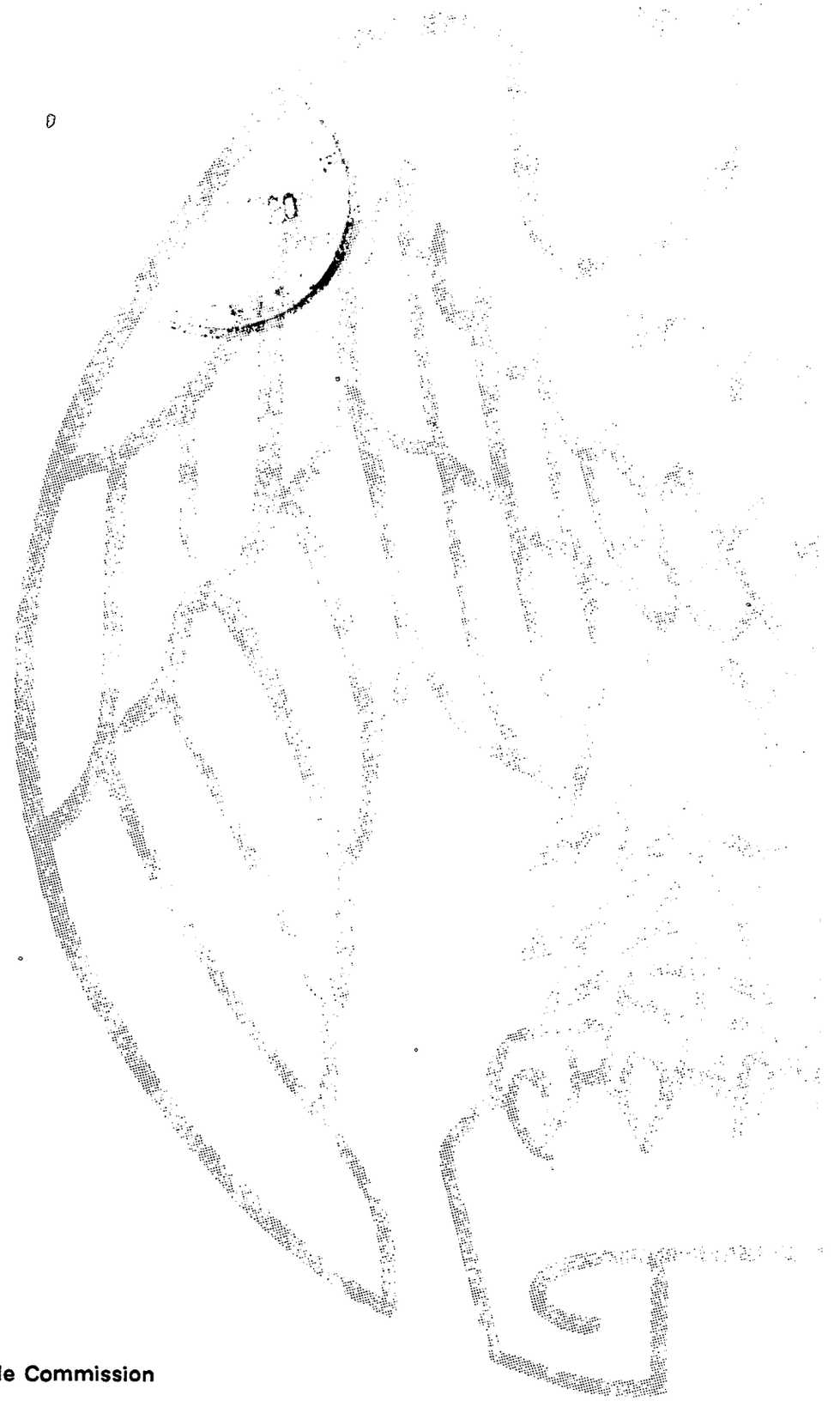
CERTAIN BRASS SHEET AND STRIP FROM JAPAN AND THE NETHERLANDS

Views on Remand in
Investigations Nos.
731-TA-379 and 380
(Final)



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UNITED STATES INTERNATIONAL TRADE COMMISSION

COMMISSIONERS

Anne E. Brunsdale, Chairman
Ronald A. Cass, Vice Chairman
Alfred E. Eckes
Seeley G. Lodwick
David B. Rohr
Don E. Newquist

