**UNITED STATES-CANADA BINATIONAL PANEL REVIEW**

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| In the matter of: | USA-89-1904-09 and USA-89-1904-10 |
| **NEW STEEL RAILS FROM CANADA** | |

Before: Italo H. Ablondi, Chairman
Martin Freedman, Q.C.
Richard Gottlieb
Morton Pomeranz
Margaret Prentis

August 13, 1990

ALGOMA STEEL CORP., LTD., AND SYDNEY STEEL CORP.,
Complainants,

versus

UNITED STATES INTERNATIONAL TRADE COMMISSION,
Respondent, and

BETHLEHEM STEEL CORP.,
Respondent-Intervenor.

William R. Silverman, Dow, Lohnes & Albertson, and Robert Herzstein, Shearman & Sterling, argued for Algoma Steel Corp., Ltd. With them on the brief were Ryan Trainer, Dow, Lohnes & Albertson and Daniel R. Tarullo, Shearman & Sterling.

Gary M. Horlick and F. Amanda deBusk, O'Melveny & Myers, argued for Sydney Steel Corp.

Calvin H. Cobb, III, argued for the U.S. International Trade Commission. With him on the brief were Lyn M. Schlitt, General Counsel, and James A. Toupin, Assistant General Counsel.

Eugene L. Stewart and James R. Cannon, Jr., Stewart & Stewart, argued for Bethlehem Steel Corp. With them on the brief were Terence P. Stewart, Vincent J. Branson, and Jessica Wasserman.

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## OPINION OF THE PANEL

### I. INTRODUCTION.

These consolidated appeals arise out of the determinations of the United States International Trade Commission (Commission or ITC) that an industry in the United States is threatened with material injury by reason of dumped imports of new steel rails from Canada (produced by Algoma Steel Corp., Ltd. (Algoma) and Sydney Steel Corp. (Sydney)) and subsidized imports of new steel rails from Canada (produced by Sydney). New Steel Rails from Canada, Invs. Nos. 701-TA-297 (Final) and 731-TA-422 (Final), USITC Pub. 2217 (Sept. 1989) (hereafter New Steel Rails); Pub. Doc. 189. [1]

Algoma and Sydney have invoked this Panel to challenge the legal and factual sufficiency of the Commission's threat of material injury determinations. Bethlehem Steel Corp. (Bethlehem), the petitioner in the underlying investigations, has invoked this Panel to challenge the legal and factual sufficiency of the Commission's determination that the material injury being experienced by the U.S. industry is not by reason of the subject imports. Also pending are: (i) a motion to strike a brief for the asserted failure to comply with the Panel's order of April 2, 1990, regarding designation of allegedly public information as confidential; and (ii) a motion to stay the order of April 2.

The Panel has jurisdiction pursuant to Article 1904.2 of the United States-Canada Free Trade Agreement and section 516A(g)(2) of the Tariff Act of

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[1] For citations to the administrative record, with one exception, we use the following notation:

"Pub. Doc. A at B" refers to List No. 1 (the index to the Commission's public record), document number A, at page B.

"Conf. Doc. C at D" refers to List No. 2 (the index to the Commission's business proprietary record) document number C, at page D.

The exception is Pub. Doc. 189, the published report of the Commission, containing the opinions of the Commissioners and the Report of the Commission. That document is cited as New Steel Rails at X.

1930. [2]

On the basis of an examination of the administrative record, the applicable United States law, and consideration of the arguments of the parties, the Panel --

(1) AFFIRMS the Commission's determination that an industry in the United States is threatened with material injury by reason of the dumped imports as supported by substantial evidence on the record and otherwise in accordance with law; [3]

(2) AFFIRMS the Commission's determination that an industry in the United States is threatened with material injury by reason of the subsidized imports as supported by substantial evidence on the record and otherwise in accordance with law; [4]

(3) AFFIRMS the Commission's determination that present material injury is not by reason of the subject imports as supported by substantial evidence on the record and otherwise

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[2] 27 I.L.M. 281 (1988) (entered into force Jan. 2, 1989) and 19 U.S.C. § 1516a(g)(2) (1988), respectively.

[3] Panel Member Gottlieb dissents from this conclusion. See his Dissenting Views at Section IX, infra.

[4] Panel Member Gottlieb dissents from this conclusion. See his Dissenting Views at Section IX, infra.

in accordance with law;

(4) DECLINES TO REACH the issue of whether to grant the motion to strike as the motion has been rendered moot;

(5) DECLINES TO REACH the issue of whether to stay the April 2, 1990, order as the issue has been rendered moot; and

(6) RESOLVES subsidiary issues as indicated herein.

## II. THE ADMINISTRATIVE PROCEEDINGS AND DETERMINATIONS.

In these final investigations, the Commission determined that an industry in the United States was threatened with material injury by reason of imports from Canada which Commerce had found to be sold at LTFV and found that an industry in the United States was threatened with material injury by reason of imports from Canada which Commerce had found to be subsidized. [5]

As a result of the affirmative determinations of Commerce and the Commission, a countervailing duty order was placed, inter alia, on all unliquidated entries of Sydney's new steel rails from Canada entered or withdrawn from warehouse for consumption on or after September 20, 1989, the date of publication of the Commission's final determination. [6] An antidumping duty order was placed, inter alia, on all unliquidated entries of Algoma's and Sydney's new steel rails from Canada entered or withdrawn from warehouse for consumption on or after September 20, 1989, the date of publication of the Commission's final

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[5] The scope of the Commission's final investigations and final determinations are dictated by the imported articles that Commerce has found to be subsidized or sold at LTFV.

At the conclusion of its investigations, Commerce had determined that Algoma had a de minimis estimated net subsidy of 0.24 percent (on which basis Algoma was excluded from the final affirmative determination) and that all other manufacturers, producers and exporters (including Sydney) had an estimated net subsidy of 112.34 percent. 54 Fed. Reg. 31991 (Aug. 3, 1989), as amended 54 Fed. Reg. 39032 (Sept. 22, 1989). Commerce determined that new steel rails were being sold at LTFV at a weighted average margin of 38.79 percent for Algoma and 38.79 percent for all others (including Sydney). 54 Fed. Reg. 31934 (Aug. 3, 1989).

[6] 54 Fed. Reg. 39032 (Sept. 22, 1989). See 54 Fed. Reg. 38751 (Sept. 20, 1989).

determination. [7]

The Commission issued three opinions. Commissioners Eckes, Rohr, and Newquist (hereafter "Plurality" or "Plurality Opinion") found that the domestic industry was experiencing material injury, but concluded that such material injury was not "by reason of" the subject imports in either investigation. New Steel Rails at 11-14, 14-15. Commissioner Lodwick did not separately determine whether the industry was experiencing material injury but, rather, determined that any material injury was not by reason of the subject imports. Id. at 228-30, 231-39. Chairman Brunsdale and Vice Chairman Cass each determined that there was no material injury by reason of the subject imports. Id. at 107-17, 178-213. Thus, the Commission unanimously determined that an industry in the United States was not materially injured by reason of the subject imports.

Chairman Brunsdale, Vice Chairman Cass, and Commissioner Lodwick determined that there was no threat of injury. Id. at 117-24, 213-23, 239-44. The Plurality Opinion, however, found that the domestic industry was threatened with material injury. Id. at 15-27. Thus, by a three-to-three vote, the Commission made a final affirmative determination based on threat of injury. [8]

**III. THE STANDARD OF REVIEW.**

Article 1904.3 of the U.S.-Canada Free Trade Agreement requires that the Panel apply the standard of review set forth in the United States law that would otherwise be applicable: whether the ITC's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

The substantial evidence standard is well-established:

> '[S]ubstantial evidence is more than a mere scintilla. It

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[7] 54 Fed. Reg. 38263 (Sept. 15, 1989). See 54 Fed. Reg. 38751 (Sept. 20, 1989).

[8] Under United States law, an evenly divided Commission vote is deemed to be an affirmative determination. 19 U.S.C. § 1677(11); Metallverken Nederland B.V. v. United States, 728 F. Supp. 730 (CIT 1989), opinion after remand, Slip Op. 90-68 (CIT July 20, 1990). See Border Brokerage Co. v. United States, 646 F.2d 539, 545-47 (CCPA 1981).

> means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 . . . (1951), quoted in Penntech Papers, Inc. v. NLRB, 706 F.2d 18, 22 (1st Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 237, . . . (1983). Accord Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 619-20, . . . (1966). Taking into account '"whatever in the record fairly detracts" from the [agency's] fact finding as well as evidence that supports it,' Penntech, supra, 706 F.2d at 22 (quoting Universal Camera, supra, 340 U.S. 587-88 . . .), '[t]he court may not substitute its judgment for that of the [agency] when the choice is "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo . . . ."' Id. at 22-23 (quoting Universal Camera, supra, 340 U.S. at 488 . . .).

American Spring Wire Corp. v. United States, 590 F. Supp 1273, 1276 (CIT 1984), aff'd sub nom., Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985), cited with approval in, e.g., Copperweld Corp. v. United States, 682 F. Supp. 552, 566 (CIT 1988). [9] Although broadly discretionary to agency factfinding, American Permac, Inc. v. United States, 831 F.2d 269, 273 (Fed. Cir. 1987), cert. dismissed, 108 S.Ct. 1067 (1988), this standard is not without limits. The Panel is not to merely look for the existence of an individual bit of data that agrees with a factual conclusion and end its analysis at that. Instead, the Panel must examine whether the Commission's --

> conclusions are supported by evidence on the record as a whole. [citations omitted]. ITC may not rely upon isolated tidbits of data which suggest a result contrary to the clear weight of the evidence.

USX Corp. v. United States, 655 F. Supp. 487, 489 (CIT 1987) (emphasis in original), op. after remand 682 F. Supp. 560 (CIT 1988), op. after remand 698 F. Supp. 234 (CIT 1988). See also Alberta Pork Producers' Marketing Board v. United States, 669 F. Supp. at 463.

Commission determinations are presumed to be correct and the burden of

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[9] See also, e.g., Matsushita Electric Industrial Co., Ltd. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984); Granges Metallverken AB v. United States, 716 F. Supp. 17, 21 (CIT 1989); National Association of Mirror Manufacturers v. United States, 696 F. Supp. 642, 644-45 (CIT 1988); Alberta Pork Producers' Marketing Board v. United States, 669 F. Supp. 445, 449-50 (CIT 1987), op. after remand, 683 F. Supp. 1398 (CIT 1988); Philipp Brothers, Inc. v. United States, 640 F. Supp. 1340, 1342 (CIT 1986).

demonstrating otherwise is on the party challenging those determinations. 28 U.S.C. § 2639(a)(1); Hannibal Industries, Inc. v. United States, 710 F. Supp. 332, 337 (CIT 1989).

> To prevail under the substantial evidence standard, a plaintiff must show either that the Commission has made errors of law or that the Commission's factual findings are not supported by substantial evidence.

National Association of Mirror Manufacturers v. United States, 696 F. Supp. at 644.

**IV. WHETHER, AFTER FINDING THAT ANY MATERIAL INJURY IS NOT BY REASON OF THE SUBJECT IMPORTS, THE COMMISSION MAY CONSIDER WHETHER THERE IS A THREAT OF MATERIAL INJURY.**

The antidumping and countervailing duty law directs certain determinations by the Commission in its final investigations.

> **(b) Final determination by Commission.--**
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> **(1) In general.**--The Commission shall make a final determination of whether--
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> (A) an industry in the United States--
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> (i) is materially injured, or
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> (ii) is threatened with material injury, or
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> (B) the establishment of an industry in the United States is materially retarded,
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> by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise with respect to which [Commerce] has made an affirmative [final] determination[.]

19 U.S.C. § 1671d(b) (countervailing duty); 19 U.S.C. § 1673d(b) (antidumping duty). [10] The meaning of this provision is at issue in these appeals.

The Appellants argue that in its final determinations under 19 U.S.C. §§ 1671d(b) and 1673d(b), supra, "the Commission may find that a U.S. industry is materially injured or it may find that a U.S. industry is threatened with material injury; it cannot find both." Algoma Brief at 43 (emphasis in original). See also Sydney Brief at 50 et seq.

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[10] Whether the establishment of an industry in the United States was materially retarded was not at issue in these cases.

Appellants assert two reasons for this position. First, they argue that the use of the word "or" means that the Commission is limited to one affirmative finding: it may find present material injury but not threat of material injury; alternatively, it may find threat of material injury but not present material injury. E.g., Sydney Reply Brief at 32. Second, they argue that the legislative history shows that the threat provision is to permit import relief before actual injury occurs, concluding that a threat finding is inapplicable if material injury has already occurred. Algoma Brief at 43-44. [11]

The positions of the parties on the literal interpretation of the statute are not dispositive. If the literal application of the language produces a result demonstrably at odds with congressional intent, it is that intent that must prevail over the literal language. If, on the other hand, there is a reasonable alternate literal reading or an ambiguity as to meaning, we must turn to the legislative intent and, perhaps, to agency construction of the statute.

**A. Examination of the Literal Language of the Statute.**

The starting point is the language of the statute itself. [12] While it may be literally read as done by the parties, focusing exclusively on the language of subsections (A)(i) and (A)(ii), this reading is not compelled by the face of the statute.

It is plausible to read the causation clause as a modifier limiting each of subsections (A)(i), (A)(ii), and (B). This alternate reading is not only consistent with the physical structure, grammar, and punctuation of the statute, but also takes into account the statute as a whole and it conforms to well-settled legal doctrine regarding Commission determinations. It is also consistent with prior interpretations of the Commission's reviewing Courts.

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[11] Appellants read the "by reason of" clause as applicable only after a determination of whether there is injury or threat of injury.

[12] E.g., Watt v. Alaska, 451 U.S. 259, 265 (1981); Scarborough v. United States, 431 U.S. 563, _____ (1976); Madison Galleries, Ltd. v. United States, 870 F.2d 627, 629 (Fed. Cir. 1989); United States v. John C. Grimberg Co., 702 F.2d 1362, 1365 (Fed. Cir. 1983).

First and foremost, the alternative reading does not myopically read only the three subsections; instead, it takes into account the entirety of the statute, particularly the "by reason of" clause that immediately follows subsection (B). Statutes are to be read as a whole, [13] and specific words or phrases in statutes are not to be read in isolation, but rather are to be read in context [14] and as part of that whole. [15]

This alternative reading is consistent with well-settled law in the area of antidumping and countervailing duty determinations by the Commission. It is now beyond cavil that an affirmative antidumping or countervailing duty injury determination can be made only if (i) there is both material injury and (ii) that material injury is by reason of the subject imports. [16] This is equally true for threat of material injury determinations. [17]

With regard to the physical structure, the grammar, and the punctuation of the statute, the section is but a single sentence. The causation clause is physically unindented, falling vertically at the same margin as the introductory language to the section, indicating that like the introductory language, it is applicable to the entire statutory provision. Moreover, clauses (A)(i), (A)(ii), and (B) are indented subsections that end with commas. Where antecedent terms

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[13] E.g., United States v. Morton, 467 U.S. 822, 828 (1984), reh. denied, 468 U.S. 1226 (1984); Stafford v. Briggs, 444 U.S. 527, 535 (1980); United States v. Yoshida International Inc., 526 F.2d 560, 574 (C.C.P.A. 1975). See Bongrain International (American) Corp. v. Delice de France, Inc., 811 F.2d 1479, 1485 (Fed. Cir. 1987).

[14] Bomont Industries v. United States, 718 F. Supp. 958, 962 (CIT 1989), reh. denied, 720 F. Supp. 186 (CIT 1989).

[15] E.g., United States v. Morton, 467 U.S. at 828; Brown v. Duchesne, 19 How. (60 U.S.) 183, 194 (1856); Sutton v. United States, 819 F.2d 1289, 1293 (5th Cir. 1987).

[16] Roses, Inc. v. United States, 720 F. Supp. 180, 184 (CIT 1989); Gifford-Hill Cement Co. v. United States, 615 F. Supp. 577, 579 (CIT 1985); British Steel Corp. v. United States, 593 F. Supp. 405, 408 (CIT 1984); American Spring Wire Corp. v. United States, 590 F. Supp. at 1276. See National Association of Mirror Manufacturers v. United States, 696 F. Supp. at 647.

[17] Phillip Brothers, Inc. v. United States, 640 F. Supp. at 1324; Rhone Poulenc, S.A. v. United States, 592 F. Supp. 1318, 1322 (CIT 1984).

are separated by punctuation marks (such as the commas and dashes in sections 1671d(b)(1) and 1673d(b)(1)) a subsequent modifier or modifying phrase (such as the "by reason of" clause) is applicable to all of them, not just the last one. [18] [19]

Finally, the applicability of the "by reason of" clause to each of the three subsections was affirmed by the 1984 amendments to the Tariff Act of 1930. In those amendments, the phrase "by reason of imports of the merchandise" was replaced with the phrase "by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise". Pub.L. 98-573, Title VI, § 602 (Oct. 30, 1984). Because "likelihood of sales" can refer only to potential future imports the "by reason of" clause must refer not only to present imports but also to future imports, making it plain that the causation clause is a limiting modifier applicable to both subsections (A)(i) and (A)ii) and, perhaps, to subsection (B) as well.

**B. Implications of Appellants' Arguments.**

A statute is not to be interpreted literally if to do so leads to absurd results or to results at odds with the demonstrable intent of Congress. [20] [21] The

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[18] Taylor v. Perdition Minerals Group, Ltd., 766 P.2d 805, 810 (Kans. 1988); Spears v. State, 412 N.E.2d 81, 82-83 (Ind. App. 1980). See United States v. Naftalin, 441 U.S. 768, 774 n.5 (1979); Board of Trustees of Santa Maria Jt. Union H.S. Dist. v. Judge, 123 Cal. Rptr. 830, 835 n.4 (Cal. App. 1975).

