

**CERTAIN HIGH-INFORMATION  
CONTENT FLAT PANEL  
DISPLAYS AND DISPLAY  
GLASS THEREFOR  
FROM JAPAN**

Views on Remand  
in Investigation  
No. 731-TA-469 (Final)

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**United States International Trade Commission  
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**UNITED STATES INTERNATIONAL TRADE COMMISSION**

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In August 1991, the U.S. International Trade Commission determined that an industry in the United States was materially injured by imports of high-information content flat panel displays and display glass therefor from Japan that the Department of Commerce had determined to be sold in the United States at less than fair value (USITC Publication No. 2413 (August 1991)). The Commission's determination was appealed to the U.S. Court of International Trade ("CIT") and, on December 29, 1992, the CIT remanded the Commission's determination (Hosiden Corp. v. United States, Slip Op. 92-229 (December 29, 1992)). The attached views were submitted to the court in response to the remand.



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VIEWS OF CHAIRMAN NEWQUIST, COMMISSIONER ROHR  
AND COMMISSIONER NUZUM

Pursuant to the remand order of the U.S. Court of International Trade (CIT) in Hosiden Corp. v. United States,<sup>1</sup> and based on the record in the final investigation as supplemented by the remand investigation, we determine that an industry in the United States is materially injured by reason of imports of active matrix liquid crystal (AMLCD) high-information content flat panel displays (HIC FPDs) and display glass therefor from Japan that are sold at less than fair value (LTFV).<sup>2</sup> We further determine that the same industry in the United States is materially injured by reason of imports of electroluminescent (EL) HIC FPDs and display glass therefor from Japan that are sold at LTFV.<sup>3</sup> We respectfully note our disagreement with the remand order of the CIT, which the Commission has appealed to the U.S. Court of Appeals for the Federal Circuit, and make the present determinations only to comply with this order of the CIT.<sup>4</sup>

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<sup>1</sup> 16 CIT \_\_\_, Slip Op. 92-229 (December 29, 1992).

<sup>2</sup> Although we use the present tense here and in the remainder of the opinion, our analysis and determination deal with data covering the period of investigation.

<sup>3</sup> Commissioner Nuzum does not join in this determination, but rather makes a negative determination with respect to EL displays. See her Additional Views.

<sup>4</sup> Specifically, we respectfully disagree with the Court's conclusion that the antidumping statute proscribes cumulating the impact of two or more classes or kinds of merchandise on a domestic industry where, as here, the like product and the domestic industry are one and the same for each class of subject merchandise. We also disagree with certain aspects of the Court's discussion concerning "like product." In particular, we take issue with the Court's emphasis on the importance of identity between domestic products and subject imports in the statutory scheme.

## I. Procedural Background

The Commission originally reached an affirmative determination in this investigation on August 26, 1991.<sup>5</sup> Respondents subsequently filed suit in the CIT challenging the Commission's determination.

The CIT issued a decision and order on December 29, 1992, remanding the Commission's determination. The CIT instructed the Commission on remand to make two separate determinations corresponding to the two classes or kinds of imported merchandise found by Commerce to be dumped, i.e., AMLCD HIC FPDs and EL HIC FPDs.<sup>6</sup> Moreover, the CIT instructed the Commission to support with substantial evidence any expansion of the like products to include products with "minor differences in physical characteristics or uses" from the imported articles, and any factual finding delineating minor differences.<sup>7</sup> The CIT ordered the Commission to file a remand determination no later than March 8, 1993.

On January 15, 1993, certain respondents filed a request for permission to file briefs concerning the Commission's remand proceeding. Among the reasons provided by the requesting parties for their request was that they wished to discuss the effect of certain scope determinations issued by the Department of Commerce on the Commission's remand determination. Petitioners

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<sup>5</sup> High-Information Content Flat Panel Displays and Display Glass Therefor from Japan, Inv. No. 731-TA-469 (Final), USITC Publication 2413 (Aug. 1991). Chairman Newquist and Commissioner Rohr were part of the Commission majority that made an affirmative determination in the original investigation. Commissioner Nuzum was not a member of the Commission at the time of the original investigation and consequently did not participate in it. She notes that her analysis in this remand determination is based on a de novo review of the record.

<sup>6</sup> Slip Op. 92-229 at 18.

<sup>7</sup> Id. at 25.

filed on January 21, 1993, an opposition to respondents' request. On January 22 and 26, 1993, certain other respondents joined in the request for permission to file briefs.

Accordingly, the Commission on February 1, 1993, issued a notice authorizing the parties to file briefs concerning the issues on remand as well as how the Commission should treat certain scope determinations issued by the Department of Commerce. The parties submitted their briefs on the remand proceeding on February 19, 1993.<sup>8</sup>

## II. Like Product

After careful review of the record in this investigation, and mindful of the court's comments concerning the definition of the "like product" in Title VII investigations, we find that there is one like product consisting of all HIC FPDs for each of the two classes or kinds of merchandise that are subject to investigation. Because we find the same like product for each class or kind of merchandise, our analysis of like product issues for one class is essentially the same as for the other, and will not be duplicated.

In determining whether an industry is materially injured or threatened with material injury by reason of the subject imports, the Commission must first define the "like product" and the "domestic industry." The statute defines the relevant industry as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product

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<sup>8</sup> See Joint Brief of U.S. Computer Systems Manufacturers and Japanese Plaintiffs, (February 19, 1993) (hereinafter cited as "respondents' remand brief.") and Letter from P. Rosenthal and R. Gilbert to P. Bardos, (February 19, 1993) (hereinafter cited as "petitioners' remand brief."). One former petitioner, OIS Optical Imaging Systems, Inc., filed a letter indicating, among other things, that it does not associate itself with the comments filed by petitioners. See Letter from P. Macrory to P. Bardos, (February 19, 1993).

constitutes a major proportion of the total domestic production of that product. . . ."9 The term "like product" is, in turn, defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation. . . ."10 Generally, the Commission looks for clear dividing lines among products in terms of distinct characteristics and uses. Minor variations in products are insufficient to find separate like products.11

The Department of Commerce (Commerce) defined two classes or kinds of merchandise subject to its dumping finding:

Active-matrix liquid crystal high information content flat panel displays (active-matrix LCD FPDs) are large area, matrix addressed displays, no greater than four inches in depth, with a picture element (pixel) count of 120,000 or greater, whether complete or incomplete, assembled or unassembled. Active-matrix LCD FPDs utilize a thin-film transistor array to activate liquid crystal at individual pixel locations. Included are monochromatic, limited color, and full color displays used to display text, graphics, and video.

Electroluminescent high information content flat panel displays (EL FPDs) are large area, matrix addressed displays, no greater than four inches in depth, with a pixel count of 120,000 or greater, whether complete or incomplete, assembled or unassembled. EL FPDs incorporate a matrix of electrodes that, when activated,

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<sup>9</sup> Section 771(4)(A) of the Tariff Act of 1930 ("the Act"), 19 U.S.C. § 1677(4)(A).

<sup>10</sup> 19 U.S.C. § 1677(10). The Commission has typically relied on the following factors in defining the like product: (1) physical characteristics and end uses; (2) interchangeability of the products; (3) channels of distribution; (4) producer and customer perceptions; (5) common manufacturing facilities and employees; and (6) where appropriate, price. See, e.g., Calabrian Corp. v. United States, 16 CIT \_\_\_, 794 F. Supp. 377 (1992). No single factor is necessarily dispositive to the outcome of the analysis and the Commission may consider other factors which it deems relevant based upon the facts of a particular investigation.

<sup>11</sup> See S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979); Asociacion Colombiana de Exportadores de Flores v. United States, 12 CIT 634, 693 F. Supp. 1165, 1169 (1988) (Asocoflores).

apply an electrical current to a solid compound of electroluminescent material (e.g., zinc sulfide) causing it to emit color. Included are monochromatic, limited color, and full color displays used to display text, graphics, and video.<sup>12</sup>

Commerce rescinded its investigation as to HIC passive matrix LCDs and found de minimis margins for HIC plasma displays.<sup>13</sup> The class or kind determination serves as the starting point for our like product analyses.

A. Active Matrix Liquid Crystal Displays

In its remand opinion, the CIT suggests that domestic AMLCDs correspond to the subject AMLCDs because they are identical to the subject imports. The record, however, leads us to a different conclusion. Imported and domestic AMLCDs are not, in fact, identical: first, all types of HIC FPDs are generally customized and specialized to discrete specifications for individual users and uses and even models within uses; and second, some domestic AMLCDs were produced using PIN diode technology whereas imports used thin film

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<sup>12</sup> 56 Fed. Reg. 32376 (July 16, 1991). Commerce also included within the scope display glass corresponding to each class or kind. As in the preliminary determination in this investigation, we do not include in any like product definition FPDs containing less than 120,000 pixels and cathode ray tubes (CRTs). Commerce excluded such products from the scope and no party has argued for their inclusion in a like product. See generally Report at A-18-19. Also not included in the scope were a number of other display technologies, such as electrochromic, electrophoretic, and field emission spun cathode. The record indicates that these technologies are only in the early stages of research and development. Id. at A-7, n.17.

<sup>13</sup> 56 Fed. Reg. at 32382, 32401. We adopt the Commission majority's finding in the original final determination that the like product should not include flat panel displays containing less than 120,000 pixels and cathode ray tubes.

Mitsui Comtek and In Focus requested that the Commission exclude their imports, respectively of computer display components and display glass cells, from the scope of the final investigation. Mitsui Comtek's prehearing brief at 13; In Focus Systems' prehearing brief at 2. As was stated in the Commission majority's original final determination, such an action may only be taken by Commerce.

transistor technology.<sup>14</sup> Nevertheless, domestic and imported active matrix LCDs share some characteristics, such as liquid crystal technology, and uses, such as aerospace.<sup>15</sup> We therefore find domestic AMLCDs are one group of products corresponding to the subject AMLCDs. The question remains, however, whether the like product also includes other types of domestic displays.

Applying the Commission's traditional like product factors to the subject AMLCDs leads us to conclude that it is appropriate in this investigation to broaden the like product to include all domestic HIC FPDs. In terms of physical characteristics, an AMLCD consists of a display glass on the front backed with a matrix of electrodes and a panel of electronics. It is less than four inches thick, contains at least 120,000 pixels and generally can display at least 25 by 80 characters of text when integrated into end user systems such as computers and other equipment. Other types of HIC FPDs share these same physical characteristics.<sup>16 17</sup>

AMLCDs and other types of HIC FPDs are found in common end use applications. Although some of the specific end uses for a given display type

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<sup>14</sup> Report at 39, n. 92.

<sup>15</sup> Report at A-28-29.

<sup>16</sup> Report at A-5-6. Although each display type has certain characteristics unique to its technology, differences in technical characteristics have not precluded a finding of one like product. See, e.g., Sony Corp. of America v. United States, 13 CIT 353, 712 F. Supp. 978, 982 (1989) (one color picture tube like product appropriate despite differences in shadow mask, electron gun type, shape of faceplate, and production process).