Address all communications to
Kenneth R. Mason, Secretary to the Commission
United States International Trade Commission
Washington, DC 20436

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Investigations Nos. 731-TA-379 and 380 (Final) (Remand)

CERTAIN BRASS SHEET AND STRIP FROM JAPAN
AND THE NETHERLANDS

Remand Determinations 1/

On the basis of the record developed in these investigations, and in light of the remand to the Commission by the U.S. Court of International Trade in Metallverken Nederland, B.V. v. United States, Ct. No. 88-09-711, slip op. 89-170 (Dec. 18, 1989) and Cambridge Lee Industries, Inc. v. United States, Ct. No. 88-09-714, slip op. 89-173 (Dec. 21, 1989), the Commission 2/ determines on remand that, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)), an industry in the United States is materially injured 3/ by reason of imports from Japan and the Netherlands of certain brass sheet and strip, that have been found by the Department of Commerce to be sold in the United States at less than fair value. 4/

1/ The Commission's original affirmative final determinations in these investigations are set forth in Certain Brass Sheet and Strip from Japan and the Netherlands, Inv. Nos. 731-TA-379 and 380 (Final), USITC Pub. No. 2099 (July 1988).

2/ Commissioners Eckes and Lodwick, whose original affirmative determinations of present material injury by reason of subject imports were affirmed by the Court, readopt their original views in their entirety. Commissioner Newquist, who did not participate in the original investigations, adopts the views of Commissioner Eckes and Lodwick. See, Views on Remand of Commissioner Don E. Newquist.

3/ Commissioner Rohr adopts his original affirmative threat determination to the extent not inconsistent with the Court's remand opinion, and issues further views on remand. See, Views of Commissioner David B. Rohr.

4/ Chairman Brunsdale and Vice Chairman Cass dissented from the Commission's original affirmative determinations, and readopt their respective views in their entirety.

Views of Commissioner David B. Rohr

Inv. Nos. 731-TA-379 & 380 (Remand)
Certain Brass Sheet and Strip
from
Japan and the Netherlands

I determine, pursuant to section 735(b) of the Tariff Act of 1930, as amended, and the remand order of the United States Court of International Trade, that the domestic industry is threatened with material injury by reason of imports of certain brass sheet and strip which the Department of Commerce has determined to be sold at less than fair value.[1] I further determine, pursuant to section 735(b)(4) of the Tariff Act of 1930, as amended, that I would have found material injury by reason of the imports of the merchandise with respect to which Commerce has made an affirmative finding under subsection (a) of that provision, but for the suspension of liquidation of entries of that merchandise.[2]

Scope of these Views

In making this determination, I take special note of the issues raised by the Court of International Trade in its decision of December 18, 1989 in *Metallverken Nederland B.V. & Outokumpu Metallverken, Inc. v. United States*, slip op. 89-170, and in its decision of December 21, 1989 in *Cambridge-Lee Industries, Inc. v. United States*, slip op. 89-173. The issues in the Court's remand relate specifically to my views explaining the affirmative threat determinations that I made in *Inv. Nos. 731-TA-379 and 380 (Final), Certain Brass Sheet and Strip from Japan and the Netherlands*. The Court is concerned with:

1) the implications of my erroneous dating of the suspension of liquidation in

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[1] To the extent not inconsistent with these views and the opinion of the Court of International Trade, I incorporate into these Views my original Separate Views contained in Certain Brass Sheet and Strip from Japan and the Netherlands, Investigation Nos. 731-TA-379 and 380, USITC Pub. 2099 at 29-36 (July 1988)("*Separate Views*").

[2] The scope of the Commission's responsibility in a remand such as this has never been clarified. While the concerns of the Court related specifically to discrete parts of my separate views, I proceed with the assumption that the remand is of the Commission's final affirmative determination, *in its entirety*, to the Commission, *as a whole*. Thus, even though the Court asked for additional explanation only of specific issues, my determination covers all issues in the investigation(s).

these investigations as September 1987 rather than February 1988;[3]

2) an explicit statement with some analysis of whether the increased capacity of the foreign industry is likely to result in a significant increase in exports to the United States;[4] and

3) an explicit statement of whether the threat of injury that I determined to exist was "real and imminent."[5]

I also note that my colleague Commissioner Newquist has made affirmative determinations in this remand investigation on the basis of the Eckes/Lodwick analysis that has already been affirmed by the Court. My affirmative threat determinations may thus be regarded as no longer controlling and unnecessary to an affirmance of the Commission determination.[6] Nevertheless, I provide these separate views in response to the issues that the Court raised in the event the Court finds them necessary or appropriate to a disposition of this matter.

