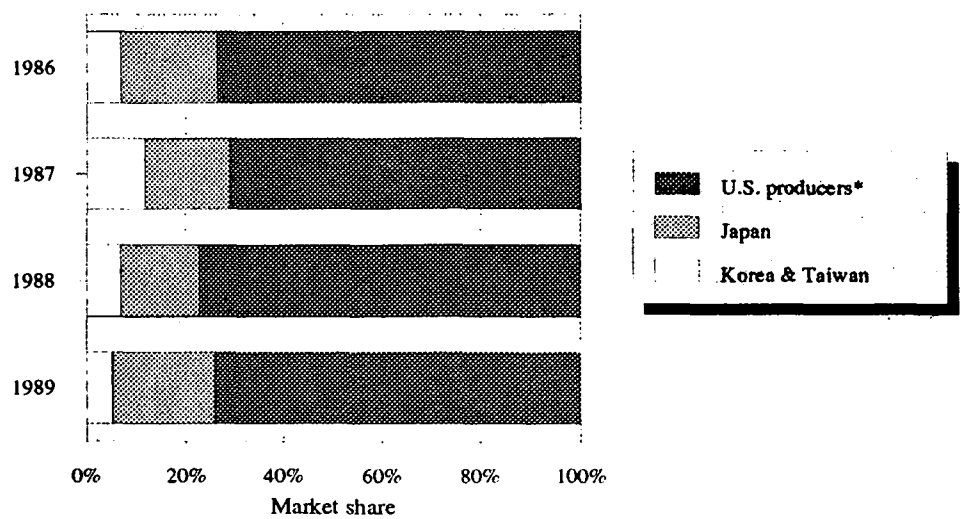


Figure 9b.-- Control and switching equipment for small business telephone systems: Shares of U.S. consumption (value), 1986-89



* Includes U.S. producers and all others

Source: Table 31

Data on other circuit cards and modules exclude a large portion of products that are integrated into control and switching equipment or telephones by the manufacturer. Therefore, market penetration as presented in table 32 is most applicable for products shipped separately from other subassemblies. These data show a similar trend of increasing market penetration by the subject imports during 1986-86 and a corresponding erosion of U.S. producers' market share; however, the imported products lost market share back to the domestic industry in the first half of 1989.

Table 32
Other circuit cards and modules for small business telephone systems: Shares of U.S. consumption supplied by Japan, Korea, Taiwan, all other imports,[1] and U.S. producers, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June-- 1988	1989
Apparent U.S. consumption (1,000 units)	3,582	3,243	3,852	2,014	1,583
Share of apparent consumption supplied by--					
Japan (percent)	20.3	16.6	12.1	12.4	13.5
Korea (percent)	***	***	***	***	***
Taiwan (percent)	***	***	***	***	***
Subtotal (percent)	22.4	25.9	32.8	36.5	27.7
All other imports (percent)	***	***	***	***	***
All imports (percent)	***	***	***	***	***
U.S. producers (percent)	***	***	***	***	***
Total (percent)	100.0	100.0	100.0	100.0	100.0

[1] The product of Sun Moon Star has been excluded from the data presented for Taiwan and is included in "all other imports."

Note: Because of rounding, figures may not add to the totals shown.

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

The volume of imported telephones exceeded U.S. shipments throughout the period of investigation. U.S. producers lost, and subject imports gained, market share during 1986-88 and these trends reversed in January-June 1989. Korean and nonsubject imports both increased their market penetration overall at the expense of other suppliers. These trends are shown in figure 10.

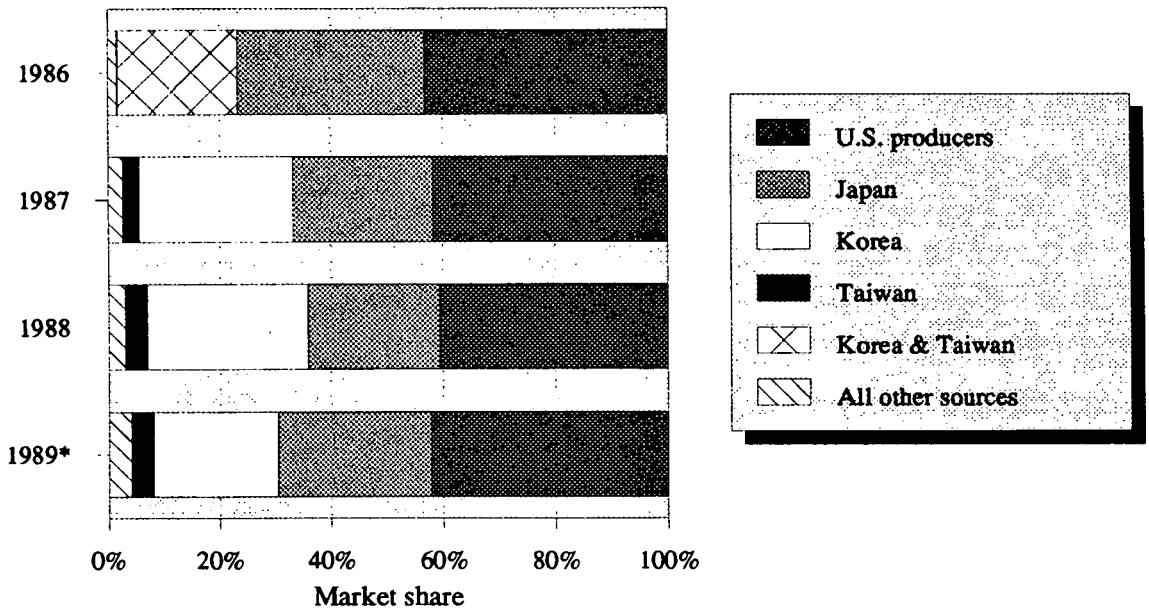
Table 33
Telephones for small business telephone systems: Shares of U.S. consumption supplied by Japan, Korea, Taiwan, all other imports,[1] and U.S. producers, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June-- 1988	1989
	Quantity				
Apparent U.S. consumption (1,000 units)	4,072	4,295	4,390	2,253	1,836
Share of apparent consumption supplied by--					
Japan (percent)	33.7	24.9	23.6	23.9	27.6
Korea (percent)	***	27.2	28.9	32.4	22.3
Taiwan (percent)	***	3.8	3.9	3.4	3.9
Subtotal (percent)	55.1	56.0	56.3	59.6	53.8
All other imports (percent)	1.7	2.7	3.0	2.5	4.1
All imports (percent)	56.9	58.7	59.4	62.2	57.8
U.S. producers (percent)	43.1	41.3	40.6	37.8	42.2
Total (percent)	100.0	100.0	100.0	100.0	100.0
	Value[2]				
Apparent U.S. consumption (1,000 dollars)	612,519	612,877	625,368	319,633	273,016
Share of apparent consumption supplied by--					
Japan (percent)	21.9	17.3	15.9	16.6	17.6
Korea (percent)	***	***	16.9	18.5	***
Taiwan (percent)	***	***	1.7	1.5	***
Subtotal (percent)	34.0	34.5	34.4	36.6	32.5
All other imports (percent)	***	***	***	***	***
All imports (percent)	***	***	***	***	***
U.S. producers (percent)	***	***	***	***	***
Total (percent)	100.0	100.0	100.0	100.0	100.0

[1] The product of Sun Moon Star has been excluded from the data presented for Taiwan and is included in "all other imports."
[2] These data understate import penetration because the reported values are at different levels of trade--the value of U.S. producers' shipments represents primarily sales to the end user, whereas the value of importers' shipments is largely sales to distributors.

Source: Compiled from data submitted in response to questionnaires of the U.S.International Trade Commission.

Figure 10.-- Telephone sets and consoles: Shares of U.S. consumption (quantity), 1986-89



* January-June 1989.

Source: Table 33

Market dynamics

Small business telephone systems and subassemblies are sold either directly by manufacturers and importers to end users or are distributed to domestic retail dealers/interconnects (interconnects) who then sell to end users, or to wholesalers/supply houses (supply houses). AT&T is unique in the industry in that it sells the vast majority of its systems directly to end users, whereas other U.S. producers and importers market their products to end users through independent interconnects and supply houses. Direct competition between AT&T systems and imported systems occurs largely between AT&T and independent interconnects through sales of complete packages to end users. Most direct competition between imported and domestic products at the same level of sale appears to be largely confined to sales of telephone subassemblies to interconnects and supply houses by importers, by domestic producers other than AT&T, and by AT&T for a relatively small portion of its total sales to authorized dealers.

* * * percent of AT&T systems are sold to end users as complete packages, and quoted prices include installation, wiring, service, warranty, and support. The remaining * * * percent of its systems are sold to authorized dealers for AT&T, which tend to be concentrated * * *.[126] Other U.S. producers, * * *, distribute the majority of their products through interconnects and supply houses.[127]

AT&T sells both systems and subassemblies to its authorized dealers, few of whom sell AT&T's products exclusively. These dealers market AT&T's products * * *. Some dealers reported that they generally purchase subassemblies from AT&T based on past sales volume and sell complete systems from subassemblies held in inventory. Dealers, like AT&T's direct sales force, sell their customers a complete package, providing installation, service, and support (e.g., training and programming) in addition to equipment.[128] One dealer indicated that he carries inventories of AT&T products for repair purposes, and orders subassemblies for complete systems directly from AT&T only after receiving a customer's order.[129] All of the dealers also sell subassemblies for expansion and replacement purposes.

Importers generally sell telephone subassemblies to retail dealers and wholesalers. While some importers sell complete systems directly to end users, this channel of distribution accounted for less than 5 percent of total sales for all but * * * during the investigation period. * * * reported that direct sales to end users account for * * * percent of its total sales. Importers generally lack the national sales and service force required to support a large

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[126] Post-conference brief of AT&T, p. 2. AT&T currently has * * * authorized dealers.

* * * * * * *

[127] Retail dealers are often referred to as interconnects. Although dealers and interconnects function at largely the same level of distribution, they market their products in different ways, with retail dealers selling from a showroom and interconnects through sales representatives. Wholesalers and supply houses function as distributors for subassemblies produced in the United States or imported from Japan, Korea, or Taiwan. The terms retail dealer and interconnect are used interchangeably in this section, as are the terms wholesaler and supply house.

[128] Conversations with representatives of * * *, all authorized AT&T dealers, Jan. 23, 1989.

[129] Conversation with * * *.

sales volume to end users, and instead rely on interconnects to market, sell, install, and service their small business telephone systems. Other importers agreed with this statement. For example, * * *, an importer of Japanese-produced systems, only competes directly with AT&T on sales of systems to large national end-user accounts, which represent * * * percent of * * * total sales.[130] Recently, however, several importers have established national distributorships, or purchased existing interconnects, in order to increase their presence in the end-user market. At present, this represents only a fraction of total sales for any of these companies. For example, * * *.[131]

Interconnects reported selling both domestic and foreign-produced telephone systems.[132] Most interconnects are authorized dealers for the producers or importers for whom they sell, although only a few sell one company's products exclusively. Supply houses carry the greatest variety of producers' systems. Interconnects compete with producers and importers that sell directly to end users, such as AT&T and * * *, and other interconnects, not supply houses. Over half of the responding interconnects reported changing suppliers during the investigation period, switching to suppliers that offered better support, discount schedules, and feature options. One interconnect commented that he carries * * * but he prefers the imported equipment since he receives direct technical and marketing support from the foreign manufacturers. * * *.[133]

Discounting policies of producers and importers for sales to interconnects and supply houses do not differ depending on the channel of distribution. Generally, discounts increase as volume or value purchase commitments become larger. AT&T's discounts to authorized dealers range * * *. AT&T gives discounts to end users only in certain circumstances. These include * * *. * * *.[134]

Comdial discounts sales of subassemblies to supply houses at * * * percent off list price, and has also offered several rebate programs during the investigation period. These programs gave free control and switching equipment to interconnects purchasing specific volumes of this subassembly from supply houses as well as percentage discounts on additional purchases, for total discounts of up to almost * * * percent. Rebates were estimated by Comdial to have cost * * * during 1988-89. * * * offers stocking distributors discounts ranging * * *.

Importers reported that their deepest discounts to interconnects ranged * * * off list, while some importers reported discounts of up to * * * percent off list for sales to wholesalers. End-user sales by importers are reportedly only discounted in response to competitive prices. Likewise, interconnects reported discounting to end users based on competition in the marketplace.

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[130] Conversation with * * *.
[131] * * *.
[132] Thirty-four interconnects and 5 supply houses responded to Commission questionnaires. These companies accounted for about 14 percent of consumption in 1988. Additional interconnects were contacted directly by staff. Responding interconnects represented sales of systems produced by all known producers and importers.
[133] Letter from * * *.
[134] * * *.

* * *.[135] Installation and wiring prices ranged * * * percent of the total installed price of AT&T telephone systems, depending on the size and type of system (* * *). Based on a sampling of the invoices supplied by importers, installation accounted for an average of * * * percent of the final installed price of a system for * * * and * * * percent for * * *.[136] Importers selling to end users reported that installation and other costs accounted for * * * to * * * percent of the total installed price. While interconnects estimated that prices for installation and other related items and labor accounted for * * * of the total system price, the average was 27 percent.

Small business telephone systems and subassemblies, whether produced in the United States or imported from Japan, Korea, or Taiwan, are not interchangeable with other companies' products. Within the same company, they are only interchangeable within specific models and families of models, and then only to a limited degree. For example, * * *.[137] * * *.[138]

Producers and importers generally agreed that no significant developments have occurred in the product range available during the investigation period, although several individual companies have expanded the range of their products. Several companies reported that standard and optional features have become important marketing factors in the face of increasing price competition. Features that were previously optional have become standard, and features that were previously offered only on larger systems are now available on smaller key and PBX systems.

Interconnects reported that producers have enhanced functionality and feature offerings during the investigation period. Key systems now provide many of the same applications that were previously offered only in PBXs. Competition in the market has increased as these systems, particularly the smaller key systems, have become more of a commodity product. Interconnects reported that end users base purchase decisions primarily on price, features, reliability of the vendor, and reputation of the manufacturer. Several interconnects commented that they have had to focus on sales of peripheral equipment and subassemblies to their existing customer base in order to remain competitive and maintain their installed base.

End users surveyed considered the reputation of the vendors of small business telephone systems, rather than the manufacturers, to be one of the most important factors in purchase decisions. They selected interconnects that could provide reliable and long-term support. While price was clearly an important factor in itself,[139] most companies commented that they selected the telephone system that offered the best features, expansion capabilities, and ease of use at the best price. Several end users had previously rented systems and reported that purchasing was a more economical option than renting.

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[135] Conversation with * * *.
[136] * * *.
[137] * * * reported that it produces subassemblies that can be integrated into several companies' telephone systems. * * * stated that it manufactures many special application items, such as back-up power supplies, that can plug into other companies' systems.
[138] * * *.
[139] * * *.

Competition between small business telephone systems and other telephone systems and services.--In addition to the small business telephone systems subject to investigation, end users may consider other types of telephone systems or services in their purchase decisions. These options include refurbished small business telephone systems, larger business telephone systems, and Centrex services.

AT&T believes that refurbished equipment has had little effect on sales and prices of new systems during the period. In general, importers and interconnects reported that refurbished equipment is an alternative to new equipment only when price is a purchaser's primary consideration. Few interconnects sell refurbished equipment, and most did not see themselves competing for sales with used equipment dealers.

