

## Chapter 9

# Antidumping and Countervailing Duty Investigations



**Photo:** Former Commissioners Deanna Tanner Okun and Charlotte Lane and attorney Paul Rosenthal examining exhibits in an investigation involving pineapples.

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This chapter provides a brief history of the law concerning antidumping and countervailing duty investigations<sup>537</sup> and addresses the Commission's role in conducting such investigations, including its practices and procedures in doing so. More detailed information can be found in the Commission's Rules of Practice and Procedure,<sup>538</sup> as well as many documents, such as the Antidumping and Countervailing Duty Handbook, generic questionnaires, and statutory timetables, on its website (<http://www.usitc.gov>).

## Antidumping Investigations

When foreign merchandise is sold in the United States at less than fair value it can be found (by the U.S. Department of Commerce (Commerce)) to be dumped,<sup>539</sup> and when a U.S. industry is materially injured, or threatened with material injury, or the establishment of an industry is materially retarded by reason of imports or sales for importation of such merchandise (as determined by the Commission), antidumping duties can be imposed on such imports to offset the dumping.

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<sup>536</sup>Mr. Featherstone is a former Director of the Commission's Office of Investigations. Mr. Lyons was General Counsel.

<sup>537</sup>Including some information also presented in *Overview and Compilation of U.S. Trade Statutes*, Committee on Ways and Means, U.S. House of Representatives, 111th Congress, 2nd sess., 2010 Edition, December 2010.

<sup>538</sup>19 C.F.R. pts. 201, 207 (2016).

<sup>539</sup>Dumping is defined in section 771(34) of the Tariff Act of 1930 (codified as amended at 19 U.S.C. § 1677(34)) as "the sale or likely sale of goods at less than fair value." More specifically, it is defined as selling an imported product in the United States at a price which is lower than the price for which it is sold in the home market (the "normal value"), after adjustments for differences in the merchandise, quantities purchased, and circumstances of sale. In the absence of sufficient home-market sales, the price for which the product is sold in a surrogate "third country" may be used. Finally, in the absence of sufficient home-market and third-country sales, or if sales have been at less than the cost of production, "constructed value," which uses a cost-plus-profit approach to arrive at normal value, may be used.

There has been at least some concern about dumping in the United States since the 1800's, but the first U.S. legislation to address it was section 801 of the Revenue Act of 1916,<sup>540</sup> which also established the Commission in section 700. However, the Commission played no role in its antidumping provisions.<sup>541</sup>

The first statute with provisions for administrative determinations was the Antidumping Act of 1921.<sup>542</sup> The Department of the Treasury (Treasury) was responsible for making all determinations until 1954, when an amendment tasked the Commission with making injury determinations.<sup>543</sup> From 1954 through 1979, when the 1921 Act was repealed,<sup>544</sup> the Commission conducted 223 investigations under it, making 101 (45 percent) affirmative determinations and 117 (53 percent) negative (five cases (2 percent) were terminated without a determination).<sup>545</sup> These investigations were generally conducted by an investigative team including an accountant, attorney, commodity-industry analyst, economist, and supervisory investigator.

With repeal of the 1921 Act in 1979, Congress established new procedures for conducting antidumping investigations<sup>546</sup> to conform with provisions of the recently completed Tokyo Round of Multilateral Trade Negotiations (Tokyo Round), and transferred Treasury's role in determining whether dumping exists to Commerce.<sup>547</sup>

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<sup>540</sup> Revenue Act of 1916, Pub. L. No. 64-271, § 801, 39 Stat. 756, 798, 799 (1916).

<sup>541</sup> The antidumping provisions of the 1916 Act were repealed in section 2006 of the Miscellaneous Trade and Technical Corrections Act of 2004 (Pub. L. No. 108-429, § 2006, 118 Stat. 2434, 2597). They had provided for significant penalties (including treble damages plus costs), but the threshold for relief was also high, requiring the imported products to be sold "at a price substantially less than the actual market value or wholesale price of such articles" and that "such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States."

<sup>542</sup> Antidumping Act of 1921, Pub. L. No. 67-10, 42 Stat. 11 (amended in the Antidumping Act of 1958, Pub. L. No. 85-630, 72 Stat. 583).

<sup>543</sup> Customs Simplification Act of 1954, Pub. L. No. 83-768, § 301, 68 Stat. 1136, 1138.

<sup>544</sup> Trade Agreements Act of 1979, 19 U.S.C. § 2501 (repealing the Antidumping Act of 1921).

<sup>545</sup> Two early investigations were identified with a single number but covered more than one country (AA1921-2, involving West Germany and France, and AA1921-6, involving East Germany and Czechoslovakia). Accordingly, on the basis of countries cited, there were 225 cases, 101 (45 percent) of which were affirmative, 119 (53 percent) of which were negative, and five (two percent) of which were terminated.

<sup>546</sup> The new provisions were added as Title VII of the Tariff Act of 1930 (Title VII) (19 U.S.C. §§ 1671-1677), also by the Trade Agreements Act of 1979 (see note 544).

<sup>547</sup> Reorganization Plan No. 3 of 1979, 93 Stat. 1381, 1383, § 5(a)(1)(C); 19 U.S.C. §§ 1617, 1677(a); and Exec. Order No. 12188, 45 Fed. Reg. 989 (January 2, 1980).

## Countervailing Duty Investigations

When the production or exportation of foreign merchandise sold in the United States receives a countervailable subsidy (as determined by Commerce)<sup>548</sup> and a U.S. industry is materially injured, or threatened with material injury, or the establishment of an industry is materially retarded by reason of imports or sales for importation of such merchandise from a Subsidies Agreement country<sup>549</sup> (as determined by the Commission), countervailing duties can be imposed on such imports to offset the subsidization.

The first U.S. legislation that addressed subsidization practices was the Tariff Act of 1890,<sup>550</sup> but that statute addressed only imports of sugar. The Tariff Act of 1897 extended coverage to all dutiable imports.<sup>551</sup> From then until 1974 the law required Treasury to assess countervailing duties on imported dutiable goods benefitting from the payment or bestowal of an export “bounty or grant”<sup>552</sup> and did not require an injury test. The Trade Act of 1974<sup>553</sup> extended the application of the countervailing duty law to duty-free imports, subject to a showing of injury by the Commission.<sup>554</sup>

In 1979, responsibility for the subsidies determination, as with that for the dumping determination, was transferred from Treasury to Commerce, and provisions of the GATT Subsidies Code were incorporated into Title VII. The new provisions required an injury test in all countervailing duty cases involving imports from “countries under the Agreement.”<sup>555</sup> The provisions of the preexisting section 303 of the Tariff Act of 1930 were retained to cover cases involving imports from countries that were not “countries under the Agreement” (that is, they

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<sup>548</sup> Countervailable subsidies are defined in Title VII as those in which a government of a country or any public entity within the territory of the country authority provides a financial contribution, provides any form of income or price support within the meaning of the Subsidies Code of the General Agreement on Tariffs and Trade (GATT), or makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments, to a person and a benefit is thereby conferred (19 U.S.C. § 1677(5)).

<sup>549</sup> Subsidies Agreement countries are defined in 19 U.S.C. § 1671(b).

<sup>550</sup> Tariff Act of 1890, 26 Stat. 567, 583 (1890).

<sup>551</sup> Tariff Act of 1897, 30 Stat. 151, 205 (1897).

<sup>552</sup> Tariff Act of 1922, Pub. L. No. 67-318, 42 Stat. 858 (amending the law to cover bounties or grants on manufacture or production as well as on exportation).

<sup>553</sup> Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975).

<sup>554</sup> These investigations were conducted under provisions of section 303 of the Tariff Act of 1930 in much the same way as antidumping investigations of the time. The Commission conducted 12 of them based on this provision from 1974 to 1980, making one affirmative determination (8 percent) and nine negative (75 percent) (two cases (17 percent) were terminated).

<sup>555</sup> “Countries under the Agreement” were countries that either were signatories to the Subsidies Code or had assumed substantially equivalent obligations to those under the Code.

were not entitled to an injury test unless the imports entered duty-free).<sup>556</sup> In 1995, to conform with provisions of the Uruguay Round of Multilateral Trade Negotiations (Uruguay Round), section 303 was repealed, thus eliminating the requirement for an injury test in all countervailing duty cases involving non-Subsidies Agreement countries, even if they enter duty-free.<sup>557</sup>

## Conduct of Antidumping and Countervailing Duty Investigations by the Commission

The overall investigation process for antidumping and countervailing duty cases can be divided into five stages, each ending with a determination by either Commerce or the Commission: (1) initiation of the investigation by Commerce, (2) the preliminary phase of the Commission's investigation, (3) the preliminary phase of Commerce's investigation, (4) the final phase of Commerce's investigation, and (5) the final phase of the Commission's investigation. With the exception of Commerce's preliminary determination (stage 3), a negative determination by either Commerce or the Commission results in a termination of proceedings at both agencies.