<sup>17</sup> Respondents argue that power consumption provides a clear dividing line between AMLCDs and other technologies. However, we find that the record is too mixed concerning power consumption to justify such a dividing line, particularly in view of other information in the record regarding like product factors. See, e.g., Report at A-12-13, A-26, n.61; Petitioner's postconference brief, Attachment C; respondent IBM's posthearing brief, Appendix D at 8; Petitioners' prehearing brief at 14-15.

can depend on the technology of the display,<sup>18</sup> two or more technologies are routinely found in computers, medical equipment, aerospace, and control equipment.<sup>19</sup> Certain computer makers offer essentially the same computer with a choice of display types.<sup>20</sup> The common applications for emissive and non-emissive displays,<sup>21</sup> such as monochrome aerospace, involve small volumes relative to those in the laptop computer market. Nonetheless, they are of particular importance to the domestic industry, in view of the fact that these areas represent the majority of the sales by the domestic industry.<sup>22</sup>

As for customer and producer perceptions, the record indicates that certain original equipment manufacturer (OEM) purchasers and FPD producers consider different technologies to be competitive with each other.<sup>23</sup> For example, some OEM companies considered AMLCD technology along with other

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<sup>18</sup> Report at A-17.

<sup>19</sup> Id. at Table 2; See also id. at A-80-81, n.182. The Report lists groups of end products within which HIC FPDs are used. We have used this list with caution, because each group contains a variety of applications that do not always permit the use of more than one technology. For example, the aerospace field, in which EL displays and active matrix LCDs are used, could be viewed as being divided into two types of applications. In one category, users have a preference for full color, and only active matrix LCDs will currently meet that need. In the other, monochrome displays are acceptable and both EL displays and monochrome active matrix LCDs have been used. Id. at A-31, n.71, A-86-87, A-95-96, and memorandum INV-0-167 (August 13, 1991).

<sup>20</sup> GRiD's postconference brief at 3-4. See also Transcript of the hearing (Tr.) at 108. The displays used tend to be imported.

<sup>21</sup> Because pixels in plasma and EL displays emit light, plasma and EL displays are called "emissive" technologies, as opposed to active and passive matrix LCDs which cannot be viewed in the dark and are termed "non-emissive." Report at A-8.

<sup>22</sup> Report, Table 3, and INV-0-167.

<sup>23</sup> Id. at A-20, n. 54; A-31, n.69; petitioners' prehearing brief at 34.

display technologies when they were designing their end use products.<sup>24</sup>

The record indicates that the different display types lack absolute interchangeability. However, HIC FPDs are typically customized and consequently there is little or no interchangeability even among displays of the same format and technology.<sup>25</sup> HIC FPDs of all technologies usually share the same channels of distribution. They are generally sold to OEMs.<sup>26</sup>

HIC FPDs are all produced by building electrical conductors and other components onto glass substrates before liquid crystal material, gas, or electroluminescent material is added. Glass cleaning, assembly, aging, and testing are generic steps common to all technologies.<sup>27</sup> All technologies use clean rooms.<sup>28</sup>

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<sup>24</sup> See generally, Id., Appendix I. Numerous buying guides and comparison charts describe different display technologies to purportedly assist purchasers in selecting a display. Id. at A-21.

<sup>25</sup> Lack of interchangeability does not preclude a finding of one like product. See, e.g., Digital Readout Systems and Subassemblies Thereof from Japan, Inv. No. 731-TA-390 (Final), USITC Pub. 2150 (January 1989) at 12. Compare Asocoflores, 693 F. Supp. at 1168 (discussing significance of substitutability at consumer level).

<sup>26</sup> Report, Table 10, A-48-49.

<sup>27</sup> Domestic producers have as a group received a grant from Commerce to do research into areas common to all technologies: automated inspection and repair, and driver interconnections and packaging. Id. at A-40. However, such processes as material filling and sealing are unique to each display type. Differences in production processes do not necessarily preclude a finding of one like product. Although they comprised "two technologies of semiconductor manufacture," Metal Oxide Semiconductors (MOS) of the N-Channel and Complementary types were found to be within the same like product. Erasable Programmable Read Only Memories from Japan, Inv. No. 731-TA-288 (Final), USITC Pub. 1927 at 10 (December 1986) (EPROMs).

<sup>28</sup> The Commission found in another investigation that "all [display types] use similar techniques for applying layers of materials to a glass substrate that must be conducted in a dust-free 'clean room.'" Liquid Crystal Display Television Receivers from Japan, Inv. No. 751-TA-14, USITC Pub. 2042 at A-9

(continued...)

In their joint brief submitted in this remand investigation, the respondents argue that the like product for the subject AMLCD FPDs consists only of domestically-produced AMLCDs.<sup>29</sup> The reasons provided include that AMLCDs (i) are produced in comparable, dedicated production facilities, (ii) share unique physical characteristics, (iii) are not used interchangeably with other HIC FPDs, and (iv) are perceived by customers and producers as distinct from other technology types.<sup>30</sup> Respondents also argue that AMLCDs are distinct from other display technologies because AMLCD is a non-emissive technology that utilizes a thin-film transistor array to activate liquid crystal at individual pixel locations, whereas other HIC FPDs, specifically EL and gas plasma, are emissive technologies.<sup>31</sup>

While it is true that AMLCDs are different in some respects from other HIC FPDs, we believe those differences are relatively minor when viewed in the context of the development of HIC FPD technology. It is clear that AMLCD, EL and plasma are rapidly developing and competing technologies.<sup>32</sup> The record

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<sup>28</sup> (...continued)

(December 1987), aff'd sub nom. Citizen Watch Co., Ltd. v. United States, 14 CIT 173, 733 F. Supp. 383 (1990). The level of clean room required depends on the size of the features being produced, and most fabrication for HIC FPDs is based on features of similar size. Report, Appendix C at B-42.

<sup>29</sup> See respondents' remand brief. Petitioners did not address the like product issue in their remand submission. See petitioners' remand brief.

<sup>30</sup> Respondents' remand brief at 6.

<sup>31</sup> Id. As noted above, some domestic AMLCDs have used PIN diode technology rather than thin film transistor.

<sup>32</sup> E.g., Report at A-20. Technology advances rapidly in this field, as evidenced by the fact that the number of available display technologies doubled during the period of investigation. Report at A-13 n.30. The Commission may take into account information concerning impending technological changes. Citizen Watch, 733 F. Supp. at 389 (Commission was  
(continued...))

indicates uncertainty among producers and purchasers alike as to which particular technology, if any, will emerge as the standard for flat panel displays.<sup>33</sup> At the state of technological development indicated in the record, each type of technology has different advantages and disadvantages.<sup>34</sup> For example, the record indicates that some respondents made some commercial sales of color AMLCDs toward the end of the period of investigation,<sup>35</sup> and color is purportedly an important quality in FPD technology for OEM purchasers. However, the record also indicates that EL FPDs may soon offer color.<sup>36</sup> What may have been a possible dividing line between different FPD technologies yesterday, therefore, may no longer exist today, and what may be a possible dividing line today may disappear tomorrow. The record indicates that "the specific end uses to which HIC FPDs have been put at any point in time is largely dependent upon currently available technology."<sup>37</sup> What is characteristic of HIC FPD technology is the rapid development of and changes in what is "currently available." In short, as stated in the record, "the appearance and power requirements of the HIC FPDs may be converging, erasing historically dichotomous relationships," and a formerly divided market "has

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<sup>32</sup> (...continued)

justified in considering information that Japanese producers were planning to make LCD televisions with larger screens).

<sup>33</sup> Report at A-23, n.58, A-30, n.69.

<sup>34</sup> Report at Table 1. For example, AMLCD has the advantage of low power consumption and low weight, except when it is utilized for color display. EL and plasma, on the other hand, have high contrast and fast response time. Id.

<sup>35</sup> Report at Table 5.

<sup>36</sup> Report at A-11, A-32, n.77, A-39.

<sup>37</sup> See Report at A-17 (emphasis added).

become a continuum."<sup>38</sup>

Furthermore, the success of one FPD technology or another in the marketplace appears to depend to some degree on such factors as a producer's access to capital, manufacturing capabilities and other resources, as well as on the properties of the technology itself.<sup>39</sup> According to one U.S. OEM, "the most important criteria in the evaluation process are technology, manufacturing capability and flexibility, and the overall philosophy of the vendor regarding the customer-supplier relationship."<sup>40</sup> The latter factors are indicators of the relative competitiveness of different producers in the marketplace, however, not of different like products or different industries.<sup>41</sup> Giving undue weight to distinctions between HIC FPDs that are caused by these factors risks arriving at a like product definition that "prevent[s] consideration of an industry adversely affected by the imports under investigation."<sup>42</sup>

Respondents argue that where the Commission has broadened the like product beyond the scope of the class or kind of merchandise, "the

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<sup>38</sup> See Report at A-23.

<sup>39</sup> See Report at A-79 ("For end products designed around the HIC FPD, the display selection assumes such importance to the success of the product that such factors as the financial stability of the HIC FPD producer and its ability to continue production and technical development of the display are significant.").

<sup>40</sup> Report at A-82.

<sup>41</sup> See Report at A-23-24 ("Some experts believe the technologies that succeed in the future may be predetermined by the amount of investment and number of companies researching and developing the technology. Active matrix LCDs are currently receiving a disproportionate amount of attention and investment capital.").

<sup>42</sup> S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979).

domestically produced articles that did not precisely correspond to the imported article shared production equipment and employees with the articles most like those in the class."<sup>43</sup> They argue AMLCDs are a distinct like product apart from other HIC FPDs because no other kind of HIC FPD can be manufactured using the production facilities for AMLCDs.<sup>44</sup> But respondents' emphasis on the importance of manufacturing facilities is overstated. Differences in manufacturing facilities appear to emanate from differences among the technologies themselves. The same is true, however, within a particular technology. Within AMLCD technology, for example, producers use different kinds of array material, e.g., thin film transistor versus PIN diode. These different AMLCD displays have typically been produced in different manufacturing facilities, yet respondents do not contend that they constitute two separate like products. Similarly, in EL technology, AC thin film and DC powder are used in the array; each of those EL technologies requires separate manufacturing facilities.<sup>45</sup> Further, manufacturing techniques may vary from firm to firm within a particular FPD technology.<sup>46</sup>

Consequently, in light of the overlaps in physical characteristics, end uses, and other factors between AMLCDs and other HIC FPDs, and the rapidly developing nature of HIC FPD technology, we believe it is appropriate to consider these competing HIC FPD technologies as a single like product.

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<sup>43</sup> Respondents' remand brief at 6.

<sup>44</sup> Id.

<sup>45</sup> See Report at A-13; Tr. at 253. Indeed, one of respondents' witnesses testified that, in his view, there are as many as seven different products to the extent that distinctions are drawn on the basis of the specific technology.

<sup>46</sup> See Report at A-13, A-17, n.45.

### B. Electroluminescent FPDs

The like product analysis that we applied to the subject AMLCDs applies with equal force to the subject EL displays. As with AMLCDs, imported and domestic EL displays are not identical, both because of customization and because some domestic displays use DC powder technology in contrast to the AC thin film approach.<sup>47</sup> The overlaps between EL displays and other HIC FPDs in terms of the traditional like product criteria considered by the Commission,<sup>48</sup> as well as the rapidly developing nature of HIC FPD technology, lead us to conclude that the like product for the subject EL FPDs is all HIC FPDs.

### C. The Like Product Includes Display Glass

As in the Commission majority's original final determination, we find that display glass should not form a separate like product or products. Accordingly, we find that both the like product corresponding to AMLCDs and the like product corresponding to EL displays include display glass. No party challenged before the CIT the Commission majority's original finding with respect to display glass, and we adopt that finding.<sup>49</sup>

### III. Domestic Industry<sup>50</sup>

The Commission majority in its original final determination found that the domestic industry was composed of the domestic producers of HIC FPDs and

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<sup>47</sup> Report at Table 5 and A-38-39.

<sup>48</sup> We note in this connection that EL and plasma displays in many respects can be described in essentially the same terms. Report at Table 1.