* * *, a national vendor of refurbished equipment, reported that it sells refurbished subassemblies at prices * * * percent below the price if purchased new. It refurbishes AT&T products purchased from other dealers and end users. AT&T inspects and certifies the equipment and backs up sales with an optional maintenance contract. * * * offers a * * * warranty on all of its sales.[140] Some interconnects refurbish equipment received as trade-ins when new systems were purchased. These interconnects reported that they do not advertise refurbished equipment and only sell it at the specific request of end users. This equipment is sold as much as 65 percent below the price of new equipment.[141]

Japanese respondents stated that larger business telephone systems have also been a significant factor in the small business market, reporting that PBXs of capacities larger than 256 nonblocking ports are sometimes sold at configurations of less than 100 lines.[142] AT&T reported that during the investigation period, it sold * * * larger systems at configurations under 100 lines, which accounted for * * * percent of annual system sales in the small business market. Importers reported selling * * * larger systems configured at under 100 lines to end users during the period. Interconnects reported selling about * * * larger systems configured under 100 lines from 1986 to 1988.[143]

Although competition between the small business telephone systems under investigation and Centrex services exists, it tends to be less significant than between Centrex and telephone systems over 100 lines. Most questionnaires indicated that Centrex is designed to compete with larger PBXs. Several respondents, however, reported that Centrex has become a viable alternative to small business telephone systems even at smaller sizes, citing the RBOCs' aggressive marketing of Centrex services during the period under investigation as the cause of the increased competition.

Prices for Centrex services are determined by local telephone companies in conjunction with regulatory authorities. Rates for Centrex vary depending on the local tariff, a company's distance from the central office switch, and the number of lines used. An agent for * * * reported that the pricing structure

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[140] Conversation with * * *.
[141] Two end users surveyed reported purchases of refurbished * * * systems, at prices substantially below the price of new systems.
[142] Post-conference Economic Submission on Behalf of Japanese Respondents, p. VI.20.
[143] Staff selected 100 lines as the division between small and large business telephone systems based on the petition, p. 12, and conversations with industry sources.

is based on four factors. First are Network Access Registers, which are the access line paths out of the Bell Central Office, and are priced * * * percent less than the central office trunk lines used with small business telephone systems. Features are considered to be minimal in cost, i.e., a company may select * * * features at * * * per month per line. A third factor in the price are intercom circuits (each circuit equals one station), which are the paths between the central office and the customer site, and are priced at * * * per month. A final factor in determining price is the distance between the central office and the customer site. Mileage can cause the per-line rate to vary * * *. Thus, mileage can be a key variable in Centrex pricing. In the experience of most interconnects, Centrex is most price competitive with small business telephone systems for customers located within a one-half mile radius of the central office.[144]

Six of the seven RBOCs responded to Commission interconnect questionnaires.[145] All of these companies agreed that Centrex might be an alternative to the purchase of key systems, but not in all cases. * * * found that 90 percent of its customers prefer a key system over Centrex, and that a key system is the less expensive option. * * * reported that Centrex may be an alternative in 5 percent of its customers' cases, adding that Centrex is more expensive when costs are considered over a 5-year period. * * * commented that Centrex is an alternative only for customers located close to a telco's central office. Small business system customers generally like the idea of having the multiple button telephone sets that are used with the systems under investigation, but with Centrex functionality occurs in a single line telephone, according to a representative of * * *. A telco representative in the * * * region reported that about 50-60 percent of small businesses with Centrex also purchase key systems behind Centrex, but he added that with technological advances now occurring in telecommunications services and equipment this percentage could drop in the next few years.[146]

About half of the interconnects responding to Commission questionnaires act as agents for sales of Centrex. Most small businesses selecting Centrex services also purchase a key telephone system as a complement to the Centrex offerings, according to these interconnects. All producers and importers reported selling key systems that could be used behind Centrex. A typical customer for Centrex is a bank, which will use Centrex to communicate between different branches, but will use a key system for its telecommunications needs within each branch. * * * commented that of more than 200 Centrex customers, all but two use key systems behind Centrex. He explained that the combination of the key system and Centrex provides customers with a complete solution to their telecommunication needs.

Additional market factors.--In addition to sales of new systems, sales to end users may include MACs. The most common adds for small businesses are telephone sets and circuit cards. Producers, importers, and interconnects reported that initial systems are generally configured below 50 percent of capacity, leaving capacity into which the business can expand. More than three-quarters of end users add to their systems after the initial purchase. Subassemblies sold as adds are generally priced at about a 25-percent premium to those sold as part of a new system. Some industry sources estimated that small businesses spend up to twice the amount paid for the initial system

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[144] Several end users surveyed reported that Centrex was either too complicated or too expensive compared to small business telephone systems.
[145] RBOC subsidiaries responding to interconnect questionnaires included * * *.
[146] Conversation with * * *.

through the purchase of additional subassemblies and the labor and materials necessary to install and maintain the additional components. Since all subassemblies are dedicated to a particular company's system, the initial sale of a system is important to companies in order to also benefit from future purchases by the small business. Industry sources claim that companies will often sell the initial system at a low price in order to gain future revenues from MACs.

Producers and importers were requested to estimate the percentage of their firms' sales of subassemblies that are used as MACs. AT&T reported that * * * percent of its sales of subassemblies are used for these purposes, while importers reported a range of * * * percent used as MACs.[147] Interconnects reported that these sales accounted for as much as * * * percent of sales during the period, although half of the reporting companies reported that MACs accounted for 20 to 50 percent of sales.

Many producers, importers, and interconnects offer end users peripheral equipment packages, including items such as facsimile machines, voice mail, external paging devices, call accounting, and automated attendant systems, to name only a few. With few exceptions, sales of peripheral equipment did not account for more than 10 percent of total 1988 sales. The availability of peripheral equipment provides end users with the option of single sourcing telecommunication equipment, thus providing the purchasers with more efficient service and maintenance. Most producers, importers, and interconnects reporting sales of peripheral equipment indicated that while prices for this equipment and small business telephone systems may be quoted together, this was not the general practice.

In general, producers and importers reported that small businesses replace their telephone systems every 5 to 7 years. * * * stated that replacement sales account for the majority of new system sales of the subject products, and that the total installed customer base grows slowly. System replacement sales are often due more to the desire of end users to upgrade available features and capabilities than to the physical age of the system. Producers and importers attempt to offer telephone systems with expandable capabilities and also to introduce new software and hardware upgrades in order to retain their installed customer base.

Prices

Data requested on sales to end users.--The Commission requested producers, importers, and interconnects to report prices for sales of installed small business telephone systems, based on the first several sales occurring in each semi-annual period during January 1986-June 1989.[148] Prices were to include installation, service, and maintenance charges, as well as optional features. These items are normally included in a system transaction. Prices were to be reported for sales in 10 designated metropolitan areas, or, for companies not selling in these areas, for sales in their principal market.

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[147] For most producers and importers, it was difficult, or impossible to provide an estimate for MACs, since they do not generally sell directly to end users.
[148] In the questionnaires, companies were originally requested to provide the installed price for the first installed sale occurring in each semi-annual period. This request was expanded to the first 6 sales in each period. In most cases, however, companies did not have 6 sales in any period that closely matched the system size named in the questionnaire.

Five system size ranges, up to 80 stations and not to exceed 256 ports, were specified. Within each range, a given construct was requested. A construct is the size of a telephone system in terms of the number of external or "central office lines" (C.O. lines) and telephone sets; for example, a system construct of 3x8 would be composed of 3 C.O. lines and 8 telephone sets. Prices were to be reported for sales that were either at or near this construct.

Data requested on sales to retail dealers/interconnects and wholesalers/supply houses.--Producers and importers were also requested to calculate system prices based on the prices at which the minimum necessary subassemblies for the system to operate were sold to their two largest customers in each period.[149] Interconnects were requested to calculate system prices based on purchase prices of domestic and imported subassemblies minimally necessary to configure a system at each of the specified sizes. All installation, service, and maintenance charges, as well as prices for any optional features, were to be excluded. As with end-user sales, prices were to be calculated at the five specific system sizes, and for each of the semi-annual periods identified above.

Price trends and comparisons.--The numerous problems in comparing prices and analyzing trends, caused by the nature of the market, are discussed in detail in this section. These problems are such that specific price comparisons and margins of underselling have not been calculated. However, staff believes that data reported by producers, importers, and interconnects are representative of the market, and that inferences about trends and comparisons between the domestic and imported products are indicative of activity in the market during the investigation period. These trends and comparisons are discussed for the different levels of trade and constructs.

An analysis of price trends and comparisons for end-user sales and sales to interconnects and supply houses is difficult for several reasons. First, despite few major technological changes, new models are frequently introduced as older models are discontinued, thus a continuous price series for a single model seldom exists. However, most companies agree that new models are considered to be replacements for the discontinued models, thus price series do show a degree of continuity for the investigation period. Where companies reported prices separately for different models, trends can be analyzed more accurately than where companies combined prices for different models or did not indicate changes in model features that affect price. However, even in instances when companies reported prices for only one model for the period, they may have added or changed features that are standard to a particular model without changing model numbers.

In most cases, direct price comparisons between domestic and imported telephone systems based on actual transactions are not possible. While prices reported by producers and importers for sales to end users are based on actual transactions, these represent a majority of AT&T's sales but only a fraction of importers' sales. Importers were able to calculate system prices to interconnects and supply houses, obtained by combining the lowest prices at

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[149] Because a system is not sold to retail dealers and interconnects or wholesalers and supply houses, all of whom purchase subassemblies and configure systems to their customers' individual requirements or resell for expansion or replacement units, there are no actual transactions at this level of sale on which to report prices of systems. Companies were provided with worksheets in order to maintain uniformity in these price calculations.

which subassemblies necessary to configure a specific system were sold.[150] Domestic prices equivalent to these import prices were estimated in a similar manner.

Respondents allege that AT&T has priced its systems at a premium, based on the company's name and reputation. End-user responses to questions of the comparability of AT&T and imported systems frequently supported this allegation, with many commenting that while they preferred the AT&T systems, they were not able to justify the price differences between AT&T's and importers' systems. According to the respondents, this policy of "premium pricing" is what has caused AT&T to lose market share,[151] and they contend that this precludes comparisons and estimation of margins of underselling.

Other difficulties in comparing prices at the end-user level are caused by differences in the size of the systems sold. Although specific constructs were identified, producers and importers rarely sold these exact constructs. In the absence of sales at the exact constructs, respondents selected sales that most closely matched the specified sizes. Thus, prices reported may differ from one period to another based on the size of the construct reported rather than on competition in the market.[152]

The greatest variations in terms of subassemblies supplied for given constructs occurred in the number and types of telephones reported. Telephones account for a large share of the total price paid for an installed system. System prices at one construct can vary considerably based on the specific telephones selected for a system. For example, * * *.

* * * * * * *

Thus, the mix of lower and higher priced telephones differs from one sale to another and can have a significant effect on the total price paid for a system.

Direct price comparisons at the end-user level are also difficult since these prices include products and services not subject to investigation. End users almost always purchase an installed system. Respondents allege that prices are not comparable at the end-user level because these sales include substantial value added in the form of installation and nonsubject materials.

* * * * * * *[153]

Many producers and importers agreed that standard features are similar among different companies. However, different optional features may be available for particular systems so that even if two competing systems appear to be closely priced, optional features may offer the end user more functionality in the one system than in the other. Thus, the end user might not consider the systems to be directly comparable.

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[150] Producers and importers are generally not aware of the final system price paid to interconnects and supply houses by end users.

[151] Postconference Brief on Behalf of Japanese Respondents, p. IV.4, Prehearing Brief on Behalf of Japanese Respondents, pp. 52-55, and transcript of hearing, pp. 154-155. Also, in a conversation with staff, * * * commented that AT&T commands a 20-percent price premium over other producers.

[152] * * *.

[153] Prehearing brief of EXECUTONE, pp. 30-31.

Installed prices to end users.--Table 34 shows installed prices to end users, including all hardware and services, with all sales averaged across all metropolitan areas, at each construct, in each semiannual period.[154] Although parties had argued that installed prices varied widely between metropolitan areas, questionnaire responses did not support this. Prices in any one metropolitan area were not consistently different than in other areas.

Table 34
U.S. and imported small business telephone systems: Prices reported by producers and importers for installed sales to end users, semiannually, January-June 1986 to January-June 1989

Country, supplier, and system size	Period						
	1986		1987		1988		1989
	Jan-Jun	Jul-Dec	Jan-Jun	Jul-Dec	Jan-Jun	Jul-Dec	Jan-Jun
*	*	*	*	*	*	*	

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

* * *. Import prices were reported by * * * importers of the Japanese-manufactured product and * * * importers of Korean-produced telephone systems and subassemblies. In the end-user market, prices for U.S. and imported systems generally declined during the 1986-88 period.

Installed prices to end users for U.S. systems * * * for telephone systems at the three smallest system sizes selected for analysis (3x8, 5x14, and 8x26).

* * * * * * *[155]

Prices for the two largest configurations, 16x48 and 24x80, * * *.

* * * * * * *

Prices for most configurations of Japanese telephone systems sold to end users declined during the period. Complete series were not available in most instances and most prices shown in the table are based on less than three sales in any one period. All sales to end users by Japanese importers were priced * * *.

Installed prices for Korean-produced small business telephone systems were reported by * * *.

* * * * * * *

[154] For example, if a producer or importer reported 6 sales that occurred at a specific construct, an average of the installed prices for these 6 sales was calculated. Few companies reported 6 sales in any one time period. For this reason, the number of data points in each average price varies from one period to the next.

[155] * * *.

Several interconnects reported end-user prices for sales of U.S., Japanese, and Korean telephone systems (table 35). As with producer and importer prices, averages of all reported sales for each system size and period are presented.[156] Prices reported for U.S.-produced systems were primarily for sales of * * * systems, although some sales of systems produced by * * * were reported in the * * * sizes. Compared to end-user sales * * * shown in table 34, these other U.S. produced-systems were priced * * *.

Table 35
U.S. and imported small business telephone systems: Prices reported by interconnects for installed sales to end users, semiannually, January-June 1986 to January-June 1989

Country and system size	Period						
	1986		1987		1988		1989
	Jan-Jun	Jul-Dec	Jan-Jun	Jul-Dec	Jan-Jun	Jul-Dec	Jan-Jun
*	*	*	*	*	*	*	

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Japanese and Korean prices were reported for systems produced by a number of manufacturers. * * *.

Prices fluctuated for all countries and sizes reported with no clear trends. This can be attributed in part to the variation in the number of companies reporting prices in each period and the mix of different models for which prices were reported by the interconnects at each construct.[157]

Comparisons of prices between U.S.-produced systems and imported systems are also difficult due to the same factors affecting producer and importer sales to end users. In general prices for the systems imported from both Japan and Korea were higher than those reported by interconnects for the domestic systems produced by * * *. Prices reported for sales of * * * systems at the * * * size ranges were higher priced than the imports during comparable periods. Comparing Japanese and Korean end-user prices reported by interconnects to * * * end-user prices in table 34 shows that the imported systems * * * were priced below * * *.

Interconnect and supply house prices.--* * * reported usable data for calculated system prices to interconnect and supply houses (table 36). Eight importers of the Japanese product and * * * importers of Korean subassemblies responded with data.

[156] Not all interconnects documented end-user sales with invoices, thus there is likely some deviation in system sizes for the sales reported compared to the sizes requested in the questionnaire.
[157] Price fluctuations for U.S.-produced systems at the * * * size, for example, are due to the specific system reported--* * *.

Table 36
U.S. and imported small business telephone systems: Average prices reported for sales to two largest interconnect and supply house customers, semiannually, January-June 1986 to January-June 1989

Country, supplier, and system size	Period						
	1986		1987		1988		1989
	Jan-Jun	Jul-Dec	Jan-Jun	Jul-Dec	Jan-Jun	Jul-Dec	Jan-Jun
*	*	*	*	*	*	*	

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

* * * * * * *

Calculated system prices of subassemblies produced in Japan decreased overall for all sizes except the 3x8 construct. Korean prices also decreased overall * * *. Throughout the period, prices for both the Japanese and Korean products fluctuated without a pattern. Price series for Taiwan-produced subassemblies and * * * were incomplete and do not allow an analysis of trends.

