Certain Color Television Receivers From China

Investigation No. 731-TA-1034 (Final) (Remand)

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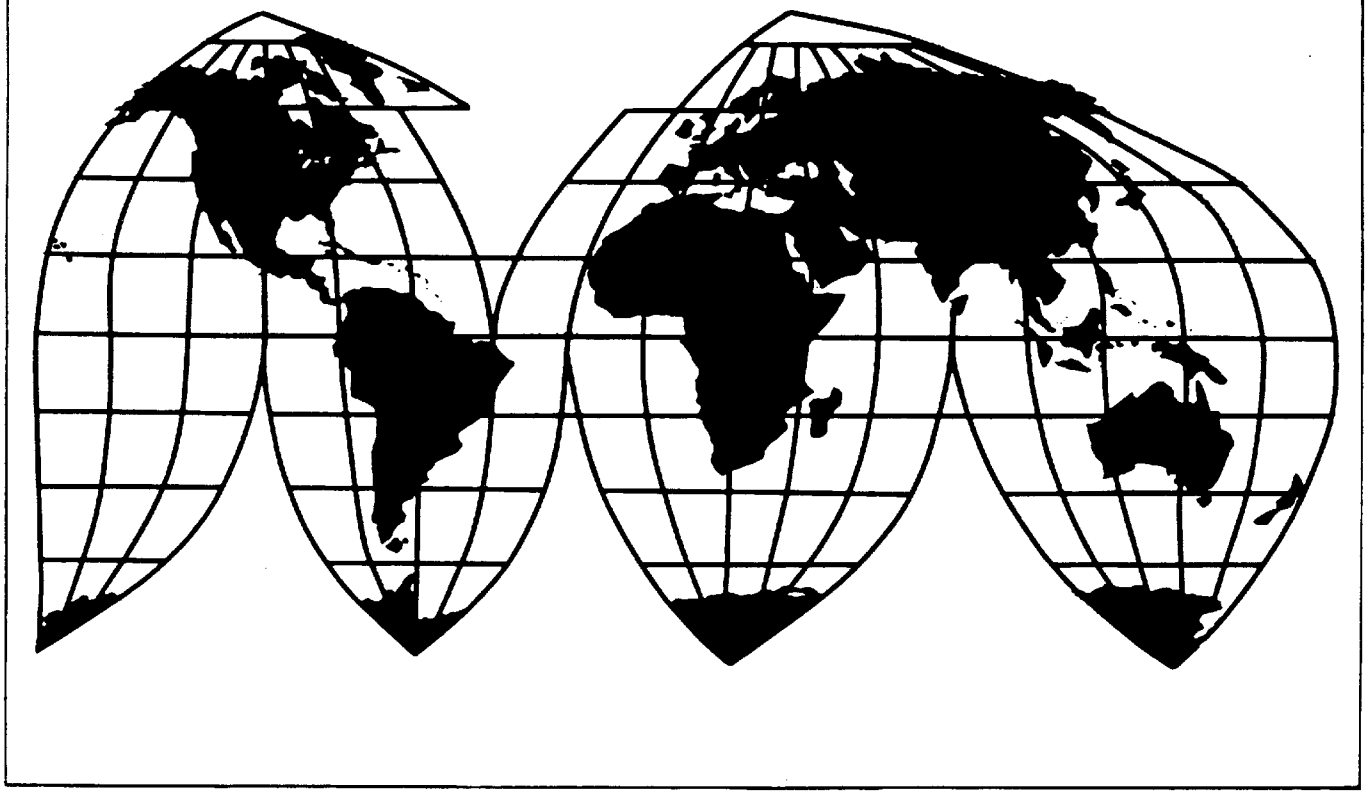
U.S. International Trade Commission



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U.S. International Trade Commission

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In May 2004, the United States International Trade Commission ("Commission") determined that an industry in the United States was materially injured by reason of imports from China of certain color television receivers that the Department of Commerce found were sold at less than fair value.

The U.S. Court of International Trade ("CIT") subsequently issued an opinion in an action challenging the Commission's determination. While the CIT upheld all contested Commission findings, it remanded the matter to the Commission for explanation and possible modification in light of two cases decided by the U.S. Court of Appeals for the Federal Circuit. The Commission submitted the attached Views to the CIT in response to the remand.