<sup>49</sup> USITC Pub. 2413 at 12-14.

<sup>50</sup> In order to comply with the CIT's direction we define two separate like products. However, the two are one and the same, as are the domestic industries that produce them. Accordingly, we discuss only once the issues of the definition of the domestic industry, establishment of that industry, and the condition of the industry.

display glass therefor, and that the domestic industry does not include In Focus and those firms referred to as integrators and assemblers. No party challenged before the CIT the Commission majority's finding with respect to those issues, and we adopt that finding.<sup>51</sup>

We also adopt the finding of the Commission majority in its original final determination that material injury analysis rather than material retardation analysis is appropriate with respect to the domestic industry, because an industry was established.<sup>52</sup>

#### IV. Condition of the Domestic Industry<sup>53</sup>

We have examined the condition of the domestic industry in the context of the relevant conditions of trade, competition, and development.<sup>54</sup> The U.S. industry producing HIC flat panel displays is made up of relatively small producers, most of which limit their business activities to production of the like product.<sup>55</sup> These domestic firms supply a very small share of the overall U.S. market, which is dominated by Japanese suppliers.<sup>56</sup> The bulk of Japanese

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<sup>51</sup> USITC Pub. 2413 at 14-18.

<sup>52</sup> USITC Pub. 2413 at 18-19.

<sup>53</sup> Chairman Newquist and Commissioner Rohr reaffirm their finding in the final investigation that the domestic industry is materially injured and adopt the discussion of the condition of the domestic industry as set forth therein. Chairman Newquist and Commissioner Rohr concur with the additional analysis of conditions of trade as presented below.

Commissioner Nuzum does not reach a separate conclusion on material injury. Based on her de novo review of the record, however, Commissioner Nuzum concurs with the original majority's discussion of the condition of the domestic industry. USITC Pub. 2413 at 19-22.

<sup>54</sup> S. Rep. No. 249, 96th Cong., 1st Sess. 88 (1979).

<sup>55</sup> See, e.g., Report at A-37, Table 17.

<sup>56</sup> Report at A-76.

producers are -- unlike U.S. manufacturers -- large, well-financed, and diversified.<sup>57</sup>

This industry and these suppliers operate in a market characterized by rapidly developing and changing technology.<sup>58</sup> Commercial survival requires, at a minimum, keeping up with technological advances; success requires leading such advances.

Yet technological advantage alone is not enough to win customers. Most end users are OEMs whose reputations ride on the performance and reliability of their products. These purchasers, therefore, look for proven productive capability and a history of product performance and reliability.<sup>59</sup> As in virtually all high-technology fields, investment in production facilities requires substantial capital. New entrant appear to sustain losses prior to establishing commercial production levels.

In considering the condition of the U.S. industry, we note that the industry is placed at a substantial disadvantage in the domestic market vis-a-vis foreign suppliers due to the size and resources of most of the participating foreign firms.

#### V. Material Injury by Reason of LTFV AMLCD Imports

In making determinations in antidumping investigations, we consider whether the material injury being suffered by the domestic industry is "by reason of" the imports under investigation.<sup>60</sup> We consider the volume of

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<sup>57</sup> See, e.g., Report at A-70.

<sup>58</sup> See, e.g., Report at A-13, n.30.

<sup>59</sup> See, e.g., Report at A-82.

<sup>60</sup> 19 U.S.C. § 1673b(a).

imports, their effect on prices for the like product, and their impact on domestic producers.<sup>61</sup> In doing so, we consider whether import volumes or increases in volume are significant, whether there has been significant underselling by imports and whether imports otherwise significantly depress or suppress prices for the like product.<sup>62</sup>

In making this determination, the Commission may consider "such other economic factors as are relevant to the determination."<sup>63</sup> Although we may consider information that indicates that injury to the industry is caused by factors other than the LTFV imports, we do not weigh causes.<sup>64</sup> Furthermore, the Commission need not determine that the dumped imports are "the principal, a substantial, or a significant cause of material injury."<sup>65</sup> Congress clearly indicated that to do so "has the undesirable result of making relief more difficult to obtain for industries facing difficulties from a variety of sources; industries that are often the most vulnerable to less-than-fair-value imports."<sup>66</sup> Rather, a finding that imports are a cause of material injury is sufficient.<sup>67</sup>

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<sup>61</sup> 19 U.S.C. § 1677(7)(B)(i).

<sup>62</sup> 19 U.S.C. § 1677(7)(C).

<sup>63</sup> 19 U.S.C. § 1677(7)(B)(ii).

<sup>64</sup> See, e.g., Citrosuco Paulista S.A. v. United States, 12 CIT 1196, 704 F. Supp. 1075, 1101 (1988).

<sup>65</sup> S. Rep. No. 249, 96th Cong., 1st Sess. 57, 74 (1979).

<sup>66</sup> S. Rep. No. 249, 96th Cong., 1st Sess. 74-75 (1979); *id.* at 88 (Commission is to "focus on the conditions of trade, competition, and development regarding the industry concerned").

<sup>67</sup> See Metallwerken Nederland. B.V. v. United States, 13 CIT 1013, 728 F. Supp. 730, 741 (1989); Citrosuco, 704 F. Supp. at 1101.

Imports of the subject AMLCDs by volume were significant and increased rapidly during the period of investigation.<sup>68</sup> Shipments of LTFV AMLCD imports captured a significant share of the U.S. market during the period of investigation, with imports for Apple, the largest consumer, gaining market share rapidly.<sup>69</sup> Respondents have argued that the subject imports were small. We note, however, that a large proportion of the total market was captured by nonsubject imports.<sup>70</sup> Hence, the domestic industry was relegated to a relatively small share of the market. Thus, the volume of dumped imports becomes all the more significant in the context of the small size of the domestic industry.<sup>71</sup> We find that the volume of subject AMLCD imports, the size of import penetration, and the increases in volume and import

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<sup>68</sup> Report at A-74, Table 35. Import figures may be slightly overstated due to the possible inclusion of metal-insulator-metal displays. Because much of this and other relevant information is business proprietary, we have discussed it in general terms.

Respondents argue that certain imports were excluded from the scope of investigation after our original determination. See respondents' remand brief at 16. We find it appropriate to include those imports in our analysis in view of the circumstances of the exclusion and because we base our determination on the original record, having received no instructions from the CIT to do otherwise. Respondents also contend that other AMLCD imports were mislabelled and actually were passive matrix LCDs. Upon review of the record, we are satisfied that the imports in question were properly labelled. However, even if we were to exclude both sets of imports, which were small, our conclusion concerning the significance of the subject AMLCDs would not change. See INV-Q-038 (Feb. 26, 1993).

<sup>69</sup> This is particularly true when examining the market for active matrix LCD, plasma, and EL displays, but is also true in the market for all HIC FPDs. See, e.g., memorandum INV-Q-038.

<sup>70</sup> Report at A-76.

<sup>71</sup> Under the statute, the Commission not only examines the volume of subject imports in the absolute, but also analyses that volume relative to production and consumption in the United States. 19 U.S.C. § 1677(7)(C)(i). We find it particularly appropriate in this investigation to evaluate the subject imports in the context of domestic production.

penetration that occurred, when considered in the context of their impact on domestic producers, are significant.

The record does not contain significant comparative pricing data. This is not surprising considering the fact that AMLCDs have only recently appeared on the market<sup>72</sup> and the nature of that market. In the HIC FPD market, a crucial point of competition is at the design stage of end use products, long before the final sale of the HIC FPDs. Failure of a domestic FPD vendor to be selected by an OEM in the first stage of negotiation means, as a practical matter, no sales for that vendor to that OEM. Consequently, there are few domestic HIC FPD prices to compare with prices of imports of AMLCDs. In this case, because of the overwhelming volume and impact of the dumped imports, pricing comparisons usually examined by the Commission were not available.

Design wins are crucial to survival and growth in this industry.<sup>73</sup> This is particularly visible in the massive setback to the domestic industry resulting from the largest AMLCD transaction during the period of investigation, i.e., the decision by Apple to reject domestic products and import Japanese AMLCDs.<sup>74</sup> Apple, a respondent importer and consumer in the investigation, argued that its rejection of a domestic producer was based on the failure of the domestic industry to meet its reasonable requirements. Apple claims that OIS sought exorbitant funding and that only prohibitively expensive investment on Apple's part could have provided OIS with adequate

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<sup>72</sup> Report at Table 6 and A-11, n.21. There have also been lags in AMLCD availability. Id.

<sup>73</sup> See, e.g., Report at A-51, n.138; compare id. at A-73, n.170.

<sup>74</sup> See Report at A-73 and App. H.

capacity.<sup>75</sup> However, the record indicates that had a major purchaser such as Apple made a commitment to any domestic producer, involving even a relatively modest investment or exposure, then other investors would have been encouraged to participate in the financing of the domestic industry.<sup>76</sup>

Instead, Apple chose to import AMLCDs from Hosiden, a Japanese producer now found to be dumping at a margin of 62.67 percent.<sup>77</sup> Hosiden, like OIS, lacked proven commercial-scale capacity at the time Apple made its choice.<sup>78</sup> Hosiden, unlike OIS, also had a history of unfulfilled promises.<sup>79</sup> Moreover, the record indicates that Hosiden could afford to wait longer in the product cycle than domestic producers to recoup its costs, in view of the fact that most domestic producers focus on the production of FPDs.<sup>80</sup> In essence, Hosiden was able to undercut OIS in competing for the sale to Apple.<sup>81</sup> Because of Hosiden, OIS lost a crucial design win.

In view of the substantial resources needed to enter a major market segment in direct competition with some of the largest Japanese corporations,<sup>82</sup> the inability to attract a buyer is damaging to all domestic producers of HIC FPDs. It is not just domestic AMLCDs that are adversely

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<sup>75</sup> E.g., Tr. at 125-126.

<sup>76</sup> Report at A-46 n.122, A-73, Appendix H.

<sup>77</sup> 56 Fed. Reg. at 32401.

<sup>78</sup> Report at A-72.

<sup>79</sup> Report at A-46, n.122.

<sup>80</sup> See, e.g., Report at Tables 15 and 18, A-37, A-73, n.167.

<sup>81</sup> See Report at A-73, Appendix H.

<sup>82</sup> E.g., Report at A-14, n.35.

affected by the subject AMLCDs. As addressed above in our discussion of like product, we find that all domestic HIC FPDs compete in the same market. In particular, the record shows that a domestic EL producer had an experience similar to that of OIS, particularly with respect to cost and price considerations.<sup>83</sup> The domestic HIC FPD industry as a whole is adversely affected by the influx of dumped AMLCDs.

Congress has clearly recognized that dumped imports can

impede or threaten to impede the ability of U.S. producers to devote the necessary resources to important product innovations and next generation development because of the long lead times from product design to actual production, business uncertainties, lost marketing opportunities, and erosion of profitability caused by such unfair trade practices.<sup>84</sup>

In some industries, such adverse effects may result from the loss of a single large transaction by the domestic industry to dumped imports.<sup>85</sup> We believe the record in this investigation indicates that dumped AMLCDs had precisely this pernicious effect on the domestic flat panel display industry.<sup>86</sup> Specifically, supplying major buyers is critical to the ability of domestic HIC FPD producers to expand beyond their niche markets. Absent interest from a major buyer, domestic producers cannot build the capacity to attract additional buyers and design wins, which are crucial to the development and growth of the industry. The producers are unable to qualify as vendors for large customers. Prospective investors perceive the producers as unpromising

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<sup>83</sup> See, e.g., Report at A-30. For a discussion of Planar's experience with Apple, See Report at Appendix H.