Calculated system prices for Japanese-produced subassemblies were below * * * in * * * of 31 comparable periods, but were priced below * * * in only * * *. Comparing * * * prices to the Korean products shows the imported product priced below the domestic product in * * *, and below * * * in * * * periods. Calculated prices for imports from Taiwan were priced * * *. * * *.

Lost sales and lost revenues

Lost sales and lost revenues reported in the final investigations.--* * * reported * * * over the investigation period totaling * * * in lost revenues, and submitted examples of such instances. In addition to its lost sales allegations submitted during the preliminary investigations, * * * provided * * * additional allegations of lost sales to end users and * * * instances in which dealers * * *. * * * reported reducing prices and offering customer incentives to avoid losing sales. * * * also reported lost sales at the end-user and dealer levels. Staff contacted 11 end users named in these allegations. Summaries of conversations with representatives of these companies follow.

* * *.--* * * alleged the loss of a sale to * * *, valued at * * *, in * * * to a telephone system imported from Japan. * * * reported that he had considered * * *. * * * selected the * * * system for several reasons. The company selling the system (an interconnect) had a good reputation for service and reliability in his area, companies he called for references all gave the * * * system positive reviews, and the system offered all the features that he needed. * * * stated that in addition to the good reviews of the * * * system, it was priced at less than * * *. He said that the * * * system was more system than they needed, in terms of the number of ports and features. Also, many companies that he contacted for references expressed dissatisfaction with the * * * system.

* * *.--* * * alleged the loss of a sale of the * * *, valued at * * *, in * * * to * * * due to price competition from a * * * system. * * * of * * * stated that he purchased a refurbished * * * system rather than the * * * system. Not only was the refurbished system considerably less expensive, according to * * *, it was also the same system used by * * *'s corporate office.

* * *.--* * * alleged a lost sale of the * * *, valued at * * *, to * * * during * * *, due to a lower-priced system imported from * * *. * * * of * * * stated that he considered the * * * system and a system imported by * * *. His company's previous system was produced by * * *, which was bought by * * *. * * * decided to purchase the * * * system because he was satisfied with the service provided by * * *. He commented that he liked the * * * product and trusted its reliability behind the * * * name, and he now regrets not having selected the * * * system.

* * *.--* * * alleged a lost sale of the * * * valued at * * * to * * * during * * *, due to a lower-priced system imported from * * *. A representative of * * * stated that they considered the * * * system, but selected a system marketed by * * *. The purchase decision was based on price and the reputation of the vendor.

* * *.--* * * alleged losing a sale of its * * * system valued at * * * for hardware only, during * * *, due to price competition from * * * imports. * * * of * * * stated that she considered the * * * system as well as systems imported by * * * and * * *, and selected the * * * system. * * * commented that she had wanted to buy an American-made system, but was not able to justify the additional cost. She also reported that the system was purchased to replace a refurbished system.

* * *.--* * * alleged the loss of a sale of * * * systems during * * * to lower-priced, * * * imports. This sale was valued at * * *. * * * of * * * reported that * * * was purchasing * * * key systems for its small offices. He considered several systems, including one produced by * * *, one imported by * * *, the * * * system, and the one selected, the * * * which is produced in * * * and marketed by * * *. * * * commented that * * * is * * * customer, and he would have selected its * * * system if the price had been within * * * percent of any of the competitors' systems. While all the systems technically met * * *'s requirements, he chose the * * * based primarily on its expansion capabilities. Prior to this purchase, * * * had rented from * * *. * * * also considered refurbished equipment marketed by * * * in * * *.

* * *.--* * * alleged that lower-priced imports from * * * caused it to lose a sale of * * * and * * * systems valued at * * *, during * * *. * * * of * * * reported that he considered systems marketed by * * * different suppliers, including * * *, but selected a system produced by * * *. Any system selected had to provide dependable voice and data communication abilities. * * * commented that * * *'s name gave it a competitive edge over other suppliers, but that the price was too high. He said that the * * * system was priced * * * the * * * system.

* * *.--* * * alleged the loss of a sale for a * * * system to * * * to a * * * system imported from * * *. A spokesman for * * * reported that they considered systems produced by * * *, * * *, * * *, and * * *, and chose * * *'s * * * system. Prices for the systems were equal, but * * *'s sales presentation and follow up were better. * * * also had excellent references, and offered a * * * year parts and labor warranty.

* * *.--* * * alleged the loss of a sale for a * * * system to * * * to a * * * system imported from * * *. A representative of * * * stated that they considered systems produced by * * *, * * *, * * *, and * * *, and chose * * *'s * * * system. The systems were similar in price and features, but the * * * salespeople had a better understanding of * * *'s business needs. * * * also offered * * *. Quotes were requested for * * * services, but none were received. * * * did not consider refurbished or used systems since previous generations of equipment are not suitable for their uses.

* * *.--* * * alleged that in * * * they lost a sale valued at * * * for a * * * system to * * * to the * * * system imported from * * *. * * *, representative for * * *, reported that his company had not purchased a phone system during * * *, but had purchased a system in * * *. * * * said that they considered a system marketed by * * *, * * *, and * * *, and decided on the * * * system. The main consideration in the purchase was price. They considered * * *, but did not feel that it was appropriate for their business.

* * *.--* * * alleged losing a sale of a * * * system to * * * to a competing * * * system. * * *, a spokesman for * * *, stated that they considered systems marketed by * * *, * * *, and * * *, and chose the * * * system. The vendor for this system was located * * * from them. * * * was not considered to be a viable option because * * * needed * * * telephones.

Lost sales and lost revenues reported in the preliminary investigations.--* * * alleged * * * instances of lost sales and * * * instances of lost revenues at the end-user level, totaling approximately * * * in lost sales and * * * in lost revenues. Lost sale and lost revenue values were based on installed system prices rather than only on the price of equipment. Staff contacted * * * of the firms named in these allegations. Conversations with representatives of these firms are summarized below.

* * * also submitted the names of * * * retail dealers and wholesalers who it believes * * *. * * * did not quantify, either in terms of volume or value, alleged lost sales at the retail dealer level. At least one of the companies named as a lost sale at the retail dealer level is an * * *. * * *, staff contacted * * * of the retail dealers named by * * * and discussed their general sales and marketing efforts for the brands of small business telephone systems that they carry.

* * *.--* * * alleged a lost sale, with a potential value of * * * installed, to a lower-priced * * *-produced telephone system. According to * * *, * * * projected an annual requirement of * * * systems. * * * for * * *, stated that * * *. * * * said that while * * * did submit a bid, the bid for the * * * equipment, which he believes is at least partly produced in * * *, met all requirements at a lower price. The total project has a value of * * *, according to * * *, however, this includes systems up to * * * stations. He did not know what percent of that total value was made up of systems under * * * stations.

* * *.--* * * alleged losing a sale to * * *, valued at * * * for a * * *, due to lower-priced * * * products. * * *, a spokesman for * * *, reported that he sought quotes from * * * and * * *. * * * was a sponsor of exhibits and programs at * * * and they would have liked to purchase its telephone system. However, according to * * *, the * * * system was priced about * * * below the * * * system, and he felt that both were comparable in terms of features and meeting the needs of * * *. * * * said he was prepared to purchase the * * * system when * * * decided to donate the system to * * *, including installation.

* * *.--* * * alleged losing a sale of * * *, valued at * * *, because of lower-priced imports from * * *. * * * of * * * reported that he based his purchase decision on service, the reputation of the vendor, and price. He opted for a system sold by * * * based on these factors. * * * felt that * * * was trying to sell them more features than * * * needed, and that * * * could not convince * * * that the additional features were needed. * * * did not comment on the price of the * * * system.

* * *.--* * * alleged losing a sale of a * * * valued at * * * for the equipment to a * * * system imported from * * * and priced at * * *. * * * of * * * stated that she looked at several systems and selected the * * * system because she felt it was the "best system at the best price." * * * said that the installed price for the * * * system reported by * * * was accurate.

* * *.--* * * alleged the loss of a sale valued at * * * for a combination of * * * and * * * systems to * * * to a competing * * *-produced system priced at * * *. * * *, a spokesman for * * *, reported that it purchased the * * *, a system produced in * * * by * * *. * * * stated that * * * had a budget for a telephone system, including wiring and installation, and that the * * * system did not fall within this predetermined budget.

* * *.--* * * alleged that revenues of * * * were lost in * * * on a sale of * * * telephone systems to * * *, due to price competition from * * * suppliers. * * *, representative for * * *, stated that his company had not asked * * * to decrease its price. * * * commented that * * * currently uses * * * different suppliers' systems in its stores nationwide. * * * is one of the suppliers, and the other three, * * *, * * *, and * * *, are all * * * companies. * * * stated that there are three main considerations when making a purchase--price, quality, and national dealerships. * * * explained that phone companies with national distribution centers can provide service for all * * * stores nationwide. In addition, * * * stated that the price of the * * * system was lower than * * *'s prices for the * * * system. However, * * * added that * * *'s * * * systems are more price competitive than are the * * * systems in the market.

* * *.--* * * alleged that revenues of * * * were lost in * * * on a sale of * * * telephone systems to * * *, due to price competition from * * * suppliers. * * *, spokesman for * * *, would not comment on this allegation on the telephone.

* * *.--* * * named * * * as a lost sale at the wholesale level but provided no information except that it involved * * *'s * * * and * * * systems. Counsel for * * * stated that around * * *, * * * contacted * * * about the possibility of carrying * * * systems in * * * stores. According to counsel, * * * was not responsive and by the time it did respond to * * *'s inquiry, * * * had opted to drop key systems from its product line. Additionally, * * * prefers to carry * * * products and it reports that * * * is reluctant to manufacture * * * products.

* * *.--* * * reported that * * * promoted imported systems over * * *'s and * * *. * * * of * * * said that he sells both * * * systems and a * * * telephone system, but he carries no systems from * * *, * * *, or * * *.

* * * stated that customers make purchase decisions based on price, service, and the reputation of the seller. He commented that they have not been effective selling * * * systems based on the price of these systems--he said that competitors sell systems below * * *'s cost for the systems.

* * *.--* * * is an interconnect that carries * * * brands of imported telephone systems. * * *, the owner of * * *, stated that * * * approached him to represent * * * products in * * * and * * *. * * * said that he would not only have had to expand the area that he covered at that time, but would also have had to directly compete with * * *'s own sales force in the * * * area.

* * * does not feel that * * * wants to compete in the market for small business telephone systems. He said that * * * prices run * * * percent above comparable imported models that he carries. (* * * carries imported models from * * *, as well as from several of the countries named in the investigations.) However, he also believes that the * * * name and the reputation of the company will, in some cases, outweigh a price differential. Companies seeking to purchase the majority of the sizes of systems under investigation, however, are quite sensitive to the price of the system they purchase. He said that with the money customers can save buying a lower-priced, though comparable, imported system, they can also buy items such as fax machines, computers, and software for their offices.

* * *.--* * * is an authorized dealer of * * * products, covering a * * *-state area in the * * *. * * * of * * * stated that they have felt severe competition from imported systems from * * *, * * *, and * * *. * * * said that first-time buyers of telephone systems, as well as small businesses (those that would purchase either * * * or * * * systems from * * *) are the most price sensitive. He cited several instances where he lost sales of * * * installed systems to * * * and * * * installed systems that were priced more than * * * percent below the * * * system.

* * *.--* * * alleged that * * * promotes lower-priced imports over the * * * product. * * * of * * * stated that he carries * * * and the * * *-produced * * * telephone systems, both of which offer good service and high quality. * * * said that his customers look at the type and size of system, features, and price, when purchasing a telephone system. Both * * * and * * * offer similar types of systems with comparable features, but * * *'s systems are more expensive than * * *'s. According to * * *, some professional groups, such as doctors or CPA's, will purchase an * * * system based on its name and reputation, but more commonly, purchasers consider the price of the system to be a very important factor.

Exchange rates

Quarterly data reported by the International Monetary Fund indicate that during January 1986-June 1989 the nominal value of the Japanese yen advanced by 36.1 percent against the U.S. dollar (table 37).[158] Adjusted for relative movements in producer price indexes in the United States and Japan, the real value of the Japanese currency appreciated 15.3 percent during the period.

During January 1986-June 1989, the nominal value of the Korean won rose by 33.0 percent against the U.S. dollar. Adjusted for relative movements in the producer price indexes, the real value of the won appreciated by 24.5 percent.

Quarterly data indicate that during January 1986-March 1989, the nominal value of the New Taiwan dollar appreciated by 42.0 percent. Adjusted for

[158] International Financial Statistics, September 1989.

relative movements in the producer price indexes, the real value of the Taiwan currency appreciated vis-a-vis the U.S. dollar by 24.4 percent.

Table 37
Exchange rates:[1] Nominal exchange rates of selected currencies in U.S. dollars, real exchange-rate equivalents, and producer price indexes in specified countries,[2] indexed by quarters, January 1986-June 1989

Period	U.S. producer price index	Japan			Korea			Taiwan		
		Producer price index	Nominal exchange-rate index	Real exchange-rate index[3]	Producer price index	Nominal exchange-rate index	Real exchange-rate index[3]	Producer price index	Nominal exchange-rate index	Real exchange-rate index[3]
			---US dollars/yen---			---US dollars/won---			---US dollars/NT$---	
1986:										
Jan.-Mar...	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Apr.-June..	98.2	96.3	110.4	108.3	97.8	100.0	99.8	99.8	102.3	104.0
July-Sept..	97.7	93.8	120.6	115.8	98.8	100.6	101.7	98.9	104.9	106.2
Oct.-Dec...	98.1	92.8	117.2	111.0	98.1	102.0	102.0	98.2	108.1	108.3
1987:										
Jan.-Mar...	99.2	92.2	122.7	114.0	98.4	103.7	102.8	97.2	112.3	110.1
Apr.-June..	100.8	91.5	131.7	119.5	99.5	107.2	105.8	96.4	121.1	115.9
July-Sept..	101.9	92.6	127.9	116.2	99.6	109.8	107.3	95.7	128.8	120.9
Oct.-Dec...	102.3	92.3	138.4	124.8	100.0	111.0	108.5	94.7	132.9	122.9
1988:										
Jan.-Mar...	102.9	91.3	146.8	130.1	101.6	115.0	113.5	93.3	137.2	124.3
Apr.-June..	104.8	90.9	149.6	129.8	101.7	120.6	117.1	94.5	137.0	123.6
July-Sept..	106.2	91.8	140.5	121.5	102.5	122.7	118.5	95.5	136.6	122.8
Oct.-Dec...	106.7	91.0	150.0	128.0	102.5	127.5	122.5	95.4	138.4	123.7
1989:										
Jan.-Mar...	109.0	91.5	146.3	122.7	102.9	130.9	123.6	95.4	142.0	124.4
Apr.-June..	110.9	93.9	136.1	115.3	103.7	133.0	124.5	(4)	(4)	(4)

[1] Exchange rates expressed in U.S. dollars per unit of foreign currency.
[2] Producer price indicators--intended to measure final product prices--are based on average quarterly indices presented in line 63 of the International Financial Statistics.
[3] The indexed real exchange rate represents the nominal exchange rate adjusted for relative movements in Producer Price Indices in the United States and the respective foreign countries. Producer prices in the United States increased 10.9 percent between January 1986 and June 1989 compared with a 6.1-percent decrease in Japan, a 3.7-percent increase in Korea, and a 4.6-percent decrease in Taiwan as of January-March 1989, the last period for which its producer price index is reported.
[4] Data not available.

Source: International Monetary Fund, International Financial Statistics, September 1989.

Note.--January-March 1986=100.0.