Statutory deadlines apply to the five stages, although Commerce can extend (for a specified amount of time) or suspend an investigation when certain conditions are met (see, for example, sections 734(f) and 735(a)(2) of Title VII). In most cases, antidumping investigations must be completed within 390 days of the filing of a petition, and countervailing duty investigations must be completed within 370 days. Title VII also requires that information obtained by both agencies, including business proprietary information (BPI), be released to certain interested parties under administrative protective orders (APOs), and makes determinations by both Commerce and the Commission subject to judicial review (see the following section on litigation). In addition, following the Uruguay Round, amendments were made to Title VII that require reviews of all orders after they have been in place for five years.

The Commission's caseload expanded sharply after Title VII was passed in late 1979 as many more new cases were filed,<sup>558</sup> and it saw the need for a more structured organization to handle it. The Office of Investigations was expanded; standardized questionnaires, notices, and report outlines were developed; and team members from the various offices were given specific

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<sup>556</sup> The Commission conducted 13 of these investigations between 1980 and 1995, making four (31 percent) affirmative determinations and four (31 percent) negative (five cases (38 percent) were terminated).

<sup>557</sup> Uruguay Round Agreements Act, 1994, Pub. L. No. 103-465, § 261, 108 Stat. 4809, 4908–10.

<sup>558</sup> For example, a total of 92 antidumping and countervailing duty cases were filed in the five fiscal years preceding 1980, while 432 were filed in the five fiscal years from 1980 to 1984. Cases (i.e., petitions) filed is a useful statistic, but not necessarily the best for measuring workload since cases are often filed on the same product from several countries and both antidumping and countervailing duty cases are sometimes filed on the same product and country. Such cases would be conducted together at the Commission.

responsibilities.<sup>559</sup> The Commission delegated responsibility to the staff for conducting (but not making determinations in) investigations prior to the preliminary determination. Unlike in the process used in final-phase investigations, a staff conference was held, rather than a full Commission hearing.

Title VII also required that the Commission establish a Trade Remedy Assistance Office to provide information to the public upon request and, to the extent feasible, provide assistance and advice to interested parties in prospective and active investigations.<sup>560</sup>

The Uruguay Round Agreements Act also had an effect on Commission caseload since it required reviews of all existing Title VII orders and all new orders five years after they were issued. However, the new requirement for review investigations was offset to some extent by a decline in the number of new Title VII petitions filed.<sup>561</sup>

## Petition

A petition<sup>562</sup> alleging dumping and/or subsidization and injury, filed simultaneously with Commerce and the Commission, is normally the first step in antidumping and countervailing duty investigations.<sup>563</sup> Commerce, as the administering authority, must decide within 20 calendar days whether to initiate an investigation. The Commission, however, must begin its

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<sup>559</sup> For a brief period in the late seventies/early eighties a different model was employed—the single investigator. As a result of its organizational change, the Office of Investigations, which up to that time contained only a small number of supervisory investigators, was expanded to include investigators. These investigators, drawn both from the ranks of then current Commission staff as well as outside hires, were given sole responsibility for the conduct of import-injury investigations, with assistance from other offices only at their request. This approach to investigations only lasted a short time as the weight of the workload proved too much for an individual, and the team concept was restored.

<sup>560</sup> 19 U.S.C. § 1339.

<sup>561</sup> For example, a total of 339 antidumping and countervailing duty cases were filed in the five fiscal years preceding 1995, while 174 were filed in the five fiscal years from 1995 to 1999.

<sup>562</sup> Petitions may only be filed by an interested party on behalf of an industry. For petition purposes, interested parties include a manufacturer, producer, or wholesaler in the United States of a domestic like product; a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product; a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States; an association, a majority of whose members is composed of interested parties described above; and, generally, in any investigation involving an industry engaged in producing a processed agricultural product, a coalition or trade association which is representative of either processors, processors and producers, or processors and growers (19 U.S.C. §§ 1677(9)(C)–(E)).

<sup>563</sup> Commerce also has the authority to self-initiate an investigation when circumstances warrant (19 U.S.C. §§ 1671(a), 1673(a)).



investigation immediately since it only has 45 calendar days to make its preliminary injury determination.<sup>564</sup>

## Institution Activities

In general, a team of staff members is first assigned to conduct the investigation, under supervision of a supervisory investigator. The team includes an investigator, economist, industry analyst, accountant/financial analyst, attorney, and statistician. They prepare a Notice of Institution for publication in the *Federal Register* after approval by the Director of Operations<sup>565</sup> and the Secretary's office assigns a number to the investigation.<sup>566</sup> The Notice includes information on the investigation's schedule, including dates for the staff conference or Commission hearing and due dates for all submissions to the Commission. It also contains instructions for persons wishing to become parties to the investigation and/or appear at the Commission's conference or hearing, and for those authorized applicants representing interested parties who are parties to the investigation to request inclusion in the APO issued by the Commission in the investigation.<sup>567</sup> <sup>568</sup> Responsibilities for report sections are also assigned during this time.

## Questionnaires and Verification

Next, the team drafts questionnaires for review and approval by the Commission. Questionnaires are similar in both preliminary and final investigations<sup>569</sup> and request

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<sup>564</sup> Both agencies work closely with petitioner (and each other) during this time (and preferably before the filing) to ensure that the petition is adequate to begin an investigation.

<sup>565</sup> Like essentially all investigative documents, the Notice is also posted on the Commission's website, <http://www.usitc.gov>.

<sup>566</sup> Investigation numbers are assigned sequentially and separately for antidumping and countervailing duty investigations, by product and country. A parenthetical following the number indicates the stage of the investigation. For example, the preliminary stage of an antidumping investigation could be numbered 731-TA-2016 (Preliminary): PRODUCT from COUNTRY. "731" refers to the Title VII antidumping provisions and "TA" refers to the Tariff Act of 1930. Similarly, a 1<sup>st</sup> review of a countervailing duty investigation could be numbered 701-TA-2016 (1<sup>st</sup> Review): PRODUCT from COUNTRY, where "701" refers to the Title VII countervailing duty provisions and "TA" again refers to the Tariff Act of 1930.

<sup>567</sup> For these and all other references to "interested parties" other than those that can file a petition (see note 562), it also includes a foreign manufacturer, producer, or exporter, or the U.S. importer, of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise; and the government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported (19 U.S.C. §§ 1677(9)(A)–(B)).

<sup>568</sup> The Secretary to the Commission prepares separate service lists for parties to an investigation and those included in its APO. All public filings must be served on the former, while filings containing BPI must be served only on the latter. The Commission is very protective of all BPI it obtains during investigations and ensures that participants are equally protected through use of an APO, which includes harsh penalties for violation.

<sup>569</sup> Except that those used in final phase investigations typically address more issues (especially issues identified in the preliminary determination) and are sent to more market participants.

information to address the statutory factors the Commission is to consider in making its required determination(s).<sup>570</sup> Once approved by the Commission, they are e-mailed to all identified market participants, or a sample thereof in the case of highly fragmented industries.<sup>571</sup>

Responses are mandatory and the Commission has subpoena authority to compel responses if necessary. The team verifies that information submitted in questionnaires is complete and reasonable for inclusion in the investigation. Attempts are made to correct deficiencies by direct contact with respondents and, as time permits, on-site verifications, with a focus on financial data submitted, by at least the assigned accountant, and often other assigned team members as well. Verification visits include a detailed review of internal company documentation to support the information submitted and, especially for producers, generally include a plant tour. Some verifications occur in the offices of counsel for the respondent.

## Fieldwork

Fieldwork is frequently conducted by the team<sup>572</sup> in investigations. The purpose of fieldwork is to further the Commission's knowledge of the subject product and its production techniques, uses, channels of distribution, pricing, etc., in addition to verification of information submitted in questionnaires. In preliminaries, it is limited because of time constraints but would normally include a visit to at least the petitioner's plant. In finals and reviews, importers and purchasers are also often visited and, rarely, foreign producers or exporters. Team participants usually include the investigator, industry analyst, and economist, as well as the accountant if a verification is to be conducted. Sometimes the supervisory investigator and attorney also participate.