<sup>84</sup> S. Rep. 71, 100th Cong., 1st Sess. at 117 (1987).

<sup>85</sup> Id.

<sup>86</sup> For further discussion of the domestic industry's development difficulties, see USITC Pub. 2413 at 22.

and hence withhold their venture capital, which, in turn, denies the producers the resources necessary to build capacity and develop new products. In short, the domestic industry is caught in a vicious cycle that denies them the opportunity to increase their production to a level that would result in economies of scale and increased expertise.<sup>87</sup> The record indicates that the dumped AMLCDs significantly contributed to the industry's inability to break out of that cycle.

We want to be clear about the reasons for our affirmative determination. We do not reach an affirmative determination on the basis that the domestic producers are small and the Japanese producers are large and well-financed, although these are factors we have taken into account in our analysis. Nor do we reach an affirmative determination on the basis that the Japanese respondents have been more successful in selling their AMLCD FPDs, as well as non-subject FPDs, to U.S. OEMs than have U.S. producers of HIC FPDs. As our reviewing court has stated, the relevant question we must answer is whether "the woes of the domestic industry were exacerbated" by imports which have been found by the Department of Commerce to be sold at less than fair value.<sup>88</sup> Given the significance of the volume of unfairly traded imports of AMLCD FPDs from Japan and the adverse impact of the imports, particularly on the domestic industry's ability to obtain investment capital and on its efforts to expand beyond its market niches, we are compelled to find that the

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<sup>87</sup> Increased production can lead to lower per unit engineering and total costs, as well as economies of scale in production and increased research and development expertise. See Mechanical Transfer Presses from Japan, Inv. No. 731-TA-429 (Final), USITC Pub. 2257 at 23, 31 (February 1990); petitioners' posthearing brief, Response F.

<sup>88</sup> Iwatsu Electric v. United States, 15 CIT \_\_\_, 758 F. Supp. 1506, 1518 (1991).

domestic industry was materially injured by reason of these subject imports.

Based on the foregoing considerations, we determine that the domestic industry producing high-information content flat panel displays is materially injured by reason of imports of LTFV active matrix liquid crystal high-information content flat panel displays and display glass therefor from Japan.

#### VI. Material Injury by Reason of LTFV EL Imports

We also find that the domestic HIC FPD industry is materially injured by reason of LTFV imports of EL FPDs from Japan.<sup>89</sup>

Domestic EL displays accounted for a predominate, and rapidly increasing, share of U.S. shipments of all HIC FPDs during the period of the investigation.<sup>90</sup> Thus, any material injury to the domestic EL industry by reason of unfair competition within the market niches captured by domestic EL displays directly injures most of the domestic HIC FPD industry. Further, as explained above, injury to one segment of the domestic industry adversely affects the other segments as well.

Imports of LTFV EL displays rose significantly between 1988 and 1989, returning in 1990 to 1988 levels.<sup>91</sup> Shipments of the unfairly priced EL imports captured a small, but constant share of the U.S. HIC FPD market during the period of the investigation.<sup>92</sup> This share, although seemingly minor in absolute terms was, in our view, significant relative to the U.S. producers'

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<sup>89</sup> As noted previously, this separate determination concerning EL displays is made pursuant to the remand instructions of the CIT in Hosiden, supra.

<sup>90</sup> Report at Table 6.

<sup>91</sup> Report at Table 35.

<sup>92</sup> Summary table 38a in INV-Q-038, p.2.

meager share of the HIC FPD market throughout the period of the investigation.<sup>93</sup>

As with LTFV imports of AMLCDs, it is difficult to assess the effect of LTFV imports of EL displays on domestic prices for HIC FPDs. The record does indicate, however, that price, while not the most important factor in most sales, is a significant factor in the decision to purchase EL displays. One indication of the importance of price is the fact that "target" prices often have been discussed during the early stages of supply contracts.<sup>94</sup>

Unlike the situation for imports of AMLCDs, the record does contain some specific comparative pricing information. The pricing data in the record<sup>95</sup> indicates that the subject imports have had an adverse effect on the prices of products sold by the domestic industry during the period of the investigation. The record shows instances of underselling by the subject LTFV imports. A number of the prices of both domestic and dumped imports exhibited downward and flat trends.<sup>96</sup> The record thus suggests to us that the subject LTFV EL imports depressed and suppressed domestic prices.

Commission staff were able to confirm one case in which a petitioner lost a sale to dumped EL imports in which cost was an important factor in the purchasing decision. Another purchaser confirmed that dumped EL imports were

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<sup>93</sup> Report at A-76.

<sup>94</sup> Tr. at 113, 186-87.

<sup>95</sup> We have considered the price data in the record with caution because price trends and comparisons are difficult to make in this market. Report at A-91. See Iwatsu, 758 F. Supp. at 1515 ("Difficulties with, or even impossibility of, direct price comparison do not mandate a negative determination").

<sup>96</sup> Report at Tables 22, 39, and 44.

priced lower than domestic products.<sup>97</sup> These instances, while small compared with the size of the market, do confirm that price plays a significant role in the marketplace.

Further, we believe that such a rigid analysis of price is not appropriate where, as here, sales lost to unfairly priced EL imports adversely affect all domestic HIC FPD producers in competing for long-term contracts. As we explained in the final investigation:

We note that the lack of other examples of lost sales and revenue is not surprising in this investigation. Much of the competition in this market [all HIC FPDs] takes the form of negotiations for the development of specialized products. A purchase contract makes it possible for a producer to obtain capital and a production base, and to develop efficient production capacity. Domestic firms have often been disqualified from negotiations for these contracts at an early stage . . . . U.S. display producers disqualified at this stage may have difficulty pointing to their disqualification as a "lost sale." Nevertheless, when the domestic firms are disqualified . . . domestic producers lose not only a sale but also an opportunity to enhance their ability to win future contracts . . . .

In our view, more important in this investigation than simple pricing and lost sales is investment. Several sources confirmed that the domestic industry was unable to raise capital due to the presence of Japanese imports. Because of the substantial investment needed to enter a major market segment in direct competition with some of the largest Japanese corporations, the inability to attract capital is particularly damaging to a producer of HIC flat panel displays. Similarly, lack of funds severely constrains research and development efforts, which are critical to the progress of the industry.<sup>98</sup>

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<sup>97</sup> Id. at A-98-99.

<sup>98</sup> USITC Pub. 2413 at 25-26 (August 1991) (footnotes omitted). See also, Id. at 26 n.95 (sources confirming the domestic industry's inability to raise capital "refer in general to all Japanese imports, but more than once specifically refer also to dumped imports") (citations omitted).

Finally, while we are mindful of the CIT's explicit instructions to separately examine the effects of LTFV imports of AMLCDs and EL displays, these instructions are silent on whether we may consider, as the legislative history requires, conditions of trade.<sup>99</sup> We assume that the CIT, by its silence, intended for us to follow Congress' wisdom; namely, that LTFV imports of EL displays cannot be examined in a vacuum. Quite to the contrary, we are to consider the domestic industry's condition in toto. As noted above, a cause of the domestic industry's precarious condition is the dimension and presence of nonsubject imports in the domestic marketplace. We note, however, that LTFV imports of AMLCDs have also contributed to the domestic industry's vulnerability to LTFV imports of EL displays and cannot be ignored. As such, we incorporate by reference here our discussion of material injury to the domestic industry by reason of dumped AMLCDs.

Based on the foregoing considerations, we determine that the domestic industry is materially injured by reason of LTFV imports of EL displays from Japan.

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<sup>99</sup> S. Rep. No. 249, 96th Cong., 1st Sess. 88 (1979).



VIEWS OF VICE CHAIRMAN WATSON, COMMISSIONER BRUNSDALE  
AND COMMISSIONER CRAWFORD

In response to the remand order of the U.S. Court of International Trade (CIT),<sup>1</sup> and based on the record obtained in this investigation, we determine that an industry in the United States is not materially retarded by reason of dumped imports of active matrix liquid crystal high-information content flat panel displays (AMLCDs) and display glass therefor from Japan.<sup>2</sup> We further determine that an industry in the United States is not materially injured or threatened with material injury by reason of dumped imports of electroluminescent (EL) flat panel displays (displays) and display glass therefor from Japan.<sup>3</sup>

I. Like Product

The Commission determines which products are like, or in the absence of like, most similar in characteristics and uses with the class or kind of merchandise under investigation, as determined by the U.S. Department of

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<sup>1</sup> 16 CIT \_\_\_, Slip Op. 92-229 (December 29, 1993).

<sup>2</sup> Commissioner Brunsdale notes that while she joins these additional views, she was not compelled to change her original views based on the remand. See Dissenting Views of Acting Chairman Anne. E. Brunsdale. Certain High Information Content Flat Panel Displays and Display Glass Therefor from Japan, Inv. 731-TA-469 (Final), USITC Pub 2413 at 34-37 (August 1991).

<sup>3</sup> Although we use the present tense here and in the remainder of the opinion, our analysis and determination deal with data covering the period of investigation.

Commerce (Commerce).<sup>4</sup> Generally, the Commission looks for clear dividing lines among products in terms of distinct characteristics and uses. Minor variations in products are insufficient to find separate like products.<sup>5</sup>

In its final investigation, Commerce found that there were three classes or kinds of merchandise subject to investigation: AMLCDs, EL displays, and plasma displays. However, it found that only EL displays and AMLCDs were dumped.<sup>6</sup> Commerce defined two classes or kinds of merchandise subject to its dumping investigation as follows:

AMLCDs are large area, matrix addressed displays, no greater than four inches in depth, with a picture element (pixel) count of 120,000 or greater, whether complete or incomplete, assembled or unassembled. They utilize a thin-film transistor array to activate liquid crystal at individual pixel locations. Included are monochromatic, limited color, and full color displays used to display text, graphics, and video.

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<sup>4</sup> 19 U.S.C. § 1677(10). Our decision regarding the appropriate like product(s) in an investigation is essentially a factual determination, based on the record, including the arguments of the parties, in each case, and we have applied the statutory standard of "like" or "most similar in characteristics and uses" on a case-by-case basis. *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT \_\_\_, 693 F. Supp. 1165, 1169 (CIT 1988) ("Asocoflores"). In analyzing like product issues, the Commission generally consider a number of factors relating to characteristics and uses including (1) physical characteristics, (2) uses, (3) interchangeability of the products, (4) channels of distribution, (5) customer or producer perceptions, (6) common manufacturing facilities and production employees, (7) production processes and, where appropriate, (8) price. See, e.g., Asocoflores, 693 F. Supp. at 1170; *Gray Portland Cement and Cement Clinker from Venezuela*, Invs. Nos. 303-TA-21 and 731-TA-519 (Preliminary), USITC Pub. 2400 at 3 (July 1991); *Heavy Forged Handtools from the People's Republic of China*, Inv. No. 731-TA-457 (Final), USITC Pub. 2357 at 4 (February 1991)(Handtools). No single factor is necessarily dispositive, and we may consider other factors we deem relevant based upon the facts of a particular investigation.

<sup>5</sup> See S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979); Asocoflores, 693 F. Supp. at 1169.

<sup>6</sup> Commerce determined that petitioners did not have standing to bring a case against passive matrix displays from Japan and further found de minimis margins for plasma displays. 56 Fed. Reg. at 32382, 32401.