APPENDIX A

THE COMMISSION'S FEDERAL REGISTER NOTICE

[Investigations Nos. 731-TA-426-428 (Final)]

Certain Telephone Systems and Subassemblies thereof from Japan, Korea, and Taiwan

AGENCY: United States International Trade Commission.

ACTION: Institution of final antidumping investigations and scheduling of a hearing to be held in connection with the investigations.

SUMMARY: The Commission hereby gives notice of the institution of final antidumping investigations Nos. 731-TA-426-428 (Final) under section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the act) to determine whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Japan, Korea, and Taiwan of small business telephone systems,[1]

[1] For the purposes of these investigations, "small business telephone systems and subassemblies thereof" are telephone systems, whether complete or incomplete, assembled or unassembled, with intercom or internal calling capability and total nonblocking ports capacities of between 2 and 256 ports, and discrete subassemblies thereof designed for use in such systems. A subassembly is "designed" for use in a small business telephone system if it functions to its full capability only when operated as part of a small business telephone system. These subassemblies are: control and switching equipment, circuit cards and modules, and telephone sets and consoles.

provided for in subheadings 8504.40.00, 8517.10.00, 8517.30.20, 8517.30.25, 8517.30.30, 8517.81.00, 8517.90.10, 8517.90.15, 8517.90.30, 8517.90.40, and 8518.30.10 of the Harmonized Tariff Schedule of the United States (previously reported under items 682.60, 684.57, 684.58, and 684.59 of the Tariff Schedules of the United States), and that have been found by the Department of Commerce, in preliminary determinations, to be sold in the United States at less than fair value (LTFV). Unless the investigations are extended, Commerce will make its final LTFV determinations on or before October 10, 1989, and the Commission will make its final injury determinations within 45 days of notification of Commerce's final determinations (see sections 735(a) and 735(b) of the act (19 U.S.C. 1673d(a) and 1673d(b))).

For further information concerning the conduct of these investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 207, subparts A and C (19 CFR part 207), as amended by 53 FR 33034 (August 29, 1988) and 54 FR 5220 (February 2, 1989), and part 201, subparts A through E (19 CFR part 201) as amended by 54 FR 13672 (April 5, 1989).

EFFECTIVE DATE: August 2, 1989.

FOR FURTHER INFORMATION CONTACT: Rebecca Woodings (202-252-1192), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-252-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-252-1000.

SUPPLEMENTARY INFORMATION:

Background. These investigations are being instituted as a result of affirmative preliminary determinations by the Department of Commerce that imports of small business telephone systems from Japan, Korea, and Taiwan are being sold in the United States at less than fair value within the meaning of section 731 of the act (19 U.S.C. 1673). The investigations were requested in a petition filed on December 28, 1988, by American Telephone & Telegraph Co., Parsippany, NJ, and Comdial Corp., Charlottesville, VA. In response to that petition, the Commission conducted preliminary antidumping investigations and, on the basis of information developed during the course of those investigations, determined that there was a reasonable indication that an industry in the United States was materially injured by reason of imports of the subject merchandise (54 FR 7891, February 23, 1989).

Participation in the investigations. Persons wishing to participate in these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules (19 CFR 201.11), not later than twenty-one (21) days after the publication of this notice in the Federal Register. Any entry of appearance filed after this date will be referred to the Chairman, who will determine whether to accept the late entry for good cause shown by the person desiring to file the entry.

Service list. Pursuant to § 201.11(d) of the Commission's rules (19 CFR 201.11(d)), the Secretary will prepare a service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance. In accordance with §§ 201.16(c) and 207.3 of the rules (19 CFR 201.16(c) and 207.3), as amended by 53 FR 33039 (August 29, 1988) and 54 FR 5220 (February 2, 1989), each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by the service list), and a certificate of service must accompany the document. The Secretary will not accept a document for filing without a certificate of service.

Limited disclosure of business proprietary information under a protective order. Pursuant to section 207.7(a) of the Commission's rules (19 CFR 207.7(a)), as amended by 53 FR 33039 (August 29, 1988) and 54 FR 5220 (February 2, 1989), the Secretary will make available business proprietary information gathered in these final investigations to authorized applicants under a protective order, provided that the application be made not later than twenty-one (21) days after the publication of this notice in the Federal Register. A separate service list will be maintained by the Secretary for those parties authorized to receive business proprietary information under a protective order. The Secretary will not accept any submission by parties containing business proprietary information without a certificate of service indicating that it has been served on all the parties that are authorized to receive such information under a protective order.

Staff report. The prehearing staff report in these investigations will be placed in the nonpublic record on October 13, 1989, and a public version will be issued thereafter, pursuant to § 207.21 of the Commission's rules (19 CFR 207.21).

Hearing. The Commission will hold a hearing in connection with these investigations beginning at 9:30 a.m. on October 31, 1989, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission not later than the close of business (5:15 p.m.) on October 20, 1989. All persons desiring to appear at the hearing and make oral presentations should file prehearing briefs and attend a prehearing conference to be held at 10:00 a.m. on October 25, 1989, at the U.S. International Trade Commission Building. The deadline for filing prehearing briefs is October 24, 1989. Testimony at the public hearing is governed by § 207.23 of the Commission's rules (19 CFR 207.23). This rule requires that testimony be limited to a nonbusiness proprietary summary and analysis of material contained in prehearing briefs and to information not available at the time the prehearing brief was submitted. Any written materials submitted at the hearing must be filed in accordance with the procedures described below and any business proprietary materials must be submitted at least three (3) working days prior to the hearing (see § 201.6(b)(2) of the Commission's rules (19 CFR 201.6(b)(2))).

Written submissions. All legal arguments, economic analyses, and factual materials relevant to the public hearing should be included in prehearing briefs in accordance with section 207.22 of the Commission's rules (19 CFR 207.22). Posthearing briefs must conform with the provisions of § 207.24 (19 CFR 207.24) and must be submitted not later than the close of business on November 6, 1989. In addition, any person who has not entered an appearance as a party to the investigation may submit a written statement of information pertinent to the subject of the investigation on or before November 6, 1989.

A signed original and fourteen (14) copies of each submission must be filed with the Secretary to the Commission in accordance with § 201.8 of the Commission's rules (19 CFR 201.8). All written submissions except for business proprietary data will be available for public inspection during regular business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary to the Commission.

Any information for which business proprietary treatment is desired must be

submitted separately. The envelope and all pages of such submissions must be clearly labeled "Business Proprietary Information." Business proprietary submissions and requests for business proprietary treatment must conform with the requirements of § 201.6 and 207.7 of the Commission's rules (19 CFR 201.6 and 207.7), *as amended* by 53 FR 33034 (August 29, 1988), 54 FR 5220 (February 2, 1989), and 54 FR 13672 (April 5, 1989).

Parties that obtain disclosure of business proprietary information pursuant to § 207.7(a) of the Commission's rules (19 CFR 207.7(a)), as amended by 53 FR 33034 (August 29, 1988) and 54 FR 5220 (February 2, 1989), may comment on such information in their prehearing and posthearing briefs, and may also file additional written comments on such information no later than November 13, 1989. Such additional comments must be limited to comments on business proprietary information received in or after the posthearing briefs.

Authority: These investigations are being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 207.20 of the Commission's rules (19 CFR 207.20).

Issued: August 11, 1989.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 89-19246 Filed 8-15-89; 8:45 am]

BILLING CODE 7020-02-M

Appendix B

LIST OF WITNESSES

List of Witnesses

Those persons listed below appeared at the United States International Trade Commission's hearing held in connection with the subject investigations.

Subject: Certain Telephone Systems and Subassemblies Thereof from Japan, Korea, and Taiwan

Invs. Nos: 731-TA-426-428 (Final)

Date and Time: 9:30 a.m., October 31, 1989

Sessions were held in the Main Hearing Room of the United States International Trade Commission, 500 E Street, S.W., Washington, DC

In support of the imposition antidumping duties:

(Appearing as a group)

Covington & Burling
on behalf of

American Telephone & Telegraph Co.

Harvey M. Applebaum)
O. Thomas Johnson, Jr.)
Sonya D. Winner)--OF COUNSEL
Susan L. Burke)
Mark P. Kindall)

Comdial Corp.
Charlottesville, VA

Witnesses:

John A. Blanchard, Senior Vice President, AT&T
John Henderson, Vice President, Frank Lynn & Associates
Paul E. Green, S. S. Kresge Professor of Marketing, The Wharton School, University of Pennsylvania
Alan R. Theesfeld, Product Manager, GBS, AT&T
Thomas M. Woodard, Director, McKinsey & Co.
William G. Mustain, Chief Executive Officer, Comdial
Bruce P. Malashevich, President, Economic Consulting Services Inc.
Thomas Davis, Northeastern Telecommunications

Thomas A. Williams, Finance Manager, GBS, AT&T
Jeff Babka, Financial Vice President, GBS, AT&T^R
Paul Wondrasch, President, GBS, AT&T
Andrew W. Bongiorno, Senior Attorney, GBS, AT&T
Kevin Nuffer, Engagement Manager, McKinsey & Co.

In opposition to the imposition antidumping duties:

(Appearing as a group for Japan)

Akin, Gump, Strauss, Hauer & Feld
on behalf of

Fujitsu Ltd.,
Fujitsu, America, Inc., and
Hasegawa Electric Co., Ltd.

Warren E. Connelly)
Valerie Slater) --OF COUNSEL

Coudert Brothers
on behalf of

NEC Corp. and
NEC America, Inc.

Mark D. Herlach)
Christer L. Mossberg) --OF COUNSEL
James G. Dwyer)

Dorsey & Whitney
on behalf of

Nissho Iwai American Corp.

James Taylor, Jr.)
L. Daniel Mullaney) --OF COUNSEL

Fenwick, Davis & West
on behalf of

Nakayo Telecommunications, Inc. and
Nakayo U.S.A., Inc.

Donald R. Davis)
Roger M. Golden) --OF COUNSEL
Preston T. Scott)

Graham & James
on behalf of

Nitsuko Corp.

Yoshihiro Saito)
Jeffrey L. Snyder) --OF COUNSEL
Lawrence R. Walders)

In opposition to the imposition antidumping duties--Continued

(Appearing as a group for Japan)--Continued

McDermott, Will & Emery
on behalf of

Hitachi, Ltd.

Carl W. Schwarz)
William H. Barrett)--OF COUNSEL
Lizbeth R. Levinson)

Mudge Rose Guthrie Alexander & Ferdon
on behalf of

Toshiba Corp. and
Toshiba America Information Systems, Inc.

N. David Palmeter)
Jeffrey S. Neeley)--OF COUNSEL
Joseph Francois)

Skadden, Arps, Slate, Meagher & Flom
on behalf of

Iwatsu Electric Co.,
Iwatsu America, Inc.,
Executone Business Systems
Business Telephones, Inc.
ATCOM Inc., and
E&H Electronics

William E. Perry--OF COUNSEL

Weil, Gotshal & Manges
on behalf of

Matsushita Electric Industrial Co.,
Matsushita Comminication Industrial Co.,
Kyushu Matsushita Electric Co., Ltd., and
Matsushita Electric Corp. of America

A. Paul Victor)
Jeffrey P. Bialos)--OF COUNSEL
Martin S. Applebaum)

Witnesses:

John W. Wilson, President, J.W. Wilson & Associates
Andrew Wechsler, Director, International Trade Services, Economists Inc.
Harold Furchtgott-Roth, Economists Inc.
Francis R. Collins, President, CCL Corp.
Kenneth M. Munsch, President, ATCOM, Inc.
John Cosgrove, President, Executon Business Systems
Allen Buckalew, Economist, J.W. Wilson & Associates

In opposition to the imposition antidumping duties--Continued

(Appearing as a group for Korea)

Dow, Lohnes & Albertson
on behalf of

Goldstar Telecommunications Co., Inc.

William Silverman)
Michael P. House)
R. Will Planert)--OF COUNSEL
Barry A. Pfeifer)

Hunton & Williams
on behalf of

Executone Information Systems, Inc.

William F. Young)
Lynda M. Rozell)--OF COUNSEL

Oppenheimer Wolff & Donnelly
on behalf of

Oriental Precision Co., Ltd.

David A. Gantz--OF COUNSEL

Witnesses:

Walter H. A. Vandaele, Principle, Putnam, Hayes & Bartlett, Inc.
Steven G. Chrust, Vice President, Corporate Planning, EXECUTONE
H. Nicholas Visser, Jr., Vice President, Direct Sales, EXECUTONE

(Appearing as a group for Taiwan)

Ablondi & Foster
on behalf of

Bitronic Telecoms Co., Ltd.
TAISEL
TECOM Co., Ltd.
Auto Telecom Co.
Sinoca Enterprises, and
Taiwan Telecommunications Industry Co., Ltd.

Peter Koenig--OF COUNSEL

In opposition to the imposition antidumping duties--Continued

(Appearing as a group for Taiwan)--Continued

Graham & James
on behalf of

Taiwan Nitsuko

Yoshihiro Saito)
Jeffrey L. Snyder)--OF COUNSEL
Lawrence R. Walders)

Witness:

Donald Karl, President, Resource Telephone Co.

Whitcom
Long Island, NY

Witness:

Harry Whittelsey, President, Whitcom

Appendix C

COMMERCE'S FEDERAL REGISTER NOTICES

[A-588-809]

Final Determination of Sales at Less Than Fair Value: Certain Small Business Telephone Systems and Subassemblies Thereof From Japan

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: We determine that certain small business telephone systems and subassemblies thereof (SBTS) from Japan are being, or are likely to be, sold in the United States at less than fair value. We have notified the U.S. International Trade Commission (ITC) of our determination and have directed the U.S. Customs Service to continue to suspend liquidation of all entries of SBTS from Japan as described in the "Continuation of Suspension of Liquidation" section of this notice. The ITC will determine, within 45 days of the publication of this notice, whether these imports materially injure, or threaten material injury to, the U.S. industry.

EFFECTIVE DATE: October 17, 1989.

FOR FURTHER INFORMATION CONTACT: Louis Apple or Michael Ready, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 377-1769 or (202) 377-2613, respectively.

SUPPLEMENTARY INFORMATION:

Final Determination

We determine that SBTS from Japan are being, or are likely to be, sold in the United States at less than fair value, as provided for in section 735 of the Tariff Act of 1930, as amended (19 U.S.C. 1673d(a)) (the Act). The estimated weighted-average dumping margins are shown in the "Continuation of Suspension of Liquidation" section of this notice.

Case History

There have been no developments in this investigation since our affirmative preliminary determination on July 26, 1989 (54 FR 31978, August 3, 1989).

Period of Investigation

The period of investigation is July 1, 1988, through December 31, 1988.

Scope of Investigation

The United States has developed a system of tariff classification based on the international harmonized system of Customs nomenclature. On January 1, 1989, the United States fully converted to the Harmonized Tariff Schedule (HTS), as provided for in section 1201 *et seq.* of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered or withdrawn from warehouse for consumption on or after this date is now classified solely according to the appropriate HTS item numbers. The HTS item numbers are provided for convenience and U.S. Customs Service purposes. The written description remains dispositive.

The products covered by this investigation are certain small business telephone systems and subassemblies thereof, currently classifiable under HTS item numbers 8517.30.2000, 8517.30.2500, 8517.30.3000, 8517.10.0020, 8517.10.0040, 8517.10.0050, 8517.10.0070, 8517.10.0080, 8517.90.1000, 8517.90.1500, 8517.90.3000, 8518.30.1000, 8504.40.0004, 8504.40.0008, 8504.40.0010, 8517.81.0010, 8517.81.0020, 8517.90.4000, and 8504.40.0015. Prior to January 1, 1989, such merchandise was classifiable under items 684.5710, 684.5720, 684.5730, 684.5805, 684.5810, 684.5815, 684.5825, 684.5830, 682.6051, and 682.6053 of the Tariff Schedules of the United States Annotated (TSUSA).