Suspension of Liquidation

In preparing my views explaining my final determination in this investigation, I erroneously used September 1987 as the date of suspension of liquidation of the relevant entries rather than the correct date of February 1988. The Court found this error to be harmless with respect to my affirmative "but for" determination under 19 U.S.C. §1673d(b)(4)(B).[7] With respect to my analysis of import penetration, however, the Court stated:

> The Court is, however, unable to ascertain to what extent the Commissioner relied on this factor in his analysis and whether his conclusion would have been different had he known the actual date of suspension of liquidation.[8]

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[3] Slip op. 89-170 at 35-36.

[4] *Id.* at 38.

[5] *Id.* at 45-46.

[6] If so, I would hope that this matter could be dealt with expeditiously and without any further expense to any of the parties.

[7] Slip Op. 89-170 at 49.

[8] *Id.* at 35.

In answer to the specific question posed by the Court, my conclusion is not different given that suspension of liquidation occurred in February 1988 rather than September 1987.

The Court stated that it was unable to ascertain the role of the suspension of liquidation in my analysis. In my original views, in analyzing the impact of the volume of imports on the market, I stated that there had been declines, which I characterized as "slight," in 1987 in the import penetration of both Japanese and Dutch imports. I went on to state:

> I also note, however, that 1987 figures may have been affected by the suspension of liquidation and preliminary duties that went into effect in September of 1987.[9]

In making this statement, I was addressing generally the role of import volumes in my analysis of the threat posed by dumped imports on the domestic industry, the weight of particular data on import volumes, and the impact of events in the course of the proceeding, specifically the suspension of liquidation, on the weight to be given data in assessing the role of import volumes.

Obviously, if foreign producers are, in the ordinary course of business (i.e. without respect to the possibility that they will be made subject to antidumping duties), abandoning or lessening their presence in the U.S. market, their dumped imports would pose "less" of a threat than otherwise. Declining import trends might be an indication of such an abandonment or lessening. The data in this investigation did show a slight decline in import penetration in 1987 and a more pronounced decline in the first part of 1988. However, in evaluating any data in an investigation, I do not simply accept the numbers without a rigorous scrutiny their meaning in the particular context of the specific investigation before me.[10] In

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[9] *Separate Views*, USITC Pub. No. 2099 at 33.

[10] I note that respondents urged the Commission to look behind the data when they believed such scrutiny advanced their case. This is, in essence, their argument that the Commission should ignore 1984 data because it was not normal for this industry. In my original Separate Views, I agreed that the 1984 data were somewhat aberrational and placed less weight on the data because it was not indicative of ordinary operating conditions. *See Separate Views* at 29 (1984 was a particularly good year); 31 (unusual circumstances characterized 1984). I also acknowledged a variety of other factors made particular data unrepresentative of normal conditions for the industry, irrespective of which side of the argument such aberrations favored. *Id.* at 30 n.6 (start up expenses); 31 n.8 (overall, the 1986 and 1987 data reflected normal domestic operating margins).

this case, I was concerned that the declines in market share that appeared to exist could have been influenced by the existence of these proceedings, which could distort normal market forces. In such an event, the conclusion that the foreign producers were abandoning or lessening their presence in the market would not be justified.

The Court noted that import levels may be affected by an affirmative preliminary dumping determination and the consequent suspension of liquidation and assessment of provisional duties.[11] The affirmative preliminary determination of Commerce, however, is not the only action in connection with a dumping action that may affect the behavior of the buyers and sellers in the market. Affirmative preliminary determinations of the Commission may also affect the market. The initiation of a dumping case in the first instance, and even the filing or rumored filing of a dumping case, can also affect the decision to buy and sell domestic or imported product.[12]

These investigations arose out of a petition that was originally filed in July 1987. Formal initiation by Commerce occurred in August 1987. The Commission made its preliminary determinations in September 1987. Commerce was to have made its preliminary determinations in December 1987, but, because of postponements requested by respondents, the preliminary did not issue until February 1988. After more postponements, Commerce made its final determination in June 1988. The Commission made its final determination in July 1988.