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VIEWS OF THE COMMISSION

In May 2004, the Commission unanimously determined that an industry in the United States was materially injured by reason of imports from China of certain color television receivers (CTVs) that the Department of Commerce found were sold at less than fair value (LTFV).[1] Sichuan Changhong Electric Co. ("Changhong"), an exporter of subject merchandise, subsequently initiated an action before the U.S. Court of International Trade (CIT) challenging the Commission's determination.

In issuing its opinion in this matter on November 15, 2006, the CIT rejected all arguments asserted by plaintiff Changhong.[2] The CIT, however, remanded the matter to the Commission for explanation and possible modification concerning the "specific causation determination" requirements recently imposed by the U.S. Court of Appeals for the Federal Circuit in Bratsk Aluminum Smelter v. United States[3] and Caribbean Ispat, Ltd. v. United States.[4]

On December 20, 2006, the Commission published notice of institution of remand proceedings in the Federal Register. In the notice, the Commission stated that it was not reopening the record for submission of new factual information. It did, however, invite the parties to file comments pertaining to the inquiries that are the subject of the CIT's remand instructions.[5] Petitioners, which are a U.S. producer of CTVs and two labor unions, were the only party to file comments with the Commission.

For the reasons stated below, we again determine that the domestic industry producing CTVs is materially injured by reason of LTFV imports from China.

I. Scope of the Remand

As previously stated, the CIT rejected each of plaintiff Changhong's arguments and affirmed all contested findings from the Original Determination. Consequently, it is not necessary for us to revisit our prior findings concerning domestic like product, domestic industry, conditions of competition, volume of subject imports, price effects of subject imports, or impact of subject imports. We again adopt the findings of the Original Determination concerning these issues.[6]

In the remand opinion the CIT stated that, under current Federal Circuit precedent, to sustain a Commission determination of material injury by reason of subject imports, a reviewing court must:

> (1) be able to discern how the Commission ensured that it did not attribute the injury from other sources to the subject imports; and (2) under certain circumstances, be able to determine that, following issuance of an antidumping order, the injury would not continue by reason of non-subject imports.[7]

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[1] Certain Color Television Receivers from China, Inv. No. 731-TA-1034 (Final), USITC Pub. 3695 (May 2004) ("Original Determination").

Commissioner Deanna Tanner Okun did not participate in the original investigation. She also has not participated in this remand proceeding.

[2] Sichuan Changhong Electric Co. v. United States, Slip Op. 06-168 (Ct. Int'l Trade Nov. 15, 2006) ("Changhong").

[3] 444 F.3d 1369 (Fed. Cir. 2006).

[4] 450 F.3d 1336 (Fed. Cir. 2006).

[5] 71 Fed. Reg. 76362 (Dec. 20, 2006).

[6] Vice Chairman Aranoff was not a member of the Commission at the time of the Original Determination and did not participate in that determination. She has reviewed de novo the record from the Original Determination. For purposes of this remand determination, she has adopted all findings from the Original Determination.

[7] Changhong, Slip Op. 06-168 at 17.

The CIT concluded that the Commission's Original Determination satisfied the first prong of this formulation.[8] The CIT characterized the second prong of this formulation as an additional requirement imposed by the Federal Circuit decisions in Bratsk and Caribbean Ispat.[9] Bratsk and Caribbean Ispat were decided after issuance of the Original Determination, and after the parties had submitted their arguments to the CIT in the Changhong litigation. As the CIT acknowledged, the Commission could not have addressed these decisions in its Original Determination.[10] The CIT consequently remanded the matter to the Commission:

> to explain (1) whether the "specific causation determination" required in those cases [i.e., Bratsk and Ispat] applies here; and (2) whether the Final Determination otherwise complies with the Federal Circuit's requirements in making its causation determination.[11]

II. Response to the Inquiries of the CIT

A. Is the "Specific Causation Determination" Required by Bratsk and Caribbean Ispat Applicable to this Investigation?

We now address the first question posed by the Court, which concerns whether the requirements of Bratsk and Caribbean Ispat are applicable to this investigation. For the reasons indicated below, we conclude that the requirements of these cases are inapplicable here.