## Hearings and Conferences<sup>573</sup>

The hearing held in connection with Title VII investigations provides the Commission an opportunity to further gather information for the investigative record and facilitate its eventual determination on the petition. The hearing also gives market participants and those with an interest in the market the opportunity to interact directly with Commissioners, and vice-versa.

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<sup>570</sup> Pursuant to the Paperwork Reduction Act (44 U.S.C. Chapter 35), questionnaires are vetted by the Office of Management and Budget. Both generic questionnaires and those used in every Commission investigation are posted on its website. The factors they are designed to address are those specified in Title VII.

<sup>571</sup> Commission statisticians assist in developing statistically valid samples, as well as in compiling data submitted.

<sup>572</sup> Commissioners may, of course, also participate in fieldwork if they wish to.

<sup>573</sup> Most of the process information in this section is addressed in detail in the Commission's *Rules*, as well as the *Guidelines for Hearings* posted on the website. Information may also be obtained from the Hearings Coordinator in the Office of the Secretary.



All participants are strongly encouraged to file a prehearing brief containing the information they intend to submit and the arguments they intend to make at the hearing,<sup>574</sup> and must participate in a prehearing conference with the team, generally by phone, where time allocations are given and the hearing organized for optimal effectiveness. Each side is generally allotted one hour for presentations, not including time spent answering questions from Commissioners. Petitioner and those in support of the petition generally go first. Hearings are relatively formal, with witnesses sworn, a verbatim transcript prepared, and time allocations strictly enforced. Commissioner questioning generally begins after each one-hour presentation and is rotated among Commissioners with each Commissioner typically allotted 10 minutes per round. Other hearing participants, including the team, can also ask questions of speakers, but briefly. Hearings are open to the public unless portions are closed to allow the discussion of BPI.

Conferences held during the preliminary phase of investigations are similar to hearings but are conducted by the team and are somewhat less formal. For example, witnesses are not sworn<sup>575</sup> and there are no provisions for a preconference brief. They are generally chaired by the Director of Investigations in the Commission's Hearing Room. The Commissioner's dais is empty, although Commissioners are welcome to attend if they wish.<sup>576</sup> Time limits for presentations are similar to those in hearings and they are also strictly enforced. Likewise, a verbatim transcript is prepared.

## Submissions to the Commission

In addition to the petition, questionnaires, and hearing, most information from parties and interested parties in Title VII investigations is provided to the Commission in written submissions. In preliminary phase investigations that submission is the postconference brief.<sup>577</sup> In final phase investigations there are several opportunities for submissions. First, parties are given the opportunity to comment on draft questionnaires before they are submitted to the Commission for approval. Next is the prehearing brief, which is intended to be each party's primary vehicle for making its arguments. It has no page limitation and is due five business days before the hearing.<sup>578</sup> Witness testimony may also be (but is not required to be) submitted prior to the hearing. The posthearing brief, including answers to questions asked of the party

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<sup>574</sup> Witness testimony may also be submitted (19 U.S.C. § 1677f(f)(7)).

<sup>575</sup> Witnesses are reminded of the applicability of 18 U.S.C. § 1001 to false or misleading statements, and of the fact that the record of the proceeding may be subject to judicial scrutiny if there is an appeal.

<sup>576</sup> As with hearings, conferences are also broadcast within the Commission on closed-circuit television.

<sup>577</sup> Nonparties may submit a brief written statement of information pertinent to the investigation within the same time frame.

<sup>578</sup> As with preliminary phase investigations, nonparties may also submit a brief written statement of information pertinent to the investigation within this time frame.

during the hearing, follows, and then parties may file final comments on any information released to them by the Commission after posthearing briefs are filed.

## Staff Reports and Memoranda

Reports<sup>579</sup> produced by the assigned team (i.e., “staff reports”) are the primary means by which information collected by the team during a Title VII investigation is made available to Commissioners (and parties to an investigation). The staff report is an objective, factual document written by the assigned staff. It consists of a presentation and analysis of the statistical data<sup>580</sup> and other information collected or submitted during the investigation. It also addresses various factual issues that are relevant to the investigation, including issues raised by the parties at the conference or hearing, and in briefs. The staff report does not contain any recommendations regarding determinations that the Commission ultimately must make. After review by the supervisory investigator, and subsequent review by personnel in various offices throughout the Commission, the staff report is transmitted to the Commission and released to parties (BPI version to APO parties, public version to others).

### Abbreviated Staff Report Outline

**Part I:** Introduction (case background, summary of data presented in the report, nature and extent of dumping and/or subsidies, detailed information on the subject product, domestic like product and domestic industry issues, etc.)

**Part II:** Conditions of competition in the U.S. market (U.S. market characteristics, supply and demand considerations, substitutability issues, etc.)

**Part III:** U.S. producers’ production, shipments, and employment

**Part IV:** U.S. imports, apparent U.S. consumption, and market shares

**Part V:** Pricing data (factors affecting prices, pricing practices, price data, lost sales and revenues, etc.)

**Part VI:** Financial experience of U.S. producers (operations on the subject product, capital expenditures, research and development expenses, assets and return on assets, capital and investment, etc.)

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<sup>579</sup> An abbreviated staff report outline is presented below.

<sup>580</sup> Statistical data are generally presented in aggregate form, although disaggregated data may be presented where appropriate.

**Part VII:** Threat considerations and information on nonsubject countries (the industry in the subject country(ies), U.S. inventories of imported merchandise, information on nonsubject countries, etc.)

**Appendices** (*Federal Register* notices, hearing witnesses, summary data, etc.)

In preliminary phase investigations there is one staff report, which is usually submitted about five weeks into the investigation (or four business days before the scheduled vote). In final phase investigations and full 5-year reviews there are two, one submitted before the hearing and one before the vote.

The General Counsel also provides the Commission with a legal-issues memorandum in all investigations, written by the assigned staff attorney, that identifies the relevant legal issues in the investigation, summarizes the arguments on both sides of the issues, and provides pertinent legal advice. This memorandum is transmitted a few days after the final staff report and is not released outside the Commission because of attorney-client privilege. Unlike the staff report, recommendations are made in this memorandum on legal issues in the investigation, such as identification of the domestic like product and the industry involved.

Other memoranda in response to requests by specific Commissioners may be transmitted to the Commission at any time prior to the vote, and Commissioners may also request briefings by the assigned team.

## Commission Determination

The Commission must determine<sup>581</sup> whether an industry in the United States<sup>582</sup> is materially injured,<sup>583</sup> or is threatened with material injury,<sup>584</sup> or the establishment of an industry in the United States is materially retarded,<sup>585</sup> by reason of imports of the subject merchandise (the

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<sup>581</sup> A tie vote is an affirmative vote (19 U.S.C. § 1677(11)).

<sup>582</sup> “Industry” means the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the producers. There are also provisions to examine a regional industry and/or to enable the Commission to exclude producers from the analysis if they are related to an exporter or importer of the subject merchandise, or are also importers of the subject merchandise, as well as numerous other provisions (19 U.S.C. § 1677(4)). The “domestic like product” is a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation (19 U.S.C. § 1677(10)).

<sup>583</sup> “Material injury” means harm which is not inconsequential, immaterial, or unimportant (19 U.S.C. § 1677(7)(A)).

<sup>584</sup> Factors to be considered are specified in 19 U.S.C. § 1677(7)(F).

<sup>585</sup> The statute does not define “material retardation” and there have been very few cases where it was an issue.

merchandise identified in Commerce’s initiation notice), and that imports of that merchandise are not negligible.<sup>586</sup>

In making material injury determinations the Commission is to consider the volume of imports of the subject merchandise, the effect of imports of that merchandise on prices in the United States for like products, and the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States, and may consider such other economic factors as are relevant to the determination.<sup>587</sup> The Commission is to cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which petitions were filed and investigations were initiated on the same day if such imports compete with each other and with domestic like products in the U.S. market.<sup>588</sup>

Commissioners typically announce their determinations (i.e., vote) in a public meeting, where they also approve the staff report, thus making it the Commission’s report. “Statements of reasons,” often referred to as “opinions,” are prepared for all determinations, with the assigned attorney generally drafting majority statements, and assisting with others as requested. Opinions have generally grown longer over time, in part due to reviewing courts asking for more detail. A public version of the determination, statements of reasons, and report are then combined, transmitted to Commerce on or before the statutory deadline, and published. A business proprietary version is also prepared, placed in the record, and released to parties on the APO service list. The determination is also published in the *Federal Register*.