[19] Our facial and grammatical review of this statute is confirmed by a recent decision of one of the Commission's reviewing courts. Bomont Industries v. United States, 718 F. Supp. at 958. The Bomont Court was faced with a challenge regarding the interpretation of a provision requiring Commerce to determine whether "foreign merchandise is being, or is likely to be, sold in the United States at less than fair value[.]" 19 U.S.C. § 1673(1). In that case, the government argued that the statute permitted it to address present LTFV sales or the likelihood of LTFV sales, but that it was not required to do both. The Court rejected the view that the statute must be read strictly in the disjunctive for several of the reasons noted above. In particular, the Court stated that the term "or" "simply set the tenses, not the substance, of the statute." Id. at 962. The same is true here.

[20] E.g., United States v. Bryan, 339 U.S. 323, 338-40 (1950); United States v. Brown, 333 U.S. 18, 27 (1948); United States Steel Corp. v. United States, 566 F. Supp. 1529, 1536 (CIT 1983); National Treasury Employees Union v. U.S. Merit Systems Protection Bd., 743 F.2d 895, 913-14 (D.C. (continued...)

Commission asserts that Appellants' reading leads to such a result. Commission brief at 27, citing United States v. Ron Pair Enterprises, 109 S.Ct. 1026, 1031 (1989). The Committee on Finance, U.S. Senate, gave the following statement, inter alia, as the reason for the availability of a finding of threat of material injury provision: "Relief should not be delayed if sufficient evidence exists for concluding that the threat of injury is real and injury is imminent." S. Rep. No. 249, 96th Cong., 1st Sess. 89 (1979). See also H.R. Rep. No. 317, 96th Cong., 1st Sess. 47 (1979). It stands to reason that a U.S. industry that is materially injured, but not by reason of the imports subject to investigation, may still face future material injury by reason of those imports. Under the Algoma reading, however, the fortuity that the industry has been materially injured by causes other than the subject imports is dispositive; it would preclude the Commission from finding that the industry is threatened with material injury. Presumably, that industry would have to wait until it was actually experiencing material injury by reason of the subject imports and it could only then file a new petition. It would need to go through the time and expense of new investigations before relief is imposed, delaying the effective

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[20](...continued)
Cir. 1984).

[21] We construe this statute keeping in mind that the antidumping and countervailing duty laws of the United States are remedial, not punitive in nature. Chaparral Steel Co. v. United States, 901 F.2d 1097, 1103 (Fed. Cir. 1990); Bomont Industries v. United States, 718 F. Supp. at 962, reh. denied, 720 F. Supp. 186 (CIT 1989); National Association of Mirror Manufacturers v. United States, 696 F. Supp. at 645; Badger-Powhatan, Division of Figgie International, Inc. v. United States, 608 F. Supp. 653, 656 (CIT 1985). See Imbert Imports, Inc. v. United States, 331 F. Supp. 1400, 1406 (Cust. Ct. 1971), aff'd, 475 F.2d 1189 (CCPA 1973). Remedial statutes are to be broadly construed to achieve their legislative purposes and are to be construed in a manner that effectuates rather than frustrates those legislative purposes. E.g., Peyton v. Rowe, 391 U.S. 54, 69 (1968); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); United States v. Ven-Fuel, Inc., 758 F.2d 741, 759 (1st Cir. 1985). See Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories, Inc., 460 U.S. 150, 159 (1983).

date of any potential relief. [22] Thus, Algoma's interpretation would lead to a result that an uninjured industry is afforded greater access to relief than an industry experiencing material injury.

**C. Legislative History and Congressional Intent.**

Appellants correctly point out that the legislative history sometimes speaks only of "material injury" or "threat of material injury." They also correctly point out that the legislative history shows that the threat provision is to prevent threatened injury from becoming actual injury. E.g., Algoma Brief at 44-45. They conclude that if actual injury has already occurred, then threatened injury cannot be prevented. Consequently, the Commission may not make a finding of threat.

Appellants rely on passages such as the following from the Report of the House Committee on Ways and Means:

> The 'threat of material injury' standard is intended to permit import relief . . . before actual material injury occurs and should be interpreted in a manner to prevent actual material injury from occurring.

Algoma Brief at 44, citing H.R. Rep. No. 317, 96th Cong., 1st Sess. 47 (1979) (emphasis supplied by Algoma). It is instructive to place the passage in its full context:

> The 'threat of material injury' standard is intended to permit import relief . . . before actual material injury occurs and should be interpreted in a manner to prevent actual material injury from occurring. Relief should not be delayed if evidence exists for concluding that the threat of material injury is sufficiently real.
>
> In examining the threat of material injury, the ITC will determine the likelihood of a particular situation developing into actual material injury. In this regard, demonstrable trends -- for example, the rate of increase of the subsidized or dumped exports to the U.S. market, capacity in the exporting country to generate exports, the likelihood that such exports will be directed to the U.S. market taking into account the availability of other export markets, and

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[22] Alternatively, a petitioning industry (or petitioning firm representing that industry) would be required to select at the outset of an investigation whether it wanted to proceed under the material injury or threat provision. We find nothing in the statute that places that kind of burden on a petitioner.

> the nature of the subsidy in question (i.e., is the subsidy the sort that is likely to generate exports to the U.S.) will be important. . . .

H.R. Rep. No. 317, 96th Cong., 1st Sess. 47 (1979). As used in this passage, "threat of material injury" clearly encompasses both the injury and causation portions of the statutory test as shown by the inclusion of references to four distinct trends dealing with whether any injury is caused by the subject imports, not dealing with whether the industry is experiencing material injury in the abstract. [23]

The same is true of determinations of current material injury. For example, in 1984, Congress described the then present practice regarding "material injury":

> In making material injury determinations the ITC must consider, among other factors on a case-by-case basis, (1) the volume of imports of the merchandise, (2) the effect of such imports on prices in the United States for like products, and (3) the impact of such imports on domestic producers of like products.

H.R. Rep. No. 1156, 98th Cong., 2d Sess. 173-74 (1984). Clearly, "material injury" is used to mean the full statutory test. [24]

Rather than supporting Appellants' views, the legislative history's use

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[23] This same usage of terms is found elsewhere in the legislative history. In 1984, when Congress enacted specific factors for the consideration of threat, it described existing practice as follows:

> Present law
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> . . . In determining whether there is a threat of material injury in CVD investigations, the ITC must consider such information as may be presented by the administering authority on the nature of the subsidy and the effects likely to be caused by the subsidy.

H.R. Rep. 1156 (Conference Report), 98th Cong., 2d Sess. 173-74 (1984) (emphasis in original).

[24] Use of terms such as "material injury" or "threat" to refer to the entire statutory test is not limited to the legislative history. Those terms with that meaning are routinely found in decisions of the Commission's reviewing courts. E.g., Bingham & Taylor Division, Virginia Industries, Inc. v. United States, 815 F.2d 1482, 1484 n.4 (Fed. Cir. 1987); Hannibal Industries, Inc. v. United States, 710 F. Supp. at 334 ("[A]n affirmative vote on either material injury or threat is treated as a vote that the overall determination should be affirmative."); BMT Commodity Corp. v. United States, 667 F. Supp. 880, 882 (CIT 1987), reh. denied, 674 F. Supp. 868 (CIT 1987), aff'd, 852 F.2d 1285, cert. denied, 109 S.Ct. 1120 (1989).

of the terms "injury," "material injury," "threat," and "threat of material injury" refer to the entire statutory tests for material injury and threat of material injury, including causation. Therefore, the legislative history does not preclude the consideration of threat of material injury if there is current material injury but not by reason of the subject imports. To the contrary, it fully supports the Commission's view that the Commission must then consider whether the industry is threatened with material injury by those imports.

**D. Conclusions.**

For the foregoing reasons, the Panel holds that an affirmative finding by the Commission that an industry in the United States is experiencing material injury, without regard to causation, does not preclude consideration of whether the industry is threatened with material injury.

## V. WHETHER THE COMMISSION MAY CONSIDER DUMPED IMPORTS FROM THE SAME COUNTRY IN A COUNTERVAILING DUTY INVESTIGATION.

In its countervailing duty investigation, Commerce found that the subsidies received by Algoma were de minimis. Thus, Algoma's exports to the United States were excluded from the countervailing duty order. At the Commission, nevertheless, the Plurality Opinion

stated that --

> in our countervailing duty analysis, we considered the simultaneous importation of LTFV rails produced by Algoma as part of the relevant conditions of trade.
>
> This framework is consistent with the notion of required cross-cumulation as determined by the [U.S. Court of Appeals for the] Federal Circuit in Bingham & Taylor [Division, Virginia Industries, Inc.] v. United States, 815 F.2d 1482, 1487 (Fed. Cir. 1987). We find that while the statute only requires cross-cumulation of LTFV and subsidized imports from 'two or more countries,' it is appropriate to consider in the countervailing duty investigation simultaneous LTFV imports from Algoma along with subsidized imports from Sydney even though both producers are located in the same country.

Pub. Doc. 189 at 18-19. We are therefore faced with the question of whether the Plurality lawfully included Algoma's dumped imports in its consideration of the countervailing duty investigation.

**A. Cumulation and the Positions of the Parties.**

As described by the U.S. Court of Appeals for the Federal Circuit --

> Cumulation involves aggregating volume and price data with respect to imports from two or more countries for purposes of the Commission's material injury determination. The aggregation of allegedly dumped and allegedly subsidized imports from two or more countries for purposes of volume and price analysis has been called 'cross-cumulation.'

Bingham & Taylor Division, Virginia Industries, Inc. v. United States, 815 F.2d at 1484 n.4. See also Chaparral Steel Co. v. United States, 901 F.2d at 1099 n.2. For present material injury determinations, the Commission cumulates (i) if the imports compete with each other and with the domestic like product, (ii) if the imports are subject to investigation, and (iii) if they are marketed within a reasonably coincident period of time. 19 U.S.C. § 1677(7)(C)(i); H.R. Rep. No. 1156 (Conf. Report), 98th Cong., 2nd Sess. 173 (1984). [25] The Commission may cumulate imports from two or more countries for some purposes in analyzing threat of material injury, 19 U.S.C. § 1677(7)(F)(iv), and may decline to cumulate negligible imports for both present material injury and threat of material injury. 19 U.S.C. §§ 1677(7)(C)(v) and 1677(7)(F)(iv). [26]

One of the Appellants asserts that consideration of the LTFV exports in the countervailing duty case is both de facto cumulation and a misapplication of the doctrine of cumulation. For the sake of its argument, the Appellant first assumes that statutory cumulation is permissible when imports from only one country are involved and then argues that cumulation is inappropriate because its

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[25] See also, e.g., Color Picture Tubes from Canada, Japan, the Republic of Korea, and Singapore, Invs. Nos. 731-TA-367 through 370 (Final), USITC Pub. 2046 (Dec. 1987) at 11; Butt-Weld Pipe Fittings from Brazil and Taiwan, Invs. Nos. 731-TA-308 and 310 (Final), USITC Pub. 1918 (Dec. 1986) at 14; Certain Welded Carbon Steel Pipes and Tubes from India, Taiwan, and Turkey, Invs. Nos. 731-TA-271 through 272 (Final), USITC Pub. 1839 (Apr. 1986) at 10.

[26] The Panel is sensitive to the terminology (particularly the terms cumulation and cross-cumulation) as were the various opinions issued by the Commissioners in these investigations. The Panel uses the terms cumulation and cross-cumulation advisedly to refer only to the aggregation of imports. The Panel defers to later sections of this Opinion its discussion of the impact of the cumulated imports.

exports to the United States do not compete with the other Appellant's product and because its exports to the United States are negligible. Sydney Brief at 60-68.

At the outset of its argument, the Commission states that the Plurality Opinion did not strictly cumulate imports, but considered them as part of the conditions of trade and development in the industry. [27] The remainder of that section of the Commission's brief (fifteen of sixteen pages) is directed to demonstrating that the Commission has the authority to cross-cumulate dumped and subsidized imports from a single country.

Neither the required cumulation for material injury nor the discretionary cumulation for threat of material injury is applicable to the present circumstances because the imports at issue are from a single country. Thus, the statutory criteria for mandatory cumulation in the consideration of present material injury and the statutory criteria for discretionary cumulation in the consideration of threat of material injury may not necessarily apply here.

It is apparent that the Plurality Opinion aggregated the dumped and subsidized imports in the countervailing duty case. [28] [29] Since Appellant has

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[27] Commission Brief at 86, citing H.R. Rep. No. 317, 96th Cong., 1st Sess. 46 (1979) ("It is expected that in its investigation the ITC will continue to focus on the conditions of trade and development within the industry concerned.").

[28] This conclusion is buttressed by the specific information on which the Plurality relied for various aspects of its threat of injury analysis, including, for example: (1) decreased home market shipments, Conf. Doc. 45 at Table 13; (2) unused Canadian productive capacity, Id. at Table 13; and (3) inventories, Id. at Table 12.

[29] It is debatable whether the directive in the legislative history to consider the "conditions of trade and development" can be a sufficient basis for the "cross-consideration" of imports from a single country. The legislative history strongly suggests that the phrase refers to economic conditions in the industry and its susceptibility to material injury by imports. This is particularly true since in the cited House Report, causation factors are discussed in the following paragraph with no mention of cumulation. Moreover, an earlier Senate Report (associated with revisions to the Antidumping Act of 1921) stated that cumulation is appropriate "only when the factors and conditions of trade show its relevance to the determination of injury." S. Rep. No. 1298, 93d Cong., 1st Sess. 180 (1974).

challenged consideration of the LTFV exports in the countervailing duty investigation, the Panel must determine whether single country cross-cumulation is consistent with the statute, at least in the context of threat of material injury. [30]

**B. Discretionary Cumulation for Consideration of Threat of Material Injury.**

Prior to the enactment of mandatory cumulation in 1984, the Commission occasionally considered the collective impact of imports from more than one country even though cumulation was not expressly authorized by statute. The practice, however, was not well-established, consistently applied, or articulately stated. See Bingham & Taylor Division, Virginia Industries, Inc. v. United States, 815 F.2d at 1485 ("Prior to the 1984 Act, the Commission's cumulation practice was characterized by internal inconsistency and confusion.").

It appears that the Commission's predecessor, the Tariff Commission, first used a cumulative analysis in Portland Gray Cement from Portugal, Inv. No. AA1921-22, TC Pub. 37 (Oct. 1961), in which the Commission found that the effect of imports from Portugal had to be assessed in light of the effects of earlier unfairly traded imports.

> [O]ne must [not disregard] the hammering effect . . . brought into play after avenues of dumping already utilized had been closed by enforcement of the antidumping statute. . . .
>
> [T]he Commission must give cognizance to the spirit of the enactment and to the evil which it was intended to prevent.

Id., aff'd, City Lumber Co. v. United States, 290 F. Supp. 385 (Cust. Ct. 1968) (emphasis supplied), aff'd, 311 F. Supp. 340, 343 (Cust. Ct. App. Term 1970), aff'd, 457 F.3d 991 (CCPA 1972). In affirming the Tariff Commission's analysis, the Customs Court, Appellate Term, upheld the Commission's authority to consider

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[30] Although the Panel uses the word "cumulation" and variations thereof for the sake of convenience, the Panel does not intend to suggest or imply that cumulation of imports from only one country is subject to the same factors and considerations as required when cumulating unfairly traded imports from more than one country. The factors to be considered in single country cumulation, given the discretionary nature of such cumulation (as discussed infra) must be developed and analyzed in the first instance by the Commission itself.

the "hammering effect" of the unfairly traded imports from more than one country on the basis of the broad, remedial objectives of the statute.

> Indeed, an investigation of imports from only one country, in disregard of the effect on the market area in question, of sales at less than fair value, would result in a study and conclusions that would be myopic and unrealistic. An investigation so limited and restricted would not help achieve the statutory remedy envisaged by the enabling legislation. It would seem clear that the mischief that the act aimed to remedy required a broad solution. Surely Congress did not seek to fashion a remedy to the problem of dumping 'by solutions only partially effective.'

City Lumber Co. v. United States, 311 F. Supp. 340, 348 (Cust. Ct. App. Term 1970), aff'd, 457 F.2d 991 (CCPA 1972), quoting NLRB v. Hearst Publications, Inc., 322 U.S. 111, 125 (1944)).

Two years after the final judicial decision in City Lumber, in the congressional consideration of the bill that, inter alia, amended the Antidumping Act of 1921, Congress both acknowledged and approved of the use of cumulative analysis:

> [T]he Commission has considered the combined impact of less-than-fair-value imports in making injury determinations when the facts and economic considerations so warrant. Such result does not follow as a matter of law; it follows, on a case by case basis, only when the factors and conditions of trade show its relevance to the determination of injury.

S. Rep. No. 1298, 93rd Cong., 2d Sess. 180 (1974), citing City Lumber Co. v. United States, 311 F. Supp. at 340.

In 1979, when considering the bill that became the Trade Agreements Act of 1979, Congress expressed similar approval. "Current ITC practice with respect to which imports will be considered in determining the impact on the U.S. industry is continued under the bill." S. Rep. No. 249, 96th Cong., 1st Sess. 57 and 74 (1979).

Thus, prior to 1984, the "law allowed ITC substantial discretion in determining whether to cumulate data on volume and effects of imports." Lone Star Steel v. United States, 650 F. Supp. 183, 186 (CIT 1986).

That discretion, however, was not absolute. As noted by the U.S. Court of International Trade, "[w]here the conditions of trade indicate that cumulation

would be appropriate, it may be arbitrary and an abuse of discretion to fail to cumulate." USX Corp. v. United States, 655 F. Supp. at 491. See Lone Star Steel v. United States, 650 F. Supp. at 186. In USX Corp., the Court not only rejected the rationales adopted by the individual Commissioners for failing to cumulate, USX Corp. v. United States, 655 F. Supp. at 491-97, but also seems to have proceeded from the view that cumulation is appropriate unless there is a specific, legally sustainable reason to the contrary.