The Federal Circuit's decision in Bratsk requires that the Commission conduct an additional analysis of non-subject imports if certain conditions are met. Specifically, the analysis is triggered "whenever the antidumping investigation is centered on a commodity product, and price competitive non-subject imports are a significant factor in the market."[12] In these situations, the Commission is directed to address "whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic producers."[13] In Caribbean Ispat, the Federal Circuit reiterated the elements of the Bratsk "replacement/benefit" test but did not attempt to refine or elaborate upon it.[14]

In a recent remand determination concerning steel wire rod from Trinidad and Tobago – the investigation underlying the Caribbean Ispat litigation – the participating Commissioners discussed the Bratsk "replacement/benefit" test extensively. All Commissioners who prepared remand opinions questioned the consistency of the Bratsk test with the statutory scheme of the antidumping and

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[8] Changhong, Slip Op. 06-168 at 25 ("It is apparent that the ITC took the necessary steps to ensure that it did not attribute injury cased by non-subject imports to the subject imports.").

[9] See Changhong, Slip Op. 06-168 at 16-17, 25.

[10] See Changhong, Slip Op. 06-168 at 25.

[11] Changhong, Slip Op. 06-168 at 25-26.

[12] Bratsk, 444 F.3d at 1375.

[13] Bratsk, 444 F.3d at 1375.

[14] Caribbean Ispat, 450 F.3d at 1341.

countervailing duty laws.[15] The Commission has also observed that the Bratsk test is unclear.[16]

According to the Bratsk court, the "replacement/benefit" test is applicable only "[w]here commodity products are at issue and fairly traded, price competitive, non-subject imports are in the market."[17] Specifically, while the Bratsk court referred to a "commodity product" as one that is "generally interchangeable regardless of its source,"[18] Commissioners have noted that this statement provides few meaningful criteria for the Commission to apply,[19] and that considerations of interchangeability and substitutability differ depending on the purpose of the comparison.[20]

For purposes of this investigation, it is not necessary for us to provide further elaboration on the meaning of the term "commodity product" to ascertain whether the Bratsk "replacement/benefit" test is triggered.[21] Regardless of how the term is defined, the record in this investigation indicates that CTVs are not a commodity product.

In the Original Determination, the Commission found that "there is some degree of brand and perceived quality differentiation in the CTV market."[22] Specifically, the Commission found branding to be a "moderately important" purchasing factor.[23] While it is true that the Commission declined to characterize branding as the principal or determinative factor in purchasing decisions, and noted the importance of price as a purchasing factor,[24] the Commission never characterized the domestic like

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[15] Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, Inv. No. 731-TA-961 (Final) (Remand), USITC Pub. 3903 (Jan. 2007) ("Steel Wire Rod Remand"), at 14-16 (opinion of Vice Chairman Aranoff and Commissioner Hillman), 25-26 (opinion of Commissioners Koplan and Lane). See also Certain Lined Paper School Supplies from China, India, and Indonesia, Inv. Nos. 701-TA-442-443, 731-1095-1097 (Final), USITC Pub. 3884 at 54 (Sept. 2006) (opinion of Chairman Pearson and Commissioners Hillman and Okun) (construing Bratsk "replacement/benefit" test as an additional required analytical step "misconstrues the purpose of the antidumping and countervailing duty laws").

[16] Steel Wire Rod Remand, USITC Pub. 3903 at 15-16 (opinion of Vice Chairman Aranoff and Commissioner Hillman), Lined Paper, USITC Pub. 3884 at 39 n.288 (opinion of Vice Chairman Aranoff and Commissioners Koplan and Lane), 71-72 (opinion of Chairman Pearson and Commissioners Hillman and Okun).

[17] Bratsk, 444 F.3d at 1373.

[18] Bratsk, 444 F.3d at 1371. Bratsk arose from an investigation on silicon metal.

[19] See Lined Paper, USITC Pub. 3884 at 39 n.288 (opinion of Vice Chairman Aranoff and Commissioners Koplan and Lane).

[20] Steel Wire Rod Remand, USITC Pub. 3903 at 18 (opinion of Vice Chairman Aranoff and Commissioner Hillman), 26 (opinion of Commissioners Koplan and Lane).

[21] We observe that in the Steel Wire Rod remand, the participating Commissioners had different views as to whether the Federal Circuit's language in Caribbean Ispat permitted the Commission to assess whether steel wire rod was a commodity product for purposes of the Bratsk analysis. The plurality opinion declined to consider the issue de novo. Steel Wire Rod Remand, USITC Pub. 3903 at 19 (opinion of Vice Chairman Aranoff and Commissioner Hillman), quoting Bratsk, 444 F.3d at 1371, 1375 ("Because we feel constrained to interpret the Court's ruling broadly for purposes of satisfying the Court's remand in this case, we conclude that this 'antidumping investigation is centered on a commodity product' that is 'generally interchangeable regardless of its source.'"). Commissioners Koplan and Lane did examine whether steel wire rod was a commodity product for purposes of the Bratsk "replacement/benefit" test, and determined that it was not. Id., USITC Pub. 3903 at 27 (opinion of Commissioners Koplan and Lane). In Lined Paper, all parties agreed that the product at issue was a commodity product. See USITC Pub. 3884 at 40.