During FY 1980–2014 a total of 1,802 new Title VII cases were filed (1,257 antidumping and 545 countervailing duty). The Commission made affirmative determinations in 738 (40.9 percent) of these and negative determinations in 686 (38.1 percent) (378 cases (21.0 percent) were terminated or suspended). Cases covering the largest volumes of subject imports included those on many steel products, software lumber, minivans, shrimp, and wooden bedroom furniture. An additional 64 cases were filed in FY 2015. As of December 2015, there were a total of 328 Title VII orders in place (265 antidumping and 63 countervailing duty).

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<sup>586</sup> The preliminary determination addresses whether there is a reasonable indication of such injury. Imports are “negligible” if they account for less than 3 percent of the volume of all such merchandise imported into the United States in the most recent 12-month period for which data are available that precedes the filing of the petition or initiation of the investigation, or less than 7 percent of the volume of all such merchandise imported into the United States during that period if cumulation (see below) is appropriate (19 U.S.C. § 1677(24)).

<sup>587</sup> 19 U.S.C. § 1677(7)(B).

<sup>588</sup> Section 612 of the Trade and Tariff Act 1984 amended Title VII to make cumulation mandatory in analysis of current material injury by reason of subject imports by adding the provision now codified at 19 USC § 1677(7)(G). Pub. L. No. 98-573, § 612, 98 Stat. 2948 (1984). Prior to that cumulation was discretionary. The 1984 amendment did not address cumulation in the circumstance of threat of material injury, which continued to be discretionary. The Uruguay Round Agreements Act added the provision now codified at 19 U.S.C. § 1677(7)(H) to the statute, which expressly states that cumulation is discretionary in threat analysis.

## Review Investigations

Review investigations are conducted five years after an antidumping or countervailing order is issued.<sup>589</sup> They are conducted in essentially the same way as original investigations, but the Commission’s determination is whether or not “revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.”<sup>590</sup>

During FY 1980–2014 a total of 994 Title VII review investigations were conducted, including many 2nd, 3rd, and some 4th reviews. The orders were not revoked in 629 (63.3 percent) of these, while the Commission made a determination to revoke the order in 127 (12.8 percent) and Commerce suspended or terminated the case in 238 (23.9 percent). An additional 57 cases were instituted in FY 2015.<sup>591</sup>

## Litigation

### Judicial Review

Determinations made by the Commission in antidumping and countervailing duty proceedings are generally subject to judicial review. The Trade Agreements Act of 1979<sup>592</sup> established the fundamental aspects of such review, and applicable law has changed relatively little since then. Jurisdiction over challenges to Commission determinations was granted to the U.S. Court

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<sup>589</sup> 19 U.S.C. § 1675(c). In addition, an interested party may request that the Commission conduct a review investigation based on “changed circumstances” after an antidumping or countervailing duty order (or suspension agreement) has been in place at least 24 months (19 U.S.C. § 1675(b)). The Commission has conducted 29 changed circumstances reviews since 1980. It made determinations to not revoke the order in nine (31 percent) and to revoke the order in 10 (34 percent) (10 cases (34 percent) were terminated).

<sup>590</sup> 19 U.S.C. § 1675a(a).

<sup>591</sup> Section 104 of the Trade Agreements Act of 1979 (Trade Agreements Act of 1979, Pub. L. No. 96-39, § 104, 93 Stat. 144, 190–93) and section 753 of Title VII (Title VII of the Tariff Act of 1930, § 753 (codified as amended at 19 U.S.C. § 1675b)) made separate provisions to review countervailing duty orders for which there had been no injury determination. The Commission conducted 26 section 104 investigations, making determinations to not revoke the order in four (15 percent) and revoke the order in 18 (70 percent) (four cases (15 percent) were terminated). It conducted 35 section 753 investigations, making a determination to revoke the order in all of them.

<sup>592</sup> Pub. L. No. 96-39, title X, § 1001(a), July 26, 1979, 93 Stat. 300.

of International Trade,<sup>593</sup> with jurisdiction for appeals from final Court of International Trade decisions established in the U.S. Court of Appeals for the Federal Circuit.<sup>594</sup>

In establishing the right to judicial review of certain enumerated Commission determinations, Congress gave standing to those interested parties to an investigation, as defined by statute, that participated in the specific agency proceeding for which they are seeking review.<sup>595</sup> For this purpose, interested parties are statutorily defined to include: a foreign manufacturer, producer or exporter or the United States importer of subject merchandise; the government in which such merchandise is produced or from which such merchandise is exported; a manufacturer, producer or wholesaler in the United States of a domestic like product;<sup>596</sup> a certified union or recognized union or group of workers which is representative of an industry engaged in the production, manufacture, or wholesale of a domestic like product; or a trade or business association participating in these same activities.

Generally speaking, Commission determinations that bring a proceeding to a close are subject to judicial review. For example, final Commission determinations under section 1671d(b) and 1673d(b) concluding countervailing duty and antidumping duty investigations, respectively, may be challenged in the Court of International Trade.<sup>597</sup> Similarly, final Commission determinations pursuant to section 1675 (c) in five-year administrative reviews are subject to judicial review.<sup>598</sup> Negative injury determinations in preliminary antidumping and countervailing duty investigations are also appealable because they have the effect of terminating a proceeding.<sup>599</sup>

The courts will uphold a Commission final determination if it is based on substantial evidence on the record and is otherwise in accordance with law.<sup>600</sup> However, the standard of review is slightly different in appeals of negative preliminary injury determinations. There the Court will

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<sup>593</sup> See 28 U.S.C. § 1581(c).

<sup>594</sup> See 28 U.S.C. § 1295(a)(5). The predecessor of the Court of International Trade was the U.S. Customs Court. Pub. L. No. 96-417, § 601(7), 94 Stat. 1727, 1744 (1980) redesignated the U.S. Customs Court as the United States Court of International Trade. Separate legislation established the U.S. Court of Appeals for the Federal Circuit. Appellate review had previously been assigned primarily to the Court of Customs and Patent Appeals (the “CCPA”). See, Pub. L. No. 97-164, 96 Stat. 25 (1982).

<sup>595</sup> See 19 U.S.C. § 1516a(d); 19 U.S.C. 1677(9) (defining “interested party”).

<sup>596</sup> The statute defines domestic like product as being a “product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an [AD/CVD] investigation . . .” 19 U.S.C. §1677(10).

<sup>597</sup> 19 U.S.C. § 1516a(a)(2)(B).

<sup>598</sup> 19 U.S.C. § 1516a(a)(2)(B)(iii).

<sup>599</sup> 19 U.S.C. § 1516a(a)(1)(C).

<sup>600</sup> 19 U.S.C. § 1516a(b)(1)(B).



uphold the determination if it is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.<sup>601</sup>

In cases involving products from either Canada or Mexico special rules established in the North American Free Trade Agreements Implementation Act<sup>602</sup> and incorporated into U.S. law allow litigants to seek review before a binational panel rather than to pursue the litigation in U.S. courts. The procedural rules and processes for NAFTA dispute settlement under Chapter 19 of the Agreement are beyond the scope of discussion here.

The Commission's determinations that result in imposition of duties are also subject to the Dispute Resolution Procedures of the World Trade Organization (WTO).<sup>603</sup> However, disputes before the WTO are brought by member states of the WTO, not by private litigants. Consequently, only a foreign government can seek to invoke WTO dispute resolution procedures.<sup>604</sup> <sup>605</sup> No Commission determinations in countervailing duty or antidumping proceedings have been challenged in U.S. courts on the basis of an adverse WTO dispute settlement report.<sup>606</sup>

## Significant Court Decisions Involving Commission Proceedings

An exhaustive treatment of the court cases that have considered Commission determinations in antidumping and countervailing duty proceedings is beyond the scope of this chapter. Instead, a general overview is presented of how the reviewing courts have examined some key issues arising in Commission proceedings. Two recurring subjects involve the interpretation of statutory language, including the contours of the authority and discretion granted to the Commission by Congress, and the scope of judicial review.

As a starting point, the Commission is a creation of Congress and possesses only those powers assigned or delegated to it through legislation. Its authority and powers are limited by the

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<sup>601</sup> 19 U.S.C. § 1516a(b)(1)(A).

<sup>602</sup> Pub. L. No. 103-182, 107 Stat. 2057 (1993); 19 U.S.C. § 1516a(g)(2); see NAFTA Article 1904.

<sup>603</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

<sup>604</sup> 19 U.S.C. § 3512(c)(1).