The Commission's discretion whether to cumulate was substantially curtailed by the Tariff and Trade Act of 1984, which mandated cumulation in certain circumstances for the consideration of whether there is present material injury by reason of imports. 19 U.S.C. § 1677(7)(c)(iv).

> The purpose of mandating cumulation under appropriate circumstances is to eliminate inconsistencies in Commission practice and to ensure that the injury test adequately addresses simultaneous unfair imports . . .
>
> The Committee believes that the practice of cumulation is based on the sound principle of preventing material injury which come about by virtue of several simultaneous unfair acts or practices. . . .

H.R. Rep. No. 725, 98th Cong., 2d Sess. 37 (1984).

In 1988, Congress again expressed its support for cumulation, and again strongly encouraged the Commission to cumulate "to the extent practicable," this time by enacting a provision specifically authorizing cumulation for analyzing threat of material injury. 19 U.S.C. § 1677(7)(F)(iv). Congress stated:

> The Committee, both in approving the original cumulation provision and in approving these amendments, recognizes that competition from unfairly traded imports from several countries simultaneously often has a hammering effect on the domestic industry. This hammering effect may not be adequately addressed if the impact of the imports is analyzed separately on the basis of their country of origin.

H.R. Rep. No. 40, Part 1, 100th Cong., 1st Sess. 130 (1987).

Since the 1988 amendments do not mandate a cumulative analysis in threat of material injury determinations, it is apparent that the amendment and the corresponding legislative history are primarily a statement of approval for cumulation and an indication that even where not mandated by statute, the

Commission has authority -- and, in fact, the encouragement of Congress -- to cumulate where appropriate.

These congressional pronouncements in favor of cumulation are reflected in the exception to cumulation for "negligible" imports, enacted in 1988 and applicable to both present material injury determinations and threat of material injury determinations. 19 U.S.C. § 1677(7)(F)(v). Congress instructed the Commission "to apply the exception narrowly, and only when the facts clearly justify its application." H.R. Rep. No. 40, Part 1, at 131. The provision is a "narrow, limited exception" whose application should not be permitted "to subvert the purpose and general application of the cumulation requirement." Id.

In Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165 (CIT 1988), op. after remand, 704 F. Supp. 1068 (CIT 1988), which applied the law as it existed prior to the 1988 amendments, the Court of International Trade acknowledged that the statute did not require cumulation in threat cases and further acknowledged the difficulties in cumulation for threat analysis. The Court stated, however, that the Commission "is not prohibited from [cumulating in a threat analysis] in a manner that is appropriate to a particular case." Id. at 1172. The Court then remanded the investigations to the Commission for, inter alia, determination of whether cumulation was appropriate for some aspects of the threat analysis. Thus, even in the absence of a specific provision requiring cumulation for the analysis of threat of material injury, the Court criticized the Commission for failing to consider whether it was appropriate to cumulate in the threat context (just as it has done for present material injury, as discussed supra).

Thus, absent a Congressional directive either mandating or prohibiting a cumulative analysis, the Commission has the inherent authority -- and Congressional and judicial encouragement -- to conduct cumulative analyses in circumstances that it finds appropriate.

**C. The Applicability of Cross-Cumulation.**

Following the 1984 amendments to the Tariff Act of 1930, the Commission was faced with a series of investigations involving simultaneous dumped imports from one country and subsidized imports from another. In its determinations of whether there was present material injury by reason of the subject imports in those investigations, the Commission found that the mandatory cumulation provision, 19 U.S.C. § 1677(7)(c)(iv), did not encompass "cross-cumulation," i.e., the simultaneous consideration of imports from one country subject to an antidumping investigation together with imports from another country subject to a countervailing duty investigation.

The issue reached the U.S. Court of International Trade in 1986. Bingham & Taylor Division, Virginia Industries, Inc. v. United States, 627 F. Supp. 793 (CIT 1986), aff'd, 815 F.2d 1482 (Fed. Cir. 1987). Of the decision not to cross-cumulate the subject imports, the CIT stated that the Commission's "interpretation of the statute in essence urges the Court to tolerate an obvious loophole in the cumulation directive for no apparent justification." Id., 627 F. Supp. at 799. On appeal, although acknowledging that the statute did not expressly cover cross-cumulation, the Federal Circuit found cross-cumulation to be encompassed within the statute. The Court concluded:

> The sum of it is that (a) Congress used statutory words which, in and of themselves, fully authorize cross-cumulation (at the very least); (b) the legislative history shows, further, that Congress wanted both to establish a general, uniform rule to end the Commission's prior variations and also to cover the broad category of "simultaneous unfair imports from different countries", a phrase plainly blanketing both types of unfair trade practices; and (c) the statute as a whole fits well with cross-cumulation.

Bingham & Taylor Division, Virginia Industries, Inc. v. United States, 815 F.2d at 1487. There is no persuasive reason to distinguish the situation involving dumped and subsidized imports from two or more countries (addressed in Bingham & Taylor Division, supra) from the situation involving dumped and subsidized imports from a single country.

Assuming arguendo that the Commission has the authority to cross-cumulate

imports from a single country, one of the Appellants argues that the Plurality's analysis is flawed because it failed to strictly apply the threat cumulation provision, 19 U.S.C. § 1677(7)(F)(iv). In effect, Appellant amends the statutory language by adding to the current phrase "may cumulatively assess" so that it reads "may [only] cumulatively assess", and argues that for the Commission to consider the effects of Algoma imports in its countervailing duty investigation, the Commission must apply the cumulation provision applicable to two or more countries, 19 U.S.C. § 1677(7)(F)(iv). No authority is cited for either of these propositions.

The premise underlying Appellant's position -- that the Commission cannot consider Algoma's imports in the countervailing duty investigation without formally applying one of the statutory cumulation analyses -- is misplaced if for no other reason than that the statutory cumulation provisions do not address simultaneously dumped and subsidized imports from a single country. Indeed, both the present injury cumulation provision and the threat cumulation provision were designed for consideration of imports from two or more countries and, by their terms, cannot be applied in this single-country context. However, the policies underlying cumulation enunciated by Congress and the Courts are equally applicable in the single country cross-cumulation situation.

**D. Conclusions.**

As reflected in the foregoing analysis, the legislative pronouncements and cases have uniformly recognized that the Commission has inherent authority to cumulate, including simultaneously dumped and subsidized imports from a single country. Congress has encouraged the Commission to cumulate where facts warrant and so, apparently, have the courts. Thus, the absence of a statutory mandate to cross-cumulate imports from a single country is not dispositive. Given the clear intent of Congress and the pronouncements of the Commission's reviewing courts, "cross-cumulation" of imports from a single country is within the discretion accorded the Commission to consider the "hammering effect" of simultaneous imports.

Moreover, in light of the policies underlying cumulation and the pronouncements of the Commission's reviewing courts, it may well be error for the Commission to have failed to consider whether to cross-cumulate in this instance. Conversely, as the statute does not expressly prohibit cross-cumulation of imports from a single country, it would be improper for this Panel to engraft such a prohibition where Congress did not. Bingham & Taylor Division, Virginia Industries, Inc. v. United States, 815 F.2d at 1487 ("This being so, for the courts to engraft onto the statute a prohibition against cross-cumulation, where Congress itself has not done so, would be improper."). Accord Copperweld Corp. v. United States, 682 F. Supp. at 564.

In the countervailing duty determination, the "hammering effect" of simultaneous dumped and subsidized imports from a single country is directly implicated because the domestic industry is being affected by both the dumped and subsidized imports. Indeed, but for the fortuity that the dumped imports came from the same country, it would have been error if the Commission majority had failed to consider whether to cumulate those imports in the countervailing duty investigation. Bingham & Taylor Division, Virginia Industries, Inc. v. United States, 815 F.2d at 1482. See Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. at 1165.

We conclude that the Commission may cross-cumulate imports from a single country for purposes of determining whether an industry in the United States is threatened with material injury.

## VI. WHETHER THE PLURALITY'S DETERMINATION THAT AN INDUSTRY IN THE UNITED STATES IS THREATENED WITH MATERIAL INJURY IS SUPPORTED BY SUBSTANTIAL INFORMATION OF RECORD AND IS OTHERWISE IN ACCORDANCE WITH LAW. [31]

After defining the like product and the domestic industry, [32] the Plurality Opinion addressed the industry's condition. The findings regarding the condition of the industry -- although not in dispute before the Panel -- provide the backdrop for both the consideration of causation of present material injury and the consideration of threat of material injury.

The Plurality Opinion addressed indicators of the economic condition of the domestic industry, including improvements and declines in production and shipments, capacity utilization, and employment. With regard to financial performance, the Plurality found that the industry --

> sustained significant gross losses, net income losses, and operating losses[,] . . . negative return on assets throughout the period of investigation and a negative cash flow until 1988.

Id. at 12-13. The Plurality concluded that the domestic industry was experiencing material injury and "that the present condition of the industry makes it extremely vulnerable to threatened material injury by reason of such imports." Id. at 13-14. [33]

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[31] Panel Member Gottlieb does not join in this section of the Opinion. For his views, see Section IX., infra.

[32] Defining the "like product," 19 U.S.C. § 1677(10), and the "domestic industry," 19 U.S.C. § 1677(4), are necessary first steps because those determinations define the industry against which the impact of the imports at issue were to be assessed. E.g., Candles from the People's Republic of China, Inv. No. 731-TA-282 (Preliminary), USITC Pub. 1768 at 3 (Oct. 1985). The Plurality and Commissioner Lodwick defined the industry as U.S. producers of new steel rail (of at least 30 kilograms per meter): Bethlehem, CF&I Steel, and Wheeling-Pittsburgh. New Steel Rails at 4-10, 225. (Wheeling-Pittsburgh was part of the U.S. industry until it stopped shipping rail in April 1987. Id. at A-27.) Those findings are not disputed here.

[33] Commissioner Lodwick generally agreed with the Plurality's assessment of the condition of the domestic industry, although he found that the condition of the industry was improving from a "very weakened condition." Id. at 229.

**A. The Standards for Threat Determinations.**

The statute sets forth a series of criteria for the Commission to consider in making its determinations of whether there is a threat of material injury by reason of the subject imports.

**(i) In general**

> In determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of the merchandise, the Commission shall consider, among other relevant factors--
>
> (**I**) If a subsidy is involved, such information as may be presented to it by [Commerce] as to the nature of the subsidy (particularly as to whether the subsidy is an export subsidy inconsistent with the Agreement [on Subsidies and Countervailing Measures]),
>
> (**II**) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States,
>
> (**III**) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level,
>
> (**IV**) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise,
>
> (**V**) any substantial increase in inventories of the merchandise in the United States,
>
> (**VI**) the presence of underutilized capacity for producing the merchandise in the exporting country,
>
> (**VII**) any other demonstrable adverse trends that indicate the probability that the importation (or sale for importation) of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury,
>
> (**VIII**) the potential for product-shifting if production facilities owned or controlled by the foreign manufacturers, which can be used to produce products subject to investigation(s) [or final orders under] this title, are also used to produce the merchandise under investigation,
>
> (**IX**) [provisions relating to agricultural products], and
>
> (**X**) the actual and potential negative effects on the existing development and production efforts of the

> domestic industry, including efforts to develop a derivative or more advanced version of the like product.
>
> **(ii) Basis for determination**
>
> Any determination by the Commission under this subtitle that an industry in the United States is threatened with material injury shall be made on the basis of evidence that the threat of material injury is real and that actual injury is imminent. Such a determination may not be made on the basis of mere conjecture or supposition.

19 U.S.C. § 1677(7)(F). [34] The consideration of threat of material injury, therefore, involves the analysis of future circumstances regarding the condition of the domestic industry and the analysis of future circumstances regarding the imported articles and their effects on the domestic industry. "[A]n examination of threat of injury is necessarily predictive since it must assess the future course of imports and their effect upon the domestic industry." Copperweld Corp. v. United States, 682 F. Supp. at 576. See also Hannibal Industries Inc. v. United States, 712 F. Supp. at 338.

Although threat of material injury involves predicted future circumstances, findings regarding threat of material injury must be consistent with findings regarding present material injury in the same determination. [35] For a finding of threat of material injury to be proper where there is a finding of no present material injury by reason of the subject imports, the record must reveal, at least, a deterioration in the condition of the domestic industry (i.e., increased susceptibility to material injury by reason of the subject imports) or increased or different effects of the imports on that industry or a

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[34] Like a determination of whether there is present material injury by reason of the imports, a threat determination is reviewed by this Panel on the basis of "substantial evidence" standard. See discussion supra at 8.

[35] "Each threat determination is based upon the facts of the particular case because each case involves a unique set of circumstances and a different period of investigation. Findings in prior, related determinations regarding threat or material injury are generally not dispositive on subsequent determinations of threatened material injury." Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1094 (CIT 1988).

combination of such factors. [36]

In reviewing the Plurality's analysis of the future impact of imports in these investigations, it is important to first note that the Plurality did not predict either future improvements or future declines in the overall condition of the industry or in any of its economic attributes. From this fact and from the fact that no party addresses the issue of whether the condition of the industry after the Commission determinations would differ from that prevailing before the determinations, it is inferred that the industry to be considered for purposes of threat of injury is the same industry (in terms of its economic condition) as that considered for present material injury and that this is not disputed by any party. Therefore, for these investigations, the Panel's review must examine, inter alia, whether the Plurality found that there were increased or different effects of the imports on that industry and whether such findings are supported by substantial evidence of record.

Review of the evidence in a threat case is somewhat more complicated than in a present material injury case because threat of material injury differs in a very important sense from present material injury: the analysis of threat of material injury necessarily involves the prediction and analysis of future circumstances, rather than observable, quantifiable facts. Hannibal Industries, Inc. v. United States, 710 F. Supp. at 338; Rhone Poulenc, S.A. v. United States, 592 F. Supp. at 1329; H.R. Rep. 317 at 47-48; S. Rep. 249 at 88-89. Cf. American Permac, Inc. v. United States, 831 F.2d at 271; Matsushita Electric Industrial Co. v. United States, 750 F.2d at 933. Those expected future circumstances can be loosely grouped in the same two categories as in the case of present material injury: (i) the expected future condition of the domestic industry (i.e., how vulnerable it will be to a threat of material injury); and (ii) the expected

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[36] Therefore, the argument that where there is a finding of no present injury, there can be no finding of threat of injury unless there is "additional" threatened injury is not correct. Material injury may occur in the future not only as a result of additional adverse effects of the imports, but also by reason of different effects of those imports or by reason of a changed condition of the domestic industry or some combination of factors.

future effects of the subject imports (primarily in terms of their volumes and prices). See Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp. 1068, 1072 (CIT 1988). Cf. American Permac, Inc. 831 F.2d at 275-76. Since threat involves the future, the intentions of foreign producers and exporters of the imported article subject to investigation and the intentions of the U.S. importers and purchasers are of particular relevance to a threat determination. Cf. Matsushita Electric Industrial Co. v. United States, 750 F.2d at 933-34.

The projection of future trends and economic conditions, as recognized in the Plurality Opinion, not only "involves projection of future events [but also] is inherently 'less amenable to quantification' than material injury analysis." New Steel Rails at 17, quoting Hannibal Industries, Inc. v. United States, 712 F. Supp. at 338. See also Metallverken Nederland B.V. v. United States, 728 F. Supp. at 742; Rhone Poulenc, S.A. v. United States, 592 F. Supp. at 1329. Cf. Matsushita Electric Industrial Co. v.United States, 750 F.2d at 933 ("In no case will the Commission ever be able to rely on concrete evidence establishing that, in the future, certain events will occur upon revocation of an antidumping order."). Moreover, "the projection of future events is necessarily more difficult than the evaluation of current data." Roses, Inc. v. United States, 720 F. Supp. at 184, quoting H.R. Rep. 1156 (Conference Report), 98th Cong., 2d Sess. 174 (1984).

Although "the projection of future events is necessarily more difficult than the evaluation of current data[,]" Roses, Inc. v. United States, 720 F. Supp. at 184, Congress intended for the Commission to ground its determinations on the information in the administrative record, particularly the trends in the data observed over the period of investigation.

> In examining the threat of material injury, the Commission will determine the likelihood of a particular situation developing into actual material injury. In this regard, demonstrable trends -- for example, the rate of increase of the subsidized or dumped exports to the U.S. market, capacity in the exporting country to generate exports, the likelihood that such exports will be directed to the U.S. market taking into account the availability of

> other export markets, and the nature of the subsidy in question (i.e., is the subsidy the sort that is likely to generate exports to the U.S.) will be important. . . .
>
> An increase in market penetration may be an early warning signal of injury. Indicia of the threat of material injury will vary from industry to industry. The [Commission] should place emphasis on the rate of increase of market penetration . . . .

H.R. Rep. 317, 96th Cong., 1st Sess. 47-48 (1979). See also S. Rep. 249, 96th Cong., 1st Sess. 88-89 (1979). See Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp. at 1072.

The statute further requires that there be substantial "evidence that the threat of material injury is real and that actual injury is imminent" and the statute precludes the Commission from relying on "mere conjecture or speculation." 19 U.S.C. § 1677(7)(F)(ii). See also H.R. Rep. 317, supra, at 47; S. Rep. 249, supra, at 88-89. [37]

Appellants characterize several Plurality findings as "speculative." It appears, however, that they use the term as a synonym for the required statutory predictions of future circumstances. Even though Appellants may disagree with certain factual findings and even though there may be substantial evidence of record to support an alternative factual finding, that does not make a Plurality finding "mere speculation or conjecture." In order to prevail, Appellants have the burden of showing that the challenged finding either is not based on substantial evidence of record or is otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B); 28 U.S.C. § 2639(a)(1).