EL displays are large area, matrix addressed displays, no greater than four inches in depth, with a pixel count of 120,000 or greater, whether complete or incomplete, assembled or unassembled. They incorporate a matrix of electrodes that, when activated, apply an electrical current to a solid compound of electroluminescent material (e.g., zinc sulfide) causing it to emit light. Included are monochromatic, limited color, and full color displays used to display text, graphics, and video.<sup>7</sup>

Commerce considered the two types of dumped displays as distinct products and therefore calculated their dumping margins separately.

A. The like product corresponding to imported AMLCDs

An important issue in this case is whether the domestic product like imported AMLCDs includes EL and plasma displays. Petitioner argued that there is one like product consisting of all flat panel displays.<sup>8</sup> Respondent argued that EL and plasma displays are not like AMLCDs. After careful consideration of the record evidence we find that the like product is domestic AMLCDs.

The factors traditionally considered by the Commission show that AMLCDs and other displays are not substitutable<sup>9</sup> when considered both from the

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<sup>7</sup> 56 Fed. Reg. 32376 (July 16, 1991). As in the preliminary determination in this investigation, we do not include in any like product definition displays containing less than 120,000 pixels and cathode ray tubes (CRTs). Commerce excluded such products from the scope and no party has argued for their inclusion in a like product. See generally report at A-18-19.

Also not included in the scope were a number of other display technologies, such as electrochromic, electrophoretic, and field emission spun cathode. The record indicates that these technologies are only in the early stages of research and development. Id. at A-7, n.17.

<sup>8</sup> We do not discuss passive matrix displays in this opinion.

<sup>9</sup> Commissioner Crawford notes that considerable confusion within the Commission and the trade bar has resulted from the use of the terms "interchangeability" and "substitutability". The Commission has traditionally considered interchangeability in the context of the like product analysis. In

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demand side and the supply side.<sup>10</sup> For example, a careful examination of physical characteristics and end uses makes it is clear that these are distinct products. While it could be argued that all displays have a similar appearance, i.e. they are all screens, the essential characteristics of a display depends largely on the type of technology involved.<sup>11</sup>

Displays differ by color, maximum screen size, power requirements, and luminescence. Monochrome AMLCDs generally have a white or blue screen, in contrast to the red-orange of plasma displays and the yellow of EL displays. More importantly, AMLCDs are the only displays sold with a full multi-color display.<sup>12</sup> EL and particularly plasma displays have a larger maximum screen size than AMLCDs. While AMLCDs, a non-emissive technology, generally consume less power than emissive EL and plasma displays, they can also be much

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<sup>9</sup> (...continued)

this context, interchangeability describes whether the physical or technical ability exists to switch among different products. Substitutability, on the other hand, goes to the issue of whether purchasers will switch products as a result of a change in price. In determining the degree of substitutability, non-price factors (e.g. quality differences, lead-times, etc.) affect the relative value of the products and are therefore important to the evaluation of the impact of subject imports on the domestic industry. In sum, interchangeability describes whether it is possible to switch among products, while substitutability describes whether it is economically feasible for purchasers to do so.

<sup>10</sup> For example, physical appearance, end uses, interchangeability, and customer perceptions are demand side factors, whereas common manufacturing facilities and production processes and employees are supply side factors.

<sup>11</sup> AMLCD technology uses a distinct medium (i.e., liquid crystal) and transistors or diodes to activate the pixels in its matrix.

<sup>12</sup> Report at Table 5. Although the record suggested that EL display technology may succeed in reaching full color in the future, most experts indicated that such success was unlikely. (Id. at A-31,32, n.77.)

brighter than EL and plasma displays when backlit.<sup>13</sup>

All displays have the same general end use, providing a continuous, visible display of text, images, and graphics. They may be used in similar broad categories of products, i.e., computers, medical instruments, or avionics. That does not, however, attest to their substitutability. Specific end uses require different technologies, and even within broad categories, such as avionics, the screens have different applications and are not substitutable.<sup>14</sup>

Over 90 percent of U.S. consumption of AMLCDs is for computer screens. In particular, the Apple MacIntosh laptop computers accounted for almost all the 1990 shipments of domestic and imported AMLCDs. EL and plasma displays are not suitable for use in laptop computers because of their high power requirement and lack of color capability.<sup>15</sup> In addition, overhead projectors cannot use EL or plasma displays. EL displays, on the other hand, are used primarily for medical and control equipment and are excellent for use in harsh environments. They generally are not used in computers.<sup>16</sup> Plasma displays,

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<sup>13</sup> Report at A-12-13. Because pixels in plasma and EL displays emit light, they are called "emissive" technologies, as opposed to active and passive LCD which cannot be viewed in the dark without backlighting and are termed "non-emissive." Backlighting increases the power requirement for AMLCDs.

<sup>14</sup> Report at A-17, A-25-27 (n. 63), A-79-81. In avionics, AMLCDs are used for applications that require color. They have replaced cathode ray tubes (CRTs), not another display technology.

<sup>15</sup> Apple argued that EL displays could not be substituted for the AMLCDs it purchased because of the power requirements and lack of color capability. Report at Table 4. The EL display considered for use by Apple in its MacIntosh portable would require substantially more power than the AM it selected. See Report at B-76.

<sup>16</sup> Report at Table 2.

on the other hand, are often used in heavier computers. In addition, they are the most popular displays for specialized military equipment.<sup>17</sup> These different end uses make it clear that AMLCDs are not interchangeable with other displays.

With respect to customer and producer perceptions, almost all original equipment manufacturers consider different technologies as having totally distinct applications. Most customers will choose only one technology based on their particular technical needs.<sup>18</sup>

It is difficult to compare pricing of displays because, with a few exceptions, displays are customized. Prices, particularly for AMLCDs, depend largely on requirements of a particular purchaser and the amount of R&D which must be performed to satisfy the purchaser's need. Domestic producers of AMLCDs are still in the prototype stage, which means that their displays are extremely expensive. Only Apple's large order for AMLCDs produced economies of scale sufficient to lower the unit price of the imported product.<sup>19</sup>

On the supply side, there is no substitutability between the three types of domestic displays, although there are some generic steps common to all technologies.<sup>20</sup> Currently, no domestic facility produces commercial quantities of AMLCDs, nor do AMLCD manufacturers have facilities in which to

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<sup>17</sup> Report at Table 2.

<sup>18</sup> Report at Appendix I.

<sup>19</sup> While AMLCDs can be more expensive than EL displays, that is not always the case. AMLCDs that are monochrome and produced in large quantities may cost substantially less than other AMLCDs. Prices of AMLCDs imported from Japan varied considerably (E.g., Report at Tables 44 and 45, A-96, A-74-75, Table 35).

<sup>20</sup> Report at A-15.

produce EL or plasma displays.<sup>21</sup> Similarly, because of the different technologies, producers of EL and plasma displays do not have the equipment and therefore could not produce active matrix displays. Even those Japanese producers that produce more than one technology do so in separate facilities using different machinery for each.<sup>22</sup> Both types of displays have similar channels of distribution, i.e. they are sold directly to end users.<sup>23</sup> However, given the other circumstances of production and consumption, this factor does not carry great significance in determining like product.

Petitioner argued that the displays should be considered one like product because they are changing rapidly and may become more similar in the future. While the manufacturers may have similar technical aspirations, it is equally possible that their products will become more distinct, and capture the niches for which they are best suited. Based on all the evidence in the record, we find the domestic like product is AMLCDs.<sup>24</sup>

#### B. The like product corresponding to imported EL displays

We determine that the like product corresponding to imported EL displays

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<sup>21</sup> Report at Table 11, n.2.

<sup>22</sup> Report at A-15, n.37.

<sup>23</sup> While both types of flat panel displays are sold to original equipment manufacturers, so are a large number of other products -- CRTs, keyboards, semiconductors, etc. Using such a weak standard, we could include almost anything in the like product.

<sup>24</sup> As in the Commission's final determination, we find that display glass should not form a separate like product or products. We adopt the reasoning of the Commission majority on that issue. Further, the record indicates that display glass is generally dedicated to a particular technology. Accordingly, we find that the AMLCD like product includes display glass dedicated to finished AMLCDs. We similarly determine that the EL display like product includes display glass dedicated to finished EL displays.

is domestic EL displays.<sup>25</sup> As the above discussion indicates, we find that the differences between AMLCDs and other displays are significant. We also find differences between EL and plasma displays to be significant. As we discussed above, all three products have different physical characteristics and end uses, based on the different technologies. EL technology is solid state and thus more appropriate than plasma for rugged military applications. Its brightness makes it suitable for certain military applications where metal screens are used to suppress radio frequency emissions.<sup>26</sup> Plasma technology permits a substantially larger display area than does EL.<sup>27</sup>

On the supply side, EL and plasma displays are not close substitutes. The two types of displays are not produced by the same companies. Applying electroluminescent material to a substrate is a different production process than inserting gas plasma.

Having found that the like product corresponding to the subject EL displays is domestic EL displays and display glass therefor, we find that the domestic EL display industry consists of the domestic producers of EL displays and display glass therefor.

The Commission in its final determination found that the domestic industry did not include firms referred to as integrators and assemblers. The Commission's finding with respect to those issues was not challenged before

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<sup>25</sup> We note that if we included plasma displays in the domestic product like EL displays, the basis for our negative determination would be even stronger.

<sup>26</sup> 56 Fed. Reg. at 32379-80.

<sup>27</sup> Report at Table 1.

the CIT, and we adopt that finding.<sup>28</sup>

II. No Material Retardation by Reason of LTFV AMLCD Imports

We find that a domestic industry is not materially retarded by reason of dumped imports of AMLCDs from Japan. We adopt the dissenting views of Acting Chairman Anne E. Brunsdale in the original determination.<sup>29 30 31</sup>

III. No Material Injury by Reason of LTFV EL Display Imports

The Commission is required to make a final determination of whether an industry in the United States is materially injured or threatened with material injury by reason of LTFV imports.<sup>32</sup> In making our determination, the Act provides that the Commission 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

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<sup>28</sup> We need not address the status of In Focus, which was treated in the final majority opinion, because In Focus's product involves passive matrix LCDs, which are not within any of the like products covered in this remand determination.

<sup>29</sup> See Dissenting Views of Acting Chairman Anne E. Brunsdale. Certain High Information Content Flat Panel Displays and Display Glass Therefor from Japan, Inv. 731-TA-469 (Final), USITC Pub 2413 at 34-37 (August 1991).

<sup>30</sup> The additional and independent views of Vice Chairman Watson, and Commissioners Brunsdale and Crawford regarding the AMLCD industry and other issues relating to this remand follow this joint determination.

<sup>31</sup> We concur with Commissioner Brunsdale's views that the domestic AMLCD industry was not established. Accordingly, analyses of present material injury or threat thereof by reason of subject imports are not required.

<sup>32</sup> 19 U.S.C. § 1673d(b).

(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.<sup>33</sup>

The Act also requires the Commission to consider all relevant economic factors that have a bearing on the state of the industry and to consider these factors within the context of the business cycle and conditions of competition distinctive to the affected industry.<sup>34</sup>

#### A. BACKGROUND

Much of the EL display industry was at an early stage of development and its performance must be considered in that light. Many of the domestic industry's performance indicators show promise for this emerging industry. These include capacity, production, shipments, number of workers, hours worked, total compensation, net sales, and research and development expenses.<sup>35</sup> Capacity utilization was at a relatively low level during the period of investigation, because of improvement in yields.<sup>36</sup> The industry's financial performance improved throughout the period of investigation.<sup>37</sup>

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<sup>33</sup> 19 U.S.C. § 1677(7)(B). The statute also indicates that the presence or absence of any factor pertaining to volume, price effects, or impact "shall not necessarily give decisive guidance" to the Commission's determination. See 19 U.S.C. § 1677(7)(E)(ii).