<sup>605</sup> *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004), *rehearing denied, certiorari denied* 543 U.S. 976 (2003). See also 19 U.S.C. § 3512(c)(1); S. Rep. No. 103-412, at 13, 16 (1994); H. Rep. No. 103-826, at 25–26 (1994).

<sup>606</sup> There are procedures under U.S. law for the executive branch to ask a federal agency to consider whether a practice or determination found inconsistent with WTO Agreements by a WTO dispute settlement body can be brought into conformity under U.S. law. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 129, 108 Stat. 4809, 4836; 19 U.S.C. § 3538. The Commission was asked to conduct such an analysis in connection with its Wheat Gluten global safeguard determination. See *Wheat Gluten*, Investigation No. TA-201-67 (Consistency Determination), USITC Publication 3423 (May 2001).

empowering statutes that created it.<sup>607</sup> The statutes giving it authority to conduct antidumping and countervailing duty investigations are in many respects very precise in identifying the determinations that the Commission must make, the timelines for its investigations, and the factors that it must consider in making its determinations. In other regards, however, the governing statutes have left considerable discretion to the Commission in exactly how it conducts its investigations. In yet other respects, the statutory language is silent or ambiguous allowing the Commission to provide its own reasonable interpretation of the statutory language in applying it to specific situations.

Not surprisingly, much of the litigation surrounding the application of the antidumping and countervailing duty laws in determinations by the Commission followed soon after the enactment of the Trade Agreements Act of 1979<sup>608</sup> and the Uruguay Round Agreements Act.<sup>609</sup> These acts added substantially to the existing statutory provisions relating to antidumping and countervailing duty investigations and determinations. Many new procedures and requirements were established. As a result whether the agency's implementation of the statute was consistent with the statutory language and its purpose frequently was contested by parties affected by those agency decisions. In the years following passage of the new statutory provisions, parties to those proceedings often sought review by the Court of International Trade. The enhanced remedy provided by the new statutory provisions also contributed to an increase in the number of petitions filed by domestic parties requesting that investigations be conducted.<sup>610</sup> A concomitant increase in the amount of litigation was only to be expected.

## Review of Analytical Methodologies Used by Commissioners

Early litigation involving the Commission considered the scope of the Commission's latitude in choosing precisely how to conduct its investigations. Questions arose regarding such issues as the period of investigation that the agency would choose to examine for purposes of

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<sup>607</sup> The Commission's organic statute is found in 19 U.S.C. §§ 1330–41, and the statutes governing its countervailing duty and antidumping proceedings are generally set forth in 19 U.S.C. 1671 *et seq.* and 1673 *et seq.*

<sup>608</sup> Pub. L. No. 96-39, 93 Stat. 144 (1979).

<sup>609</sup> Pub. L. No. 103-465, 108 Stat. 4838 (1994).

<sup>610</sup> Based on statistics on the USITC website for the period between 1980–2008, the Commission made a total of 1,632 determinations. *USITC Import Injury Investigations*, Case Statistics (FY 1980-2008), table 1 (2010). Approximately, 550 of those determinations, or fully one-third, were made in the first six years (1980–85) of that period shortly after the effective date of the 1979 Trade Agreements Act. In contrast, only 223 antidumping determinations were made prior to 1980. See Table 10, Case Statistics.

collecting economic data and analysis.<sup>611</sup> Other cases raised questions as to whether the Commission could introduce factors into its analysis which were not specifically enumerated in the statute.<sup>612</sup> In other instances, legal disputes were pursued pertaining to how the Commission implemented such concepts as the cumulation of imports from countries subject to investigation for purposes of making its determination whether “subject imports” caused injury to the domestic industry.<sup>613</sup> The issue of causation findings itself has spawned a large amount of litigation as parties fought over whether a sufficient nexus existed between the subject imports and any material injury to the domestic industry.<sup>614</sup> Indeed, the existence of non-subject imports, i.e., imports from countries not under investigation, and whether they contributed to the material injury, or were the explanation for such injury, has been frequently examined both by the Commission and its reviewing courts.<sup>615</sup>

As mentioned above, while the statutes authorizing the Commission to conduct investigations specify in some detail the factors that it is to consider in making its injury determination,<sup>616</sup> the factors listed are not exhaustive. However, the Commission must address all of the primary factors relating to the volume and price of the subject imports as well as any resultant impact, regardless of the analytical methodology that any Commissioner may use. Thus, in *Angus Chemical Co. v. United States*,<sup>617</sup> the Federal Circuit held that while Commissioners were free to use a so called “bifurcated” analytical approach where they separately examined the question of economic harm or injury to the domestic industry from issues such as causation, they were statutorily required to consider all of the factors enumerated in the statute in making a determination.<sup>618</sup>

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<sup>611</sup> See *Altx, Inc. v. United States*, 370 F.3d 1108 (Fed. Cir. 2004) (ITC could reasonably rely on annual rather than potentially inaccurate semi-annual data); *Nucor Corp. v. United States*, 414 F.3d 1331, 1337 (Fed. Cir. 2005) (“the Commission has broad discretion with respect to the period of investigation that it selects for purposes of making a material injury determination.”).

<sup>612</sup> See *Kern-Liebers USA v. United States*, 19 CIT 87 (1995); 19 U.S.C. § 1677(7)(F)(1).

<sup>613</sup> See, e.g., *Nucor Corp. v. United States*, 601 F.3d 1291 (Fed. Cir. 2010) (ITC consideration of likely differing conditions of competition permissible in deciding whether to cumulate).

<sup>614</sup> *Nippon Steel Corp. v. United States*, 350 F. Supp. 2d 1186, *opinion after remand*, 29 CIT 338 (2005), *reversed, rehearing en banc denied*, 458 F.3d 1345 (Fed. Cir. 2006).

<sup>615</sup> *NSK Corp. v. United States*, 637 F. Supp.2d 1311 (Ct. Int’l Trade 2009), *reversed*, 716 F.3d 1352 (Fed. Cir. 2013); *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867 (Fed. Cir. 2008); *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369 (Fed. Cir. 2006), *rehearing, en banc, denied, on remand* 533 F. Supp. 2d 1348 (Ct. Int’l Trade 2008).

<sup>616</sup> See, e.g., 19 U.S.C. § 1677(7).

<sup>617</sup> 140 F.3d 1478, 1484–85 (Fed. Cir. 1998).

<sup>618</sup> *Angus Chemical Co.*, 140 F.3d at 1483-86. However, no Commissioner has chosen to employ a bifurcated analysis since the mid-1990s.

But the statutory scheme does not require any particular analytical approach.<sup>619</sup> In *U.S. Steel Group*,<sup>620</sup> the Court succinctly stated its conclusion:

In the end, of course, the factual conclusions of each Commissioner will drive the legal conclusion he or she reaches, namely whether the requisite injury has been shown. The invitation to employ such diversity in methodologies is inherent in the statutes themselves, given the variety of the considerations to be undertaken and the lack of any congressionally mandated procedure or methodology for assessment of the statutory tests.<sup>621 622</sup>

Furthermore, in the *U.S. Steel Group* decision referenced above, the Federal Circuit also rejected litigants' argument that the Commission was required to give weight to post period data (i.e., data outside the Commission's traditional period of investigation, comprising three full calendar years, and partial years where available).<sup>623</sup> In *Torrington Co. v. United States*, the Court of International Trade also acknowledged that the statute does not specify how volume of imports or domestic production is to be evaluated and it is permissible to rely on value as a basis of evaluating volumes when circumstances warrant.<sup>624</sup>

## The "Reasonable Indication" of Injury Requirement in Preliminary Determinations

Another important issue arose soon after the passage of the 1979 Trade Agreements Act, which for the first time required the Commission to conduct preliminary investigations and make preliminary determinations in virtually all of its original investigations under Title VII of the Act.<sup>625</sup> Domestic parties challenged Commission negative material injury determinations in

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<sup>619</sup> See *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 722 (Fed. Cir. 1997) (noting that prior Federal Circuit precedent did not endorse any specific methodology); *United States Steel Group v. United States*, 96 F.3d 1352, 1361–62 (Fed. Cir. 1996) (neither the "one-step" (unitary) nor "two-step" (bifurcated) analysis is mandated by the statute; Commissioners may use either).

<sup>620</sup> *United States Steel Group v. United States*, 96 F.3d 1352 (Fed. Cir. 1996).

<sup>621</sup> *Ibid.* at 1362. The court emphasized that the judiciary's role in this respect is quite limited: "This court has no independent authority to tell the Commission how to do its job. We can only direct the Commission to follow the dictates of its statutory mandate. So long as the Commission's analysis does not violate any statute and is not otherwise arbitrary or capricious, the Commission may perform its duties in the way it believes most suitable." *Ibid.* at 1362.