**B. Adequacy of the Plurality's Reasoning.**

Before turning to an examination of the findings of the Plurality, the record compiled in these investigations, and the arguments of the parties to determine whether the Plurality's

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[37] The statutory standards found in subsection 1677(7)(F)(ii) were enacted in the 1984 revisions to the Tariff Act of 1930 and are identical to the standards set out in the 1979 legislative history. Congress indicated no change in the meaning of the standards and, accordingly, subsection 1677(7)(F)(ii) should be read as a fully consistent codification of those provisions.

findings and determination are based on substantial evidence of record and are otherwise in accordance with law, the Panel must address the adequacy of the explanation given by the Plurality. Appellants assert that the Commission failed to "'articulate any rational connection' between the evidence and its determination" and the Panel "'cannot defer to a decision that is based on inadequate analysis or reasoning.'" Algoma Brief at 51, citing USX Corp. v. United States, 655 F. Supp. at 490 and 492. The challenge is summed up as follows:

> The prevailing Commissioners do not even approach the kind of analysis contemplated by Congress and the U.S. Court of International Trade. Their 'analysis' of the threat issue consists of a paragraph for each statutory factor considered. The structure of each paragraph is similar: several bits of data strung together, followed by a conclusory sentence whose link to the data is at best tenuous.

Algoma Brief at 51.

As noted by that Appellant, the Plurality Opinion considered and analyzed each of the statutory threat factors it found relevant to this investigation and did so in a separate paragraph for each factor. Those paragraphs, however, are quite detailed -- some of them are more than a full page long -- with extensive footnote citations to the record. Some of the individual paragraphs analyze specific arguments of the parties. Each of the paragraphs addresses and analyzes specific evidence of record -- far more than may be fairly characterized as "several bits of data" -- including information on which the Appellants rely before this Panel. The discussion in the Plurality Opinion is not made up of "bits of data strung together[.]"

With regard to the assertion that each paragraph ends with "a conclusory sentence whose link to the data is at best tenuous[,]" [38] the law requires that the Panel "uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned." Bowman Transportation v. Arkansas-Best Freight

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[38] We understand the term "conclusory" to be used by Algoma in the sense of "making a conclusion."

Systems, Inc., 419 U.S. 281, 285-86 (1974), quoted in, e.g., Ceramica Regiomontana, S.A. v. United States, 810 F.2d 1137, 1139 (Fed. Cir. 1987); Negev Phosphates Ltd. v. United States Department of Commerce, 699 F. Supp. 938, 947 (CIT 1988); American Spring Wire Corp. v. United States, 590 F. Supp. at 1277. When each such sentence is read in context, it is readily apparent what factual conclusions are being drawn by the Plurality on the basis of the evidence and considerations discussed earlier in that paragraph. The "link" between the data discussed and the factual finding drawn is not "tenuous" and the Plurality's path of reasoning is not insufficient under the test of Bowman Transportation v. Arkansas-Best Freight Systems, Inc., 419 U.S. at 285-86. [39]

In a related issue, if there is no present material injury by reason of the subject imports, the circumstances for threat of injury must be different from the circumstances of alleged present material injury. Thus, in order to examine whether the Plurality's threat determination is consistent with the Plurality's no present material injury determination (and here Appellants assert the lack of consistency, as addressed supra), it must be discernible from the opinion that the Plurality found that there are differences in the condition of the industry or differences in the effects of the imports or both. [40] Bowman Transportation v. Arkansas-Best Freight Systems, Inc., 419 U.S. at 285-86. It is apparent that the Plurality so found in these investigations.

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[39] Moreover, while a Panel must examine each of the statutory factors on which Appellants challenge a determination, it should be remembered that the Commission made a determination of threat of material injury, not merely a series of individual findings that are somehow summed together to reach a conclusion. Even though a Panel must examine individual factual findings and the evidence which allegedly underlies them, it is actually testing the determination itself.

[40] We hasten to add that we see no reason to require specific findings on those differences; it is sufficient that the Commission's findings indicate that the anticipated future situation will be different and that those findings are supported by substantial evidence.

**C. The Nature of the Subsidies to Sydney Steel Co.**

The first factor dealt with by the Plurality was the nature of the subsidies. 19 U.S.C. § 1677(7)(F(i)(I). The Plurality noted that the subsidies applicable to Sydney were found by Commerce to be 113.56 percent. Although it recognized that these were not specifically export subsidies, the Plurality stated that Sydney is primarily an exporter (with capacity to export) and, increasingly, an exporter to the United States.

> This information suggests the commitment of Sydney's sponsors to preserve Sydney as a railmaker, and underscores Sydney's urgent need to seek out export markets in the face of operational problems coupled with a sharply declining domestic market.

New Steel Rails at 20. Both Appellants challenge the Plurality's analysis of the subsidies. Sydney Brief at 27-29; Algoma Brief at 42-45.

Although it is not disputed that Sydney is primarily an exporter, it is claimed that the Plurality failed to mention that Sydney's other markets are collectively larger than the United States market and are growing. It is also claimed that the Plurality ignored the fact that Sydney had failed to qualify as suppliers for certain U.S. purchasers. These assertions (dealt with infra on the question of whether there will be an increase in imports to the United States) do not relate to the findings regarding the effects of the subsidy, except to the extent that they show that the subsidies affect exports in general. While this may be true, it does not show that the Plurality erred in finding that the subsidies will affect exports to the United States. Moreover, that the Commission failed to mention a particular asserted fact is not error and the fact that the Plurality did not mention or discuss a particular factual assertion cannot be bootstrapped into an error of law. Failure to discuss a particular fact or argument does not mean that the Commission ignored that fact or argument. See discussion infra.

The subsidies granted by the various Canadian federal and provincial authorities were not found by Commerce to be "export subsidies." Final Affirmative Countervailing Duty Determination: New Steel Rail, Except Light

Rail, from Canada, 54 Fed. Reg. 31991 (Aug. 3, 1989), reprinted in New Steel Rails at Appendix B. See 19 U.S.C. § 1677(5)(A). It is asserted, nevertheless, that the Plurality improperly treated the subsidies as export subsidies. Sydney Brief at 42 ("The subsidies granted to Sysco were not export subsidies."). In its view, the Plurality should have found that the absence of export subsidies in the Commerce final determination supports a negative determination by the Commission. [41] Id.

The statute, however, directs the Commission to consider the nature of all applicable subsidies, not merely those particular subsidies that Commerce found to be "export subsidies." 19 U.S.C. § 1677(7)(F)(I). [42]

Neither Appellant challenges whether the Plurality's factual inferences may actually be drawn from the facts of the subsidies themselves, that is, whether those findings are supported by substantial evidence of record. Therefore, the Panel merely notes that among the subsidies found by Commerce are grants for the planning and execution of the modernization of Sydney's facilities, grants to cover Sydney's debentures, and grants to cover operating expenses and capital expenditures. Final Affirmative Countervailing Duty Determination: New Steel Rail, Except Light Rail, from Canada, 54 Fed. Reg. at 31991 (the Commerce final determination notice contains a lengthy exposition of the programs found to confer subsidies, the programs found not to confer

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[41] Sydney also states that although Commerce did not find the subsidies at issue to be export subsidies, the Plurality "nevertheless concluded that the existence of subsidies caused a threat of material injury." Sydney Brief at 42. It also states that the fact that it was found uncreditworthy and unequityworthy by Commerce "does not create a threat of material injury." Id. at 43. However, there is no indication that the Plurality reached its ultimate conclusion of threat of injury solely on the basis of the nature of the subsidy.

[42] The Commission, of course, may not look behind the Commerce determination and redetermine for itself whether there is a subsidy and, if so, the nature and amount and amount of the subsidy. Administrative comity requires that the Commission defer on these matters to Commerce just as Commerce defers to the Commission on matters of injury. American Permac, Inc. v. United States, 831 F.2d at 269. The Plurality did not overstep those bounds here. Nothing in the Plurality Opinion may be read fairly to be a redetermination of whether there is a subsidy, its amount, or its nature for countervailing duty calculation purposes.

subsidies, and the programs not used.).

The evidence available to the Commission permits the inference that the subsidies are important to Sydney's operations and, perhaps, to its existence. The evidence available, including the apparently declining Canadian market and Sydney's orientation toward production for export (see discussion infra) permits the inference that the subsidies will aid in making future exports available from Sydney to countries outside of Canada, including the United States. Finally, the evidence of record, particularly the Commerce findings on the extent and nature of the subsidies, permits the inference that there is a "commitment of Sydney's sponsors to preserve Sydney as a railmaker [for export]," New Steel Rails at 20, and further permits the inference that the subsidies provided by those sponsors would assist in this effort.

The Panel concludes that the Plurality's findings as to the injury-related effects of the subsidies are supported by substantial evidence of record and that the Plurality did not err in its analysis of the subsidies provided to Sydney.

**D. Capacity Utilization of Canadian Producers.**

Several of the statutory factors relate to the volume of exports to the United States and to the abilities and intentions of foreign producers regarding their exports of the unfairly traded articles to the United States. 19 U.S.C. § 1677(7)(F)(i)(II), (III), and (VI), supra. Those factors include unused and new productive capacity, predicted increases in market penetration, and the availability of unutilized foreign productive capacity. The Panel begins by examining the Plurality's findings regarding Canadian producers' ability to use productive capacity to generate exports, including exports to the United States.

The Plurality found that Appellants' shipments to consumers in Canada decreased over the period of investigation and that their unused capacity increased substantially. New Steel Rails at 20-21. The Plurality's capacity utilization findings relied on Conf. Doc. 45, Table 13, which incorporated data supplied by Appellants. Conf. Doc. 45 at Table 13. See also Conf. Doc. 49,

Tables 13a and 13b, providing disaggregated data. Both Appellants, however, challenge the Plurality's reliance on those data.

Sydney states that "Algoma and Sydney had no unused capacity." Sydney Brief at 36. The statement refers to data for only one of the two producers and further refers to productive capacity that includes steel rail as well as other products.

Algoma states that the data regarding Algoma in Conf. Doc. 45, Table 13, and in Conf Doc. 49, Table 13a, are incorrect and that it brought this problem to the Commission's attention at the hearing. Thereafter, it provided corrected data in its confidential post-hearing brief. Algoma Brief at 25, citing Pub. Doc. 140 at 112-13 and Conf. Doc. 26 at 9 and attachment 4. Like Sydney's assertion, supra, Algoma's Attachment 4 (which provides capacity and utilization figures) refers to productive capacity that includes steel rail as well as other products.

It is implicit in Appellants' assertions that the Plurality erred in the data it relied on. In their view, the Plurality should have relied on data encompassing more foreign-produced products than simply new steel rail. Nevertheless, in making predictions of future circumstances, the legislative history emphasizes reliance on the observed trends in data of record: "demonstrable trends . . . will be important." H.R. Rep. 317, 96th Cong., 1st Sess. at 47 (1979). See discussion supra. Reliance on those data cited by the Plurality is in conformity with the legislative history cited supra. Moreover, the Plurality permissibly chose between capacity utilization data that corresponded to the industry as it had been defined and capacity utilization data calculated on a broader product grouping that included, but was not limited to, new steel rails. [43] Moreover, no party has pointed to anything in the record to

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[43] Although 19 U.S.C. § 1677(4)(D), the "product lines" provision, is not directly involved here, the principles underlying it are sound and are applicable here by analogy. The product lines provision reflects Congressional intent that an injury determination be addressed, to the extent possible, on the industry as defined by the Commission in an individual case. See Hannibal Industries, Inc. v. United States, 710 F. (continued...)

suggest that the capacity and related data reflected in Conf. Doc. 45, Table 13, and in Conf. Doc. 49, are incorrect. Thus, the suggestion that the Plurality should have looked at capacity utilization on a broader basis as a matter of law must be rejected.

This is not to say that the ability of foreign producers to shift capacity to the subject products from other products or (if not counted in productive capacity) to start up idle capacity for the subject products is not a permitted consideration in analyzing the threat of material injury. The ability to shift production facilities from other products to the imported articles at issue is frequently relevant, even where the specific considerations of 19 U.S.C. § 1677(7)(F)(i)(VIII) are not implicated.

In fact, in the present investigations, had the Plurality considered productive capacity on a broader basis, as urged by Appellants, e.g., Transcript of Panel Hearing at 87, it may have reached the same conclusions. An examination of the confidential capacity utilization information of record, on the basis of a broader definition of productive capacity, as urged by Appellants, shows that those data that would have permitted an inference that unutilized capacity was significant and (along with other data of record) could have led to an inference that levels of capacity utilization supported an affirmative threat determination. There is no need to belabor this point because the Plurality made no findings regarding the ability (or lack thereof) to so shift production and did not suggest that there would be a realignment of Canadian production capacity to shift capacity into steel rails.

Appellants have not demonstrated that the Plurality erred in its

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[43](...continued)
Supp. at 334-35; Kenda Rubber Industrial Co. v. United States, 630 F. Supp. 354, 357-58 (CIT 1986). Fundamental fairness suggests that the same be done for the foreign industry and for the same reasons. It appears preferable to compute foreign industry capacity and utilization on the same basis as those data are computed for the domestic industry. This permits the Commission to compare apples to apples. Accordingly, the Plurality's decision to rely on information compiled for the foreign industry on the same basis as compiled for the domestic industry is not error.

consideration of productive capacity utilization and Appellants have not demonstrated that available capacity had declined or would decline significantly. In fact, the record does not support an inference that Canadian unused productive capacity would decline or would decline to the point that there would be no ability to significantly change the quantity of exports to the United States. [44] Therefore, Appellants have not met their burden of showing that the findings regarding Canadian capacity and capacity utilization are not supported by substantial evidence of record or that they are otherwise not in accordance with law.

**E. The Future Volume of Exports to the United States.**

In examining the factors related to the anticipated future volume of imports, the Plurality first examined exports from Canada in absolute terms. The Plurality found that, over the period of investigation, an increasing proportion of Canadian production was dedicated to export, "with an increasing share of those exports being marketed in the U.S." New Steel Rails at 21. The Plurality found the share of Canadian production exported to the United States in 1988 was significant and further found that Canadian exports to the U.S. had increased by more than six times since 1986. Id. The Plurality also found that market conditions in Canada would continue to exert pressure to increase exports to the U.S. Id.

In relative terms, the Plurality found that the share of apparent U.S. consumption held by the imports from Canada "increased dramatically in both volume and value terms over the period of investigation." Id. at 21-22. Import penetration in volume terms rose from 1.5 percent in 1986 to 4.9 percent in 1987 and increased still further in 1988. Although there was some decline during the first quarter of 1989 (the final months in the period of investigation), the Plurality discounted those data. Id. at 22. The Plurality deemed the data for

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[44] Sydney was downsizing and modernizing its facilities. New Steel Rails at A-68-69. Sydney stated that "the downsizing and modernization program will not change [its] railmaking capacity[.]" Pub. Doc. 127 at 30.

the interim period to be an aberration (which the Plurality addressed in the next paragraph of its opinion). As in the case of absolute exports from Canada, it is apparent that the Plurality found that exports to the United States in relative terms would continue to increase.

The Plurality found unpersuasive the argument that the foreign producers had received no orders during 1989. It noted that the purchasing season was not yet over, that the decline in orders could be a result of the pending antidumping and countervailing duty investigations, and that there had been an increasing number of bids by Canadian producers. Id. at 22-23.

Appellants Algoma and Sydney argue that these findings were incorrect for both legal and factual reasons.

**(1) Legal Issues.**

The Panel must address four legal issues regarding the volume of imports in the threat analysis of the Plurality Opinion.

Sydney argues that as a matter of law in this case, imports must rise in order for there to be a valid determination that there would be a threat of material injury:

> Since . . . the current level of Canadian imports was not a cause of the U.S. industry's present material injury, . . . for Canadian imports to threaten future material injury, the absolute level (and market share) of Canadian imports must rise. Moreover, the statute dictates that the increase in Canadian market share must be 'rapid' for there to be a threat of material injury.

Sydney Brief at 25-26. However, 19 U.S.C. § 1677(7)(F)(i)(III) calls for consideration of increases in market penetration. Increases in market penetration may occur in relative or absolute terms and the statute does not preclude the Commission from considering relative market share nor does it require increases in market share in both absolute and relative terms. Second, subsection (III) requires that the Commission consider (1) any past rapid increases in import penetration and (2) the likelihood that import penetration (in either relative or absolute terms) will increase to injurious levels. The statute does not require that predicted future import penetration be "rapid."

Algoma correctly states that the record reveals no orders from U.S. purchasers for Canadian-produced rail during 1989. In its view, "the absence of orders shows that imports could not rise in the year following the investigation[s]." Algoma Brief at 18. The argument is unpersuasive for two reasons. First, acceptance of Algoma's argument would have the effect of precluding the Commission from examining the record to determine for itself the cause or causes for the absence of orders. For example, if a decline in orders resulted from importers' concerns about an importer's susceptibility to duties, that very fact would then have the perverse result of requiring a negative threat determination. Second, the argument reflects the popular misconception that the "real and imminent" standard refers only to the twelve-month period following the conclusion of the Commission's investigation. Each investigation must focus on its own facts and threat of injury will depend on those facts. Therefore, an affirmative determination that there is a threat of injury is not dependent on the prediction that the injury will occur within the space of twelve months. In one recent case, the threat of injury depended in part on the current patterns of plantings of orange trees, which take at least five years to reach citrus-bearing maturity. However, the fact of those plantings can be one of the factors underlying an affirmative determination where the threat of injury may not become actual injury for several years. Citrosuco Paulista, S.A. v. United States, 704 F. Supp. at 1094-97.

Algoma also argues, see supra, that the absence of sales is dispositive of threat in these cases. As discussed, supra, no single factor is dispositive in a Commission analysis and it is for the Commission to determine which of the pieces of data are more persuasive. More importantly, Appellants have shown no persuasive reason to require that the Commission focus on either the decline in imports in the interim period or the immediate future that encompasses only the period during which the absence of orders will preclude imports. A greater showing than that made here is needed before the Commission is required to depart from its traditional analysis in terms of the time periods examined. See Bomont

Industries v. United States, 718 F. Supp. at 960-63; American Spring Wire Corp. v. United States, 590 F. Supp. at 1279. Moreover, as in the case of capacity utilization, the use of the traditional time frames for analysis is based primarily on observed trends in the data over the period of investigation and extrapolations from those data. This method of analysis conforms to the legislative history's emphasis on the analysis of observable trends over the period of investigation. H.R. Rep. 317 at 47-48.

