

**NATURAL BRISTLE PAINT
BRUSHES FROM THE
PEOPLE'S REPUBLIC OF
CHINA**

Views on Remand in
Investigation No.
731-TA-244 (Final)



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UNITED STATES INTERNATIONAL TRADE COMMISSION

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In 1986, the U.S. International Trade Commission made a determination in Investigation No. 731-TA-244 (Final) that an industry in the United States was threatened with material injury by reason of dumped imports of natural bristle paint brushes from the People's Republic of China (USITC Pub. No. 1805 (1986)). On February 28, 1989, the Commission received a request to review that determination pursuant to section 751(b) of the Tariff Act of 1930, as amended, 19 U.S.C. 1675(b). This request was denied on May 18, 1989, 54 Fed. Reg. 21491. That denial was subsequently appealed to the U.S. Court of International Trade and remanded to the Commission for further consideration (A. Hirsh, Inc. v. United States, Ct. No. 89-06-00366, slip op. 90-05, C.I.T. Jan. 17, 1990). The attached views were submitted to the Court in response to the remand.

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In re Dismissal of Request for Institution
of a Section 751(b) Review Investigation;
Natural Bristle Paint Brushes from the
People's Republic of China

VIEWS OF THE COMMISSION

In this remand determination, we set forth our reasons for dismissing the request filed by A. Hirsh, Inc. (Hirsh) to institute a section 751(b) review of the affirmative determination in Natural Bristle Paint Brushes from the People's Republic of China, Inv. No. 731-TA-244 (Final).

The Commission determined that the request did not show changed circumstances sufficient to warrant a review investigation. 54 Fed. Reg. 21491 (May 18, 1989). Following a challenge to this determination in the Court of International Trade (CIT), A. Hirsh, Inc. v. United States, Ct. No. 89-06-00366, the CIT concluded that the Commission had not provided sufficient reasons for its determination to allow judicial review thereof. Accordingly, the CIT remanded the matter to the Commission for a statement of reasons for its determination to dismiss the request for review. Slip Opinion 90-05 (Jan. 17, 1990). These Views are provided in response to the CIT's remand directive.

I. Section 751(b) and the Antidumping Statutory Scheme

Section 751(b) of the Tariff Act of 1930, 19 U.S.C. 1675(b), authorizes the Commission to institute a review of an outstanding affirmative determination when it is presented with a request for review "which shows changed circumstances sufficient to warrant a review of such determination." Like a section 751(b) review itself, the Commission's decision whether to institute a review proceeding begins "against the backdrop of the original antidumping order." American Permac, Inc. v. United States, 831 F.2d 269, 274 (Fed. Cir. 1987). In evaluating a request for review, the Commission will consider the factors that formed the basis for its original affirmative determination and evaluate the allegations in the request in light of its earlier determination.

As the Commission has previously stated, changes that are simply attributable to the imposition of antidumping relief are not changed circumstances within the meaning of section 751(b), and therefore will not warrant institution of a review proceeding. This approach is grounded in the antidumping statute, which anticipates that antidumping duties will have an effect on imports. Because dumping is offset by the imposition of duties, it is to be expected that an antidumping duty order will result in decreased prices in the foreign market, increased prices for the merchandise in the United States market, or a combination of both. Congress recognized as much in passing the antidumping laws, stating that the imposition of an order "is a discipline on the pricing practices of foreign

manufacturer[s] . . . the order offsets the effects of any dumping." H.R. Rep. No. 1156, 98th Cong., 2d Sess. 182 (1984). Therefore, changes in import price and volume, and related effects such as a depletion of import inventories in the United States that existed before the imposition of antidumping relief, are an expected effect of virtually every antidumping duty order.

The statutory scheme does not envision that such changes provide a basis for institution of a section 751(b) review and subsequent removal of an order, for if that were the case, every order would be subject to review and revocation as soon as the order began to have its intended effect. Congress granted considerable discretion to the Commission to institute review proceedings. See H.R. Rep. No. 317, 96th Cong., 1st Sess. 72 (1979). Moreover, the Court of International Trade (CIT) has noted, "Congress intended the review process to be available on a limited basis", Avesta AB v. United States, 12 CIT _____, 689 F. Supp. 1173, 1180, 1182 (1988), and "a request for review of an affirmative injury determination and the resultant review investigation are premised upon an underlying finding of injury from dumping or subsidization which is entitled to deference and should not be disturbed lightly." Id. at 1180, citing Royal Business Machines, Inc. v. United States, 1 CIT 80, 87 n.18 (1980), aff'd, 669 F.2d 692 (CCPA 1982). Thus, the CIT has concluded that an event that "is simply an anticipated result of the issuance of an antidumping duty order. . . . cannot form the basis for [section 751(b)] review." Id. at 118.