Suspension of liquidation is a noteworthy event among the various preliminary events in the course of an antidumping investigation.[13] It was thus convenient to use it to illustrate the point I was making. The underlying question was whether the data for 1987 and 1988

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[11] Slip op. 89-170 at 35.

[12] *See, eg.*, USX Corp. v. United States, 11 CIT _____, 655 F. Supp. 487, 492 (1987). Sometimes, purchasers or sellers may rush to import larger quantities of the imports to "beat" the higher prices or imposition of duties. Sometimes, purchasers or sellers will be more reluctant to engage in import transactions.

[13] While events early in an investigation may provide incentives to increase or decrease exports, after the suspension there is little incentive to increase them.

reflected normal, ordinary commercial activity or whether they may reflect aberrations caused by our investigations. Half of 1987 and all of the 1988 could be affected by these concerns. This question was of particular concern in these investigations because the industry was so close to being "materially injured" and very small changes in the market would be sufficient to push it over the line.

The point I was making by referring to the suspension of liquidation is that I had less confidence that 1987 yearly data and the interim 1988 data reflected normal operating conditions from which I would make projections about the future. I did not believe that the declines that the data show would have occurred absent the investigation nor did I believe that they would be reflective of trends were the investigation to be terminated after a negative finding.

This point, that I do not trust the 1987 and interim 1988 data to reflect the operation of normal market forces, is equally compelling given that September 1987 was the date of the Commission preliminary affirmative determination, which is also likely to have an effect on the market, rather than being the date of the Commerce affirmative. It would also be compelling to me had I chosen to cite July 1987 when the petition was filed. I cannot, and do not, place much weight on the declines in import penetration for 1987 and 1988.

Although the Court viewed the incorrect date of suspension of liquidation as harmless error in the context of my "but for" analysis under 19 U.S.C. §1673d(b)(4)(B), I interpret my obligation in this remand as the making of a full statutory determination, which, if based on threat, requires the additional "but for" determination. I determine that I would have found material injury but for the suspension of liquidation. I find that the interval between September 1987 and February 1988 makes no difference to my affirmative "but for" determination.

The essence of my decision, as stated in my original separate views, in this respect, was that the domestic industry was on the very knife edge of a condition that I would consider reflective of material injury. In my judgement, very small increases in the volume of dumped imports or continuing negative price effects would push the industry over the edge into

material injury.

One of the principal reasons the industry did not experience present material injury was the decline in imports in the most recent periods of the investigation, which I have discussed above. In my judgement, had there been, in February 1988, no affirmative Commerce preliminary determination, suspension of liquidation, and continuation of these investigations, import levels would have increased.[14] That increase, by July 1988, when I made my determination, would have been enough to push the industry over the edge into material injury.

Foreign Capacity

The second issue on which the Court required elaboration concerned foreign capacity. The Court was concerned that I did not explicitly tie the increases in foreign capacity to the likelihood of increased exports to the United States. Within the statutory list of threat related factors, two separate items relate to foreign capacity:

> (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; and
>
> (VI) the presence of underutilized capacity for producing the merchandise in the exporting country.

In addition to these specific discussions of capacity, other capacity related considerations may arise as "other demonstrable adverse trends" or "other relevant economic indicators."

I note that there are distinctions between these provisions. For example, while item II looks to an "increase in production capacity" only if that increase is "likely to result in a significant increase in imports," item VI, relating to the "presence of underutilized capacity," contains no such "likely to result" requirement. One could therefore conclude that Congress

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[14] *See* Industrial Belts from Israel, Italy, Japan, Singapore, South Korea, Taiwan, the United Kingdom, and West Germany, Inv. Nos 701-TA-293(Final) and 731-TA-412 through 419 (Final), USITC Pub. 2194, Views of Commissioner David B. Rohr at 49 n.77 (May 1989). I indicate that one can identify four separate events relating to the suspension of liquidation but that it is not possible to analytically separate the effects of these four contemporaneous events on the market.

thought that existing, available capacity to increase production in an exporting country was *ipso facto* a factor threatening the domestic industry, while increases were clearly a threat only if the increases were likely to result in increased exports to the United States.