**(2) Factual Issues.**

Turning to the factual issues, the trends in the data, discussed supra, are not disputed. Instead, the thrust of Appellants' arguments is that, despite the observed history of the pattern of Canadian participation in the U.S. rail market, Canadian exports to the United States would decrease. As noted, Algoma's position relies heavily on the fact that neither Appellant had received any orders for deliveries during the remainder of 1989 and 1990. Algoma Brief at 16-17. In Algoma's view, "[t]his fact alone should dispose of this case[.]" Id. at 17. Sydney argues that export sales to the United States were likely to decrease because of the increased needs of Canadian railroads. Sydney Brief at 24-25.

Appellants' arguments regarding the projected future decrease in imports were raised before the Commission and the Plurality did not find them persuasive for the following reasons:

> First, the normal rail-buy period for 1989 in which the majority of tonnage is purchased in the U.S. market is not over. [Footnote as to the increasing importance of the spot market.] Second, as noted above, we are entitled to note the pendency of this investigation [sic] since September, 1988, in discounting any recent decline in orders from U.S. customers, whether such a decline can be attributed to tactical maneuvering by foreign producers or U.S. importers or to increased uncertainty on the part of U.S. purchasers. Finally, we note that from 1986-88, both Canadian producers increased the number of quotes to Class I railroads year by year, and both have made recent sales to Class I railroads of rail samples for on-track testing, for the purpose of qualifying for future sales. We are thus not persuaded by respondents' assertion that sales of Canadian product into the U.S. are likely to decline.

New Steel Rails at 22-23. Algoma and Sydney challenge each one of these reasons.

The rail-buy period for the year apparently had about thirty days to run. See Algoma Brief at 18. Yet, both Algoma and Sydney appear to argue that there would probably be little in the way of sales in that period. See Algoma Brief at 18. The Plurality was not required to accept that view and Algoma's acknowledgement, Id., that two Class I railroads had not completed their buying programs for the year provides additional support for the Plurality's finding.

As to the Plurality's discounting of the declines in imports in the interim period because of either tactical maneuvering or uncertainty due to the pendency of the investigations, both Algoma and Sydney assert that the Plurality's statement was "speculation." In their submissions, however, the alternative explanation they offer for the decline in Canadian sales during the interim period is Algoma's statement that the price of Canadian rail was higher. Algoma Brief at 31. The record shows that there are only three instances of 1989 rail bids to which Algoma is referring and the data do not compel the conclusion Algoma asserts. See Conf. Doc. 45 at A-112, A-115. The Plurality would have been entitled to completely discount the data because of the very few bidding situations involved. [45]

The pendency of an investigation can affect the behavior of exporters and importers, if only because of the financial risks that an importer must run if it imports articles potentially subject to antidumping or countervailing duty orders or both. The Commission has, in past instances, found that interim declines changes in imports may be attributable to the pendency of investigations.

> This court and the [Commission] consistently have recognized that the initiation of antidumping and countervailing duty proceedings can create an artificially low demand for affected imports, thus distorting the data on which the [Commission] relies in making its determinations.

USX Corp v. United States, 655 F. Supp. at 492. See also Philipp Brothers, Inc.

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[45] Moreover, that the Plurality did not accept the argument that the drop in orders was due to a change in the exchange rates is not error.

v. United States, 640 F. Supp. at 1346; Rhone Poulenc S.A. v. United States, 592 F. Supp. at 1324-25.

In the present investigations, the finding that the volume of imports may have been affected by the fact of the pendency of the investigations is based on information that showed the decline in imports during the interim period and that showed that the decline in imports from Canada closely corresponded to the institution of the investigation and the potential liability for duties. The Plurality was entitled to rely on its expertise and was entitled to find that the pendency of the investigation had an effect on the volume of imports and the volume of sales. On the facts of these investigations, the Plurality was not required to adopt the alternative view of Appellants that there were alternative causes for the decline in imports.

Sydney has asserted throughout these proceedings that in the immediate future, its shipments to the Canadian market and to other export markets were likely to increase. E.g., Sydney Brief at 25. Sydney's evidence consisted primarily not of evidence of specific orders for specific tonnages but rather of Sydney's own projections of its future sales and exports. Conf. Doc. 20 at 32-33. It is apparent that the Plurality did not find this evidence persuasive, and such weighing of the evidence is clearly within the realm of Commission discretion.

As noted, the Plurality discounted the declines in imports in the interim period and the absence of present orders, inter alia, on the grounds that the number of quotations by Sydney and Algoma increased year by year and that there were sales made by them to become qualified as suppliers to different railroads. In Sydney's view, the increased number of quotes reflects the better condition of the U.S. railroad industry. Sydney Brief at 31. The Plurality, however, did not find that the railroad industry is improving and appellants have not shown that the failure to make such a finding was error. The condition of the railroad industry was not at issue before the Commission. Moreover, the fact remains that the record shows an increased number of bids at the same time there was increased

market penetration in both volume and value terms. Conf. Doc. 45 at A-99, Table 15a. See discussion supra. Thus, the Plurality was not required to attribute the increased number of bids to the assertedly improved condition of the railroad industry.

Finally, the Plurality noted increasing samples for on-track testing. There is no apparent reason for such testing, and neither Appellant has suggested any, other than a desire to be able to offer product for commercial sale to the party conducting the on-track test. The fact that certain tests were unsuccessful does not compel the conclusion that the difficulties are insurmountable in a reasonable time frame or that the Canadian suppliers had decided to stop seeking that business.

Therefore, Appellants have not shown that the Plurality erred as a matter of law in its analysis or that there is not substantial evidence underlying the Plurality's conclusions regarding the anticipated future volume of imports. 28 U.S.C. § 2639(a)(1).

**F. The Future Price Effects of the Subject Imports.**

The Commission must consider "the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise." [46] 19 U.S.C. § 1677(7)(F)(i)(IV).

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[46] Appellants appear to argue that this provision restricts the Commission's discretion because "[t]he absence of evidence that imports will depress or suppress prices indicates that imports do not pose a threat of material injury." Sydney Brief at 17. First, the pricing factors alone are not necessarily dispositive; in threat of material injury cases, just as in present material injury cases, no single factor is determinative. See discussion supra. Second and far more importantly, although it is true that the Commission must consider price depression and suppression, it is not precluded from considering or relying upon other price effects of the subject imports, such as underselling or the absence of underselling.

The Plurality found that this is a bid-negotiation market in which initial bids are submitted, and the purchaser then seeks lowering of prices and additional quotations. "Thus, the presence of LTFV and subsidized Canadian imports can cause price suppression and depression without actual underselling." [47] New Steel Rails at 23. (The Plurality did not rely on either price depression or price suppression or the absence thereof in finding no present material injury by reason of the subject imports.) The Plurality found that some information showed Canadian initial bids below those of U.S. producers and that the Canadian pricing may have been instrumental in the lowering of domestic bids. The Plurality further found that some initial Canadian bids, even though not ultimately successful, were lower than domestic bids. Id. at 24. [48]

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[47] It is important to note that the linkage drawn by the Plurality is between the imports and the possibility of price depression/suppression; the linkage is not drawn between the imports and material injury to the industry and the linkage is not drawn between the imports and the existence of price suppression/depression. See SCM Corp v. United States, 544 F. Supp. 194, 199 (CIT 1982). Moreover, the Plurality did not equate the presence of imports to price suppression or price depression.

[48] One of the three Commissioners forming the Plurality stated that he --

> could not conclude that Canadian imports had resulted in present price suppression or depression. With the increase in the presence of Canadian imports likely as a result of the efforts of both Canadian producers to qualify themselves for future sales to Class I railroads, [he] does not believe that the conclusion that there is no price suppressive or depressive effect can be extended to the future. Accordingly, [he] finds this particular factor to be essentially neutral in his determination.

New Steel Rails at 23, n.61. Id.

Sydney states that the Commissioner thus found that "the price data were essentially neutral in the threat determination." Sydney Brief at 17-18, n.8. As a result, Sydney asserts that the Commissioner found that there would be no future price depression or suppression, so that the Plurality's findings on these matters are findings of two Commissioners only. The characterization is unpersuasive.

It is apparent that the Commissioner found no present price depression or suppression and that that finding could not be extended to the future. He clearly found that there would be price depressive or price suppressive effects, or both, in the future.

Thus, while his statement is far from a model of clarity, the finding that the "factor [is] essentially neutral in [the] determination" must refer -- if the whole footnote is to be internally consistent -- to the price depressive and suppressive effects in his entire determination, encompassing both present material injury and threat of injury, not just in his threat determination.

The primary issue addressed by the parties regarding the question of pricing is whether the finding of no present material injury by reason of the subject imports is consistent with the statement, quoted supra, that the presence of unfairly traded "imports can cause price suppression and depression." [49] We have concluded, see discussion infra, that there is no inconsistency. The fact that there may be future price depressive or price suppressive effects is not dispositive of whether there is current material injury by reason of the subject imports. Conversely, the absence of current causation is not dispositive of whether there will be future price suppression or depression effects or both or whether those effects (along with other factors, as appropriate) will amount to a threat of material injury by reason of the subject imports.

In its arguments, Sydney does not challenge the evidence relied upon by the Plurality, but refers to different evidence and to the views of dissenting Commissioners. [50] Dissenting views have no weight since two inconsistent conclusions may both be supported by substantial evidence of record. Metallverken Nederland B.V. v. United States, 728 F. Supp. at 734. Moreover, that a Commissioner found one piece of data or set of data more credible than another is within the Commission's discretionary authority and will not be disturbed unless reliance on such data is shown to be erroneous as a matter of law or so inconsequential or so contrary to the record as a whole that it amounts to reliance on "isolated tidbits." USX Corp. v. United States, 655 F. Supp. at 489.

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[49] As noted supra, Bethlehem and Algoma read this statement as an affirmative finding that there would be future price depression and price suppression or both.

[50] As part of its price depression and suppression argument, Sydney states that "ITC staff found not even a single instance in which a U.S. producer lost a sale to Canadian imports because of price." Sydney Brief at 17. However, the existence of price suppression or price depression or both does not depend on the existence of lost sales. Prices can be depressed or suppressed by the imports when the domestic industry actually makes the sale.

Moreover, the Commission staff does not make findings. It compiles and analyzes information for the Commission. Only the Commission can make findings.

The linchpin of Algoma's argument regarding pricing is that the price suppression and price depression "finding is unsupported by any evidence that current pricing patterns will change in the future." Algoma Brief at 30. Regardless of whether there is any change in the pricing patterns, the argument takes the analysis of injury and threat out of context, since the pricing factors, standing alone, need not be dispositive. Maverick Tube Corp. v. United States, 687 F. Supp. 1569, 1579 (CIT 1988). Even if current pricing patterns in conjunction with other evidence of record did not support a finding of injury, this does not mean that the same pricing patterns in the future, when coupled with other information regarding the future condition of the industry and the other future effects of the imports, must lead to the same conclusion. Moreover, in its finding of no present causation of injury, the Plurality did not discuss and, thus, did not rely on any purported absence of price suppression or price depression. See 19 U.S.C. §§ 1671d(d) and 1673d(d).

Algoma also asserts that the Plurality's statement that the imports "can cause" price suppression or price depression is speculative because "[v]irtually anything can happen." Algoma Brief at 31. Algoma is correct that, as an abstract proposition, imports "can cause" price suppression and "can cause" price depression. As Algoma also correctly recognizes, the question of whether imports "can cause" such effects is not a proper issue; the issue should be whether the imports will cause such effects or are likely to cause such effects. Nevertheless, at other points in its arguments, Algoma agrees with Bethlehem that the Plurality found that there would be future price suppression/depression.

The paragraph of the Plurality Opinion dealing with pricing is an analysis of the projected future market for rail based on observed present operation. The paragraph emphasizes the bidding process and the effects of low priced bids in both initial and subsequent rounds of bidding. The entire focus of the paragraph is on the use of the bidding process to lower prices. The paragraph concludes with the statement that the existence of nonprice factors does not "diminish the likelihood that initial low bids are used by purchasers

to depress subsequent quotations." Id. at 24. Appended to that sentence is a footnote in which the Plurality stated that the fact that domestic producers have not been able to recoup their costs of production "is an indication of price suppression and price depression." Id. at 24, n.62.

As noted above, the Panel must "uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned." Bowman Transportation v. Arkansas-Best Freight Systems, Inc., 419 U.S. at 285-86. Throughout the paragraph at issue the Plurality was discussing the dynamic context of purchases of rail focusing on the price effects of the subject imports on subsequent rounds of bidding. That is, it was discussing price suppression and price depression and found that there would be price suppression and price depression in the future. This conclusion is buttressed by the content of footnote 62. This instance, therefore, is a paradigm of the situation envisioned in Bowman Transportation. While the language used by the Plurality is "less than ideal," the agency's path may be reasonably determined.

The final question, then, is whether that finding is supported by substantial evidence of record. The Panel has independently reviewed the data regarding the individual bidding and contract situations, particularly those pointed out in the Commission Brief at 72-73 and in the testimony at the Commission hearing. Pub. Doc. 140 at 32-33, 34. See also Commission Brief at 74. The individual situations reviewed are such that a reasonable mind might conclude that there would be price suppression or price depression or both. [51] A reasonable mind could also conclude that the future price depression or suppression in the context of that future industry, would be significant and, in conjunction with other factors, could support an affirmative threat determination.

In sum, Appellants have failed to show that there is no substantial evidence of record underlying the Plurality's findings regarding the projected

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[51] We do not address the individual situations because they involve confidential business information and we cannot discuss them in a public document in any meaningful fashion.

future price effects of the subject imports.

**G. Inventories.**

The Plurality found that inventories of Canadian rails had approximately tripled during the period of investigation and, during 1988, were approximately forty percent of Canadian shipments. The Plurality found that the level of inventories was "indicative of continued Canadian participation in the U.S. market." New Steel Rails at 24-25.

One Appellant argues that levels of inventories were not significant, an assertion that it supports by comparing inventories of Canadian product to apparent U.S. consumption of steel rail and by comparing inventories of Canadian product to other stocks. Algoma Brief at 34-35. Although Algoma is correct that the inventories could be compared to U.S. consumption and to other stocks, it has not shown that the Commission is required to do so as a matter of law and it has not shown that a reasonable mind would only make the comparisons urged by the Appellant. The Plurality was entitled to rely on absolute trends in inventories and to compare those trends to shipments and the Plurality is not 7required to compare inventories to either consumption or to other stocks.

It is for the Commission to determine whether a particular level of inventories is significant in determining whether there is a threat of material injury to a particular industry. Algoma has shown, at most, that a different conclusion might be warranted; it has not shown that the conclusion is either unsupported by substantial evidence or that it was an error of law. [52]

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[52] Algoma also asserts that Bethlehem had conceded that the question of inventories is irrelevant to this industry. Whatever factual concessions Bethlehem may have made in this investigation cannot be read as binding on the Commission. Even though one party may deem a matter either irrelevant or insignificant, that is a finding for the Commission to make and the Commission need not rely on concessions by a party or abdicate its power to make findings on those matters.

**H. Research and Development.**

As found by the Plurality, this is a mature industry. It is currently undergoing a shift toward the purchase of premium rail, the technology for which continues to evolve. New Steel Rails at 25. The shift in demand toward premium rail is well-documented on the record, e.g., New Steel Rails at A-10, and is not contested by any of the parties.

The Plurality found that the U.S. producers "have been unable to make specific investments to improve the technology for premium rail production." Id. at 25. Sydney is making such investments and Algoma has developed patented processes for the production of premium rail. At the same time, the Plurality found that the U.S. industry not been able to make investments to improve their technology for premium rail production. The Plurality also found that capital expenditures had declined and that the level of research and development costs have declined over the period of investigation at one of the domestic firms. Id. Finally, focusing on the financial performance of the industry, the Plurality noted that the negative cash flow position of the industry in 1986 and 1987 and the marginal position in 1988 made the potential adverse effect on research and development apparent.

Although both Algoma and Sydney dispute the findings, their arguments go essentially to the conclusions to be drawn from the various items of information of record. Thus, Sydney would rely on CF&I Steel Corporation's 1986 completion of a head-hardening facility as evidence of ability to invest. Sydney Brief at 46. Neither Appellant has shown any error in failure to rely on the 1986 investment by CF&I. [53]

Appellants also dispute the Plurality's conclusions regarding the availability of funds to conduct research and development. Sydney, for example, argues that there were "ample funds" available for those purposes. The financial

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[53] In any event, this particular investment, occurring at the beginning of the period of investigation, appears to be of marginal relevance to the future effects of imports on the ability to invest and appears to be more directly related to present material injury considerations.

data of record, however, including the negative cash flow position of the industry in 1986 and 1987 and the marginal cash flow position in 1988, permits the inference that "ample funds" for research and development were not available.

Finally, although Sydney correctly points out that there were some increases in expenditures for technology by one of the U.S. producers during the period 1986-88, this does not compel the conclusion that the expenditures were at levels significantly unaffected by the unfairly traded imports.

In sum, the arguments raised by both Algoma and Sydney dispute the weight and persuasiveness to be given to the data. While both Appellants point out how the data may be read differently, this is not tantamount to a showing that the Plurality did not rely on substantial evidence of record or that its determination is otherwise not in accordance with law.

## I. Conclusions.

The Panel has carefully reviewed the Plurality Opinion, the evidence of record, and the arguments of the parties on all the issues, including those not addressed in this Opinion. [54] As indicated herein, the Panel concludes that Appellants have not demonstrated that Plurality's determination that an industry in the United States is threatened with material injury is not supported by substantial information of record or is otherwise not in accordance with law. Accordingly, the affirmative determination of the Commission on the basis of threat of material injury is AFFIRMED.