In keeping with the statutory scheme and the CIT's interpretation thereof, the Commission has consistently interpreted section 751(b) to require that a request for review allege changed circumstances that are not attributable simply to the grant of antidumping relief. Thus, for example, increases in U.S. prices for imports subject to an antidumping order, or a decline in import volumes, are an expected result of import relief and do not warrant a review investigation unless the petition provides a sufficient showing that such developments are not attributable to the antidumping relief. Salmon Gill Fish Netting of Manmade Fibers from Japan, Inv. No. 751-TA-5, USITC Pub. 1234 (Mar. 1982) at 7; Television Receiving Sets from Japan, Inv. No. 751-TA-2, USITC Pub. 1153 (June 1981) at 7, 8; Birch Three-Ply Door Skins from Japan, Inv. No. 751-TA-6, USITC Pub. 1271 (July 1982) at 3 n.4, 4 n.8; Stainless Steel Plate from Sweden, 50 Fed. Reg. at 43613-14 (July 1987); Welded Carbon Steel Pipes and Tubes from Turkey, In re Docket No. 1394, Dismissal of Antidumping Review Request (1987) (Views of Commissioners Eckes, Lodwick and Rohr) at 4. Furthermore, the imposition of an antidumping order is expected to have a beneficial effect on a domestic industry. Television Receiving Sets from Japan, Inv. No. 751-TA-2, USITC Pub. 1153 at 8 (June 1981); Welded Carbon Steel Pipes and Tubes from Turkey, In re Docket No. 1394, Dismissal of Antidumping Review Request (1987) (Views of Commissioners Eckes, Lodwick and Rohr) at 7. As the Court noted in the opinion remanding this matter, "the party seeking review

bears the initial burden of showing the existence of changed circumstances sufficient to warrant a review . . ." Hirsh, slip op. 90-5 at 7, citing Avesta AB v. United States, 689 F. Supp. 1173, 1181 (CIT 1988).

II. The Original Commission Determination

In the investigation of Natural Bristle Paint Brushes from the People's Republic of China, the Commission found that the domestic industry producing paint brushes was threatened with material injury by reason of LTFV imports of natural bristle paint brushes from the People's Republic of China (PRC). USITC Pub. 1805 at 14. The Commission found that the industry was "fairly healthy", although its performance had shown some erosion. Id. at 9-10. The determination of a threat of material injury was based on the increase, by volume and market share, of PRC imports, and the likelihood that imports would rise to an injurious level in the future; the increased volume of higher-quality PRC imports; the possibility that PRC capacity could expand and that exports of natural bristle could be shifted to paint brush exports; the likelihood that restrictions on PRC exports to other markets would lead to increased exports to the United States; underselling of domestic merchandise by the PRC imports; and the large increase in PRC import inventories. Id. at 11-13.

III. The Request For Review at Issue

The request for review of the outstanding threat of material injury determination in Natural Bristle Paint Brushes from the People's Republic of China failed to allege changed circumstances within the meaning of section 751(b). Specifically, the request described conditions that were attributable to the existence of the antidumping duty order, failed to document alternative reasons therefor, and attempted to reargue issues that had been addressed in the Commission's affirmative determination for which review was sought. The specific deficiencies of each allegation in the review request are discussed below.

The request for review first asserted that large inventories of natural bristle paint brushes from the PRC in the United States no longer exist, and it is unlikely that inventories would again increase because PRC paint brushes are priced too high to be competitive. Request at 6-7. The request claims that PRC paint brush prices have increased since 1985, the year the antidumping petition was filed. Id. at 7-8. Also, according to the request, most PRC paint brushes are "chip" brushes, a type of brush not produced in the United States, and therefore PRC brushes compete with imports from other countries but not with domestically produced merchandise. Id. at 8.