Certain small business telephone systems and subassemblies thereof are telephone systems, whether complete or incomplete, assembled or unassembled, with intercom or internal calling capability and total non-blocking port capacities of between 2 and 256 ports, and discrete subassemblies designed for use in such systems. A subassembly is "designed" for use in a small business telephone system if it functions to its full capability only when operated as part of a small business telephone system. These subassemblies are defined as follows:

(1) Telephone sets and consoles, consisting of proprietary, corded telephone sets or consoles. A console has the ability to perform certain functions including: answer all lines in the system; monitor the status of other phone sets; and transfer calls. The term "telephone sets and consoles" is defined to include any combination of two or more of the following items, when imported or shipped in the same container, with or without additional apparatus: housing; hand set; cord (line or hand set); power supply; telephone set circuit cards; console circuit cards.

(2) Control and switching equipment, whether denominated as a key service unit, control unit, or cabinet/switch. "Control and switching equipment" is defined to include the units described in the preceding sentence which consist of one or more circuit cards or modules (including backplane circuit cards) and one or more of the following items, when imported or shipped in the same container as the circuit cards or modules, with or without additional apparatus: connectors to accept circuit cards or modules or building wiring.

(3) Circuit cards and modules, including power supplies. These may be incorporated into control and switching equipment or telephone sets and consoles, or they may be imported or shipped separately. A power supply converts or divides input power of not more than 2,400 watts into output power of not more than 1,800 watts supplying DC power of approximately 5 volts, 24 volts, and 48 volts, as well as 90 volt AC ringing capability.

The following merchandise has been excluded from this investigation: (1) Nonproprietary industry-standard ("tip/ring") telephone sets and other subassemblies that are not specifically designed for use in a covered system, even though a system may be adapted to use such nonproprietary equipment to provide some system functions; (2) telephone answering machines or facsimile machines integrated with telephone sets; and (3) adjunct software

used on external data processing equipment.

We note that a number of ambiguities existed in the scope language previously published in the Notice of Initiation with regard to the definition of subassemblies. In our preliminary determination, therefore, we clarified the language describing the subassemblies under investigation.

The Department continues to receive numerous inquiries regarding the inclusion of dual use subassemblies within the scope of this investigation. As noted in the preliminary determination notice, 54 FR 31978 (1989), the Department defines dual use subassemblies as those subassemblies that function to their full capability when operated as part of a large business telephone system as well as a small system. Because dual use subassemblies by definition are not subassemblies "designed" for use in small business telephone systems, dual use subassemblies are excluded from the scope of the investigation.

Fair Value Comparisons

To determine whether sales of SBTS from Japan to the United States were made at less than fair value, we compared the United States price to the foreign market value. For our preliminary determination, we used the best information available, as required by section 776(c) of the Act, because the respondents withdrew their questionnaire responses from the administrative record of the investigation. As best information available, we took the highest margin contained in the petition for each such or similar category, and averaged these figures on a company-specific basis to determine the margins in this investigation. These categories are based on our "scope" definition and consist of (a) Control and switching equipment, (b) circuit cards and modules, (c) telephone sets and consoles, and (d) complete small business telephone systems. We are using the same methodology for calculating a margin for the final determination.

United States Price

United States price was based on the U.S. price information provided in the petition.

Foreign Market Value

Foreign market value was based on home market prices provided in the petition.

Interested Party Comments

Comment 1

Petitioner argues that, rather than use the company-specific margins contained in the petition as best information available for each company, the Department should apply the highest margin calculated in the petition to both of the non-cooperating respondents. Therefore, petitioner argues, the margin calculated for Matsushita, 178.8%, should also be applied to Toshiba Corp. and "all other" imports from Japan. In support of its argument, petitioner cites the Department's final determination in its antidumping investigation of antifriction bearings (other than tapered roller bearings) and parts thereof from the Federal Republic of Germany (54 FR 18992).

DOC Position

We disagree. It is the Department's practice to use company-specific data, where available, for each company whenever a petition is used as a source for best information available (*see, e.g., Final Determination of Sales at Less Than Fair Value: Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, from Japan* (54 FR 15485, April 18, 1989)). In the case cited by the petitioner, company-specific data was not available.

Comment 2

Nakayo Telecommunications and Nakayo USA, Inc., a manufacturer and importer, respectively, request that products included under the scope of the investigation, but re-imported following repair in Japan be excluded from duties upon re-entry into the United States.

DOC Position

Re-imports of merchandise otherwise subject to this investigation are governed by U.S. Customs regulations concerning the re-importation of articles exported for repair.

Comment 3

Panor Corporation, a U.S. importer, disputes the large disparity between the margins calculated for purposes of the preliminary determination in this investigation, and the margins calculated in the preliminary determination of the companion investigation involving imports of the same class or kind of merchandise from Korea. Panor suggests it would be more logical and less discriminatory to impose a flat duty of 50 percent against imports of the subject merchandise from all sources.

DOC Position

There is no reason why the margins calculated in the two investigations necessarily should be similar, because each case involves different merchandise, different firms, and different pricing in the relevant markets. The margins in the companion investigation of SBTS from Korea were calculated on the basis of information submitted by the investigated firms concerning the prices those firms obtain on sales of the subject merchandise in the United States as compared to the prices they obtain on sales of such or similar merchandise in their home market. By contrast, the margins calculated for purposes of this investigation were based upon the best information otherwise available, as the respondent firms in Japan chose to withdraw their submissions and discontinue their involvement in the investigation.

Comment 4

Mitel Corporation, an importer of the subject merchandise, argues that the above definition of "dual use subassemblies" be modified by including two clarifying paragraphs proposed by Mitel:

1. Dual use subassemblies should be defined as those which function to their full or greater capability when operated as part of a large business system as well as a small system.

2. Dual use subassemblies by definition are not subassemblies "designed" exclusively for use in small business telephone systems.

Alternatively, Mitel proposes that the Deparmtent specifically exclude by name two Mitel telephone sets which Mitel claims fall under the definition of dual use subassemblies.

Petitioner argues that the proposed modifications are "confusing, and add nothing to the Department's definition of dual-use subassemblies."

DOC Response

We agree with petitioner that the modifications proposed by Mitel are apt to detract from, not add to the clarity of the definition of dual use subassemblies. With respect to Mitel's alternative suggestion that we exclude by name two of Mitel's telephone sets, the Department is not in a position to decide this issue at this time. In many proceedings, the Department can only investigate a limited number of respondents. Insofar as the products at issue are of a highly technical nature and were not manufactured by a respondent, the Department did not investigate whether the particular

models imported by Mitel qualify as dual use subassemblies. Therefore, should an order be issued in this case, Mitel may want to consider seeking a scope letter ruling, as described in 19 U.S.C. 1516a(a)(1)(B)(vi).

Continuation of Suspension of Liquidation

We are directing the U.S. Customs Service to continue to suspend liquidation, under section 733(d) of the Act, of all entries of SBTS from Japan, as defined in the "Scope of Investigation" section of this notice, that are entered, or withdrawn from warehouse, for consumption on or after August 3, 1989, the date of publication of the preliminary determination in the Federal Register. The U.S. Customs Service shall continue to require a cash deposit or posting of a bond equal to the estimated amounts by which the foreign market value of the subject merchandise from Japan exceeds the United States price, as shown below. This suspension of liquidation will remain in effect until further notice.

The averages of the highest margin for each such or similar category based on information provided in the petition are as follows:

Manufacturer/producer/exporter	Margin percentage
Toshiba Corp	138.77
Matsushita Electric Industrial Co. Ltd., Matsushita Communication Industrial Co., Ltd., Kyushu Matsushita Electric Co., Ltd	178.93
All Others	157.85

ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our determination. In addition, pursuant to section 735(c)(1) of the Act, we are making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Assistant Secretary for Import Administration.

The ITC will determine within 45 days from the date of this final determination whether material injury exists, or if threat of material injury exists. If the ITC determines that material injury, or threat of material injury, does not exist, the proceeding will be terminated and all securities posted as a result of the suspension of liquidation will be refunded or cancelled. However, if the ITC determines that the material injury does exist, the Department will issue an antidumping duty order directing Customs officials ot assess antidumping duties on SBTS from Japan entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, equal to the amount by which the foreign market value exceeds the United States price.

This determination is published pursuant to section 735(d) of the Act (19 U.S.C. 1673(d)).

Dated: October 10, 1989.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 89-24502 Filed 10-16-89; 8:45 am]

BILLING CODE 3510-DS-M

[A-580-803]

Preliminary Determination of Sales at Less Than Fair Value: Certain Small Business Telephone Systems and Subassemblies Thereof From Korea

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: We preliminarily determine that certain small business telephone systems and subassemblies thereof (SBTS) from Korea are being, or are likely to be, sold in the United States at less than fair value. We have notified the U.S. International Trade Commission (ITC) of our determination and have directed the U.S. Customs Service to suspend liquidation of all entries of SBTS from Korea as described in the "Suspension of Liquidation" section of this notice. If this investigation proceeds normally, we will make a final determination by October 10, 1989.

EFFECTIVE DATE: August 2, 1989.

FOR FURTHER INFORMATION: Louis Apple or Nancy Saeed, Office of Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 377-1769 or (202) 377-1777, respectively.

SUPPLEMENTAL INFORMATION:

Preliminary Determination

We preliminarily determine that SBTS from Korea are being, or are likely to be, sold in the United States at less than fair value, as provided in section 733 of the Tariff Act of 1930, as amended (19 U.S.C. 1673b) (the Act). The estimated weighted-average margins are shown in the "Suspension of Liquidation" section of this notice.

Case History

Since the Notice of Initiation on January 24, 1989 (54 PR 3517), the following events have occurred. On February 13, 1989, the ITC determined that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports from Korea of SBTS (USITC Pub. No. 2156, February 1989).

On February 9, 1989, the Department's questionnaire was presented to Goldstar Telecommunications Co., Ltd. (Goldstar) and Samsung Electronics Co., Ltd (Samsung). These two manufacturers accounted for a substantial portion of exports of the subject merchandise to the United States during the period of investigation (POI).

On April 13, 1989, petitioner requested that the preliminary determination be postponed. On April 27, 1989, in accordance with section 733(c)(1)(A) of the Act, we postponed the preliminary determination until July 28, 1989 (54 FR 19211).

On March 3 and May 15, 1989 we received replies to the questionnaire from Goldstar and Samsung.

A number of supplemental and deficiency questionnaires were issued subsequent to May 15, 1989. Supplemental and deficiency responses were received from the respondents prior to the date of this preliminary determination.

Period of Investigation

The POI is July 1, 1988, through December 31, 1988.

Scope of Investigation

The United States has developed a system of tariff classification based on the international harmonized system of Customs nomenclature. On January 1, 1989, the United States fully converted to the Harmonized Tariff Schedule (HTS), as provided for in section 1201 *et seq.* of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered or withdrawn from warehouse for consumption on or after this date is now classified solely according to the appropriate HTS item numbers. The HTS numbers are provided for convenience and U.S. Customs Service purposes. The written description remains dispositive.

The products covered by this investigation are certain small business telephone systems and subassemblies thereof, currently classifiable under *Harmonized Tariff Schedule* item numbers 8517.30.2000, 8517.30.2500, 8517.30.3000, 8517.10.0020, 8517.10.0040, 8517.10.0050, 8517.00.0070, 8517.10.0080, 8517.90.1000, 8517.90.1500, 8517.90.3000, 8518.30.1000, 8504.40.0004, 8504.40.0008, 8504.40.0010, 8517.81.0010, 8517.81.0020, 8517.90.4000, and 8504.40.0015. Prior to January 1, 1989, such merchandise was classifiable under items 684.5710, 684.5720, 684.5730, 684.5805, 684.5810, 684.5815, 684.5825, 684.5830, 682.6051, and 682.6053 of the *Tariff Schedules of the United States Annotated* (TSUSA).

Certain small business telephone systems and subassemblies thereof are telephone systems, whether complete or incomplete, assembled or unassembled, with intercom or internal calling capability and total non-blocking port capacities of between 2 and 256 ports, and discrete subassemblies designed for use in such systems. A subassembly is "designed" for use in a small business telephone system if it functions to its full capability only when operated as part of a small business telephone system. These subassemblies are defined as follows:

(1) Telephone sets and consoles, consisting of proprietary, corded telephone sets or consoles. A console has the ability to perform certain functions including: answer all lines in the system; monitor the status of other phone sets; and transfer calls. The term "telephone sets and consoles" is defined to include any combination of two or more of the following items, when imported or shipped in the same container, with or without additional apparatus: housing; hand set; cord (line or hand set); power supply; telephone set circuit cards; console circuit cards.

(2) Control and switching equipment, whether denominated as a key service unit, control unit, or cabinet/switch. "Control and switching equipment" is defined to include the units described in the preceding sentence which consist of one or more circuit cards or modules (including backplane circuit cards) and one or more of the following items, when imported or shipped in the same container as the circuit cards or modules, with or without additional apparatus: connectors to accept circuit cards or modules; building wiring.

(3) Circuit cards and modules, including power supplies. These may be incorporated into control and switching equipment or telephone sets and consoles, or they may be imported or shipped separately. A power converts or divides input power of not more than 2400 watts into output power of not more than 1800 watts supplying DC power of approximately 5 volts, 24 volts, and 48 volts, as well as 90 volt AC ringing capability.

The following merchandise has been excluded from this investigation: (1) nonproprietary industry-standard ("tip/ring") telephone sets and other subassemblies that are not specifically designed for use in a covered system, even though a system may be adapted to use such nonproprietary equipment to provide some system functions; (2) telephone answering machines or facsimile machines integrated with telephone sets; and (3) adjunct software used on external data processing equipment.

We note that a number of ambiguities existed in the scope language previously published in the Notice of Initiation with regard to the definition of subassemblies. We therefore have clarified the language describing the subassemblies under investigation.

In addition, the Department has received a number of inquiries regarding the inclusion of dual use subassemblies within the scope of this investigation. The Department defines dual use subassemblies as those subassemblies that function to their full capability when operated as part of a large business telephone system as well as a small system. Because dual use subassemblies by definition are not subassemblies "designed" for use in small business telephone systems, dual use subassemblies are excluded from the scope of the investigation.

Such or Similar Comparisons

For all respondent companies, pursuant to section 771(16)(C) of the Act, we established four categories of "such or similar" merchandise consisting of: a) control and switching equipment, b) circuit cards and modules, c) telephone sets and consoles, and d) complete small business telephone systems.

Product comparisons were made on the basis of the following criteria which are ranked in the order of importance. For control and switching equipment we used the following criteria: 1) port

capacity based on minimum operational configuration, 2) type of central microprocessor, and 3) read-only memory (ROM) size. For circuit card and modules we considered: 1) functions, and 2) physical appearance. For telephone sets and consoles we considered: 1) number of buttons (regardless of function) excluding dialpad, and 2) number of individual visual indicators. For complete telephone systems, we made comparisons on the basis of the similarity of the subassemblies, using the criteria described in the preceding sentences.

Where there were no sales of identical merchandise in the home or third country markets with which to compare merchandise sold in the United States, sales of the most similar merchandise were compared on the basis of the characteristics described above. We made adjustments for differences in the physical characteristics of the merchandise in accordance with section 773(a)(4)(C) of the Act. Consistent with our normal practice, when adjustments proved to be substantial, we used constructed value. In this case, we determined that an adjustment greater than twenty percent of the cost of manufacturing of the U.S. model is substantial.

In order to determine whether there were sufficient sales of SBTS in the home market to serve as the basis for calculating foreign market value (FMV), we compared the volume of home market sales within each such or similar category to the volume of third country sales within each respective such or similar category, in accordance with section 773(a)(1) of the Act.

Samsung had no sales of complete small business telephone systems in the United States during the POI. We determined that there were sufficient home market sales to unrelated customers for each of the other such or similar categories.