In my threat analysis, I did not distinguish between various types of foreign capacity. I did note that the capacity figures were "soft" numbers. By soft, I mean not very probative of limitations on the ability of producers to increase production. Brass products other than those under investigation can be produced in the same facilities as the products under investigation and management has at least some flexibility in deciding which products to produce.[15] In my view, it was not absolutely necessary for me to conclude that there was a likelihood that additional foreign capacity would result in increased imports for me to conclude that the foreign capacity situation weighed in affirmatively in a threat analysis. That capacity exists to expand exports to the United States at the discretion of the foreign producers is itself threatening. Of course, any showing that it is actually likely to increase shipments to the United States increases the threat potential.

In this case, I believe that the facts demonstrate that foreign capacity not only exists but that there is a likelihood that it would result in increased imports. Most of the additional and excess capacity exists within the Japanese industry. The argument was made that this capacity will not result in additional exports to the United States because it will be used to fill increasing demand in other East Asian markets.

There is no question that exports to these markets from Japan are increasing. Japanese exports to countries other than the United States increased in each year for which the Commission obtained data from the Japanese producers. The Japanese argument is credible, however, only if it is clear that the additional capacity being placed on line in Japan is related to the increases in sales to those markets. In my view, the evidence of record does not establish that the capacity increases are related to the expansion in other, particularly East Asian,

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[15] I note that Japanese capacity was given on the basis of "all brass products", while Dutch capacity, whose utilization rates were much higher were on the basis of only C20000 series brass.

markets.

Based on a comparison of 1984 to 1985 data supplied by respondents, Japanese capacity increased by some 8.3 million pounds, while production declined by 26.5 million pounds and non-U.S. exports (for which data is not particularly specific and hence reliable) increased 14.6 million pounds.[16] Between 1985 and 1986, capacity increased another 8.8 million pounds while production increased 10.4 million pounds and non-U.S. exports increased only 3.3 million pounds. The following year, capacity increased 11.8 million pounds while production increased 2.2 million pounds and non-U.S. exports increased only 75,000 pounds.[17]

Respondents claim that any increases in capacity would go to non-U.S. markets. The data shows that over the period of investigation the proportion of the increases in capacity devoted to third country exports grew smaller every year. Neither the changes in production nor the changes in capacity were significantly devoted to the third country markets. I do not find respondents arguments credible in light of the evidence.

Real and Imminent

The final concern expressed by the Court was based on respondent's argument that because I did not use the words "real and imminent" the threat was either too speculative or not likely to be realized in any reasonably short future. I note that I made the judgement in my original views that the threat I postulated would have ripened into actual material injury "but for" the suspension of liquidation. This conclusion means that actual injury would have occurred to the domestic industry by July 1988 had not this proceeding intervened. It is difficult to see any threat that could be more real and imminent than one which would have resulted in actual injury "but for" the suspension of liquidation. I believe the Court recognized this fact when it acknowledged that it was not absolutely necessary to use any

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[16] There was also a drop in Japanese home market shipments of over 44 million pounds, which dwarfs these changes.

[17] Comparing interim figures, capacity declined 2.5 million pounds, an amount comparable to the decline in U.S. exports, while non-U.S. exports decreased 1.4 million pounds.

particular words as long as the substance of the conclusion was evident.[18] However, because the talismanic invocation of magic words appears to be comforting to lawyers and to remove any shadow of a doubt as to my conclusion, I will use the magic words.

I conclude that the threat posed by the Japanese and Dutch imports is real and imminent. The basis for this conclusion is that of my original views. This industry is extremely vulnerable to injury. My only disagreement with my colleagues, Commissioners Eckes and Lodwick, and now Commissioner Newquist, was solely that, looking at exactly the same facts in exactly the same way, I placed this industry just to the uninjured side of the line separating an injured and uninjured industry. Imports entering the United States under the same or similar conditions at virtually any level in excess of that actually recorded in the first two to three months of 1988 would, in my judgement, have pushed the industry over that line. There is certainly a real possibility, even probability, that in the absence of this investigation, and the imposition of duties, that such dumped imports would enter the United States and cause material injury. Given the current conditions of the foreign industry, I judge that the additional exports could be shipped to the United States in a few months if not weeks. The threat posed by the imports could not be more real and more imminent.

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[18] Slip op. 89-170 at 45.