<sup>622</sup> See *Copperweld Corp. v. United States*, 682 F. Supp. 552 (Ct Int'l Trade 1988).

<sup>623</sup> *United States Steel Group*, 96 F.3d at 1357-58.

<sup>624</sup> 790 F. Supp. 1161, 1172–73 (Ct. Int'l Trade 1992), *aff'd*, 938 F.2d 1278 (Fed. Cir. 1991).

<sup>625</sup> Prior to the Customs Simplification Act of 1954 Pub. L. No. 83-768, 68 Stat. 1138, the Secretary of the Treasury Department made injury determinations in connection with countervailing duty and antidumping investigations. 89 Treas. Dec. 242, T.D. 53599; See *City Lumber Co. v. United States*, 311 F. Supp. 340 (Customs Ct. 1st Div. 1970). While the Commission was responsible for material injury determinations before 1979, preliminary injury investigations were the exception and were still conducted by the Treasury Department until 1979.

several cases, arguing that the agency was prohibited from weighing evidence at this stage in a proceeding. In essence, they argued that the Commission was required to make its preliminary determination largely on the basis of the facts presented by the domestic industry in its petition. The Court of International Trade, in a series of decisions arising from these challenges, ruled in favor of the domestic industry and remanded the cases to the Commission for new decisions consistent with the Court's ruling.<sup>626</sup> The Commission appealed each of these lower court decisions to the U.S. Court of Appeals for the Federal Circuit and prevailed in a decision rendered in *American Lamb Co. v. United States*.<sup>627</sup>

In that decision, the Federal Circuit found that the Commission's long-standing interpretation of the "reasonable indication of material injury" standard was entitled to Chevron deference and was a reasonable interpretation of the statute.<sup>628</sup> The Court sustained the Commission's two-part test that looked to whether: (1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of material injury to a domestic industry, and (2) no likelihood exists that contrary evidence will arise in a final investigation.<sup>629</sup> The Court of Appeals found that the Commission's approach provides fully adequate protection against unwarranted terminations and is consistent with both the statutory language and its purpose.<sup>630</sup> But for the *American Lamb* decision, both the Commission and the Commerce Department otherwise would be required to conduct full investigations despite the fact that the record in a preliminary investigation before the Commission failed to support a reasonable basis for proceeding to a full investigation.<sup>631</sup>

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<sup>626</sup> See *Republic Steel Corp. v. United States*, 591 F. Supp. 640 (Ct Int'l Trade 1984); *Jeannette Sheet Glass Corp. v. United States*, 607 F. Supp.123 (Ct Int'l Trade 1985); *American Lamb Co. v. United States*, 611 F. Supp. 979 (Ct Int'l Trade 1985). In the CIT's view: "The object of these determinations should have been simply to find whether there were any facts which raised the possibility of injury. The resolution or interpretation of conflicting facts should have been reserved for a possible final injury determination." *Republic Steel*, 591 F. Supp. at 650 (emphasis in original).

<sup>627</sup> 785 F.2d 994 (Fed. Cir. 1986).

<sup>628</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, courts first consider "whether Congress has spoken to the precise question at issue." *Ibid.* at 842. "If the intent of Congress is clear, that is the end of the matter." *Ibid.* Otherwise, courts must address "whether the agency's [interpretation] is based on a permissible construction of the statute." *Ibid.* at 843. The Federal Circuit has said that courts "must accord substantial weight to an agency's interpretation of a statute it administers." *Am. Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986) (quoting *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450-51 (1978)).

<sup>629</sup> *Am. Lamb Co.*, 758 F.2d at 1001.

<sup>630</sup> *Ibid.* at 1001-02.

<sup>631</sup> The relative importance of the *American Lamb* decision is best revealed by the percentage of preliminary investigations that have resulted in negative material injury determinations. Historically, until 2009 approximately 20 percent of all preliminary investigations were terminated based on a determination of no reasonable indication of material injury or threat of material injury. See, USITC website, Import Injury Investigations, Case Statistics (FY 1980-2008), Table 3. However, since 2009, only one preliminary investigation was terminated with a negative determination of material injury. A number of others were terminated based on negligible imports.

## The Commission's Subpoena Power

One aspect of the Commission's statutory authority that is unique in trade law investigations is the fact that the Commission possesses subpoena power that is enforceable in federal district courts in aid of its investigative functions. The Commission is permitted "for purposes of carrying out its functions and duties in connection with any investigation authorized by law" to obtain access to information in the possession of persons engaged in the production, importation, or distribution of any article under investigation and to seek the attendance and testimony of witnesses.<sup>632</sup> The Commission in general seeks information through the routine investigative processes discussed previously in this chapter, for example, by issuing questionnaires and conducting field visits to producers, manufacturers, and importers. When confronted by uncooperative or unwilling respondents to its information requests, it can issue administrative subpoenas to collect the information it deems necessary to its investigations.<sup>633</sup> Absent voluntary compliance with its subpoenas, the Commission may seek enforcement of such subpoenas by bringing an action "in any district or territorial court of the United States."<sup>634</sup>

In *United States International Trade Commission v. E. & J. Gallo Winery*,<sup>635</sup> the scope of the Commission's power to enforce its subpoenas was put to the test when the largest single producer of table wine refused to respond with business confidential information to ITC questionnaires issued in a preliminary antidumping investigation. The U.S. District Court for the District of Columbia rejected Gallo's arguments and found that because the Commission's request for information was "reasonably relevant" to its investigations and did not "unreasonably or unduly burden" the domestic producer, they were enforceable and Gallo was required to produce the subpoenaed information.<sup>636</sup> The Court concluded by stating that: "In short, the burden of showing that an agency subpoena is unduly broad or burdensome rests with Gallo, and Gallo has failed to meet its burden."<sup>637</sup>

The subject matter of the Commission's subpoena power was further discussed by the U.S. District Court for the District of Columbia in a 2004 case. Although that action arose from a Commission investigation conducted under Section 337 of the Tariff Act of 1930, it is relevant for purposes of Title VII investigations as well because the Commission invokes and has available to it the same statutory authority, 19 U.S.C. 1333, whenever it acts to enforce a

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<sup>632</sup> 19 U.S.C. §§1333(a), (b), and (d).

<sup>633</sup> 19 C.F.R. §§ 201.9, 207.8, 210.32 (2016).

<sup>634</sup> 19 U.S.C. §1333(b).

<sup>635</sup> 637 F. Supp. 1262 (D.D.C. 1985)).

<sup>636</sup> *Ibid.* at 1267, 1272–73.

<sup>637</sup> *Ibid.* at 1272.



subpoena.<sup>638</sup> In this later case, a witness living in California asserted that the Commission did not have jurisdiction over him for purposes of requiring him to testify and produce subpoenaed documents. The Court importantly rejected this argument, holding that: “Because the Tariff Act authorizes extraterritorial service of process, and Washington, DC, is the jurisdiction in which the ITC’s inquiry is being conducted, this Court has personal jurisdiction over ASAT, Inc.”<sup>639</sup> Absent the vindication of the ITC’s broad subpoena power, its ability to develop information essential to its investigations could have been seriously compromised. For example, if the Commission were to have been compelled to enforce its subpoenas throughout the country in each district where witnesses and documents were located, the Commission would have been seriously impeded in obtaining such information solely by budgetary and personnel resource limitations.

## Variations on a Theme: Evolving Interpretations of the Causation Requirement

Under applicable law, the Commission determines whether an industry in the United States is materially injured “by reason of the imports under investigation.”<sup>640</sup> Thus, an affirmative determination requires a finding that material injury is caused by the subject imports. Although the causal link is not specifically defined in the statute, its legislative history does state that the Commission must find a sufficient causal link between the subject imports and the material injury in light of all the information presented.<sup>641</sup> Imports need not be the principal or a substantial cause of material injury.<sup>642</sup> The Commission is not to weigh relative causes of injury.<sup>643</sup> The Commission will also consider other known factors that may be causing injury to the industry, often as conditions of competition.<sup>644</sup> The subject imports must be more than a “tangential” or “minimal” cause of material injury.<sup>645</sup> However, “[a]s long as its effects are not merely incidental, tangential, or trivial, the foreign product sold at less than fair value meets the causation requirement.”<sup>646</sup>

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<sup>638</sup> 19 U.S.C. § 1337. The Commission’s statutory subpoena authority found in 19 U.S.C. § 1333 is the same for all of its investigations.