For Goldstar we determined that there were sufficient home market sales to unrelated customers for two such or similar categories: telephone sets and consoles; and control and switching equipment. For two such or similar categories, circuit cards and modules, and complete telephone systems, we determined that there were insufficient home market sales.

With respect to circuit cards and modules, we determined that sales to the Philippines, Cyprus, Canada, Italy, and Norway were the most appropriate basis for calculating FMV because the merchandise sold in these countries was the most comparable to that sold in the United States. With respect to complete small business telephone systems, Goldstar made no sales to third country markets during the POI. Therefore, we are comparing United States sales to constructed value for this such or similar category.

Fair Value Comparisons

To determine whether sales of SBTS from Korea to the United States were made at less than fair value, we compared the United States price to the foreign market value, as specified in the "United States Price" and "Foreign Market Value" sections of this notice.

United States Price

For Samsung, we based the United States price on purchase price in accordance with section 772(b) of the Act because all sales were made directly to unrelated parties to importation into the United States. For Goldstar, we based the United States price on exporter's sales price, in accordance with section 772(c) of the Act, because in each case the sale to the first unrelated purchaser took place after importation into the United States.

We were unable to make comparisons for sales where further manufacturing was claimed because sufficient data which complied with the Department's requests for information was not submitted in time for consideration in our preliminary determination.

Samsung

For Samsung, we calculated purchase price based on packed f.o.b. Korean port prices. We made deductions, where appropriate, for inland freight, wharfage and container freight station fees, customs clearance fees, and postage fees. We added rebated duties and uncollected taxes pursuant to section 772(d)(1) (B) and (C) of the Act.

Goldstar

We calculated exporter's sales price based on packed, delivered prices in the United States. We made deductions from ESP, where appropriate, for cash discounts, brokerage, warfage, inland freight in Korea, stuffing charges, ocean freight, marine insurance, United States customs duty, customs brokerage fees, inland freight in the United States, inland insurance, rebates, warranty expenses, credit expenses, promotional material, cooperative advertising, commissions, and indirect expenses and inventory carrying expenses incurred in both Korea and the United States. We added uncollected duties, and uncollected or rebated taxes pursuant to section 772(d)(1) (B) and (C) of the Act.

Foreign Market Value

In accordance with section 773(a) of the Act, we calculated FMV based on home market sales, third country sales, or constructed value, as appropriate.

Samsung

For Samsung, we calculated foreign market value based on the packed, delivered prices to unrelated customers in the home market.

We made deductions, where appropriate, for inland freight, inland insurance, rebates, and discounts. We deducted the home market packing costs from the foreign market value and added U.S. packing costs. We made circumstance of sale adjustments, where appropriate, for differences in credit terms, warranty expenses, and advertising expenses, pursuant to section 773(4)(B) of the Act. We did not consider technical services to be a direct selling expense for purposes of this preliminary determination because it was not clear that this expense was directly related to sales of the subject merchandise. We will look at this expense in more detail at verification.

We made an upward adjustment to tax-exclusive home market prices for the value-added tax we computed for the United States price.

Where appropriate, we made further adjustments to the home market price to account for differences in the physical characteristics of the merchandise, in accordance with section 353.57 of the Department's regulations published in the Federal Register on March 28, 1989 (54 FR 12742) (to be codified at 19 CFR section 353.57).

For those products sold in the United States for which the difference in merchandise adjustment between the reported home market product and the U.S. product was substantial, we calculated foreign market value based on constructed value (CV), in accordance with section 773(e) of the Act. In this case, we determined that an adjustment greater than twenty percent is substantial. The calculation of constructed value is fully described in the "Constructed Value" section of this notice.

We used best information available for two U.S. products of circuit cards, for which both the difference in merchandise adjustment was greater than twenty percent and no constructed value was supplied on the computer tape. As best information available, we took the highest margin for Samsung contained in the petition for circuit cards and modules.

Goldstar

Where sales in the home market were used, we calculated foreign market value based on the packed, delivered or ex-works prices to unrelated customers. We made deductions, where appropriate, for inland freight, cash discounts, volume rebates, product rebates and exchange rebates. We deducted the home market packing costs from the foreign market value and added all U.S. packing costs. We made deductions, where appropriate, for differences in credit terms and advertising. We also deducted home market indirect selling expenses, including: warranty expenses, inventory carrying costs, and other indirect selling expenses. These expenses were capped by the amount of indirect selling expenses incurred in the U.S. market, in accordance with § 353.41 of the Department's regulations.

We made an upward adjustment to tax-exclusive home market prices for the value-added tax we computed for the United States price.

Where appropriate, we made further adjustments to the home market price to account for differences in the physical characteristics of the merchandise, in accordance with § 353.57 of the Department's regulations.

We calculated foreign market value, in the third country markets, based on the packed, delivered or ex-works prices to unrelated customers. We made deductions, where appropriate, for wharfage, ocean freight, inland freight in the third countries, brokerage, stuffing and marine insurance. We deducted the home market packing costs from the foreign market value and added all U.S. packing costs. We made deductions, where appropriate, for differences in credit terms and commissions. We added duty rebates to the third country price. We also deducted third country indirect selling expenses, including: inventory carrying costs and other indirect selling expenses. These expenses were capped by the amount of indirect selling expenses incurred on sales in the U.S. market, in accordance with § 353.41 of the Department's regulations.

Where appropriate, we made further adjustments to the third country price to account for differences in the physical characteristics of the merchandise, in accordance with section 353.57 of the Department's regulations.

For those products sold in the United States for which the difference in merchandise adjustment between the reported home market or third country product and the U.S. product was substantial, we calculated foreign market value based on constructed value in accordance with section 773(e) of the Act. In this case, we determined that an adjustment greater than twenty percent is substantial.

Constructed Value

In the situations described above, we calculated foreign market value based on constructed value for Samsung and Goldstar, in accordance with section 773(e) of the Act. The constructed value included amounts for materials, fabrication costs, general expenses, profit and packing. The statutory minimum of eight percent profit was applied in the case of Samsung. For Goldstar, the actual profit rate submitted by the respondent was used since it exceeded the eight percent statutory minimum. In all cases the amounts for actual general expenses were used since these figures exceeded the statutory minimum of ten percent of the cost of materials and fabrication. Reported finance expenses were reduced to account for the interest portion included in the imputed credit and finished goods inventory carrying costs.

In general, the information submitted by respondents was relied upon in calculating constructed value, except in those instances where the costs were not appropriately quantified or valued. For Samsung, we adjusted several costs which were not appropriately quantified or valued. First, the Department used Samsung's corporate general and administrative (G&A) and finance expenses, as a percentage of the cost of sales, to develop a ratio in calculating the G&A and finance expenses for the subject merchandise. Samsung had reported these expenses using a ratio based primarily on the divisional G&A and finance expenses, instead of the corporate G&A and finance expenses. Also the constructed value information reported by Samsung did not contain gains and losses on the disposal of fixed assets, research and development (R&D) amortization expenses, special depreciation, miscellaneous and other losses incurred. Amounts for these losses were therefore allocated to the subject merchandise as non-specific operating expenses in the computed general expenses. We made circumstance of sale adjustments for credit, warranty, and advertising expenses.

For Goldstar, we adjusted the costs which were not appropriately quantified or valued as follows. The G&A and finance expenses of consolidated Goldstar Telecommunications as a percentage of the cost of sales for consolidated Goldstar Telecommunications were used by the Department to develop the factor used in calculating the G&A and finance expenses for the subject merchandise. Goldstar had used a ratio based on divisional G&A and finance expenses instead of corporate-wide G&A and finance expenses. We also made deductions from constructed value for home market selling expenses consisting of credit and advertising. We made an adjustment to constructed value for home market indirect selling expenses consisting of warranty expenses, inventory carrying costs, and other indirect selling expenses. These expenses were capped by the amount of indirect selling expenses incurred on sales in the U.S. market, in accordance with § 353.41 of the Department's regulations.

Currency Conversion

We used the official exchange rates in effect on the dates of sale, in accordance with section 773(a)(1) of the Act, as amended by section 615 of the Trade and Tariff Act of 1984. All currency conversions were made at the rates certified by the Federal Reserve Bank of New York in accordance with § 353.60 of the Department's regulations.

Verification

As provided in section 776(b) of the Act, we will verify all information used in reaching the final determination in this investigation.

Suspension of Liquidation

In accordance with section 733(d)(1) of the Act, we are directing the U.S. Customs Service to suspend liquidation of all entries of SBTS from Korea, as defined in the "Scope of Investigation" section of this notice, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the Federal Register. The U.S. Customs Service shall require a cash deposit or posting of a bond equal to the estimated amounts by which the foreign market value of the subject merchandise from Korea exceeds the United States price as shown below. This suspension of liquidation will remain in effect until further notice. The weighted-average margins are as follows:

Manufacturer/Producer/Exporter	Weighted-average margin percentage
Samsung Electronics Co., Ltd	9.33
Goldstar Telecommunications Co., Ltd	6.09

Manufacturer/Producer/Exporter	Weighted-average margin percentage
All others	7.79

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Assistant Secretary for Import Administration.

The ITC will determine whether these imports materially injure, or threaten material injury to, the U.S. industry before the later of 120 days after the date of this preliminary determination or 45 days after our final determination, if affirmative.

Public Comment

In accordance with § 353.38 of the Department's regulations, case briefs in at least ten copies must be submitted to the Assistant Secretary by September 21, 1989, and rebuttal briefs by September 28, 1989. In accordance with § 353.38(b) of the Department's regulations, if requested, we will hold a public hearing to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs at 1 p.m. on September 29, 1989, at the U.S. Department of Commerce, Room 3708, 14th Street and Constitution Avenue NW., Washington, DC 20230.

Individuals who wish to participate in the hearing must submit a request to the Assistant Secretary for Import Administration, Room B-099, at the above address within ten days of the publication of this notice. Requests should contain: (1) the party's name, address and telephone number; (2) the number of participants; (3) the reasons for attending; and (4) a list of the arguments to be raised. In accordance with § 353.38(b) of the Department's regulations, oral presentations will be limited to issues raised in the briefs.

This determination is published pursuant to section 733(f) of the Act (19 U.S.C. 1673b(f)).

Dated: July 26, 1989.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 89-18067 Filed 8-2-89; 8:45 am]

BILLING CODE 3510-DS-M

[A-583-806]

Final Determination of Sales at Less Than Fair Value: Certain Small Business Telephone Systems and Subassemblies Thereof From Taiwan

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: We determine that certain small business telephone systems and subassemblies thereof (SBTS) from Taiwan are being, or are likely to be, sold in the United States at less than fair value. We have notified the U.S. International Trade Commission (ITC) of our determination and have directed the U.S. Customs Service to continue to suspend liquidation of all entries of SBTS from Taiwan, except those of Sun Moon Star as described in the "Continuation of Suspension of Liquidation" section of this notice. The ITC will determine within 45 days of the publication of this notice whether these imports materially injure, or threaten material injury to, the U.S. industry.

EFFECTIVE DATE: October 17, 1989.

FOR FURTHER INFORMATION: Contact Louis Apple or Kathy Boyce, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 377-1769 or (202) 377-4198, respectively.

SUPPLEMENTARY INFORMATION:

Final Determination

We determine that SBTS from Taiwan are being, or are likely to be, sold in the United States at less than fair value, as provided in section 735(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1673d(a)) (the Act). The estimated weighted-average dumping margins are shown in the "Continuation of Suspension of Liquidation" section of this notice.

Case History

On July 26, 1989, the Department issued an affirmative preliminary determination (54 FR 31987). Since that time the following events have occurred:

Verification of the questionnaire response of Sun Moon Star (SMS) was conducted in Taiwan during August 7-18, 1989.

Interested parties submitted comments for the record in their case briefs dated September 11, 1989 and in their rebuttal briefs dated September 15, 1989. A public hearing was held on September 20, 1989.

Period of Investigation

The period of investigation (POI) is July 1, 1988, through December 31, 1988

Scope of Investigation

The United States has developed a system of tariff classification based on the international harmonized system of Customs nomenclature. On January 1, 1989, the United States fully converted to the Harmonized Tariff Schedule (HTS), as provided for in section 1201 *et seq.* of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered, or withdrawn from warehouse, for consumption on or after this date is now classified solely according to the appropriate HTS item number(s). The HTS item numbers are provided for convenience and U.S. Customs Service purposes. The written description remains dispositive.

The products covered by this investigation are certain small business telephone systems and subassemblies thereof, currently classifiable under Harmonized Tariff Schedule item numbers 8517.30.2000, 8517.30.2500, 8517.30.3000, 8517.10.0020, 8517.10.0040, 8517.10.0050, 8517.10.0070, 8517.10.0080, 8517.90.1000, 8517.90.1500, 8517.90.3000, 8518.30.1000, 8504.40.0004, 8504.40.0008, 8504.40.0010, 8517.81.0010, 8517.81.0020, 8517.90.4000, and 8504.40.0015. Prior to January 1, 1989, such merchandise was classifiable under items 684.5710, 684.5720, 684.5730, 684.5805, 684.5810, 684.5815, 684.5825, 684.5830, 682.6051, and 682.6053 of the Tariff Schedules of the United States Annotated (TSUSA).

Certain small business telephone systems and subassemblies thereof are telephone systems, whether complete or

incomplete, assembled or unassembled, with intercom or internal calling capability and total non-blocking port capacities of between 2 and 256 ports, and discrete subassemblies designed for use in such systems. A subassembly is "designed" for use in a small business telephone system if it functions to its full capability only when operated as part of a small business telephone system. These subassemblies are defined as follows:

(1) Telephone sets and consoles, consisting of proprietary, corded telephone sets or consoles. A console has the ability to perform certain functions including: Answer all lines in the system; monitor the status of other phone sets; and transfer calls. The term "telephone sets and consoles" is defined to include any combination of two or more of the following items, when imported or shipped in the same container, with or without additional apparatus: housing; hand set; cord (line or hand set); power supply; telephone set circuit cards; console circuit cards.

(2) Control and switching equipment, whether denominated as a key service unit, control unit, or cabinet/switch. "Control and switching equipment" is defined to include the units described in the preceding sentence which consist of one or more circuit cards or modules (including backplane circuit cards) and one or more of the following items, when imported or shipped in the same container as the circuit cards or modules, with or without additional apparatus: connectors to accept circuit cards or modules or building wiring.

(3) Circuit cards and modules, including power supplies. These may be incorporated into control and switching equipment or telephone sets and consoles, or they may be imported or shipped separately. A power supply converts or divides input power of not more than 2400 watts into output power of not more than 1800 watts supplying DC power of approximately 5 volts, 24 volts, and 48 volts, as well as 90 volt AC ringing capability.

The following merchandise has been excluded from this investigation: (1) Nonproprietary industry-standard ("tip/ring") telephone sets and other subassemblies that are not specifically designed for use in a covered system, even though a system may be adapted to use such nonproprietary equipment to provide some system functions; (2) telephone answering machines or facsimile machines integrated with telephone sets; and (3) adjunct software used on external data processing equipment.

We note that a number of ambiguities existed in the scope language previously published in the Notice of Initiation with regard to the definition of subassemblies. In our preliminary determination, therefore, we clarified the language describing the subassemblies under investigation.

The Department continues to receive numerous inquiries regarding the inclusion of dual use subassemblies within the scope of this investigation. As noted in the preliminary determination notice, the Department defines dual use subassemblies as those subassemblies that function to their full capability when operated as part of a large business telephone system as well as a small business telephone system. Because dual use subassemblies by definition are not subassemblies "designed" for use in small business telephone systems, dual use subassemblies are excluded from the scope of the investigation.

Such or Similar Comparisons

For all respondent companies, pursuant to section 771(16)(C), we established four categories of "such or similar" merchandise consisting of: (a) Control and switching equipment; (b) circuit cards and modules; (c) telephone sets and consoles; and (d) complete small business telephone systems.