[22] Original Determination, USITC Pub. 3695 at 11.

[23] Original Determination, USITC Pub. 3695 at 10.

[24] Original Determination, USITC Pub. 3695 at 10.

product and the subject imports as close substitutes. The Changhong decision itself acknowledges this.[25] Indeed, in the Original Determination, the Commission merely stated that "the record indicates *some overlap* in brand perceptions between brands that have been produced in the United States and brands that have been produced in China."[26] While the overlap was sufficient to permit the Commission to conclude that head-to-head pricing comparisons between the subject imports and the domestic like product were probative for some pricing products, for other products the Commission conceded that "differences in brand perceptions may help explain the very high underselling margins observed."[27] For this reason, a major premise of the Commission's finding on price effects was that prices at the low end of the market (where the subject imports were concentrated) could affect prices in other portions of the market.[28]

Given the existence of perceived quality differences among products and the significance of branding in purchasing decisions, the record does not support a conclusion that the domestic like product and the subject imports – much less CTVs from all sources – are highly interchangeable. Indeed, none of the parties to this investigation have contended that CTVs are a commodity product.[29] Consequently, CTVs do not possess even the basic characteristics of a commodity product, as that term is used by the Federal Circuit in Bratsk.[30]

Because we have found that CTVs are not a commodity product, the "replacement/benefit" test of Bratsk is not applicable in this investigation.[31] [32] Therefore, in response to the first inquiry posed by the

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[25] Changhong, Slip Op. 06-168 at 25 (observing that Commission did not make "a finding of 'high fungibility' among subject and non-subject imports.")

[26] Original Determination, USITC Pub. 3695 at 11 (emphasis added).

[27] Original Determination, USITC Pub. 3695 at 15.

[28] Original Determination, USITC Pub. 3695 at 11, 15-16.

[29] Petitioners contend that CTVs are not a commodity product for purposes of the Bratsk analysis, albeit on different grounds than those on which we have relied. See Petitioners' Comments on Remand at 5-6.

Respondents – including Changhong – were also invited in the Federal Register notice to submit comments on this matter, but declined to do so. Respondents never suggested in their prior submissions to the CIT or the Commission that CTVs are a commodity product. Indeed, their arguments during the original investigation were directly to the contrary. See, e.g., Changhong/Chinese Producers Prehearing Brief at 28 ("Because of the segmented market, there is only limited competition between the Chinese imports, which are sold under new, largely unknown or poorly regarded brand names, and U.S. produced CTVs, which are sold overwhelmingly under established, highly regarded brand names."), 52 (branding in market limits price competition); Philips Prehearing Brief at 11 ("One important theme in this case is that the product in question is not a fungible product, such as steel;" branding differences reflect perceived quality differences); Hearing Tr. at 219 (Bell) ("The T.V. market is far from being a commodity market.").

[30] See Bratsk, 444 F.3d at 1371.

[31] It is unnecessary for us to reach the issues of whether the second Bratsk triggering factor (concerning whether price-competitive non-subject imports are a significant factor in the market) is satisfied, or what results application of the Bratsk "replacement/benefit" test would yield. We reiterate that no party to this investigation has contended that CTVs are a commodity product. Moreover, the CIT did not suggest in its opinion that CTVs were such a product.

[32] Commissioner Koplan finds that it is unnecessary for him to reach the issues of whether the second Bratsk triggering factor (concerning whether price-competitive non-subject imports are a significant factor in the market) is satisfied, or what results application of the Bratsk "replacement/benefit" test would yield. He reiterates that no party to this investigation has contended that CTVs are a commodity product. Moreover, the CIT distinguished Caribbean Ispat and Bratsk from Changhong by pointing out that "there has been no showing that CTVs are 'commodity products,' nor has the ITC made a finding of 'high fungibility' among subject and non-subject imports. Thus it may be that the analysis the court required in those cases does not apply here." Changhong, Slip Op. 06-168 at 25. The Court remanded Changhong "because the [ITC's] Final Determination was issued before the Federal Circuit's decision in Bratsk and Caribbean Ispat." Id. Commissioner Koplan finds that those cases do not

(continued...)