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[54] Unfortunately, both the Plurality Opinion and the arguments of the parties are, in effect, placed in a straight-jacket by the rather slavish following of the statutory factors and by the attempt to address each one of them. While the Commission may be required to consider the matters addressed in the statute and may be required, in certain instances, to make findings as to why a certain factor is or is not relevant or persuasive, both the Plurality and the parties have lost sight of the forest (the threat determination itself) for the trees (the individual statutory factors).

## VIII. WHETHER THE DETERMINATION OF THE PLURALITY AND COMMISSIONER LODWICK THAT ANY PRESENT MATERIAL INJURY IS NOT BY REASON OF THE SUBJECT IMPORTS IS SUPPORTED BY SUBSTANTIAL EVIDENCE OF RECORD AND IS OTHERWISE IN ACCORDANCE WITH LAW.

### A. Introduction.

As noted above, the Plurality determined that the domestic industry was experiencing material injury. New Steel Rails at 14. Commissioner Lodwick did not separately determine whether the industry was experiencing material injury. New Steel Rails at 230. On the question of causation, the Plurality and Commissioner Lodwick found that any material injury was not by reason of the subject imports. Id. at 14-15, 231-39. The Plurality's analysis was as follows:

> We find that, although the domestic industry is experiencing material injury, we cannot conclude that, at the present time, the imports subject to these investigations are a cause of this injury. All imports from Canada come from two producers. One of these producers has been excluded from the countervailing duty investigation, while both are subject to the dumping investigation. Only those imports subject to investigation were considered in making our determinations in these investigations.
>
> We note that there were substantial increases in imports, in both volume and value terms, from both producers. The same is true of their respective market shares; however, particularly in the countervailing duty investigation, the relevant market penetration was not currently significant.
>
> The pricing information of record does not support a finding of underselling. We note that in most instances in which a Canadian producer was awarded an entire contract, it was the only responsible bidder. In most of the other instances in which Canadian product was offered in competition with domestic product, the Canadian product was initially offered at a price between the high and low domestic bids.
>
> Finally, we note that in several instances sales of Canadian rail were made in 'trial lot' sizes, purchased by railroads seeking to qualify the Canadian producer for future sales. The sales themselves were in small lots and the sale price was of little importance. Such sales do not themselves cause injury, but are a factor in our consideration of whether Canadian imports pose a threat of material injury to the domestic industry.

Id. at 14-15. One member of the Plurality, Commissioner Rohr, stated that he did not find current price suppression or depression. New Steel Rail at 23, n.61.

Commissioner Lodwick first found that the volume of imports had increased

and "may be significant," Id. at 232, but that this alone would not be sufficient for an affirmative finding. On the question of price effects, he found that the record on underselling was mixed. He found that the Canadians were not the consistent low bidders to whom the domestic producers had to adjust their bids. He concluded that there was no significant underselling. Id. at 234. He next examined several factors to determine whether the imports depressed prices or prevented price increases; he found that they did neither. Id. at 234-38. Examining the impact of the imports on the domestic industry, he concluded that the industry was not materially injured by reason of the subject imports. Id. at 231-39.

**B. Issues Presented on Appeal.**

Intervenor challenges the finding that any material injury was not by reason of the subject imports. The bases for Intervenor's challenge may be summarized as follows: (1) that the Plurality failed to consider and failed to explain its views on each required statutory factor; (2) that the Plurality Opinions "present injury finding was inconsistent with its finding of price suppression and price depression;" (3) that the data relied upon by the Plurality regarding underselling were not reliable and that more reliable data in the administrative record demonstrated underselling; and (4) that the Plurality's analysis of import volume was flawed in that but for the margins of dumping and subsidization, the Canadian product would have been out of the market and, consequently, the domestic industry suffered material injury, including lost revenues.

**C. Whether Intervenor Has Shown That the Plurality Failed to Properly Explain Its Views on Each Statutory Factor.**

Congress has established certain criteria for the Commission to consider in its material injury determinations.

**(B) Volume and consequent impact**

> In making determinations under sections 1671b(a), 1671d(b), 1673b(a), and 1673d(b) of this title, the Commission, in each case--

> (**i**) shall consider--
>
> > (**I**) the volume of imports of the merchandise which is the subject of the investigation,
> >
> > (**II**) the effect of imports of that merchandise on prices in the United States for like products, and
> >
> > (**III**) 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
>
> (**ii**) may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of the imports.
>
> In the notification required under section 1671d(d) or 1673d(d) of this title, as the case may be, the Commission shall explain its analysis of each factor considered under clause (i), and identify each factor considered under clause (ii) and explain in full its relevance to the determination.

19 U.S.C. § 1677(7)(B).

The final sentence of the foregoing section was added by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, § 1328(1). The significance of that amendment in relation to sections 1671d(d), 1673d(d)3, and 1677(7)(C) and what it requires of the Commission are at issue in these appeals. [55]

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[55] Section 1677(7)(C) provides:

> **(C) Evaluation of relevant factors**
>
> For purposes of subparagraph (B)--
>
> **(i) Volume**
>
> In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.
>
> **(ii) Price**
>
> In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether--
>
> > **(I)** there has been significant price underselling by the imported merchandise as compared with the price of like products of the United States, and
> >
> > **(II)** the effect of imports of such merchandise other depresses prices to a significant degree or prevents price increases which otherwise would have occurred, to a significant degree.

(continued...)

In Intervenor's view, the impact of this amendment is significant: "judicial precedent regarding the discretion of the Commission to identify and discuss the relevant factors is obsolete." Bethlehem Brief at 53. Because it views section 1677(7)(C) as an amplification of the requirements of section 1677(7)(B) (i.e., it reads the factors listed in subsection (C) into subsection (B)), Intervenor views the amendment as requiring that the Commission make and explain findings for each of the factors enumerated in subsection (C). Because the Plurality did not explain its findings on the factors listed in subsections (C)(iii)(I) through (IV), Intervenor asserts that a remand to the Commission is required. Bethlehem Brief at 54.

The Commission argues that the foregoing reading of the amendment is too broad. It views the amendment as a narrow one directed only at the factors in subsections (B)(i) and (ii), not at the individual factors enumerated in subsection (C). The Commission further argues that there is no congressional intent to overturn the cases holding that the Commission need not discuss every factor or every argument presented in an investigation. Commission Brief at 34-43.

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[55](...continued)

> **(iii) Impact on affected domestic industry**
>
> In examining the impact required to be considered under subparagraph (B)(iii), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to--
>
> **(I)** actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> **(II)** factors affecting domestic prices,
>
> **(III)** actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and
>
> **(IV)** actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.
>
> The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

19 U.S.C. § 1677(7)(C).

For cases arising under Title VII of the Tariff Act of 1930 and starting with British Steel Co. v. United States, 593 F. Supp. at 405, the Commission's reviewing Courts established that a Commission opinion need not address every argument advanced by a party in an investigation. E.g., Roses, Inc. v. United States, 720 F. Supp. at 185; Avesta AB v. United States, 689 F. Supp. 1183, 1182 (CIT 1988); Maverick Tube Corp. v. United States, 687 F. Supp. at 1576; Empire Plow Co. v. United States, 675 F. Supp. at 1354; Hercules, Inc. v. United States, 673 F. Supp. 454, 482 (CIT 1987); National Association of Mirror Manufacturers v. United States, 696 F. Supp. at 648-49. See Granges Metallverken AB v. United States, 716 F. Supp. 17, 24 (CIT 1989) ("there is no statutory requirement that the Commission respond to each piece of evidence presented by the parties."). Also starting with British Steel Co. v. United States, 593 F. Supp. at 405, the Commission's reviewing Courts have established that a Commission opinion need not address every issue present in an investigation, but only that an opinion is required to address "material issues of law or fact." Jeannette Sheet Glass Corp. v. United States, 607 F. Supp. 123, 130 (CIT 1985), app. dismissed, 803 F.2d 1576 (Fed. Cir. 1986), vacated in part, 654 F. Supp. 179 (1987). See also National Association of Mirror Manufacturers v. United States, 696 F. Supp. at 649; Gifford-Hill Cement Co. v. United States, 615 F. Supp. at 587. Likewise, Commission opinions are not required to discuss each factor enumerated in the statute. E.g., Citrosuco Paulista, S.A. v. United States, 704 F. Supp. at 1094; Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. at 1073. See Rhone Poulenc S.A. v. United States, 592 F. Supp. at 1326. [56]

It is presumably these and similar cases that Intervenor characterizes as "obsolete." They are obsolete because "Congress rejected the Court's [sic] tolerant approach with respect to the necessary components of each Commission decision." Bethlehem Brief at 53.

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[56] The law under the Antidumping Act of 1921 was the same. The Commission was not required to address every issue or argument in its statements of reasons. Pasco Terminals, Inc. v. United States, 477 F. Supp. 201, 218-19 (Cust. Ct. 1979), aff'd, 634 F.2d 610 (CCPA 1980).

However, the legislative history cited by the Commission, Commission Brief at 38-39, demonstrates that the statement of the Intervenor does not reflect congressional intent.

> The Committee notes that it does not intend overturning judicial precedent such as British Steel Corp. v. United States, 593 F. Supp 495 (C.I.T. 1984), holding that the [Commission] need not necessarily respond to all arguments, regardless of their merits or relevance, made by the parties before it.

S. Rep. 71, 100th Cong., 1st Sess. 115 (1987). Rather than "reject" the "Court's [sic] tolerant approach with respect to the necessary components of each Commission decision," Bethlehem Brief at 53, Congress expressly endorsed the line of cases discussed above.

Faced with this legislative history, Intervenor did not press the position that those cases are "obsolete." Bethlehem's Reply Brief at 23 Instead, it argues that Congress gave only a limited endorsement to the British Steel line of cases. In this fall-back view, Intervenor argues that Congress reaffirmed only that the Commission need not respond to arguments of the parties; Congress did not affirm that the Commission need not address each of the factors listed in subsection (C).

Intervenor's fall-back position fares no better than its original position because it points to nothing in the statute or the legislative history to demonstrate that the 1988 amendments were designed to require that Commission opinions discuss some or all of the factors enumerated in subsection (C). In the absence of any demonstration that this was the intent of Congress, we decline to reach such a result here. [57] [58]

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[57] In fact, the legislative history leading up to the 1988 amendments discusses only volume, price, and impact (the three factors in subsection (B)). S. Rep. 71, 100th Cong., 1st Sess. 115 (1987); Conference Report to Accompany H.R. 3 at 616.

[58] It is not clear that the amendment to section 771(7)(B) was aimed at the content of Commission opinions. It appears that the amendment came about because of a Congressional concern

that individual Commissioners -- none of whose opinions are at issue here -- were developing and using analyses that departed from the requirements of the statute.

> The changes which the Committee has approved . . . are

(continued...)

In sum, Intervenor has not demonstrated that the Plurality Opinion is insufficient as a matter of law for failing to address in its causation section the factors enumerated in subsection (C).

**D. Whether The Plurality Made Inconsistent Findings.**

Several parties assert that the Plurality's "present injury finding was inconsistent with its finding of price suppression and price depression." Bethlehem Brief at i and 17. Accord Algoma Brief at 27-28; Bethlehem Reply Brief at 18. Intervenor argues that remand is required to deal with the inconsistency. Id. To demonstrate the alleged inconsistency, Intervenor refers to page 23 of the Plurality Opinion where the Plurality stated that "the presence of LTFV and subsidized Canadian imports can cause price suppression and depression without actual underselling." [59]

The passage quoted by Intervenor occurs in the section of the Plurality Opinion dealing with threat of material injury, not in the section dealing with causation of present injury. Whatever impact the imports may have in the context

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[58](...continued)

> believed necessary because certain Commissioners may not be applying the law in accordance with Congressional intent. . . . The Committee disapproves of determinations by individual Commissioners that rely upon mechanical application of factors or formulas that remain constant from case to case, but are not enumerated in section [1677(7)].

S. Rep. 71, 100th Cong., 1st Sess. 115-16 (1987).

Congress, that is, was concerned not with the length, detail, and adequacy of the opinions issued by Commissioners, but rather with the factors that those Commissioners were using as indicators of whether there was material injury by reason of the subject imports. Logically, it therefore chose to amend the statutory provisions dealing with factors to be considered in material injury determinations, not the statutory provisions dealing with the notification required.

[59] Intervenor states that the Plurality "failed to mention" whether Canadian imports caused price suppression or depression. The Commission is required only to publish the findings and conclusions on which its decision is based. 19 U.S.C. §§ 1671d(d) and 1673d(d); British Steel Co. v. United States, 593 F. Supp. at 414. See also Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp. at 1071. It has not been demonstrated that the 1988 amendments require more than this. See discussion supra. The question of price suppression and price depression, moreover, has not been demonstrated to be so pivotal to these investigations that it could fairly be said that the failure to discuss it could constitute error.

of threat of material injury (i.e., their projected future impact on the industry) says nothing about whether they are having a current impact on the industry, much less whether that impact is significant or whether that impact (in conjunction with other appropriate factors) satisfies the causation standard of the statute.

The thrust of Intervenor's argument is that the Commission must find present causation of material injury if it finds a likelihood of future price depression or price suppression. That is, the likelihood of future price suppression or price depression is made determinative of present material injury by reason of the subject imports. [60] The argument must fail because no single fact or consideration is dispositive in any investigation. National Association of Mirror Manufacturers v. United States, 696 F. Supp. at 645; Maverick Tube Corp. v. United States, 687 F. Supp. at 1579 ("even significant price undercutting would not necessarily give decisive guidance"); Lone Star Steel Co. v. United States, 650 F. Supp. at 186 ("instances of lost sales alone do not mandate a finding of injury"); Maine Potato Council v. United States, 613 F. Supp. 1237, 1244 n.8 (CIT 1986) (an econometric study does not mandate an affirmative determination); American Spring Wire Corp. v. United States, 590 F. Supp. at 1278-79 (declining profitability standing alone does not mandate a finding that an industry is experiencing material injury); SCM Corp. v. United States, 544 F. Supp. 194, 199 (CIT 1982) (rejecting a per se injury rule based solely upon market penetration); H.R. Rep. No. 317, 96th Cong., 1st Sess. 46 (1979) ("Neither the presence nor the absence of any single factor listed in the bill can necessarily give decisive guidance with respect to an injury determination."); S. Rep. 249, 96th Cong., 1st Sess. 88 (1979).

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[60] Whatever else may be said about it, Bethlehem's position carries the notion that a single factor is determinative of present injury or causation to extremes, since it does not even rely on a current economic indicator or trend, but rather on future projections. Anticipated future events are a singularly unreliable indicator of present causation unless, perhaps, there are very unusual circumstances shown on the record (and no such circumstances are shown here).

There is no inconsistency between the portions of the Plurality Opinion regarding price suppression and price depression and the absence of present causation of material injury. Accordingly, there is no need to grant the request for a remand on this point.

**E. The Pricing Data Relied on by the Plurality.**

It is asserted that the determinations of the Plurality and Commissioner Lodwick on the absence of causation of present material injury are not supported by substantial evidence of record. It is argued that the pricing data on which the Plurality and Commissioner Lodwick relied for their analyses of "underselling were flawed, because data reported by railroads was [sic] inconsistent with data reported by producers[,]" Commission Brief at 17, and because those Commissioners ignored "the evidence of consistent underselling by importers of new steel rails, as reported in Tables 29 and 30." Bethlehem Brief at 27. The argument is premised on the assertion that "the Commission is presumed to have relied upon the entire record." Id. at 27 (citations omitted).

Under the law, the Commission is not presumed to have relied on all the information of record, but to have considered all information of record. E.g., Metallverken Nederland B.V. v. United States, 728 F. Supp. at 736; Roses, Inc. v. United States, 720 F. Supp. 185; Yuasa-General Battery Corp. v. United States, 661 F. Supp. 1214, 1222 (CIT 1987); Maine Potato Council v. United States, 613 F. Supp. at 1245; Jeannette Sheet Glass Corp. v. United States, 607 F. Supp. at 130. The burden is on the party challenging the Commission's determination to demonstrate that the Commission did not consider all the evidence in making its decision. Roses, Inc. v. United States, 720 F. Supp. at 185; Rhone Poulenc, S.A.v. United States, 592 F. Supp. at 1326. Thus, there is no presumed reliance on any information of record other than that specifically mentioned or referred to by the Plurality or by Commissioner Lodwick in their respective opinions.

There is nothing unusual about the fact that there are conflicting data of record in an investigation. In fact, there are almost always conflicting opinions of the parties regarding the significance of particular data, even when

those data themselves are undisputed. It is the Commission's function to determine the weight to be given to each factor, including the evaluation of the data of record and the choice between conflicting data. E.g., Copperweld Corp. v. United States, 682 F. Supp. at 562; S. Rep. 249, 96th Cong., 1st Sess. 88 (1979). This function permits the Commission, inter alia, to accept, to reject, or to qualify the evidence presented by the parties, which (as in the record before us) will normally be contradictory and will normally be self-interested. [61] So long as the Plurality and Commissioner Lodwick made reasonable choices among the conflicting data of record, the fact that the data might support other choices in de novo review is immaterial. See discussion supra.

It is true that some of the pricing data provided by one source are not consistent with pricing data from other sources and, as noted by both the Commission and Algoma, data provided by rail producers did not match data provided by U.S. railroads. Commission Brief at 17; Algoma Brief at 21. Even assuming that all of the factual assertions made by Intervenor are correct (something disputed by Appellants), its Brief does no more than demonstrate what all parties already agree: that there are inconsistent data series regarding pricing in these investigations. E.g., Bethlehem Brief at 28. This fact, however, is insufficient to show that the alleged reliance on one set of data in preference to another was wrong as a matter of law. [62] The fact that Intervenor

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[61] This is confirmed by the standard of review that the Panel must apply.

> The substantial evidence standard 'frees the reviewing [Panel] of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute.'