This allegation does not describe changed circumstances within the meaning of the statute. The request for review appears to ascribe the depletion of import inventories to the decline in PRC imports that followed the imposition of the

antidumping duty order. Id. at 6. In turn, the request attributes the decline in imports to the imposition of antidumping relief. Id. at 8, 20. By Hirsh's own admission, therefore, the decline in imports and import inventories is directly attributable to the pendency of the antidumping order. The request further failed to allege, much less demonstrate, that there was any other reason for these developments. The related declines in imports and import inventories are, consequently, an expected result of the imposition of relief under the antidumping laws and do not constitute changed circumstances. 1/

The claim that PRC imports compete only against other imports, and not against domestic paint brushes, not only was not documented in the request for review but is flatly contradicted by the Commission's final affirmative determination in Natural Bristle Paint Brushes from the People's Republic of China. Based on the record in that investigation, the Commission found competition between the PRC imports and the domestic like product. See, e.g., USITC Pub. 1805 at 13 n.37 and A-43. The request for review did not contest this aspect of the Commission's determination or provide any basis for concluding this circumstance has changed since the Commission's final determination was rendered.

The request did provide import statistics purporting to show

1/ This conclusion concerning the effect of import relief is buttressed by the impact that provisional antidumping duties had on PRC imports during the Commission's final investigation. The Commission found that imports had declined because of the imposition of provisional relief. USITC Pub. 1805 at 12,

an increase in Taiwanese imports since the imposition of the order. See id. at 14-16 and addenda 6-8. However, these statistics include in their coverage all paint brushes that were classified by the Customs Service under item 750.65.00 of the Tariff Schedules of the United States Annotated (TSUSA). This TSUSA category includes synthetic and other types of brushes in addition to natural bristle brushes. The request provided no documentation concerning imports of natural bristle paint brushes, and did not demonstrate that natural bristle brushes from the PRC had been displaced by imports of natural bristle paint brushes from Taiwan or other sources. The request thus failed to document the allegation that natural bristle brushes from other sources have supplanted PRC imports. Moreover, the Commission had previously determined that an increasing number of PRC imports were not chip brushes, but higher quality brushes which competed in a segment of the domestic market which offers greater profits. Id. at 12. The request for review simply ignored the trend toward increased imports from the PRC of higher quality brushes. In sum, the Commission had already established that PRC imports compete against domestic paint brushes, and the request for review provided no reason for us to question this conclusion.

The request then argued that material injury to the domestic industry never, in fact, occurred, and that the Commission's "prediction" of injury was therefore erroneous. Request at 10-11. This argument misunderstands the purpose of a threat of

material injury finding under the antidumping law. An affirmative threat determination and the consequent issuance of an antidumping duty order are designed to prevent the threatened injury from actually occurring. S. Rep. No. 249, 96th Cong., 1st Sess. 89 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 47 (1979). The Commission had determined that continued LTFV imports could materially injure the domestic industry in the future. USITC Pub. 1805 at 13. The "change" that has occurred is the elimination of LTFV sales through imposition of antidumping duties, rather than an incorrect prediction by the Commission. We do not consider the proper working of the import relief laws to be a changed circumstance cognizable under section 751(b).

The request for review next asserted that the threat of price suppression found by the Commission in its affirmative determination does not exist. Request at 11-13. In support of this allegation the request essentially reargues an issue that was settled in the Commission's original determination. Hirsh repeats its claim that PRC imports compete, and have competed in the past, primarily with Taiwanese imports. *Id.* at 12-13. As discussed above, however, the Commission found sufficient competition between the LTFV imports from the PRC and the domestic product to establish a threat of material injury, and the request provided no reason to question this conclusion or believe that these competitive conditions have changed. Moreover, although PRC prices have risen, this rise followed the

imposition of the antidumping duty order. Such a price rise is a foreseeable result of import relief, especially in a case involving imports from a nonmarket economy. 2/

The request merely points out the price increase without providing an argument that price changes resulted from any cause other than the existence of an antidumping duty order. There is no reason to conclude, therefore, that in the absence of an antidumping duty order natural bristle paint brushes from the PRC would remain uncompetitive in the U.S. market.