<sup>34</sup> See 19 U.S.C. § 1677(7)(C).

<sup>35</sup> Report at Tables 11, 12, 14, 22, and 26.

<sup>36</sup> Report at Table 11.

<sup>37</sup> Report at A-59, Tables 22, 23. The relatively poor industry profitability, in absolute terms, can be accounted for by development-stage operations.

## B. VOLUME

In determining whether there is material injury by reason of LTFV imports, the statute directs the Commission to consider "whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant."<sup>38</sup>

Domestic producers' shipments accounted for over half the volume of sales in the U.S. market during 1990. Finnish imports had a significant market share.<sup>39</sup> By contrast, imports from Japan were small and declined during the period of investigation.<sup>40</sup> The dumping margin in this case averaged 7 percent. We find no evidence that the dumped imports prevented the domestic industry from selling more displays, or selling them at higher prices, such that there is material injury by reason of the dumped imports.

It is clear that the smaller the volume of imports, the smaller the effect they will have on the domestic industry. The determination of whether the volume of imports or their increase is significant, however, cannot be made in a vacuum.<sup>41</sup> We must consider other factors, such as the nature of

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<sup>38</sup> 19 U.S.C. § 1677(7)(C)(i).

<sup>39</sup> E.g., tr. at 195. In addition, Vice Chairman Watson notes that domestic shipments accounted for a substantial share of the U.S. market during the period of investigation. With the acquisition of the Finnish producer Finlux, who also had a significant market share, the domestic producer Planar was in a position to dominate the market.

<sup>40</sup> Report at A-79, Table 38.

<sup>41</sup> See H.R. Rep. No. 319, 96th Cong., 1st Sess. 46 (1979) ("For one industry, an apparently small volume of imports may have a significant impact on the market; for another the same volume may not be significant."); S. Rep. No. 249, 96th Cong., 1st Sess. 88 (1979) ; H.R. Doc. No. 153, Part II, 96th Cong., 1st Sess. 434 (1979).

the market and the level of substitutability between domestic and Japanese EL displays, as discussed below.

Based on all evidence in the record, we do not find the volume or any increase in volume of subject imports to be significant.

### C. PRICE EFFECTS

In evaluating the effect of LTFV imports on prices, the Commission considers whether there has been significant price underselling of imports and whether the imports depress prices to a significant degree or prevent price increases that otherwise would have occurred, to a significant degree.<sup>42</sup>

A number of factors are relevant to the determination as to price suppression, including the volume and market share of subject imports, the degree of substitutability between the domestic and subject imports of EL displays, the availability of fairly traded imports and substitute products, and the size of the dumping margin.<sup>43</sup>

The more substitutable the products, the more likely that potential purchasers will make their purchasing decisions based on price differences between the products. Conversely, the more differentiated the products, the less substitutable they will be, and the less likely that price will be a determining factor in purchasing decisions. In addition to physical differences, differences in quality, reliability, and price can affect the substitutability of competing products.

The fact that domestic prices for EL displays have fluctuated during the

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<sup>42</sup> 19 U.S.C. § 1677 (7)(C)(ii).

<sup>43</sup> Vice Chairman Watson did not consider the dumping margin in determining possible price suppression.

period of investigation tells us nothing about whether the subject imports caused price suppression or depression of the like product. It is difficult to draw credible inferences from looking at price trends, because EL displays are generally customized for the purchaser.<sup>44</sup> In addition, when technologies are new, their prices are relatively high. As firms become more efficient and the volume of output increases, prices generally fall. On the other hand, as products improve, they may become more costly to produce.

We also do not place much weight on evidence of underselling. As stated above, EL displays are not generally comparable, and data were not collected separately for different models of EL displays. Even if the price comparisons were more reliable, only a limited number are available, and they do not show a pattern of underselling by Japanese producers.<sup>45</sup>

The record does indicate that purchasers consider the financial condition, production capability, quality commitment, and past production experience of the supplier to be important considerations.<sup>46</sup> These factors vary by producer. In addition, the quality of domestic EL displays has been questioned by certain customers.<sup>47</sup> ITC staff estimates that the substitutability between U.S. and Japanese EL displays is only moderate.<sup>48</sup>

Although we do not place reliance on reported lost sales, we note that

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<sup>44</sup> Report at A-94.

<sup>45</sup> Report at A-91-92.

<sup>46</sup> Report at A-90.

<sup>47</sup> E.g., tr. at 201 concerning the quality of the DC power approach. One respondent also criticized the quality of domestic AC thin film EL displays. IBM's posthearing brief, Appendix A at 4.

<sup>48</sup> See, e.g., INV-O-161 (August 9, 1991) at 14, 16.

staff was able to confirm virtually none of the many lost sales and lost revenue allegations made by the domestic industry in this investigation.<sup>49</sup>

For the reasons discussed above, it is likely that many purchasers of Japanese EL displays would have purchased Japanese displays even if they had been sold at fair value. Those who would not have purchased a fairly-traded Japanese display would not necessarily have purchased a domestic display. Some customers would have purchased fairly-traded imports from Finland.

Japanese imports had only a limited market share relative to domestic EL displays and fairly-traded imports. Therefore, any reduction in subject import market share would have a proportionally smaller impact on domestic EL display sales. We believe that if imports had been fairly traded, both the increase in demand for domestic EL displays and domestic price increases would have been very limited. Thus, we find that LTFV imports did not cause significant price suppression.

#### D. IMPACT ON THE AFFECTED DOMESTIC INDUSTRY

In assessing the impact of LTFV imports on the domestic industry we consider, among other relevant factors, U.S. consumption, production, shipments, capacity utilization, employment, wages, financial performance, capital investment, and research and development expenses.<sup>50</sup> In this case, due to the lack of significant volume or price effects of the Japanese imports, we do not find a sufficient impact by the LTFV imports on the industry to warrant an affirmative determination. As discussed above, we have

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<sup>49</sup> Report at A-98-103.

<sup>50</sup> See 19 U.S.C. § 1677(7)(C)(iii).

carefully considered the criteria listed in the statute pertaining to impact of the imports, and do not repeat that discussion.

Subject imports from Japan accounted for a relatively small percentage of the EL display market during the period of investigation. Import penetration declined significantly. The weighted average dumping margin in this case is 7 percent.<sup>51</sup> For the reasons stated above, we determine that if the subject imports had been sold at their fairly traded prices, it is likely that many customers still would have bought the Japanese displays. While some additional customers would have purchased a domestic display, evidence in the record does not indicate the increase in demand would have led to a level of increased sales for domestic producers or increased prices such that we would conclude the domestic EL display industry is materially injured by reason of LTFV imports. We conclude, therefore, that the domestic EL display industry is not materially injured by reason of the LTFV EL display imports from Japan.

#### IV. No Threat of Material Injury by Reason of LTFV EL Display Imports

We further determine that there is no threat of material injury by reason of LTFV EL display imports from Japan. Under the statute, the Commission is required to consider various criteria.<sup>52</sup>

Our application of the statutory threat criteria supports our negative determination. The statute provides that a threat determination "shall be made on the basis of evidence that the threat of material injury is real and that actual injury is imminent," and that our decision "may not be made on the

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<sup>51</sup> Vice Chairman Watson did not consider the dumping margin.

<sup>52</sup> See 19 U.S.C. § 1677(7)(F).

basis of mere conjecture or supposition." <sup>53</sup> In addition, the evidence must show more than a "mere possibility" that injury might occur.<sup>54</sup>

Our analysis of threat is simplified because this antidumping investigation does not involve subsidies or agricultural products, any potential for product shifting due to other findings or orders under the antidumping or countervailing duty laws, or dumping findings or remedies in third countries.<sup>55</sup> Thus, those factors are not pertinent to this investigation.

The record clearly shows that market penetration by the subject EL displays did not "rapidly increase." To the contrary, subject import market penetration declined significantly during the period of investigation.<sup>56</sup> We also do not find any excess or underutilized capacity in Japan that would likely result in a significant increase in exports to the United States.<sup>57</sup> Moreover, we find no probability that imports of Japanese EL displays will enter the United States at prices that will have a suppressing or depressing effect on U.S. prices. There was a decline in inventories of the imported product in the U.S. in 1990.<sup>58</sup>

We also find that any existing or potential effects on existing development or production efforts of the domestic industry are not sufficient

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<sup>53</sup> See 19 U.S.C. § 1677(7)(F)(ii).

<sup>54</sup> Alberta Gas Chemicals, Inc. v United States, 515F. Supp. 780 (1981).

<sup>55</sup> Report at A-66.

<sup>56</sup> Report at Table 38.

<sup>57</sup> Report at Table 34.

<sup>58</sup> Report at Table 31.

to warrant a threat finding. While petitioners contend that the LTFV EL display imports have affected their plans for future growth, we decline to base a threat determination solely on petitioners' statements about effects on development or production efforts.

We find no other demonstrable trends or evidence in the record that would support a finding of threat of material injury. Based on the above analysis, we find no threat of material injury by reason of LTFV EL display imports.



## ADDITIONAL VIEWS OF VICE CHAIRMAN WATSON

I. The Court of International Trade's Remand Determination

On December 29, 1992, the Court of International Trade issued its decision in Hosiden Corp. v. United States, 16 CIT \_\_\_, Slip Op. 92-229 (December 29, 1992).<sup>1</sup> In its final determination,<sup>2</sup> the Commission found that there was one like product, namely all domestic high information content flat panel displays (HIC FPDs). The Commission then determined that the domestic producers of the like product were materially injured by reason of "cumulated" imports of active-matrix liquid crystal displays (AMLCDs) and electro-luminescent (EL) FPDs. The Court held that in regard to the Commission's "cumulation" of the two classes or kinds of merchandise found by Commerce "the Commission's interpretation of its statutory duties were not in accordance with the plain language of the statute."<sup>3</sup> The Court further held that the "plain language of the statute therefore limits the Commission to individual determinations of whether a domestic industry producing products like each separate class or kind of imported article is being injured by each separate class or kind of imported merchandise

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<sup>1</sup> On March 1, 1993, the U.S. International Trade Commission filed a notice of appeal of the CIT's remand. Vice Chairman Watson supported that appeal.

<sup>2</sup> High-Information Content Flat Panel Displays and Subassemblies Thereof from Japan, USITC Publication 2413, Inv. No. 731-TA-469 (Final) (August 1991). Vice Chairman Watson was not a member of the Commission at that time.

<sup>3</sup> Hosiden Corp. v. United States, at 10.

designated by Commerce."<sup>4</sup>

In reaching my determination on remand, I believe it appropriate to follow the CIT's instructions explicitly and I have done so. Having not participated in the Commission's final determination, however, it concerns me that I have not had the opportunity to use my discretion to interpret the statutory provisions relating to the important issues decided by the CIT's remand. The relevant statutory provision relating to the issue of whether the Commission had the discretion to "cumulate" the separate classes of merchandise subject to investigation is 19 U.S.C. § 1673. I note that the pertinent language of that statutory provision appears to be ambiguous.<sup>5</sup> The CIT's failure to apply a deferential standard of review raises an important issue

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<sup>4</sup> Id., at 12.