Alberta Pork Producers' Marketing Board v. United States, 669 F. Supp. at 449, quoting, Consolo v. Federal Maritime Commission, 383 U.S. at 620. See also Empire Plow Co. v. United States, 675 F. Supp. at 1351.

[62] In a related argument, "Bethlehem speculates that the U.S. railroads and Algoma have an incentive to misreport pricing data in order to skew the results of the Commission investigation." Algoma Brief at 10. The self-interest of a party goes to that party's credibility and credibility of testimony and documentary evidence is for the Commission. Metallverken Nederland B.V. v. United States, 728 F. Supp. at 746; American Permac, Inc. v. United States, 656 F. Supp. 1228, 1233 (CIT 1986), aff'd, 831 F.2d 269 (Fed. Cir. 1987), cert. dismissed, 485 U.S. 901 (1988). (continued...)

can --

> point to evidence of record which detracts from the evidence that supports the Commission's decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive. It is not the function of a [Panel] to decide that, were it the Commission, it would have made the same decision on the basis of the evidence.

Matsushita Electric Industrial Co. v. United States, 750 F.2d at 936. See also 28 U.S.C. § 2639(a)(1).

The propriety of the Commission's reliance on data provided by the railroads is buttressed by the fact that the Commission was aware of these discrepancies in the data reported to it and made efforts to obtain clarification. In its questionnaires, for example, the Commission sought specific price data on uniform terms and further sought data on transportation costs and delivery terms for each transaction. E.g., Conf. Doc. 42.22 at 41; Conf. Doc. 42.26 at 26. Similar information was included in the staff report to the Commission. Conf. Doc. 45 at 36-37. These same issues were debated and were the source of questions to the parties during the hearing. [63] Pub. Doc. 140 at 52-55, 82-85, 143-44, 147-48. [64]

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[62](...continued)
Intervenor points to no facts of record, other than that of the self-interest of the parties reporting, that suggest that the Commission erred as a matter of law in its inherent decisions on credibility and this is not a sufficient basis on which to find error.

Intervenor's suggestion is a two-edged sword. Just as the railroads may have a business incentive to distort data to retain access to Canadian product, domestic producers have a business incentive that is just as strong if not stronger to deny them that access or make that access more expensive (if only in terms of administrative costs). If the self-serving nature of data and testimony were determinative, the Panel would have to discount Intervenor's data at least to the same extent that it would have to discount the railroads' data.

[63] In response, Intervenor outlined transportation costs to various delivery points for itself and other producers. Conf. Doc. 25 at 25-26.

[64] On the specific facts of these investigations, given the efforts by the Commission to obtain comparable data, to explore the differences in the data, and to seek clarification of those data, the Panel need not explore the question of whether there is a duty of investigative thoroughness or whether the Commission violated it. Compare, e.g., Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1561 (Fed. Cir. 1984); Mitsubishi Electric Corp. v. United States, 500 F. Supp. 538, 564 (CIT 1988), with (continued...)

The argument, noted supra, that the Plurality failed to address the data covered in Tables 29 and 30 is unpersuasive because it has not been demonstrated that the failure to mention or discuss data in an opinion is error. Therefore, the Plurality's silence may not be bootstrapped into an error in its consideration. Second, Commission's "decision does not depend on the 'weight' of the evidence, but rather on [its] expert judgment . . . based on the evidence of record." Matsushita Electric Industrial Co., Ltd. v. United States, 750 F.2d at 933. Accord Empire Plow Co. v. United States, 675 F. Supp. at 1351; Manufacturas Industriales de Nogales, S.A. v. United States, 666 F. Supp. 1562, 1567 (CIT 1987). "However, neither the governing statute nor its legislative history require the [Commission] to adopt any particular analysis when the market consists of several segments." Copperweld Corp. v. United States, 682 F. Supp. at 566. The mixed price comparisons on the record as a whole and the relatively small volume of sales reflected in the data in Tables 29 and 30 are insufficient to require that the Plurality find significant underselling as a matter of law. [65]

Other considerations support the Commission's apparent choice of data. First, there are discrepancies in the reporting of data by producers (both U.S.

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[64](...continued)
Wieland Werke, AG v. United States, 718 F. Supp. 50, 60 (CIT 1989); Timken Co. v. United States, 630 F. Supp. 1327, 1337-38 (CIT 1986); Budd Co., Railway Division v. United States, 507 F. Supp. 997, 1000 (CIT 1980). See, generally, Hercules, Inc. v. United States, 673 F. Supp. at 482.

> The Panel recognizes that there are time constraints to antidumping and countervailing duty injury investigations. The Panel notes that the function of Commission staff is to gather information, supplement it, analyze it, and present

it to the Commission and parties in time for its use in briefing and decisionmaking. Although the discrepancies in the pricing data appear to have been known in sufficient time to permit further exploration during the investigations by staff, the Panel has not been able to locate anything in the record that shows any exploration of these discrepancies, much less an attempt to reconcile conflicting price data on individual sales.

[65] It bears repeating that no single factor is dispositive in a Commission determination, see discussion supra, so that even if there were significant underselling, this factor

(alone or in conjunction with the other data of record) would not necessarily require a finding of injury by reason of the unfairly traded imports.

and Canadian) while there is uniformity in the reporting of data provided by the purchasers. Sydney Brief at 24. In fact, as Algoma points out, Intervenor itself provided inconsistent statements on how it prices steel rails. Algoma Brief at 12-13. Second, the sources of one party's pricing data may raise questions about the reliability of some of those data. See Algoma Brief at 11.

In the absence of a persuasive demonstration that the Commission's choice of data on which to rely was erroneous as a matter of law or unsupported by substantial evidence, the Panel cannot determine that the reliance on certain information in preference to other information was improper.

### F. Whether the Commission Is Required to Consider the Margins of Dumping or Subsidization in an Allegedly "Price-Sensitive" Industry.

It is asserted that the Plurality committed error in its analysis of the volume of imports and in the market share held by the Canadian imports because it failed to take into account the margins of dumping and subsidization and because it did not find the volume of imports and the revenue effects "significant." Bethlehem Brief at 33 et seq. The error is alleged to be made more egregious because of the asserted price-sensitivity of steel rail. Thus, Intervenor seeks to require the Commission to consider the margins of dumping and subsidization in cases involving "price-sensitive" products. See Bethlehem Brief at 34.

Neither the Plurality Opinion nor Commissioner Lodwick's opinion found that the industry in the United States was "price sensitive." [66] Neither the Plurality nor Commissioner Lodwick found, as Intervenor asserts was warranted, that minor differences in price "will result in winning or losing a sale." [67]

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[66] None of the parties have provided us with a definition of the term "price sensitive" and it does not appear to be a term of art in this context.

[67] Such a finding cannot be inferred from the fact that rail is usually purchased by means of rounds of bids in which the purchaser seeks bids from different producers. While it may be true that successive rounds of bidding may lead to price lowering by individual bidders, it does not necessarily imply that minor differences in price determine whether a (continued...)

Bethlehem Brief at 34.

The statute directs the Commission to examine the volume effects, the price effects, and the effects of the imports on the domestic industry; the Commission is not directed to examine the effects of the dumping or the subsidization or the amount thereof. 19 U.S.C. §§ 1677(7)(B) and (C). The Commission may consider margins of dumping or subsidization as an "other economic factor." 19 U.S.C. § 1677(7)(B). U.S. law is unequivocal that the Commission is not required to consider the margins of dumping and subsidization [68] and, indeed, it has been repeatedly held that the Commission is permitted to consider the margin of dumping or subsidization, but is not required to do so. Algoma Steel Corp. v. United States, 688 F. Supp. 639, 645 (CIT 1988), aff'd, 865 F.2d 240 (Fed. Cir. 1989) ("Congress has not simply directed [the Commission] to determine directly if dumping is causing injury."); Copperweld Corp. v. United States, 682 F. Supp. at 564 (the consideration of margins is neither prescribed nor required); Hyundai Pipe Co. v. U.S. International Trade Commission, 670 F. Supp. 357, 360 (CIT 1987) ("Congress did not mandate that margins analysis be used."); Maine Potato Council v. United States, 613 F. Supp. at 1241-43. None of the foregoing cases depended on whether the industry involved was or was not "price sensitive."

Assuming arguendo that this is a price sensitive industry, there has been no legal support offered for the proposition that margins of dumping and subsidization must be considered in such industries as an exception to the above rules and the Panel's own research has uncovered none. The Panel declines to depart from the above principles and further declines the invitation to create a legal requirement that the Commission consider margins of dumping and

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[67](...continued)
sale is made. This is especially true here because there is no demonstration of what constitutes a "minor" difference in the view of purchasers and because the record demonstrates the significance of nonprice factors in sales in the rail markets.

[68] The only exception to this general rule is that the Commission is required to consider the nature of a subsidy, if one is involved, in its threat analyses. 19 U.S.C. § 1677(7)(F)(i)(I).

subsidization in price sensitive industries. It would be improper for this Panel to engraft such a requirement where the U.S. courts and Congress have not done so. See Bingham & Taylor Division, Virginia Industries, Inc. v. United States, 815 F.2d at 1487; Copperweld Corp. v. United States, 682 F. Supp. at 564.

The impact of margins is, in the first instance, for the Commission, if the Commission chooses to consider the effect of the margins along with the other criteria in its determinations and if the consideration of margins is relevant to the analysis and determination. The Plurality and Commissioner Lodwick chose not to rely on margins and the statute and the case law, supra, establishes that this was a permissible decision.

It was argued, nevertheless, that margins of dumping and subsidization are a necessary consideration in these investigations because, in the absence of dumping or subsidization, there would be no imports from Canada and there would be consequent beneficial volume and price effects on the U.S. industry. Those arguments notwithstanding, it is far from clear that but for the margins of dumping and subsidization, the imported product would be priced out of the U.S. market. The complexities of international marketing and pricing do not guarantee that the prices of imports would rise, much less that they would rise by the full amount of the dumping or the subsidization. Dumping margins, for example, may be eliminated or decreased by decreasing the home market price without affecting the United States price and consequently without affecting volume of sales in the United States. Subsidies may be used for purposes other than lowering the export price and, thus, may have little or no effect on U.S. price or the volume of exports to the United States. Accordingly, the volume of imports cannot depend on the margins of dumping and subsidization, but rather depends on all of the facts in an investigation and, therefore, is a matter for the Commission.

This Panel, for the reasons given supra, cannot find that, as a matter of law, the Canadian product would be out of the U.S. market but for the margins of dumping and subsidization. Neither the Plurality nor Commissioner Lodwick made the finding sought and this decision was within their lawful discretion.

Therefore, the Panel need not address the amount of revenues allegedly lost to the domestic industry by reason of the presence of those imports. [69]

Finally, even if the imports would not have been in the U.S. market but for the margins of dumping and subsidization, this fact would not necessarily compel the conclusion that the effects of such imports are "significant," see 19 U.S.C. § 1677(7)(C), in such terms as volume and value of the subject imports and in the market penetration of the subject imports. The fact that in some prior Commission investigations, a small volume of imports was found significant and, with other factors, to be a cause of material injury, does not compel the same conclusion here. First, the mere presence of imports is not sufficient to establish material injury to the industry. See discussion supra. Second, each investigation depends on its own factual record.

> The Commission's determinations must be based upon an independent evaluation of the factors with respect to the unique economic situation of each product and each industry under investigation.

Alberta Pork Producers' Marketing Board v. United States, 669 F. Supp. at 461. Accord Citrosuco Paulista, S.A. v. United States, 704 F. Supp. at 1087-88; Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. at 1169 n.5; Armstrong Brothers Tool Co. v. United States, 489 F. Supp. 269, 279 (Cust. Ct. 1980), aff'd, 626 F.2d 168 (CCPA 1980). That the Commission reached conclusions based on its evaluation of the record as a whole in other investigations does not compel the Commission to reach identical conclusions in other cases, even where there is a similarity in one item of data. Maine Potato Council v. United States, 613 F. Supp. at 1244 n.7; Armstrong Brothers Tool Co. v. United States, 483 F. Supp. at 328.

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[69] The price implications of the removal of the dumped and subsidized imports from the United States market are made more complex by the presence of steel rails imports from third countries. The pricing of such third country imports may limit the ability of the domestic industry to raise prices as a result of the exit of the unfairly traded imports from the U.S. market.

### G. Conclusions.

The Panel has thoroughly and carefully examined the Plurality Opinion and the Opinion of Commissioner Lodwick, the evidence of record cited by the parties in their presentations to the Panel and the evidence or record relied upon by the opinions, and the arguments of the parties. It has not been shown that either the Plurality or Commissioner Lodwick committed legal errors in their respective analyses of whether any current material injury was "by reason of" the dumped and subsidized imports of new steel from Canada. Moreover, it has not been demonstrated that there are any factual conclusions or analyses unsupported by substantial evidence of record. 28 U.S.C. § 2639(a)(1). The Panel therefore affirms the determinations of the Plurality and Commissioner Lodwick that any material injury is not by reason of the subject imports. Accordingly, the determination of the Commission that an industry in the United States is not materially injured by reason of the subject imports is AFFIRMED.

## VIII. PRODCEDURAL ISSUES

### A. Mootness of Bethlehem's Challenge.

The Bethlehem Brief of January 30, 1990 ("Brief of Bethlehem Steel Corporation Requesting Judgment on its Complaint") was the subject of motions for dismissal by Algoma, by Sydney, and by the Commission. They argued that because Bethlehem prevailed before the Commission, it lacked standing to independently challenge the Commission's determination. [70] Those motions were denied.

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[70] In general terms, the doctrine of standing relates to the interest of the individual litigant in the subject matter of the litigation, not to the subject matter of the litigation. As currently viewed, standing focuses on whether a litigant has both a sufficient stake in the litigation (i.e., will that litigant be sufficiently affected in one of its legal rights or obligations, not just in obtaining a ruling of law of academic interest to the litigant) and the incentive to litigate fully. As expressed in a leading case, the test for standing is:

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?

Baker v. Carr, 369 U.S. 186, 204 (1969).

In its opposition to the Bethlehem Brief, the Commission again moves to dismiss that brief, this time on the ground that the issues raised in that brief have been rendered moot. Acknowledging the denial of its earlier motion, the Commission states that --

> changed circumstances warrant a second look at Bethlehem's standing. While at one time Bethlehem arguably was injured by the Commission's alleged failure to make an affirmative material injury finding, Bethlehem cannot now allege any injury that is redressable by the panel, because intervening events have rendered moot its only real claim of injury.

Commission Brief at 3. We infer that the Commission is not seeking a rehearing of its prior motion, [71] but rather that it is asserting new grounds for dismissal based on events that have occurred since denial of the earlier motion. Those events are the certification of facts (as presented in affidavits by Algoma) that had not been filed at the time of the earlier motions. Panel Docket No. 293.

Bethlehem asserts that the Panel should not address the matter anew because principles of law of the case [72] bar relitigation of a matter previously decided unless there are special circumstances. Bethlehem Reply Brief at 4, citing Arizona v. California, 460 U.S. 605, 619 (1983). Bethlehem asserts that there are no special circumstances in this case.

Although principles of law of the case would normally preclude consideration of successive motions to dismiss, the facts presented in the

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[71] A rehearing is not a vehicle to relitigate and a "previous decision will not be disturbed unless it is 'manifestly erroneous.'" RSI (India) Pvt., Ltd. v. United States, 688 F. Supp. 646, 647, quoting United States v. Gold Mountain Coffee, Ltd., 601 F. Supp. 212, 214 (CIT 1984), in turn quoting Quigley & Manard, Inc. v. United States, 496 F.2d 1214 (CCPA 1974). Manifest error consists of such flaws in the prior proceedings as: (i) an error or irregularity in the original proceeding, (ii) a serious evidentiary flaw, and (iii) the discovery of important new evidence not available at the time of the original proceeding. Bomont Industries v. United States, 720 F. Supp. 186, 188 (CIT 1989); North American Foreign Trading Corp. v. United States, 607 F. Supp. 1471, 1473 (CIT 1985), aff'd, 783 F.2d 1301 (Fed. Cir. 1986), and cases cited therein. The Commission has pointed to nothing in the prior proceedings that might warrant our examination of whether the threshold is met for rehearing.

[72] "As most commonly defined, the doctrine [of law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618 (1983) (citations omitted).

affidavit indicate a changed factual circumstance: all of Algoma's new steel rail that was entered into the United States between March 13, 1989, and September 20, 1989, has been liquidated. [73] [74] Panel Docket No. 293. The facts in the affidavit were not before the Panel at the time of the earlier decision and were not necessary to the argument or decision on whether Bethlehem had standing.

The significance of liquidation rests on the fact that imported articles become subject to antidumping and countervailing duties on different dates depending on whether the Commission found that they are causing present material injury or found that they threaten material injury. If they are found to cause present material injury, the articles become subject to antidumping and countervailing duties as of the date of the Commerce preliminary determination. [75] 19 U.S.C. §§ 1671e(b)(1) and 1671b(d)(1) (countervailing duty) and 19 U.S.C. §§ 1673e(b)(1) and 1673b(d)(1) (antidumping). If they are found to threaten material injury, the articles become subject to antidumping and countervailing duties as of the date of publication of notice of the Commission's final determination in the Federal Register. 19 U.S.C. § 1671e(b)(2) (countervailing duty) and 19 U.S.C. § 1673e(b)(2) (antidumping).

The Commerce preliminary determination in the countervailing duty investigation case was published on March 2, 1989, and the preliminary

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[73] An affidavit making the same factual statements regarding Sydney's exports to the United States was filed at an earlier date.

No one has challenged the facts asserted in the affidavits. Therefore, they are assumed to be true as alleged.