The alleged changes in the nature of the PRC economy, at least as presented in the request for review, are not changed circumstances that would warrant the commencement of a section 751(b) investigation. See id. at 16-18. The assertion that the PRC economy is no longer centrally controlled, even if true, has not been shown to have any relevance to the threat that imports of natural bristle paint brushes pose to the domestic industry. 3/ The nature of the PRC economy was not a factor in the Commission's affirmative determination, and, with the sole

2/ In a nonmarket economy case, Commerce may calculate LTFV margins by comparing the United States price of the imports under investigation with foreign market value based on factors of production in the exporting country or based on the foreign market value of merchandise in a surrogate market economy. 19 U.S.C. 1677b(c). Consequently, in these situations the imposition of antidumping duties may be avoided or minimized only through an increase in the United States price of the merchandise or the cessation of imports. In such a nonmarket economy case, a decrease in the price of the merchandise in the home market has no effect on the size of the antidumping margin.

3/ We note that the PRC continues to be classified as a state controlled economy for purposes of the antidumping laws.

exception of price, the request for review failed to relate the asserted changes in the PRC to any of the factors that were considered in the Commission's determination.

The request does state that PRC vendors now have an incentive not to sell their product at a loss, and thus to increase their prices. The request for review, however, failed to demonstrate that this "incentive" to higher prices would affect the underselling of domestic paint brushes by the PRC imports found in the Commission's affirmative determination. ^{4/} USITC Pub. 1805 at 13. In view of the importance of price in the United States paint brush market, Id. at A-33-34, the request has provided us with no reason to believe that PRC imports would be sold at a price that would render them noncompetitive in the absence of the antidumping duty order.

To the extent that the request for review implies that price

^{4/} Vice Chairman Cass does not join in this statement. In concurring in the Commission's decision to dismiss the request for review, the Vice Chairman has not placed great weight on the data pertaining to underselling that was collected in the investigation that led to the Commission's earlier affirmative determination. In considering the existence of significant price underselling in accordance with the instruction of Congress (see 19 U.S.C. § 1677(7)(C)(ii)), Vice Chairman Cass believes that it is essential to consider the extent to which differences in prices of the domestic and imported products may reflect product features and sales terms that differ across products and sales. See, e.g., Certain Granite from Italy and Spain, Inv. Nos. 701-TA-289 and 731-TA-381 (Final), USITC Pub. No. 2110 (Aug. 1988); Certain Telephone Systems and Subassemblies Thereof from Japan and Taiwan, Inv. Nos. 731-TA-426 and 428 (Final) ("Telephone Systems"), USITC Pub. No. 2237 (Nov. 1989) at 260 n.183 (Dissenting Views of Vice Chairman Cass). He notes that the record compiled in the Commission's earlier investigation suggested that there were substantial differences in the quality of the domestic and imported Chinese products, and in the uses to which those products were put.

changes will eliminate LTFV margins, it does not present a changed circumstance cognizable by the Commission. The Commerce Department has exclusive jurisdiction over the calculation of LTFV margins, and the Commission must assume that LTFV sales are continuing and will continue for purposes of making a determination under section 751(b). American Permac, Inc. v. United States, 831 F.2d 269 (Fed. Cir. 1987).

The request asserts that the domestic industry continues to be "healthy". Request at 18-21. 5/ Even assuming this to be true, the request did not assert that the current condition of the domestic industry is attributable to causes other than the presence of import relief. 6/ The request also does not provide a basis for concluding that the present condition of the domestic industry would continue in the absence of import relief. It merely repeats the arguments, discussed above, that PRC imports

5/ We note that the industry data submitted with the request cover a broader range of domestic paint applicator production than is encompassed by the domestic industry producing the like product, i.e., natural and synthetic bristle paint brushes. These data therefore provide no specific guidance concerning the current state of the relevant domestic industry.

6/ Vice Chairman Cass also notes that he believes that the statute under which the Commission conducts Title VII investigations does not, in general, contemplate that the Commission will assess the condition of the domestic industry separately from an assessment of the effects of unfairly traded imports on that industry. See, e.g., Telephone Systems, supra, at 171-228 (Dissenting Views of Vice Chairman Cass). Accordingly, the Vice Chairman regards the past or current "health" of the industry as relevant only to the extent that an examination of the condition of the industry assists in determining whether the industry has suffered material injury, or is threatened with material injury, by reason of the unfairly traded imports under investigation.

and inventories declined after import relief was imposed. The presence of an antidumping duty order is presumed to have a beneficial effect on the domestic industry, and the request did not even attempt to attribute the current condition of the domestic industry to anything other than the imposition of antidumping relief.

In short, the request ignores the impact that removal of the order would have on the domestic industry. The continued "health" of the domestic industry demonstrates the efficacy of the antidumping laws, and does not in itself provide a reason for the removal of import relief.

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