<sup>5</sup> The CIT stated that 19 U.S.C. § 1673 on its face requires the Commission to consider each class or kind separately. There are, however, other statutory provisions that define the imports that are relevant to the Commission's investigation. For example, 19 U.S.C. § 1673d(a)(1) requires Commerce to determine "whether the merchandise which is the subject of the investigation is being" sold at LTFV. Next, 19 U.S.C. § 1673d(b)(1) requires the Commission to base its final determination on "imports . . . with respect to which the administering authority has made an affirmative determination under subsection (a)(1) of this section", i.e., the merchandise which is the subject of the Commerce investigation and affirmative LTFV determination. These provisions do not direct the Commission to look solely to individual classes or kinds of merchandise, but direct the Commission to consider all imports as to which Commerce has made "an affirmative determination", and arguably authorize the Commission to follow the approach it did in its final determination.

of institutional concern for the Commission.<sup>6</sup>

In reaching my like product determination on remand, I have noted the CIT's warning that the Commission may not indiscriminately nor habitually include products with minor differences from the imported articles in its definition of like product.<sup>7</sup> While in these investigations I have found the appropriate like products to be identical to the classes or kinds of merchandise found by Commerce, a question exists whether the CIT's warning is consistent with relevant congressional intent.<sup>8</sup>

## II. New Developments Affecting the Domestic Active Matrix Liquid Crystal Display Industry

Subsequent to the Commission's final determination, there were new developments that came to the Commission's attention regarding the AMLCD industry that merit additional discussion.

On February 25, 1992, Commerce issued a Scope Review that

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<sup>6</sup> Indeed, if it is correct that the agency has discretion to consider the classes or kinds separately or collectively, the Commission may well decide that separate consideration provides the better approach. This is a decision for the Commission to make, however, and the result should not be forced on the Commission by the court.

<sup>7</sup> Hosiden Corp. v. United States, at 24.

<sup>8</sup> The CIT's decision quotes language in the Senate Report to the Trade Agreements Act of 1979 to support the position that the Commission should not habitually include within the definition of like product products with minor differences in physical characteristics or uses. Hosiden Corp. v. United States, at 22. My reading of the legislative history indicates that the Commission should not obscure injury by limiting the scope of the like product because of minor differences. Moreover, it does not require the Commission to exclude goods from the like product because minor differences exist. S. Rep. No. 249, 96th Cong., 1st Sess. 90-91 (1979).

excluded from the scope of the antidumping order certain AMLCDs imported for avionics purposes by Rockwell International Corp.<sup>9</sup> I find that the Scope Review should be included in the record and I have taken it into account in reaching my determination on remand.<sup>10</sup> The Commission may, irrespective of the inclusion of the Scope Review in the record, properly take official notice of the Scope Review because it is a matter of public record and is an official decision of a federal agency.<sup>11</sup> Under the statutory scheme, it is Commerce that determines the scope of the investigation and issues any antidumping order.<sup>12</sup> The ITC must accept Commerce's determination of the scope and may not look behind it.<sup>13</sup> I also note that federal courts have consistently held that an agency has an obligation to make corrections when it has been relying on

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<sup>9</sup> See, Scope Review on the request by Rockwell International Corporation (Scope Review), Inv. No. A-588-817, February 25, 1992.

<sup>10</sup> The Commission requested and has received briefs of the parties specifically addressing, inter alia, whether the Commission can and should reopen the record to include Commerce's Scope Review.

<sup>11</sup> See, Interstate Natural Gas Co. v. Southern California Gas Co., 209 F.2d 380, 384-85 (9th Cir. 1953); 4 Jacob A. Stein, Glenn A. Mitchell & Basil J. Mezines, Administrative Law § 25.01 (1992). The principal of official notice permits an agency to take cognizance of facts similar to those of which a court could take judicial notice.

<sup>12</sup> See, 19 U.S.C. § 1673.

<sup>13</sup> Algonia Steel Corp. v. United States, 688 F. Supp. 639, 644 (1988), aff'd, 865 F.2d 240 (Fed. Cir.), cert. denied, 492 U.S. 919 (1989).

erroneous factual assumptions, or to correct errors of substance.<sup>14</sup> The Scope Review should, therefore, be taken into consideration in order to prevent the possibility of an injury determination on remand that would be attributable in part to merchandise that is no longer subject to investigation or to an antidumping order.

Having considered the quantity and value of those imports excluded by the Scope Review, I find that they account for a small share of total AMLCD imports and ultimately have a de minimis effect on the overall AMLCD market and therefore my remand determination.<sup>15</sup> As a result, regardless of whether those imports are included or excluded from those AMLCD imports subject to investigation, my determination would remain the same.

On November 3, 1992, OIS Optical Imaging Systems, Inc. (OIS), the sole domestic producer of AMLCDs, submitted a letter to Commerce which advised the Department it was no longer interested in enforcement of the antidumping order; requested that the Department conduct a changed circumstances review; and finally, that Commerce revoke the antidumping order. Accordingly, on January 19, 1993, Commerce published its preliminary decision to

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<sup>14</sup> See, Alberta Gas Chemicals, LTD. v. Celanese Corp., 650 F.2d 9, 13 (2d Cir. 1981); Green County Planning Bd. v. Fed. Power Commission, 559 F.2d 1227, 1233 (2d Cir. 1976), Borlem S.A. - Empreeditmentos Industriais v. U.S., 718 F. Supp. 41 (CIT 1989).

<sup>15</sup> Staff Report, Table 38. I have also noted that the excluded imports account for one of three sets of AMLCD pricing in the Staff Report. Report at A-177.

revoke its order on AMLCDs and display glass therefor.<sup>16</sup> On February 19, 1993, OIS filed a letter with the Commission advising it that maintenance of the existing antidumping order on AMLCDs was no longer in the interest of the U.S. AMLCD industry and that it was not associated with any remand brief filed on behalf of the petitioners. The letter dated February 19, 1993 was accepted into the record and distributed to the Commission. Attached to that letter was a copy of another letter dated January 11, 1993, which was previously sent to Commerce by OIS.<sup>17</sup>

I find it appropriate, irrespective of whether the February 19, 1993 letter is considered part of the record, to take official notice of Commerce's Preliminary Revocation which directly relates to the February 19, 1993, OIS submission.<sup>18</sup> The Preliminary Revocation makes it apparent that important changed circumstances have occurred, namely, that the sole U.S. producer of AMLCDs no longer supports the petition or the continuation of the antidumping

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<sup>16</sup> Preliminary Results of Changed Circumstances Antidumping Duty Administrative Review and Intent to Revoke the Order (Preliminary Revocation), 58 Fed. Reg. 4979.

<sup>17</sup> There does not appear to be any question that both the January 11, 1993 and the February 19, 1993 letters became part of the record which was considered by the Commission in reaching its remand determination. The letters, which were served on the parties, were stamped received by the Commission on February 19, 1993 and promptly distributed. The Commission did not receive any comments or objections to OIS's submission from interested parties.

<sup>18</sup> See, Footnote 11, supra.

order.<sup>19</sup>

Accordingly, I have considered the February 19, 1993, OIS submission in reaching my determination regarding the AMLCD industry. Although OIS's change in position occurred after the date of the Commission's original determination, I believe it is the type of extraordinary development that warrants a departure from rigid adherence to the rule of finality.<sup>20</sup> The consideration of such changed circumstances is appropriate "especially where broad public interests are at stake."<sup>21</sup> I have no doubt that the ultimate disposition of this case will have a profound impact on the dynamic computer industry and American consumers. Extremely relevant, therefore, are the contemporary positions of the parties.

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<sup>19</sup> Before a final ruling by Commerce, interested parties are provided an opportunity for written comment and a hearing, if requested. I note, however, that Commerce has preliminarily determined that none of the three objecting parties have standing to object to the proposed revocation of the antidumping order as it relates to AMLCDs.

<sup>20</sup> See, Alberta Gas Chemicals, 650 F.2d 9, 13 (1981); Bookman v. United States, 453 F.2d 1263, 1265 (Ct.Cl. 1972).

<sup>21</sup> See, Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316, 321, 81 S.Ct. 1611, 1617, 6 L.Ed 2d 869 (1961). As stated by the Supreme Court:

Whenever a question concerning administrative, or judicial, reconsideration arises, two opposing policies immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what ultimately, appears to be the right result on the other.

See also, Green County Planning Bd. v. Fed. Power Com'n, 559 F.2d 1277 (1976); Hudsons River Fishermen's Ass'n v. FPC, 498 F.2d 827, 833 (2d Cir. 1974).

The fact that the domestic AMLCD industry opposes antidumping duties greatly bolsters my negative determination in regard to whether the establishment of the domestic AMLCD industry is materially retarded.<sup>22</sup> In its January 11, 1993 letter, OIS has clearly indicated that it believes the antidumping duty on AMLCDs will impede the development of an AMLCD industry in the United States.<sup>23</sup> The OIS submission confirms statements made by the domestic computer industry during the Commission's final investigation regarding the need to move production offshore in the event of an antidumping order.<sup>24</sup> Since the antidumping order was issued, a significant number of potential customers have moved production offshore and others have threatened to do so. This appears to have made it more difficult for OIS to develop the kind of close, ongoing working relationships with potential customers on which success in this rapidly changing, cutting-edge market hinges. Further, the antidumping order makes it impossible to obtain the design expertise and capital necessary to move forward

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<sup>22</sup> I note that my findings as to why the establishment of the domestic AMLCD industry is not being materially retarded as set forth in the Views of Vice Chairman Watson and Commissioners Brunsdale and Crawford are, by themselves, legally sufficient to support a negative determination. The separate views expressed here provide an additional and independent basis for that determination.

<sup>23</sup> Letter from OIS Optical Imaging Systems, Inc. to the Honorable Barbara H. Franklin dated January 11, 1993.

<sup>24</sup> Transcript at 177-178.

with plans to manufacture AMLCDs for consumer use.<sup>25</sup>

Under the material retardation standard in a final investigation, the Commission determines "whether the establishment of a domestic industry is materially retarded by reason of the subject imports."<sup>26</sup> The statute does not mandate how the Commission should apply this provision. I note that the Commission has stated that "the establishment of any new industry is so inherently unique that material retardation must always be examined on a case by case basis."<sup>27</sup> I agree with this statement. Certainly, OIS's change in position and its supporting statements confirm other evidence of record indicating a lack of material retardation and, as such, were given due consideration in my remand determination.

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<sup>25</sup> Id. OIS believes that without protection it will be better able to develop relationships with prospective customers, capitalize on its continued technical leadership and market knowledge, and thereby demonstrate its capabilities and win orders.

<sup>26</sup> 19 U.S.C. § 1673d(b).

<sup>27</sup> Certain Dried Salted Codfish from Canada, Inv. No. 731-TA-199 (Preliminary), USITC Pub. 1571 (Sept. 1984) at 6.



ADDITIONAL VIEWS OF COMMISSIONER ANNE E. BRUNSDALE  
High-Information Content Flat Panel Displays from Japan

Invs. Nos. 731-TA-469 (Final)

The issues raised on the appeal from the order remanding this case, as well as the remand itself, have been the subject of considerable debate within the Commission. Given the anomalous situation that the views of the Commission majority are represented on appeal, but the views of the minority are not, I have decided to write these additional views to discuss my thoughts on two issues: the appealability of remand orders and the Commission's discretion to cumulate classes or kinds of merchandise in defining a like product produced by a domestic industry.<sup>1</sup>

I. APPEALABILITY OF REMAND ORDERS

The entire Commission is well aware that its reconsideration on remand is proceeding simultaneously with an appeal of the CIT's remand order. The same is true of the Commission's reconsideration on remand of Atlantic Salmon from Norway, which is now frozen at the CIT pending completion of the appeal in Chr. Bjelland Seafoods A/C v. United States, 16 CIT \_\_\_\_, Slip Op. 92-196 (October 23, 1992). One can reasonably anticipate that nearly every CIT order remanding a case to the Commission

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<sup>1</sup> I fully join Commissioner Crawford's additional views on a third issue, the Commission's ability to consider evidence on remand that was not presented to it (or did not exist) when it made its initial determination.

will now be appealed. The Commission majority has taken the position that this is not only right, but good. I disagree.