[74] Liquidation refers to the final administrative action in which duties (regular duties and special duties such as antidumping duties) are conclusively determined, the duties are collected, and the file on the particular importation is closed. Liquidation is final. Once it occurs, the imported merchandise subject to the liquidation cannot be assessed further duties. See Zenith Radio Corp. v. United States, 710 F.2d 806, 810 (Fed. Cir. 1983); American Spring Wire Corp. v. United States, 578 F. Supp. 1405 (CIT 1984).

[75] Imports that threaten material injury and but for a suspension of liquidation would have led to a finding of material injury are subject to antidumping and countervailing duties from the date of the Commerce preliminary determination. 19 U.S.C. §§ 1671d(b)(1) and 1673d(b)(1).

determination in the antidumping case was made on March 6, 1989. 54 Fed. Reg. 8784 (March 2, 1989) and 54 Fed. Reg. 10393 (March 13, 1989), respectively. Notice of the Commission's final determination was published on September 20, 1989. 54 Fed. Reg. 38751. Thus, duties in these investigations are effective as of September 20, 1989. If Bethlehem had prevailed on present material injury, the imports would be subject to duties as of March 1989 rather than September 1989.

At U.S. customs law, liquidation of entries is final; once entries of merchandise have been liquidated, they are beyond the reach of potential antidumping duties or countervailing duties that were not applied to them. United States Steel Corp. v. United States, 792 F.2d 1101 (Fed. Cir. 1986); Zenith Radio Corp. v. United States, 710 F.2d at 810; Nuove Industrie Elettriche di Legano S.p.A. v. United States, Slip Op. 90-51 (C.I.T. June 1, 1990); American Spring Wire Corp. v. United States, 578 F. Supp. 1405 (CIT 1984).

Once liquidation has occurred, there is nothing that can be done to "redress the alleged injury [to the U.S. industry] because [the Panel] could not reach the entries in question." United States Steel Corp. v. United States, 792 F.2d at 1101. The dispute between the parties, for purposes of this Panel, is effectively at an end because the Panel cannot fashion any order that would have the effect of authorizing or requiring the collection of antidumping and countervailing duties or both on entries that have been liquidated. See National Corn Growers Association v. Baker, 840 F.2d 1547, 1553 (Fed. Cir. 1988); Sunco Steel Tube Division, Ferrum, Inc. v. United States, 698 F. Supp. 927, 932 (CIT 1988). Therefore, even if Bethlehem had prevailed on each and every one of its challenges to the various factual and legal findings of the Commission or individual Commissioners, it has no substantive rights that would be affected by the outcome of this review.

Panel review can be exercised only where the Panel can address some injury suffered by a litigant. See U.S.-Canada Free Trade Agreement, Ch. 19, Art. 1904:3. (Panel to apply general legal principles) and Art. 1911 (general

legal principles include mootness). See also Iron Arrow Honor Society v. Heckler, 464 U.S. 67, 70 (1983); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976). Because the parties' lack a legally cognizable interest in the outcome of the dispute, the case is moot and must be dismissed. See Murphy v. Hunt, 455 U.S. 478, 481 (1982); Powell v. McCormack, 395 U.S. 486, 496 (1969). [76]

**B. Mootness of the Motions to Strike and to Stay.**

The Panel's April 2, 1990, order afforded Bethlehem the opportunity either to prepare a new public version of its brief or to explain why information deleted from a number of specific pages of the public version of the brief was business confidential (i.e., not releasable to the public) and, therefore, properly deleted from the public version of the Brief. [77] Bethlehem responded by filing a respectful letter that said that, in its view, the information deleted from the public version of its Brief was business confidential. Thereafter, Sydney moved that the Brief be stricken for failure to comply with the April 2, 1990, order. Bethlehem, in turn, moved for a stay of the Panel's April 2, 1990, order.

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[76] Due to the dates in the Algoma affidavit, it is possible that there were entries of Algoma's new steel rail between March 2 and March 13, 1990, that have not been liquidated. No party has made any such factual assertion, however. Moreover, whether there are any such unliquidated entries is irrelevant because the Commission's negative present material injury determination has been upheld supra.

[77] That order appears to have engendered some confusion among the parties about whether the Panel asserted jurisdiction to decide whether any individual piece of information is business proprietary and, if so, whether to order its public release. Such jurisdiction was contested by the Commission. This confusion is misplaced.

First, the Panel did not reach the issue of jurisdiction because it did not order the release of any information. Rather, the Panel exercised its powers to control the proceedings before it and to speed the resolution of issues raised within the time-frame for Panel determinations.

Second, the Panel's order did not require the release of any information whose business proprietary status was in dispute. Bethlehem was given the option of explaining why, in its view, each contested item of information was properly treated as business proprietary. Bethlehem could have fully complied with the order by doing so.

The substantive issues raised in the Bethlehem Brief have been rendered moot by the liquidation of entries because there is no additional substantive relief that this Panel could afford Sydney even if Sydney were to prevail on the motion to strike. Moreover, the Commission's determination that any present material injury is not by reason of the subject imports has been affirmed. The motion to strike has been rendered moot and, therefore, is dismissed. [78] The motion for a stay of the Panel's order has also been rendered moot by the same events and, therefore, is dismissed.

## IX. DISSENTING VIEWS OF PANEL MEMBER GOTTLIEB ON WHETHER THE PLURALITY'S DETERMINATION THAT AN INDUSTRY IN THE UNITED STATES IS THREATENED WITH MATERIAL INJURY IS SUPPORTED BY SUBSTANTIAL INFORMATION OF RECORD AND IS OTHERWISE IN ACCORDANCE WITH LAW.

The jurisdiction of this Panel is created pursuant to Article 1904 of the Canada-United States Free Trade Agreement (the "FTA"). Under Article 1904(2) of the FTA, the Panel's jurisdiction is limited to determining "whether [a final antidumping or countervailing duty] determination [of a competent investigating authority] was in accordance with the antidumping or countervailing duty law of the importing Party". Thus, this Panel is charged with issuing a decision as to whether the determination of the U.S. International Trade Commission (the "Commission" or "ITC") is in accordance with U.S. law.

The Panel's jurisdiction is limited to approving or disapproving an existing final determination. As stipulated by Article 1904(8) of the FTA, the Panel may come to one of only two conclusions following its review of the Commission's final determination: "The panel may uphold a final determination or remand it for action not inconsistent with the panel's decision." Article

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[78] Accordingly, the Panel does not rule on whether any of the information deleted from the public inspection version of the Bethlehem Brief was public rather than business confidential. However, there is reason to believe that the deletion of certain material consisting solely of arguments and broad characterizations of the record may well be excessive. Moreover, it is doubtful that the names and citations of publicly reported cases before the Commission's reviewing courts are business confidential and the arguments to the contrary do not appear persuasive.

1904(11) of the FTA defines remand as a "referral back for a determination not inconsistent with the panel . . . decision."

Although the Panel's scope of authority is narrowly defined and is expressly limited (for example, it has no injunctive or contempt powers), both the FTA and the relevant U.S. implementing legislation provide that, from a legal point of view, the Panel is a substitute for the U.S. Court of International Trade in reviewing the lawfulness of the Commission's injury determinations.

Therefore, under U.S. law, this Panel has the same authority in its decision-making as do U.S. Courts. The FTA stipulates at Article 1904(1) that a binational panel review "shall replace judicial review of final antidumping and countervailing duty determinations." The FTA further stipulates that a "decision of a panel . . . shall be binding" on the United States. FTA Article 1904(9).

Thus, the FTA requires the United States to comply with a Panel decision, which replaces domestic judicial review. In legislation implementing the FTA, the United States has provided for full compliance with this international obligation. That legislation added a new provision to U.S. law, entitled "Implementation of International Obligations Under Article 1904," and providing in pertinent part that, after a remand by a panel, the "Commission shall, within the period specified by the panel or committee, take action not inconsistent with the decision of the panel." 19 U.S.C. § 1516a(g)(7)(A). Thus, as a matter of United States law, the Commission is under the obligation to implement this Panel's decision.

For reviewing the Commission's findings, Article 1904(3) of the FTA provides that the Panel --

> shall apply the standard of review described in Article 1911 and the general legal principles that a court of [the United States] otherwise would apply to a review of a determination of the competent investigating authority.

FTA, Article 1904(3). Article 1911 of the FTA, in turn, defines the "standard of review" as "the standard set forth in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended [19 U.S.C. § 1516a(b)(1)(B)]." (emphasis in original).

Section 516A(b)(1)(B) of the Tariff Act of 1930 requires that this Panel

overturn the Commission's determination if it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(b) (1988). In defining this standard of review, the U.S. Court of International Trade has directed that "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Matsushita Electric Industrial Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984); American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1276 (CIT 1984), aff'd sub nom, Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1988) (quoting Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951)).

The standard of review is a two-tiered standard:

> [T]o prevail under the substantial evidence standard, a plaintiff must show either that the Commission has made errors of law or that the Commission's factual findings are not supported by substantial evidence.

National Association of Mirror Manufacturers. v. United States, 696 F. Supp. 642, 644 (CIT 1988).

Having in mind the foregoing, we are therefore in the same position, in this case, as the Court of International Trade ("CIT"), and must apply the criteria applied by the CIT in determining whether and under what conditions a decision of the Commission may be altered or otherwise remanded for reconsideration.

I understand the law and practice of the CIT to be to the effect that a decision of the ITC will stand unless certain elements are found which would lead us to believe that the determination is either "unsupported by substantial evidence on the record, or otherwise not in accordance with law."

In the present case, the ITC has found that the domestic industry was suffering material injury but that the material injury was not caused by the dumped and/or subsidized imports. However, the ITC then went on to find, on a three-to-three decision, that the dumped and/or subsidized imports threatened material injury.

In order for a threat of injury finding to be made, section 1677(7)(F)(i)

of Title 19 of the U.S. Code directs the ITC to consider the following criteria:

> (**I**) If a subsidy is involved, such information as may be presented to it by [Commerce] as to the nature of the subsidy (particularly as to whether the subsidy is an export subsidy inconsistent with the Agreement [on Subsidies and Countervailing Measures]),
>
> (**II**) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States,
>
> (**III**) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level,
>
> (**IV**) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise,
>
> (**V**) any substantial increase in inventories of the merchandise in the United States,
>
> (**VI**) the presence of underutilized capacity for producing the merchandise in the exporting country,
>
> (**VII**) any other demonstrable adverse trends that indicate the probability that the importation (or sale for importation) of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury,
>
> (**VIII**) the potential for product-shifting if production facilities owned or controlled by the foreign manufacturers, which can be used to produce products subject to investigation(s) [or final orders under] this title, are also used to produce the merchandise under investigation,
>
> (**IX**) [provisions relating to agricultural products], and
>
> (**X**) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.

19 U.S.C. § 1677(7)(F)(i).

It is noted from these criteria that the ITC is directed to find something more than a <u>possibility</u> that dumped or subsidized imports will cause injury. It is to be further noted that in considering threat of material injury, the ITC is not to speculate. 19 U.S.C. § 1677(7)(F)(ii).

This reflects the intent of the legislature in 1979. The Senate Report states:

> In determining whether an industry in the United States is threatened with material injury, the ITC will consider the likelihood of actual material injury occurring. It will consider any economic factors it deems relevant, and consider the existing and potential situation with respect to such factors. An ITC affirmative determination with respect to threat of material injury must be based upon information showing that the threat is real and injury is imminent, not a mere supposition or conjecture. . . .

S. Rep. No. 96-249, 96th Cong., 1st Sess. 88-89 (1979) (emphasis supplied). The House Report, for its part, states:

> With regard to the standard for a threat of material injury, the committee intends that the ITC affirmative determination shall be based upon evidence showing that the threat is real and imminent and not upon mere supposition or conjecture.

H. Rep. No. 96-317, 96th Cong., 1st Sess. 47 (1979) (emphasis supplied).

This is reflected in the statute:

> **(ii)** Basis for determination
>
> Any determination by the Commission under this subtitle that an industry in the United States is threatened with material injury shall be made on the basis of evidence that the threat of material injury is real and that actual injury is imminent. Such a determination may not be made on the basis of mere conjecture or supposition.

19 U.S.C. § 1677(7)(F)(ii) (emphasis supplied).

While there is no judicial interpretation of the word "threat," the criteria outlined in the statutes reflect what is in Article 3 of the GATT Code and, especially, Paragraph 6, which provides:

> 6. A determination of threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

1979 GATT Anti-Dumping Code, Art. 3, ¶ 6 (emphasis supplied). The Anti-Dumping Code gives an example where a determination of threat of injury could be justified:

> One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the immediate future, substantially increased importation of the

product at dumped prices.

1979 Anti-Dumping Code, Art. 3, Paragraph 6, Note 6.

The undersigned is uneasy about the reasoning underlying the threat of material injury finding of the three Commissioners forming the Plurality in that they make use in various places of the words "can" or "may" (see New Steel Rails, Invs. Nos. 701-TA-297 (Final) and 731-TA-422 (Final), USITC Pub. 2217 (Sept. 1989) at 23 and 24; Pub. Doc. 189 at 23 and 24). Neither of these words reflects or implies a "threat;" these words merely indicate a possibility of something happening which is far short, in my humble view, of the requirements of the statute.

However, the Plurality did find a number of harmful activities relating to the dumped or subsidized goods, the main ones of which were the following:

-- Substantial increase in imports (in both volume and value terms).

-- Substantial increase in market share (even though the relevant market penetration was not significant).

Notwithstanding the vague language of the finding, if I were to be considering the "threat" finding in isolation, I might be inclined to say that there was, at least, some evidence of threat of injury by reason of imports to justify allowing the decision to stand, although I am still troubled by what appears to be a lack of connection or causality between the importation of the dumped or subsidized imports and the material injury suffered by the domestic industry.

However, my discomfort becomes even greater when I consider that essentially the same set of facts led the Commission to find no injury by reason of dumped or subsidized imports. In the context of a finding of no material injury wherein the facts were recited at great length, it seems to me that in order for the Commission to make a threat of injury finding, some "new element" of a significant nature must be identified which caused "non-injurious activities" to become "injurious" in a "likely" or "threatening" way.

Dictionary definitions of threat imply something that is likely and imminent. Webster's New Twentieth Century Dictionary of the English Language

(unabridged, Second ed., 1977) defines the term as follows: "An indication of imminent danger, harm [or] evil." The definition of The Oxford English Dictionary (Oxford; Clarendon Press, 1961), vol. XI, is similar: "An indication of impending evil." (emphasis supplied in both instances).

This new element can only be one or both of the following:

1. That in the face of the same activities relating to dumped or subsidized goods, there is a threat of injury because the domestic industry is becoming weaker; and/or
2. Where the condition of the domestic industry is not deteriorating, that the activities relating to dumped or subsidized goods are becoming more threatening by reason of some new activity.

In the present case it does not appear as if the domestic industry is weakening; indeed, there is some suggestion that it is becoming stronger, even within the context of the business cycle.

Furthermore, there do not appear to be any "new" activities of an imminent nature which worsen or render more threatening the impact on the domestic industry. The Plurality Commissioners, who found a threat of injury, referred to the following elements:

1. A decrease in Canadian home market shipments;
2. An increase in Canadian unused capacity;
3. An increase in Canadian production exported (with an increasing share of those exports being marketed in the U.S.);
4. An increased share of apparent U.S. consumption held by Canadian imports in both volume and value terms;
5. An increase in inventories of steel rails from Canada in the U.S.; and finally
6. An increasing preference among Class I railroads in the U.S. for premium rail (which are imported more and more from Canada).

However, the same activities of foreign producers of the subject goods led those Commissioners to find that they were not a cause of material injury to

the domestic industry. In the face of this finding, it seems to me that the finding of threat of injury based on the same set of facts must have arisen through one or several of the following events:

1. A misapplication of the law;

2. Speculation;

3. Disregard of the evidence.

In my mind, the finding of no injury by reason of dumped or subsidized imports creates at least a presumption of fact that there is no threat of injury by reason of the same set of facts, all things being equal. It seems to me that it is incumbent upon a Tribunal seeking to make a threat of injury finding under such circumstances to clearly indicate those events which are not injurious actually but which constitute a threat for the future, as it were, which are likely to arise and which will constitute the new element in a way that is imminent. Failure to do so leads them to speculate -- which they are not permitted to do -- when they made a threat of injury finding. Words to the effect that an activity "may" occur, or "can" occur, in my humble view, do not meet the statutory test.

All the definitions and criteria on injury would be useless if it were possible to circumvent them by reverting to the notion of "threat of injury" when the actual injury mentioned is insufficient to justify the application of protective measures. It was clearly one of the objects of the 1979 legislation to prevent the concept of threat from being used as an excuse to justify the application of protective measures when there is no prospect of material injury being caused to the domestic industry.

The foregoing remarks are made with respect for the Commission and also my colleagues, who have much more experience than I in United States law.

The reasons discussed in my remarks lead me to conclude that the Commission finding is not in accordance with U.S. law and this, insofar as the Plurality based its threat of injury findings on the mere possibility of something happening -- as made explicit by their use of the word "can" and "may".

In other words, the reasoning underlying the threat of injury findings falls far short of the requirements of the statute.

In any case, even if such reasoning had been in accordance with U.S. law, I believe that the Panel should remand to the Commission for an explanation of how the factual situation had changed so as to indicate the presence of some "new elements" which caused "non-injurious activities" to become "injurious" in a likely or "threatening" way.

For the reasons outlined above, I respectfully dissent from the Section VI of this opinion.

## X. CONCLUSION.

For all of the foregoing reasons, the determinations of the United States International Trade Commission in investigations Nos. 701-TA-297 (Final) and 731-TA-422 (Final) that an industry in the United States is threatened with material injury by reason of dumped imports of new steel rails from Canada and that an industry in the United States is threatened with material injury by reason of subsidized imports of new steel rails from Canada are AFFIRMED.

**SIGNED IN THE ORIGINAL BY:**

Italo H. Ablondi

Italo H. Ablondi, Esq., Chairman

Martin Freedman

Martin Freedman, Q.C.

Richard Gottlieb

Richard Gottlieb, Q.C.

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