Product comparisons were made using criteria which are ranked in order of importance. For control and switching equipment we used the following criteria: (1) Port capacity based on minimum operational configuration; (2) type of central microprocessor; and (3) read-only memory (ROM) size. For circuit cards and modules we considered: (1) Functions; and (2) physical appearance. For telephone sets and consoles we considered: (1) Number of buttons (regardless of function) excluding dialpad; and (2) number of individual visual indicators. For complete telephone systems, we made comparisons on the basis of the similarity of subassemblies, using the criteria described in the preceding sentences.

Where there was no identical product in the home or third country market with which to compare a product imported into the United States, the most similar product was compared on the basis of the characteristics described above. We made adjustments for differences in the physical characteristics of the merchandise in accordance with section 773(a)(4)(C) of the Act. Consistent with our normal practice, when adjustments for differences in the merchandise proved to be substantial, we used constructed value.

In order to determine whether there were sufficient sales of SBTS in the home market to serve as the basis for calculating foreign market value (FMV), we compared the volume of home market sales within each such or similar category to the volume of third country sales within each respective such or similar category, in accordance with section 773(a)(1) of the Act.

For Sun Moon Star (SMS), we determined that there were sufficient home market sales to unrelated customers for three such or similar categories. SMS had no sales of complete small business telephone systems in the United States during the POI.

Fair Value Comparisons

To determine whether sales of SBTS from Taiwan to the United States were made at less than fair value, we compared the United States price to the FMV, as specified in the "United States Price" and "Foreign Market Value" sections of this notice.

Since Taiwan Nitsuko declined to provide information essential to our investigation, we used the best information available as required by section 776(c) of the Act. As best information available, we took the highest margin contained in the petition for products manufactured by Nitsuko Japan for each such or similar category and averaged these figures to determine the margin for Taiwan Nitsuko in this investigation.

Taiwan Nitsuko declined to respond to the Department's MNC questionnaire. Because the MNC provision, section 773(d) of the Act, calls for the Department to calculate FMV with reference to merchandise produced in facilities outside the country of exportation, we attempted to compare the FMV in the petition for merchandise produced and sold in Japan with actual United States prices reported by Taiwan Nitsuko for products produced in Taiwan and sold in the United States, or Taiwan Nitsuko's U.S. sales prices as provided in the petition. Since we did not have data on sales of merchandise produced by Taiwan Nitsuko in Taiwan and sold in the United States that was comparable to the merchandise listed in the petition as being produced and sold in Japan and there were no U.S. sales prices for Taiwan Nitsuko reported in the petition, we used the margins calculated in the petition based on a comparison of the FMV of merchandise produced and sold in Japan and the United States price of merchandise produced in Japan and sold in the United States. Petitioner supplied information indicating that Taiwan Nitsuko and Nitsuko Japan produce the

same products for sale in the United States and that these products are sold in the U.S. market at the same prices to the same single customer.

For SMS, we compared the United States price to the FMV as described below.

United States Price

Because virtually all sales by SMS were made directly to unrelated parties prior to importation into the United States, we based the United States price for these sales on purchase price, in accordance with section 772(b) of the Act. We calculated purchase price based on packed, f.o.b. Taiwan port prices. Gross unit price was based on the contract price plus an exchange rate adjustment. We made a further upward adjustment to gross unit price to account for early payment on future sales. We made deductions were appropriate for inland freight and brokerage and handling. We added uncollected duties pursuant to section 772(d)(1)(B) of the Act and § 353.41(d)(ii) of the Department's regulations published in the Federal Register on March 28, 1989 (54 FR 12742) (to be codified at 19 CFR 353.41).

For Taiwan Nitsuko we used information contained in the petition for United States price as described above.

Foreign Market Value

In accordance with section 773(a) of the Act, we calculated FMV for SMS based on home market sales prices or constructed value, as appropriate. We calculated FMV based on the packed, delivered or ex-works prices to unrelated customers in the home market. We made deductions, where appropriate, for inland freight, discounts, and rebates. We deducted the home market packing costs from the FMV and added all U.S. packing costs. We made circumstance of sale adjustments, where appropriate, for differences in credit terms, advertising, and warranties. We made adjustments for indirect selling expenses and inventory carrying costs in the home market to offset commissions paid in the United States in accordance with § 353.56(b) of the Department's regulations.

Where appropriate, we made further adjustments to the home market price to account for differences in the physical characteristics of the merchandise in accordance with section 353.57 of the Department's regulations.

In our preliminary determination, we stated that where the adjustment for differences in the physical characteristics of the merchandise being compared exceeded 20 percent, we would not use home market sales as the basis of FMV. Instead, FMV would be based on constructed value.

As a result of verification in this case, adjustments were made to increase the costs reported by SMS. The effect of these corrections was to raise the difference in the physical characteristics of one product above the 20 percent threshold stated in our preliminary determination to 23 percent.

For purposes of this final determination, we have decided that despite the size of the adjustment, the home market merchandise may still be reasonably compared to the U.S. merchandise within the meaning of section 771(16)(C)(iii) of the Act. The product in question, included in the such or similar category of control and switching equipment, is an SCPU. The SCPU is sold individually in the United States, while it is sold in combination with an internal circuit card in the home market. Except for this, the home market SCPU is identical to the SCPU sold in the United States. Moreover, the internal circuit card is significantly less important component by value than the SCPU in the home market transaction. For these reasons, we find the home market and U.S. merchandise to be similar within the meaning of 771(16)(C)(iii).

As noted above, for Taiwan Nitsuko, we used information contained in the petition for FMV.

Constructed Value

We calculated the constructed value in accordance with section 773(e) of the Act. For SMS, the following adjustments were made to its submitted costs. Material cost was adjusted: (1) To eliminate the effect of "free samples" by using the average cost at which the product was transferred from Work-In-Process to Finished Goods Inventory; (2) to reflect the difference between the purchase order price and the actual price paid for materials; (3) to include import duties (see DOC position to comment 13).

The cost of direct labor and factory overhead for each part was determined by calculating the average per unit fabrication cost at which the part was transferred from Work-In-Process to Finished Good Inventory. Additionally, direct labor and factory overhead were increased to reflect the effect of the respondant's reclassification of labor insurance from general expenses to the cost of manufacturing. Finally, factory overhead was also adjusted to include product-specific research and development costs (R&D) for three of the five R&D departments. While these departments performed product-specific R&D, the expenses had been classified as general expense.

Selling expenses included an absolute amount of indirect and direct selling expenses on a per product basis and an amount for interest expenses incurred by SMS. Since SMS is a sales company and because it could not be consolidated with Emptel (the related manufacturer), all of SMS's interest expenses were treated as indirect selling expenses. Interest income of SMS was used to offset its interest expenses, since the income was earned from short-term investments related to the current operations of the company. When imputed inventory and credit expenses were included in selling expenses, the interest expense reflected on SMS's books was reduced for a portion of the expenses related to these activities in order to avoid double counting.

For general and administrative expenses incurred by related entities other than Emptel, the following adjustments were made: (1) General expenses of the holding company of Vidar-SMS were allocated over the cost of goods sold of Vidar-SMS (parent of Emptel) and the holding company; (2) general management expenses incurred by SMS for the management of Vidar-SMS and SMS were allocated over the cost of goods sold of the same two companies; (3) general R&D incurred by Vidar-SMS was allocated over the cost of goods sold of Vidar-SMS. For general and administrative expenses incurred by Emptel, the following adjustments were made: (1) R&D was adjusted to exclude those expenses incurred for cellular mobile telephones (CMTs) and all product-specific R&D; (2) royalties paid for the production and sale of CMTs were excluded; (3) loss on physical inventory was reclassified from non-operating expenses to general expenses. Financial expenses were computed using the financial data from Vidar-SMS and the holding company. Interest revenue earned from short-term investments related to the current operations of the company was offset against interest expense. Since the profit on the sales of SBTS in the home market was not provided by the respondent, "best information available" was used. The "best information available" was the profit earned on Emptel's and SMS's financial statement, after eliminating intercompany sales.

Currency Conversion

We used the official exchange rates in effect on the dates of sale, in accordance with section 773(a)(1) of the Act. All currency conversions were made at the rates certified by the Federal Reserve

Bank of New York in accordance with section 353.60 of the Department's regulations.

Verification

Except where noted, we verified all information used in making our final determination in accordance with section 776(b) of the Act. We used standard verification procedures including examination of relevant accounting records and original source documents of the respondent. Our verification results are outlined in the public version of the verification report which is on file in the Central Records Unit (Room B-099) of the Main Commerce Building.

Interested Party Comments

Sun Moon Star

Comment 1

Petitioner asserts the Department should rely on best information available rather than the information submitted by SMS because of significant deficiencies in SMS's response. SMS disagrees and does not believe best information available should be used.

DOC Position

We disagree with petitioner. Verification of SMS did uncover several minor deficiencies. However, these deficiencies were not of a magnitude that warranted rejection of the response and they were subsequently corrected.

Comment 2

Petitioner asserts that if the Department does not use the best information availalbe for all subassemblies of SMS, the Department should compare the U.S. sales of DKTS Plus with home market sales of DKTS Non Plus products for the following two reasons. First, petitioner alleges that the DKTS Plus products sold in the home market were sold after the period of investigation and, therefore, the Department should reject SMS's date of sale for home market sales of these products. Petitioner argues that the facts indicate that there was no binding commitment from the dealers to purchase a specified quantity of goods in November 1988 because the dealers did not specify a delivery date until after the period of investigation and the obligation to take delivery appears conditional both on the dealers finding purchasers and the Taiwan authorities approving the products for sale in the home market. Second, petitioner argues that the Department should disregard these home market sales because they were sales of trial units and, therefore, were not sales in the ordinary course of trade.

SMS disagrees, arguing it would be inappropriate to compare DKTS Plus with DKTS Non Plus products. They contend that the merchandise was sold during the period of investigation because price and quantity were established within the period. They further assert that the two sales were in the ordinary course of trade, following normal sales procedures, and in fact were not sales of trial units.

DOC Position

We agree with SMS on both issues. First, when resolving date of sale issues, the Department is guided primarily by the date on which the essential terms of the sale—price and quantity—are established to the extent that the parties have nothing left to negotiate. In this case, the Department verified that price and quantity of the two DKTS Plus home market transactions were set in November 1988, the date of the purchase orders.

Contrary to petitioner's assertions, the facts indicate that both parties treated the November 1988 pruchase orders as binding agreements. Therefore, the date of sale for these transactions is within the period of investigation. Second, the DKTS Plus sales were within the ordinary course of trade. The sales were pursuant to an established dealer price list and discount schedule. The fact that approval by the Taiwan authorities was not given until after the period of investigation (because it took longer than expected to approve the system) is incidental to, and not dispositive of, this issue.

Comment 3

Petitioner claims that SMS failed to report significant exporter sales price (ESP) sales in the period of investigation. SMS disagrees, claiming that these transactions were actually transfers of goods from the home market manufacturer to its United States subsidiary and that they did not constitute sales.

DOC Position

We agree with SMS. We verified that SMS reported all of its ESP sales during the period of investigation and that these intracompany transfers were not sales.

Comment 4

Petitioner argues that the Department should reject SMS's proposed adjustments for rebates and monthly discounts. SMS claims that these adjustments were properly reported and verified as correct.

DOC Position

We agree with SMS and accept the adjustments SMS for rebates earned but not yet paid. We verified hat it is SMS's longstanding policy to grant cumulative discounts. We also verified that the amounts were correctly reported.

Comment 5

Petitioner argues that the Department should reject SMS's proposed adjustments for commissions and uncollected duties. SMS alleges that the adjustments for commissions and uncollected duties were correctly reported and verified.

DOC Position

We agree with SMS. These adjustments were verified to be correctly reported.

Comment 6

Petitioner claims that if the Department accepts SMS's proposed adjustments for uncollected duties, only 50% of the amount of the duties should be applied to U.S. price based on the terms of a confidential clause in the SMS-Bell South contract. SMS disagrees and claims that the adjustment for uncollected duties was reported and fully verified.

DOC Position

The Department has adjusted United States price for the full amount of duties which were not collected by reason of the exportation of the merchandise. We have done so because, regardless of the terms of the confidential contract clause at issue, inputs for the home market comparison merchandise are subject to the full amount of duties. Given this fact, it is appropriate to adjust for duties in their entirety per section 772 (d)(1)(B) of the Act.

Comment 7

SMS esserts that it was correct in not reporting a U.S. transaction arising from a purchase order dated December 18, 1988. SMS contends that the correct date of sale for this transaction is February 3, 1989, the "order date" stated on the February 9, 1989 invoice.

DOC Position

The Department agrees with SMS that the merchandise was not sold until the purchase order was issued in February 1989, because it was at this time that both price and quantity were set. Therefore, this sale was outside the period of investigation.

Comment 8

SMS argues that an advance downpayment from BellSouth was correctly reflected as a discount from invoice prices to BellSouth.

DOC Position

We agree. The downpayment was correctly reported as a deduction from the invoice price because the downpayment was applied to reduce the prices of DKTS products purchased in the future.

Comment 9

SMS claims that the Department should use the list-price allocation method SMS proposed for the comparisons of home market sales of MCPUs priced and sold with modems and SCPUs priced and sold with conference cards with MCPUs, modems, conference cards, and SCPUs sold separately in the United States.

DOC Position

We are not persuaded that the list-price methodology proposed by SMS yields an acceptable measure of FMV. In the instances SMS has cited, there is a single observed price for two components being sold together in the home market. Under its methodology, SMS would have the Department "create" two prices from that one observed price based on relative prices from their price list. We believe the better method is to start with the observed price and perform adjustments for differences in the physical characteristics of the home market and U.S. merchandise, where appropriate, using the variable manufacturing costs of the components, in accordance with section 773(a)(4)(C) of the Act and § 353.57 of our regulations.

Comment 10

SMS claims that the Department failed to make an adjustment to constructed value for home-market credit expenses.

DOC Position

We agree. Home-market credit expenses have been deducted from constructed value in the final determination.

Comment 11

Petitioner argues that the Department should not rely on respondent's constructed value data because respondent failed to identify all affiliated parties and thereby disguised related party transactions. The respondent states that it did in fact report the existence of other related companies, but acknowledges that it erred in identifying only certain companies as members of "Sun Moon Star Group." The respondent maintains that it had no intent of misleading the Department, because the other related parties were referred to in various parts of the SMS response and because the complete corporate structure was clarified at verification.

DOC Position

Prior to verification, the Department requested in the original questionnaire and in deficiency letters that the respondent provide details of its corporate organization. During the cost verification, the Department obtained information which reflected facts concerning related companies that were different than those disclosed in the SMS response. SMS and Vidar-SMS are related parties. Because of this relationship, certain adjustments were made to constructed value: (1) Net interest expenses incurred by SMS were considered to be indirect selling expenses, not manufacturing-related interest as presented in the response and were allocated over SMS's Cost of Goods Sold; (2) the offset related to the credit expenses and inventory carrying costs were computed on SMS's financial expenses since this company incurred the expense of credit and inventory carrying costs; and (3) the general management expenses of SMS incurred to manage the Vidar-SMS Group and SMS were allocated over the cost of goods sold of the Vidar-SMS Group and SMS to determine a fair value for these services to Emptel.

Comment 12

Petitioner contends that the Department correctly rejected the SMS internal profit and loss statement as an inaccurate protrayal of profit on home market sales because the statement failed to include the profits earned by Emptel, the manufacturer of the products under investigation. Petitioner further states that the Department must include the profit earned by both companies, Emptel and SMS, to determine the total profits earned by the SMS Group on the manufacture and sale of SBTS. The respondent claims that it reported its only "regularly kept" statement of profits and losses for the products under investigation. The respondent argues that it would be inappropriate to use the profit stated in the financial statement of Emptel as a measure of profit in the home market because Emptel's profit is earned on export sales as well as on transfers to SMS. The respondent further argues that Emptel's profit has no relationship to the home market sales to unrelated customers.