CIT, we conclude that the "specific causation determination" required in Bratsk and Caribbean Ispat does not apply here.

B. Does the Original Determination Otherwise Comply with Federal Circuit Requirements?

The second question posed by the Court concerns whether the Original Determination "otherwise complies with the Federal Circuit's requirements in making its causation determination."[33] We perceive this question as having three elements.

The first concerns whether Bratsk imposes any additional requirements in investigations generally, as opposed to those investigations where the triggering factors are satisfied. Our answer to this question is no. The CIT in Changhong does not suggest that Bratsk imposes additional requirements applicable to all investigations.[34] Bratsk indicates that its "additional causation inquiry" is required only when both triggering factors are satisfied.[35] Otherwise, Bratsk indicates that the causation standard articulated in prior Federal Circuit decisions such as Gerald Metals, Inc. v. United States[36] and Taiwan Semiconductor Industry Ass'n v. USITC[37] continues to apply.[38]

The second element concerns whether the Original Determination satisfies the causation standard articulated in Gerald Metals and Taiwan Semiconductor. We respond to this question in the affirmative. The parties argued this issue in the Changhong litigation, and the Court concluded in the Commission's favor.[39] The CIT specifically found that "[i]t is apparent that the ITC took the necessary steps to ensure that it did not attribute injury caused by non-subject imports to the subject imports."[40] This conclusion conforms to the CIT's own formulation of the causation requirements the Federal Circuit applied before issuing Bratsk and Caribbean Ispat.[41]

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[32](...continued)
apply to the facts as evidenced in this record of this investigation.

[33] Changhong, Slip Op. 06-168 at 25-26.

[34] See Changhong, Slip Op. 06-168 at 16 (indicating that Bratsk and Caribbean Ispat apply "under certain circumstances"),

[35] See Bratsk, 444 F.3d at 1375.

[36] 132 F.3d 716, 719 (Fed. Cir. 1997).

[37] 266 F.3d 1339 (Fed. Cir. 2001).

[38] See Bratsk, 444 F.3d at 1373 (citing Gerald Metals and Taiwan Semiconductor as principal authorities concerning whether material injury is "by reason of" the subject imports). As previously stated, Caribbean Ispat did not impose any requirements beyond those of Bratsk.

[39] The Court expressly rejected Changhong's argument that the Commission insufficiently analyzed the effects of non-subject imports. See Changhong, Slip Op. 06-168 at 17 ("the ITC did take into account non-subject imports in making its volume, price effects, and impact determinations"), 19 (Commission sufficiently considered non-subject imports in its volume analysis), 20-21 (describing consideration of non-subject imports in Commission's price effects analysis).

[40] Changhong, Slip Op. 06-168 at 25.

[41] See Changhong, Slip Op. 06-168 at 15-16.

The third element concerns whether any Federal Circuit case, with the exception of Bratsk and Caribbean Ispat, has imposed causation requirements upon the Commission beyond those articulated in cases such as Gerald Metals and Taiwan Semiconductor.[42] We respond to this question in the negative.[43]

Therefore, in response to the second inquiry posed by the CIT, we conclude that the causation analysis in the Original Determination complies with applicable Federal Circuit requirements.

III. Conclusion

Our responses to the inquiries posed by the CIT indicate that the Bratsk "replacement/benefit" test is not applicable in these investigations, and no change to the Original Determination is necessary to satisfy Federal Circuit requirements. Accordingly, we again determine, for the reasons stated in the Original Determination, that the domestic CTV industry is materially injured by reason of LTFV imports from China.

[42] We read the CIT as opining that Bratsk and Caribbean Ispat did not merely elaborate upon the causation requirements of Gerald Metals, but imposed additional requirements in certain circumstances. See Changhong, Slip Op. 06-168 at 25. This position is the same as that previously expressed by Vice Chairman Aranoff and Commissioners Koplan, Hillman, and Lane. See Lined Paper, USITC Pub. 3884 at 39 (opinion of Vice Chairman Aranoff and Commissioners Koplan and Lane), 53 n.13 (footnote of Commissioner Hillman).

[43] Changhong does not suggest that there are any such Federal Circuit cases. We observe that the Federal Circuit has not issued any decisions on the issue of causation since the CIT's decision in Changhong.