VIEWS ON REMAND OF COMMISSSIONER DON E. NEWQUIST

I submit these views pursuant to the decision in Metallverken Nederland, B.V. v. United States, where the Court of International Trade directed that certain views of a single Commissioner in Certain Brass Sheet and Strip from Japan and the Netherlands [1] be supplemented and clarified. [2] I wish to note that I was not on the Commission at the time of the original determination and I therefore had no opportunity to participate in the development of the investigative record. Further, I believe that in instances where a determination in an antidumping or countervailing duty investigation is remanded in order that the views of Commissioners who voted in the majority be reconsidered or clarified, and those Commissioners are still at the Commission, the investigation should be resolved solely by those Commissioners.

The statute requires the Commission to act within prescribed periods. In my view, it runs counter to the scheme of the statute for a differently constituted Commission to make a new determination, when the participation by a new Commissioner not present during that period is not necessary to effectuate the Court's correction of certain errors of articulation in the views supporting the Commission majority's original determination. In this case, the Commissioner whose views the Court has directed be clarified is

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[1] Inv. No. 731-TA-379 and 380 (Final), USITC Pub. 2099 (July 1988).

[2] Court No. 88-09-00711 (Dec. 18, 1989) (Judge DiCarlo) (Slip Op. 89-170) at 35, 38, 42.

present at the Commission and able to respond. Also, I understand that while my colleague will be presenting additional views on remand, he will reach the same outcome as he originally did. If the Court affirms my colleague's views on remand, my participation in this remand will not affect the outcome of the underlying investigation. [3] For these reasons, my personal view is that it is inappropriate for me to participate in this investigation for the first time on remand. [4] [5] Nevertheless, as the Court has directed that "[t]he Commission shall file its remand determination with the Court," I respectfully comply. [6]

Upon my review of the record developed in Certain Brass Sheet and Strip from Japan and the Netherlands, Inv. No. 731-TA-379 and 380 (Final), I determine that a domestic industry is materially injured by reason of the

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[3] In a case such as this, I do not believe that by succeeding in obtaining a remand of one Commissioner's views, petitioner should then be able to argue successfully that that Commissioner's determination is moot because, independent of his remand determination, the vote of a newly-appointed Commissioner now creates a "new" Commission majority.

[4] See Frozen Concentrated Orange Juice from Brazil, Inv. No. 731-TA-326 (Final)(Remand) (USITC Pub. 2154) at 2 n.2 (Feb. 1989). At least one of my colleagues has expressed a similar view in similar circumstances. See Certain Welded Carbon Steel Pipes and Tubes from Taiwan, Views on Remand in Inv. No. 731-TA-349 (Final), USITC Pub. 2105 (Aug. 1988) at 2 (Views of Commissioner Cass).

[5] This sort of "narrow issue" remand differs from a case where the prior Commission majority is unavailable to explain its prior determination; where the Court has ordered the creation of a new investigative record, see USX Corp. v. United States, 655 F. Supp. 487 (CIT 1987); or where the Court believes it is necessary for the newly-constituted Commission to address on remand "a major policy determination [in the original investigation] [having] broad and significant implications in the interpretation and administration of the antidumping law." SCM Corp. v. United States, 519 F. Supp. 911 (CIT 1981).

[6] It would appear from previous cases that the Court of International Trade considers there to be no exception to the general rule requiring that remands be directed to the entire Commission. See, e.g., Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1103 (CIT 1988); Asociacion Columbiana de Exportades de Flores v. United States, 704 F. Supp. 1068, 1070 n. 2 (CIT 1988). It is my understanding that the parties did not brief the issue in either case.

subject LTFV imports from Japan and the Netherlands. In reaching this determination, I find that the volumes of the subject imports are significant, particularly in light of their pervasive underselling. [7] In addition, I find that the subject imports have been a cause of price suppression and depression. Thus, I do not find that any quality differences between the subject imports and domestically-produced brass sheet and strip are so substantial as to make the underselling by imports, or the effects of such underselling, insignificant. I concur in the analysis of the condition of the domestic industry, and in the reasoning regarding causation, as set forth in the original views of Commissioners Eckes and Lodwick and I hereby join and adopt those views in their entirety.

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[7] I agree that, in view of sharp fluctuations in copper prices in 1987 and 1988, and the fact that essentially all sales of the subject imports and a majority of the domestic industry's sales are made on a non-toll basis, see Staff Report at A-37-A-38, a comparison of toll-account sales prices is of limited probative value. Further, I endorse the use of total price comparisons based on the prices charged for domestic and foreign producers' largest quarterly sales.