DOC Position

We agree with the petitioner. The amount of profit Emptel earns on the transfer of the product to SMS is crucial to the calculation of total profit on the sales in the home market. It is the actual costs incurred by the manufacturer of the product which determines profit on sales to unrelated buyers in Taiwan. Thus, the difference between the cost incurred by Emptel, the manufacturer, and the sales price of SMS in the home market to the first unrelated customer for the general class or kind of merchandise is the profit required for the constructed value. As related parties, the total profitability of home market sales can be determined only by reference to the profits earned by each. Because the submitted profit did not reflect profits earned by Emptel, the Department used the profit earned on Emptel's and SMS's financial statements after eliminating intercompany sales as BIA.

Comment 13

Respondent contends that the Department should not add import duties to the cost of manufacture because it would increase constructed value by an amount far greater than the amount of duties actually paid. This is due to the multiplier effect of the rates for general and administrative expenses and profit because they are expressed as percentages of cost of manufacture and cost of production, respectively. Respondent argues that the Department should continue to follow the methodology used in the preliminary determination and should add the duties separately after profit.

DOC Position

In our preliminary determination we added import duties after general expenses and profit were accounted for in the constructed value as BIA because respondent's treatment of these import duties was not clear. We were not able to resolve this issue during verification. In particular, respondent's general and administrative expenses were calculated as a percentage of cost of goods sold inclusive of import duties, based on its financial statements. As a result, it would be inappropriate to apply this percentage to a cost of manufacture exclusive of import duties for purposes of calculating constructed value. Therefore, as BIA, import duties have been included in cost of manufacture for purposes of the final determination.

Comment 14

Petitioner argues that since the respondent failed to provide the 1988 financial statements for the holding company that owns Vidar-SMS the Department should reject the respondent's information and use the best information available. The respondent contends that the holding company had not been audited by its independent auditors and, thus, the 1988 financil statements were not available. The respondent maintains that the holding company had no employees and its general expenses were negligible.

DOC Position

The Department used the 1987 financial statement of the holding company as "best information available" for the general expenses for that entity, because there were no audited 1988 financial statements.

Comment 15

The respondent argues that royalty expenses included in general and administrative expenses in its response should be deducted from general and administrative expenses because they were specifically incurred for a product unrelated to those products under investigation.

DOC Position

The Department agrees with respondent and has deducted royalty expenses from general and administrative expenses that were incurred for the production of merchandise not under investigation.

Comment 16

Petitioner maintains that the respondent failed to provide documentation to support its claim that the "Inventory Loss" and "Loss on Physical Inventory" accounts were not related to the products under investigation. Furthermore, petitioner argues that the "Purchase Price Difference" account, which is the difference between the purchase order price and actual price paid for all materials, was also improperly excluded from the submission. The respondent maintains that these expenses were submitted in detail in the response. However, the three expenses were not included in the company's constructed value calculation because they were classified as non-operating expenses by the company's auditors. The respondent further argues that the "Provision For Inventory Loss" expense is merely a loss reserve and not an actual cost of production.

DOC Position

The Department agrees with the respondent in part. The "Loss on Physical Inventory" expense is an actual cost of production, although not a product-specific one. Therefore, it was included as a general expense and not as part of the cost of manufacturing. Since the "Provision for Inventory Loss" expense is a reserve against future losses, this amount was appropriately excluded by the respondent. The "Purchase Price Difference" expense was added to the material costs since this difference represented the actual price paid.

Comment 17

Petitioner argues that the respondent failed to include research and development costs (R&D) incurred by the parent Vidar-SMS in the constructed value calculations. The respondent contends that all other R&D incurred by Vidar-SMS, other than Emptel's R&D, was incurred by API and Vidar, the other subsidiaries consolidated with Emptel and Vidar-SMS. Furthermore, the R&D incurred by API and Vidar was for different products than those under investigation.

DOC Position

The Department included a portion of the R&D expenses incurred by Vidar-SMS as general R&D in the general and administrative section of the constructed value calculation. Those R&D expenses determined to be product-specific were reclassified from general expenses to cost of manufacturing.

Comment 18

Petitioner argues that the Department did not err by finding that fabrication costs are evenly distributed throughout the manufacturing process, and thus manufacturing costs should be computed using equivalent units. The respondent maintains that the structure of Emptel's assembly line dictates that virtually all manual labor expenses are incurred in the first eleven stages of the twenty-eight stage production process, and thus conversion costs are incurred most heavily in the very first stages of production. Therefore, the respondent claims that the process cost accounting system, by not computing equivalent units and instead using physical units to divide production costs, accurately reflects the cost of manufacturing the products under investigation. The respondent also maintains that it did not want to create controversies by using a new cost methodology solely for the submission.

DOC Position

The Department agrees with the petitioner. During the plant tour at verification and through our discussions with Emptel's officials, we noted that fabrication costs were not incurred only at the beginning of the production process as the respondent's process cost system assumes. This was apparent for factory overhead expenses, e.g., depreciation, rent, and indirect labor, which were a substantial portion of the overhead. The respondent uses a process cost accounting system that does not compute equivalent units in order to compute average costs per unit. Therefore, the production costs for a period of time are divided by less or more output than the amount actually produced by these costs. The Department, therefore, computed the equivalent units for the period of investigation for each part in work-in-process and used these equivalent units as the denominator in calculating average cost per unit.

Comment 19

Petitioner argues that the Department should not rely on the respondent's cost of production information because it substantially understated the material costs for units produced during the period of investigation by including free sample units without the fully loaded cost of these units being included in the process cost calculations. The respondent maintains that its cost system is reliable, and argues that if the Department makes substantial adjustments to the reported costs, the resulting figures will bear little resemblance to the respondent's knowledge of the products' cost structure.

DOC Position

We agree with the petitioner. The Department adjusted the per unit costs to exclude the effect of the "free samples." The Department used the average Finished Goods cost of the products which was based on the respondent's process cost accounting system used in the production process.

Comment 20

The respondent argues that the Department should allocate general expenses of Emptel over its cost of manufacturing rather than the cost of goods sold, although this was not the methodology that the respondent used in its questionnaire response. Also, the respondent argues that general expenses should not be solely attributed to production because Emptel is also an exporter and investor. Petitioner

contends that the respondent's methodology for allocating general expenses is improper and that the Department should follow its normal methodology for allocating general and administrative expenses to the products.

DOC Position

We agree with petitioner. We allocated general expenses over the respondent's cost of goods sold since the nature of these expenses relate to current operations. General expenses are not allocated over the cost of manufacturing since all the products may not have been sold in the current period of time, nor may ever be sold. Certain expenses related to the selling operations of SMS for accounting and general manager staff functions classified as general expenses in the response to the Section D questionnaire were reclassified by the Department as indirect selling expenses.

Comment 21

The respondent argues that selling expenses should be divided by the cost of manufacture instead of sales value because it would be improper to use a ratio based on a denominator of sales value and then apply it to the smaller factor, i.e., cost of manufacturing.

DOC Position

Where selling expenses are allocated, it is the Department's practice to allocate those expenses on the basis of sales. Use of the respondent's proposed allocation methodology could lead to anomalous results. For example, selling expenses could be allocated to merchandise which was produced during the period even though there were no sales of that merchandise.

Moreover, SMS misunderstands the application of this amount to the constructed value. The allocation of selling expenses described above yields an absolute amount to be applied to sales of SBTS. This amount, in turn, is allocated among units sold to arrive at an absolute, per unit selling expense. Finally, this absolute amount is divided by the cost of manufacture so that the selling expense can be expressed as a percentage of that cost. This is not the same as applying a sales-based ratio to a smaller denominator as the comment implies.

Comment 22

Petitioner claims that the Department should reject the respondent's submission and use BIA because the respondent did not provide the Department with sufficient information to verify its response, which was replete with deficiencies and inaccuracies. The respondent argues that all costs of production were submitted as they are recorded on the company's books. Moreover, the respondent contends that most of the issues presented by petitioner were disagreements with methodologies used rather than material deficiencies and omissions.

Finally, the respondent maintains that BIA has been used only in cases of very serious deficiencies or lack of cooperation from respondents. They argue that there is nothing on the record that indicates that the respondent failed to provide requested information or made unresponsive, insufficient or untimely submissions.

DOC Position

The Department agrees with the respondent in part. Although there were areas in which information was not provided or was deemed insufficient, e.g., import duties and profit, the Department was able, with adjustments, to rely on the information submitted in the response for most costs.

Taiwan Nitsuko

Comment 23

Taiwan Nitsuko asserts that petitioner's MNC allegation was based on subassembly prices that were constructed from dealers' price lists for systems and, therefore, are not relevant to the true prices of Nitsuko Corporation's subassemblies. Taiwan Nitsuko requests that the Department rescind its MNC investigation and rely on the information submitted by Taiwan Nitsuko. Petitioner argues that it submitted actual prices of control units sold in Japan and that it did not extrapolate subassembly prices from system prices. Petitioner further argues that the information submitted was specific to Nitsuko.

DOC Position

We agree with the petitioner. The petitioner established to our satisfaction the criteria necessary for the initiation of a MNC investigation. Accordingly, we do not agree to rescind the MNC investigation with regard to Taiwan Nitsuko.

Comment 24

Taiwan Nitsuko asserts that the Department's decision to initiate the MNC investigation was improper because the information upon which the decision was made was not initially accompanied by the proper certification required by the Department's regulations. Petitioner asserts it was sufficient that its legal counsel certified the submission at a later date.

DOC Position

The Department agrees with the petitioner. The Department's certification requirement is relatively new (see section 353.31(i) of the Department's regulations). Department officials' failure to discover that the petitioner's allegation was not accompanied by the requisite certification was an oversight. Once respondent's counsel pointed out that the certification was missing, petitioner's counsel immediately provided the requisite certification. The fact that the petitioner's allegation was not initially accompanied by the requisite certification does not invalidate the allegation. The certification of the relevant submission subsequently provided by petitioner's legal counsel satisfied the Department's regulations.

Comment 25

Several importers have requested that we exclude certain imported products from the scope of the investigation.

DOC Position

In many proceedings, the Department can only investigate a limited number of respondents. Insofar as the products at issue are of a highly technical nature and were not manufactured by an investigated company, the Department did not investigate whether the particular models imported by the above interested parties should be excluded. For the most part, we did not have enough information, submitted in a timely fashion, to address these concerns. Therefore, should an order be issued in this case, the above importers may want to consider seeking a scope letter ruling, as described in 19 U.S.C. 1516a(a)(1)(B)(vi).

Comment 26

Several interested parties have requested that the best information available rate of Taiwan Nitsuko not be used in calculating the "All Others" rate as it was stated in the preliminary determination. These interested parties state that Taiwan manufacturers and American importers are being unfairly treated because the best information available rate is based on Taiwan Nitsuko which is a multinational company not a Taiwan company, and because Taiwan Nitsuko's rate is premised upon Japanese market information not reflective of the Taiwan market. These interested parties request that the Department disregard Taiwan Nitsuko's rate in calculating the "All Others" rate because they believe SMS, the only responding company from

Taiwan, more fairly reflects the experience in Taiwan. Petitioner argues that Taiwan Nitsuko is a Taiwan company and is the largest exporter to the U.S. of the products under investigation; therefore, Taiwan Nitsuko's best information available rate is the appropriate rate to use in calculating the "All Others" rate.

DOC Position

In the preliminary determination, the Department followed its standard practice of excluding zero and *de minimis* margins from the "All Others" rate. As a result, the "All Others" rate was based solely on Taiwan Nitsuko's BIA rate. For purposes of this final determination, however, the Department has determined that the application of the BIA rate for Taiwan Nitsuko to the "All Others" rate is inappropriate. The Department does not believe that the BIA rate calculated for Taiwan Nitsuko is representative of other unnamed Taiwan manufacturers because, as previously explained, the Department applied section 773(d) of the Act (the MNC provision) to calculate Taiwan Nitsuko's BIA rate. This resulted in comparisons being based only on merchandise produced and sold in Japan to that produced in Japan and sold in the United States.

Instead, the Department has determined that it is more appropriate to apply the margin of SMS, the only responding company from Taiwan, as the "All Others" rate. For SMS, we calculated a dumping margin of 0.00%, which will be applied to the "All Others" rate for cash deposit purposes. We note, however, that the Department has determined that SBTS from Taiwan are being, or are likely to be, sold in the United States at less than fair value. The only company excluded from this determination is SMS. Therefore, all companies subject to the "All Others" rate are covered by the Department's affirmative determination, but will be subject to a cash deposit of 0.00%.

Continuation of Suspension of Liquidation

We are directing the U.S. Customs Service to continue to suspend liquidation, under section 733(d) of the Act, of all entries of SBTS from Taiwan, except those of Sun Moon Star, as defined in the "Scope of Investigation" section of this notice, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the Federal Register. The U.S. Customs Service shall continue to require a cash deposit or posting of a bond equal to the estimated amounts by which the foreign market value of the subject merchandise from Taiwan exceeds the United States price as shown below. This suspension of liquidation will remain in effect until further notice.

The weighted-average dumping margins are as follows:

Manufacturer/producer/exporter	Weighted-average margin percentage
Taiwan Nitsuko Co., Ltd	129.73
Sun Moon Star Inc	0
All Others	0

ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our determination. In addition, pursuant to section 735(c)(1) of the Act, we are making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under administrative protective order, without the written consent of the Assistant Secretary for Import Administration.

If the ITC determines that material injury, or threat of material injury, does not exist with respect to any of the products under investigation, the proceeding will be terminated and all securities posted as a result of the suspension of liquidation will be refunded or cancelled as to those products. However, if the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing Customs officials to assess antidumping duties on SBTS from Taiwan, except those of Sun Moon Star, entered, or withdrawn from warehouse, for consumption, on or after the effective date of the suspension of liquidation, equal to the amount by which the foreign market value exceeds the U.S. price.

This determination is published pursuant to section 735(d) of the Act (19 U.S.C. 1673d(d)).

Dated: October 10, 1989.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

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APPENDIX D

ALTERNATIVE DATA EXCLUDING RELATED PARTIES

Alternative table 5
Subassemblies of small business telephone systems: U.S. capacity, production, and capacity utilization, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June-- 1988	1989
*	*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Alternative table 7
Control and switching equipment for small business telephone systems: U.S. producers' U.S. shipments, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June-- 1988	1989
*	*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Alternative table 9
Other circuit cards and modules for small business telephone systems: U.S. producers' U.S. shipments, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June-- 1988	1989
*	*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Alternative table 10
Telephones for small business telephone systems: U.S. producers' U.S. shipments, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June-- 1988	1989
*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Alternative table 30
Small business telephone systems and subassemblies: Shares of U.S. consumption supplied by Japan, Korea, Taiwan, all other imports, and U.S. producers, 1986-88, January-June 1988, and January-June 1989

Item	1986	1987	1988	January-June-- 1988	1989
*	*	*	*	*	*

Source: Compiled from data submitted in response to questionnaires of the U.S. International Trade Commission.

Appendix E

STATEMENTS ON CAPITAL AND INVESTMENT

1. Since January 1, 1986, has your firm experienced any actual negative effects on its growth, investment, ability to raise capital, or existing development and production efforts as a result of imports of systems or subassemblies thereof from Japan, Korea, or Taiwan?

* * * * * * *

2. Does your firm anticipate any negative impact of imports of systems or subassemblies from the subject countries?

* * * * * * *

3. Has the scale of capital investments undertaken been influenced by the presence of imports of the subject merchandise from the subject countries?

* * * * * * *