<sup>639</sup> *United States International Trade Commission v. ASAT, Inc.*, 411 F.3d 245 (D.C. Cir.2005).

<sup>640</sup> 19 U.S.C. § 1671d(b); 19 U.S.C. § 1673d(b).

<sup>641</sup> S. Rep. No. 96-249, *reprinted in* 1979 U.S.C.C.A.N. 381, 444.

<sup>642</sup> 1979 U.S.C.C.A.N. at 443.

<sup>643</sup> *Ibid.*

<sup>644</sup> Statements of Administrative Action, H.R. 5110 (H.R. Doc. No. 103-316) at 851–52 (1994) (SAA), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4200.

<sup>645</sup> *Gerald Metals, Inc. v. United States*, 132 F.3d 716 (Fed. Cir. 1997), *rehearing and re hearing en banc denied* (Fed. Cir. 1998).

<sup>646</sup> *Nippon Steel Corp. v. USITC*, 345 F.3d 1379, 1384 (Fed. Cir. 2003).

Given that the question of causation is one of the issues central to a Commission injury determination, it has been frequently litigated. At the same time, the Commission's legal conclusion that imports under investigation are causing or threatening to cause material injury is specifically predicated on its factual findings to which the reviewing courts have largely deferred, consistent with the applicable standard of review under the substantial evidence test as discussed below.

There is one scenario, however, where both the Court of International Trade and the Court of Appeals for the Federal Circuit often have struggled in reviewing the Commission's causation analysis. This has been most pronounced when imports that are not subject to investigation, or that are fairly traded, are similar to the imports under investigation and are equal to or greater in quantity than the investigated imports. One of the more noteworthy cases to squarely present this issue was decided by the Federal Circuit in *Gerald Metals, Inc. v. United States*.<sup>647</sup> In that case, there were both fairly traded imports of pure magnesium and unfairly traded subject imports present in the U.S. market from the same country, Russia (a consequence of a Commerce determination finding one importer to be making sales at less than fair value and the other one not despite the fact that they were purchasing from the same Russian suppliers). The fairly traded imports were smaller in volume at the outset, but by the end of the investigation had surpassed the quantity of unfairly traded imports. In light of what the court described as "unique facts," it held that the Commission could not find a causal connection because in the court's view there was no more than a temporal connection between the subject imports and the injury to the domestic industry where the fairly traded imports could fully replace the subject imports without benefit to the domestic industry.<sup>648</sup>

The reasoning of the *Gerald Metals* Court reappeared in similar circumstances in *Bratsk Aluminum Smelter v. United States*.<sup>649</sup> Once again, the imports in question, this time silicon metal, were from Russia. As in *Gerald Metals*, the subject merchandise was a commodity product with competition focused primarily on price. Although the Commission specifically found that subject imports undersold both non-subject imports and the domestic product and also increased in volume, the Federal Circuit found that the Commission's explanation was inadequate in light of the particular facts<sup>650</sup> and that the Court of International Trade had erred

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<sup>647</sup> 132 F.3d 716 (Fed. Cir. 1997).

<sup>648</sup> *Ibid.* at 719–20 (citing *United States Steel Group v. United States*, 96 F.3d 1352, 1358 (Fed. Cir. 1996)).

<sup>649</sup> *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369 (Fed. Cir. 2006); see also *Caribbean Ispat Ltd. v. United States*, 450 F.3d 1336 (Fed. Cir. 2006).

<sup>650</sup> *Bratsk*, 444 F.3d at 1371–72.

in affirming the Commission’s determination.<sup>651</sup> The Federal Circuit summarized the causation requirement as follows:

Thus under *Gerald Metals*, the increase in volume of subject imports priced below domestic products and the decline in domestic market share are not in and of themselves sufficient to establish causation. *Gerald Metals* did not, of course, establish a per se rule barring a finding of causation where the product is a commodity product and there are fairly traded imports priced below the domestic product. However, under *Gerald Metals*, the Commission is required to make a specific causation determination and in that connection to directly address whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic producers.<sup>652 653</sup>

Both the Commission and its reviewing courts remained unable to extract themselves from this causation thicket and were soon again struggling to reach a common understanding as to the exact meaning of the *Bratsk* decision. In *Mittal Steel*,<sup>654</sup> the Federal Circuit attempted to rectify some of the confusion engendered by its earlier decisions.<sup>655</sup> It explained that the “replacement” language in its *Gerald Metals* and *Bratsk* decisions was not intended to require the Commission to determine the potential effectiveness of an order in removing unfairly traded imports from the U.S. market, but instead designed to introduce a “but-for” causal analysis—“the inquiry is a hypothetical one that sheds light on whether the injury to the domestic industry can reasonably be attributed to the subject imports.”<sup>656</sup> The court also reiterated that it had not created a presumption of no injury in a situation in which there were non-subject imports that could replace the subject imports.<sup>657</sup>

While it remains unclear whether the nature of the causation analysis required in the type of circumstances presented in *Gerald Metals*, *Bratsk*, and *Mittal* has been put to rest, there may be reason for optimism. In a decision issued by the Federal Circuit in *NSK Corp., v. United States*

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<sup>651</sup> The Court of International Trade also had affirmed the Commission’s determinations in the matter appealed in *Gerald Metals*. While this by itself does not demonstrate that the Federal Circuit had introduced a new requirement in that case, it does at a minimum suggest that it had introduced a statutory construction that was not anticipated by either the Commission or the lower court. *Bratsk*, 444 F.3d at 1376.

<sup>652</sup> *Bratsk*, 444 F.3d at 1374–75.

<sup>653</sup> Judge Archer dissented from his colleagues on the *Bratsk* panel and stated that he would have affirmed the Commission’s determination because of its fully adequate explanation of its decision, including its causation analysis.

<sup>654</sup> *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867 (Fed. Cir. 2008).

<sup>655</sup> 542 F.3d 867 (Fed. Cir. 2008). The *Mittal* decision arose after the Commission changed its affirmative determination to a negative determination based on its understandings of the Federal Circuit’s remand instructions in *Caribbean Ispat Ltd. v. United States*, 450 F.3d 1336 (Fed. Cir. 2006).

<sup>656</sup> *Mittal Steel*, 542 F.3d at 875–77.

<sup>657</sup> *Ibid.* at 877–79.

*International Trade Commission*,<sup>658</sup> the court reversed a Court of International Trade judge who had relied heavily on the appellate court's earlier *Bratsk* opinion to find that the ITC's determination was not supported by substantial evidence because it failed to adequately explain why non-subject imports would not replace subject imports without benefit to the domestic industry.<sup>659</sup> The Federal Circuit disagreed with the lower court's view of both the adequacy of the evidence supporting the Commission's determinations and the reasonableness of the Commission's factual and legal conclusions:

Because we agree with Appellants that the Commission's Second Remand Determination was supported by substantial evidence and the Court of International Trade erred repeatedly in remanding the case, we: (1) reverse the Court of International Trade's decisions in *NSK V* and *VI* and judgment affirming the Commission's negative determinations . . . (2) vacate the Court of International Trade's decision in *NSK IV* . . . and (4) order the Court of International Trade to reinstate the Commission's affirmative material injury determinations reached in the Second Remand Determination.<sup>660</sup>

By this decision, the Federal Circuit hopefully has made it clear that the role of the reviewing courts does not somehow change simply because there are commodity-like non-subject imports competitive with subject imports in the market. As in every other case, it is incumbent for the Commission to consider and examine all relevant known factors operating in the U.S. market for the product in question and causing injury to a domestic industry.<sup>661</sup> And in reviewing the Commission's determinations, the courts are to consider both the evidence in support of the determination and that which detracts from its conclusion. But at the end of the day, as discussed below, the Commission determination is to be sustained if supported by substantial evidence regardless of whether the court would have reached the same conclusion on its own.

## Application of the Substantial Evidence Standard of Review

Another frequently litigated question involves the scope of judicial review, including to what extent can the reviewing court, which is almost always the Court of International Trade in the first instance, second guess the Commission's factual determinations. As previously stated, the

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<sup>658</sup> *NSK Corp. v. USITC*, 716 F.3d 1352 (Fed. Cir. 2013), *certiorari denied*, 134 S.Ct. 2719 (2014).

<sup>659</sup> *Ibid.* at 1369.

<sup>660</sup> *Ibid.* at 1355.

<sup>661</sup> See *Swiff-Train Co. v. United States*, 792 F.3d 1355 (Fed. Cir. 2015). In this relatively recent case the court sustained the lower court's decision that the Commission's remand decision comported with the guidance in *Mittal Steel*. Both the Court of International Trade and the appellate court rejected appellants' arguments that a counter-factual analysis was an essential part of any non-attribution causation analysis. *Ibid.* at 1361.

function of the Court of International Trade on factual issues is to determine whether the Commission's determinations are supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>662</sup> The possibility of reaching more than one conclusion from consideration of the same set of facts does not mean that there is not substantial evidence for a conclusion.<sup>663</sup>

On appeal, the Federal Circuit will review the Court of International Trade's "evaluation of Commission factual determinations by stepping into the shoes of the Court and duplicating its review, evaluating whether Commission determinations are unsupported by substantial evidence or otherwise not in accordance with law."<sup>664</sup> Although the Federal Circuit has observed that such review is in essence duplicative, it does not ignore the informed opinion of the Court of International Trade.<sup>665</sup>

While the standard of review is thus clear, its application has not always been without difficulty. In *Nippon Steel Corp. v. International Trade Commission*,<sup>666</sup> the Court of International Trade issued a number of remands to the ITC directing it to explain determinations that in the court's view were not supported by record evidence. Given the final remand instructions from the court, the ITC issued a negative determination of present material injury as ordered by the court and a negative threat of injury determination as it believed it was compelled to do by the same court order. It then brought an appeal.

Upon appeal, the Federal Circuit found that the lower court had exceeded the bounds of its review authority.<sup>667</sup> In so holding, the Federal Circuit concluded:

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<sup>662</sup> See *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477–78 (1951)

<sup>663</sup> *Cleo Inc. v. United States*, 501 F.3d 1291 (Fed. Cir. 2007); *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (quoting *Am. Silicon Techs. v. United States*, 261 F.3d 1371–76 (Fed. Cir. 2001)).

<sup>664</sup> *Allegheny Ludlum Corp. v. United States*, 287 F.3d 1365, 1369 (Fed. Cir. 2002) (citing *Taiwan Semiconductor Indus. Ass'n v. USITC*, 266 F.3d 1339, 1343–44 (Fed. Cir. 2001)).

<sup>665</sup> *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994).

<sup>666</sup> The Court of International Trade issued four separate opinions over the course of this proceeding with remands to the Commission. In two instances, the lower court found that there was no substantial evidence to support an affirmative injury determination and ordered the Commission to enter a negative determination of material injury. See *Nippon Steel Corp. v. United States*, 223 F. Supp. 2d 1349 (Ct. Int'l Trade 2002) (*Nippon II*) and 350 F. Supp. 2d 1186, 1222 (Ct. Int'l Trade 2004) (*Nippon IV*) ("... the court concludes that because the Commission is unable to obtain new evidence to significantly supplement the record... further investigation or reconsideration in this matter is futile. The Commission's Second Remand Determination is remanded with instructions to issue a negative material injury determination."). *Nippon Steel Corp. v. United States*, 29 CIT 338 (2005); see also *Nippon Steel Corp. v. United States*, 28 CIT 1738 (2004); *Nippon Steel Corp. v. United States*, 25 CIT 1415 (2001).

<sup>667</sup> *Nippon Steel Corp. v. USITC*, 345 F.3d 1379 (Fed. Cir. 2003).

Under the statute, only the Commission may find the facts and determine causation and ultimately material injury—subject, of course, to Court of International Trade review under the substantial-evidence standard. The Court of International Trade despite its very fine opinions and analysis went beyond its statutorily-assigned role to ‘review.’ Despite its express dissatisfaction with the fact-finding underlying the Commission’s remand decisions, the Court of International Trade abused its discretion by not returning the case to the Commission for further consideration.<sup>668</sup>

A more recent Federal Circuit opinion again found that a Court of International Trade judge had misapplied the standard of review, erroneously substituting her evaluation of the evidence for that of the agency, and improperly directing the ITC to change its five-year review determination to one that would result in the revocation of several antidumping duty orders.<sup>669</sup> After remands in which the ITC re-opened the record and offered both additional fact-finding and explanation,<sup>670</sup> the ITC concluded that the lower court judge’s orders compelled it to alter its legal determination from a finding in favor of continuation of the outstanding antidumping orders to one which would result in their revocation.<sup>671</sup> The Commission then appealed the several aspects of the Court of International Trade’s decisions that it believed were contrary to the substantial evidence standard of review. Once again the Federal Circuit admonished the lower court judge for interposing her analysis of the facts for the determination of the Commission, which the appellate court found to be supported by substantial evidence in all respects: “As this court has noted in the past, ‘it is the role of the Commissioners—to decide which side’s evidence to believe.’”<sup>672</sup>

The relationship between the Court of International Trade and the Court of Appeals for the Federal Circuit has itself been a subject of some discussion. How much deference should the appellate court show to the “trial court”? The Federal Circuit, as we have discussed, has

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<sup>668</sup> *Nippon Steel Corp. v. USITC*, 345 F.3d 1379, 1381–82 (2003). The Court went on to say: “Thus, to the extent the Court of International Trade engaged in re-finding the facts (*e.g.*, by determining witness credibility), or interposing its own determinations on causation and material injury itself, the Court of International Trade, we hold, exceeded its authority.” *Ibid.* at 1381. See also *Nippon Steel Corp. v. United States*, 458 F.3d 1345 (Fed. Cir. 2006). After a second appeal, the Federal Circuit ruled that the Court of International Trade had again exceeded its authority by rejecting the agency’s findings and substituting its own. The Appeals Court ordered the lower court to vacate its order sustaining the negative injury determination made under protest by the Commission and to reinstate the Commission’s final affirmative injury determination. *Nippon Steel*, 345 F.3d at 1381.

<sup>669</sup> *NSK Corp. v. USITC*, 716 F.3d 1352 (Fed. Cir. 2013).

<sup>670</sup> *NSK Corp. v. United States*, 577 F. Supp. 2d 1322 (Ct. Int’ Trade 2008); 593 F. Supp.2d 1355 (2008) (denying motions for rehearing based on intervening law); 637 F. Supp. 2d 1311 (2009) (remanding affirmative determination re UK imports); 712 F. Supp. 2d 1356 (2010); 774 F. Supp. 2d 1359 (2010); 774 F. Supp. 1296 (2011).

<sup>671</sup> Views of the Commission on Remand, Investigation Nos. 731-TA-394-A, 731-TA-399-A (March 2011) (Fourth Remand Determination).

<sup>672</sup> Citing *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006).



addressed this subject directly and repeatedly.<sup>673</sup> Nonetheless, some Court of International Trade judges and some members of the bar have suggested that a more deferential approach to the lower court's decisions would be appropriate and that perhaps the appellate court should not repeat the review performed by the Court of International Trade judges.<sup>674</sup> Indeed, legislation was at least once proposed that would have limited the scope of review by the Federal Circuit to one where a lower court decision might be reversed only if it constituted an abuse of discretion or was otherwise inconsistent with applicable law.<sup>675</sup> No such legislative proposal has ever been adopted.<sup>676</sup>

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<sup>673</sup> While almost all the Federal Circuit judges have expressed a common view of the standard of review and its application, a small minority favored a more deferential approach. See *Zenith Elecs. Corp. v. United States*, 99 F.3d 1576, 1579 (Fed. Cir. 1996) (concurring opinion of Judge Plager). See also Judge Rader's concurring opinion in the same decision at 1583 where he expressed the view that "this court's replication of the record review already performed effectively renders the Court of International Trade's review superfluous" and that "the Atlantic Sugar standard undercuts the benefits this court derives from the experience and expertise of the Court of International Trade." (citations omitted).

<sup>674</sup> See Mark E. Wojcik & Lawrence Friedman Setting Standards: "Should the Federal Circuit Give Greater Deference to Decisions of the U.S. Court of International Trade in International Trade Cases?," 36 *J. Marshall L. Rev.* 721 (2003) (discussing Remarks of Chief Judge Gregory W. Carman).

<sup>675</sup> The proposal was made in by the Customs and International Trade Bar Association in June 2009 and may be viewed and downloaded from <http://citba.org/CITJurisdictionLegislation.php>.

<sup>676</sup> Based on annual data contained on the Circuit's website regarding rates of reversal, the Court of International Trade was reversed roughly twice as often as the Circuit's jurisdiction-wide experience between 2005–15. Whereas the average case reaching the Court of Appeals had a one in eight chance of being reversed, decisions from the Court of International Trade had a rate of reversal approximating 25% on average. In some years, the reversal rate was as high as 39%; it was over 30% in 4 out of 11 years during that period. It was below 14% in only one year: 2015.