A. Appealability as of Right

The key language governing the appealability of orders remanding cases to the Commission is 28 USC Section 1295, which gives the Federal Circuit jurisdiction over appeals from the CIT only if the order appealed from is a "final decision." In the not too distant past, the rule was that orders remanding cases to the Commission were not final decisions. See Cabot Corp. v. U.S., 788 F.2d 1539, 1542-43 (Fed. Cir. 1986). More recently, the Federal Circuit, following Sullivan v. Finkelstein, 496 U.S. 617 (1990), held that "remands are not all of the same nature. Some are final; some are not." Travelstead v. Derwinski, 978 F.2d 1244, 1249 (Fed. Cir. 1992).

It is clear that in Finkelstein one factor supporting appealability was that the lower court had made a final decision that the agency involved was misconstruing its statute. But the Court there did not rely on misconstruction alone:

The District Court's remand order was unquestionably a "judgment," as it terminated the civil action challenging the Secretary's final determination that respondent was not entitled to benefits, set aside that determination and finally decided that the Secretary could not follow his own regulations in considering the disability issue. Furthermore, should the Secretary on remand undertake the inquiry mandated by the District Court and award benefits, there would be grave doubt, as the Court of Appeals recognized, whether he could appeal his own order.

Finkelstein, 496 U.S. at 625 (emphases added).

One can easily see the issues that Finkelstein and Travelstead left unresolved. On the one hand, an order may be appealable if it (1) rejects an "established standard", even if (2) that rejection does not lead to a final dismissal of a case reviewing an agency's determination, and even if (3) the agency issuing the order has the right to seek appellate review upon being compelled to reach a contrary determination upon consideration on remand. But Travelstead and Finkelstein may also mean that an order is appealable if it (1) rejects an "established standard", but only if it also (2) leads to a final dismissal of a case reviewing an agency's determination, and (3) deprives that agency of its ability to seek appellate review upon being compelled to reach a contrary determination upon consideration on remand.

I think the better reading of Finkelstein and Travelstead is the latter: Finality has little to do with the characterization of a question as legal or factual. It has everything to do with whether its resolution was in fact dispositive and whether later review is possible. All courts have a "preference for review of a fully-developed record in contrast to determination of legal questions in the abstract." Travelstead, 978 F.2d at 1247. By allowing the Commission to appeal interlocutory remand orders that turn (in whole or part) on whether they reverse established legal standards (or merely, as here, customary practice), the Federal Circuit would be depriving itself of the opportunity to enjoy this preference.

### B. Policy Implications

Quite apart from the legal definitions of finality, however, are the policy implications of routine interlocutory appeals of remand orders. There are several. First, appeals of remand orders will cause the Commission to lose a chance to narrow the focus of issues that remain in dispute in an investigation, or to reopen the record on the order of the CIT to resolve issues that could be resolved before appeal to the Federal Circuit. The result may well cause increased expense and delay as repeated appeals are taken in the same case.

Second, an interpretation of finality that focuses on whether an "established legal standard" is being appealed might well benefit only the ITC, and no interested party. It is true, of course, that the Commission itself is a party to any review of its determinations, but we should not forget that petitioners and respondents are the really "interested" parties. They are the ones who must hire counsel and suffer from any delay occasioned by interlocutory appeals. Unlike cases involving social security benefits or forgiveness of indebtedness to the VA, the Commission does not stand to lose money or property (or, more precisely, to cause the United States to lose money or property) as a result of judicial review. Interpreting "final decision" to mean that the Commission may appeal remand orders involving "established legal standards" may make for interesting appellate arguments, and might even save some time for the Commission in the future, but

it is unlikely to further the goal of quickly resolving disputes between interested parties.<sup>2</sup>

And, indeed, it is the potential for delay that I find most troubling about this new spate of appeals. It is the general rule that the bringing of an appeal to the Federal Circuit deprives the CIT of jurisdiction to take any action concerning the remand until the Federal Circuit has ruled. This almost guarantees an extra year of litigation in those cases where such appeals are taken, subjected to motions to dismiss, heard on the merits, subjected to motions for reconsideration and petitions for certiorari, et cetera. This has grave implications, since it is quite possible that a broad rule of appealability will have one of two doleful effects. If it results in unjustified duties staying in place for years, it will disrupt international trade, contrary to our obligation under the GATT to conclude these investigations expeditiously. If it results in an unjustified failure to impose antidumping or countervailing duties, it may well irreparably harm a domestic industry. Antidumping and countervailing duty laws are remedial, not compensatory, and those industries bringing them have no prospect of money damages that might make delay affordable.

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<sup>2</sup> It is also noteworthy that the "established legal standards" in Travelstead and Finkelstein were apparently regulations or written policies. The "established legal standards" involved in Bjelland and this case are, in contrast, Commission precedent (and not even unvarying precedent), not embodied in any regulation subjected to public notice and comment, or even subject to the internal review a policy manual.

## II. CUMULATION OF CLASSES OR KINDS

A second issue raised by the order remanding this case is the Commission's ability to cumulate classes or kinds found by Commerce in defining a like product and domestic industry. It seems painfully obvious that what the Commission majority did in making its final determination was to define a like product that corresponded to all the articles subject to investigation, rather than define a particular like product for each of the classes or kinds of articles subject to Commerce's investigation. This in turn raises three major issues, not all of them addressed in the CIT's opinion accompanying its remand order, and none addressed in our initial opinions: Does the plain meaning of the statute allow this reading?; Is there precedent overriding the plain meaning of the statute?; and, What is the effect of not being able to cumulate classes and kinds in defining a like product?

I will address each in turn.

A. The Plain Meaning of the Statute

One of the benefits of judicial review is its occasional ability to focus the attention of an administrative agency on the actual words of the statute it administers. That certainly is the case here, where neither of the opinions in the final determination actually parsed the statute. This is not surprising. Much of administrative decisionmaking (whether or not openly acknowledged) depends on prior decisions or customary practices. We build on what we have learned and done in previous cases. An unfortunate consequence is that the text of the

statute sometimes gets lost in the paraphrasing and shorthand descriptions that regular discussion of a topic engenders. It is nevertheless important to admit that the agency's discretion is not boundless, and that the words of the statute are more important than our protecting our right to do things the way we've always done them.

In this instance, the relevant language of the statute is really pretty obvious. Section 1673 states that antidumping duties shall be imposed if

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that --

(A) an industry in the United States (i) is materially injured, or (ii) is threatened with material injury . . . by reason of imports of that merchandise . . . .

19 USC § 1673.

One may fairly construe "a" to mean "at least one" instead of "one and only one particular one" in many contexts. No one would contest, for instance, the Commission's customary reading of "an industry" to mean "at least one industry," for instance. But it is impossible to find any ambiguity in this sentence when "a class or kind of foreign merchandise" is referred to in the same sentence as "that merchandise." The restrictive modifier "that" cannot legitimately be construed to refer to any merchandise other than that within a particular class or kind found by Commerce to have been dumped. Our "determination" must

therefore concern imports of a particular class or kind. And we must make a separate determination for each separate class or kind of merchandise that Commerce finds is being dumped. There is, in short, no room for exercise of administrative discretion.

B. Precedent

Read in this way, it is difficult to understand why some Commissioners interpret the CIT opinion to limit the Commission's discretion to find a number of like products different from the number of classes or kinds of merchandise that Commerce finds to be dumped. The CIT specifically upheld the Commission's discretion to find multiple like products when Commerce finds one class or kind of merchandise, or a single like product when Commerce finds multiple classes or kinds of merchandise. "The Commission's determination of which domestic product or products are 'like' each class or kind of imported article is not limited in scope to that merchandise contained within Commerce's corresponding class or kind distinctions. . . . For example, the Commission may properly find multiple like products within each class or kind of article defined by Commerce." Op. at 7 n.1.

There is thus no conflict with precedents like Torrington Co. v. U.S., 747 F. Supp. 744 (CIT 1990), aff'd, 938 F.2d 1278 (Fed. Cir. 1991), which have upheld Commission findings of more like products than classes or kinds of merchandise.

C. Cumulation

Finally, it appears that some Commissioners read the CIT decision to preclude them from cumulating the effects of

different classes or kinds of merchandise. A close reading of the opinion shows that it has nothing to do with cumulation in this sense. The opinion is in no way inconsistent with the cumulation provision of the statute or the Commission's long-standing assertion of its authority to cumulate the effects of imports subject to investigation at the same time. That provision, 19 USC § 1677(7)(C)(iv), and its corresponding section for threat cases, requires us to cumulate "the volume and effect" of the imports. It has nothing to do with cumulating multiple classes or kinds of merchandise as found by Commerce for the purpose of defining a like product under Section 1677(10). Indeed, Section 1677(10), with its definition of a like product as one "which is like, . . . the article subject to an investigation under this subtitle" suggests that our like product analysis begin with a particular class or kind of article, inasmuch as it is particular (and not cumulated) classes or kinds of articles that are subject to Commerce's investigation. All the CIT held was that, when Commerce finds multiple classes or kinds of merchandise, the Commission must make multiple determinations -- not find multiple like products, not find multiple domestic industries, just make multiple determinations. As the opinion states

Upon remand, the Commission must individually determine the domestic industry -- the domestic producers of a like product corresponding to imported AMLCD FPDs . . . . Secondly, the Commission must determine the domestic producers of the like product corresponding to EL FPDs, and

whether that domestic industry was injured by reason of EL FPD importations.

Op. at 18.

There is nothing in the opinion that would not allow the Commission on remand to find that there is one like product that is like each of the classes or kinds of article that Commerce investigated. Cumulation of the volume and effects of each of those classes or kinds of merchandise could then follow, at least to the extent that we can cumulate the volume and effects of merchandise that is subject to both countervailing and antidumping investigations, or any other cases where the Commission cumulates the effects of subject imports as part of its consideration of the conditions of competition.

In a way, then, the CIT opinion might be thought trivial. It only compels the Commission to reach separate determinations, not different results. Instead of defining a single like product corresponding to cumulated classes or kinds of merchandise, the Commission could define a single like product that corresponded to each class or kind of merchandise. If those single like products were the same, we could then (on analogy to cross-cumulation) cumulate their effects and make separate, identical determinations. The only difference would seem to be the necessity of two affirmative votes instead of one.

However, as the CIT points out, cumulating classes or kinds of merchandise in defining a like product may well be very important:

Cumulation of two or more classes or kinds of articles increases the diversity of merchandise for which the Commission seeks to find a "like product." This increase in diversity, of course, accordingly increases the totality of characteristics of the group -- or class or kind - - of merchandise for which the Commission determines a "like product." The Commission's definition of products "like" the newly created diverse class or kind of article under investigation is therefore expanded because it must take into account these increased characteristics.

Correspondingly, the expanded definition of the domestic industry leads to a skewed causation determination.

Op. at 15-16.

In some cases, cumulating the classes or kinds of merchandise would have no effect on the ultimate determination made. In some cases, it would. But in all cases, the Commission needs to remember the specific language, and plain meaning, of the statute it is charged with administering.



## ADDITIONAL VIEWS OF COMMISSIONER CRAWFORD

In making its remand determination with respect to AMLCD imports, the Commission must decide whether to consider two items of information not included on the administrative record in its original determination. First, after the Commission's original final determination, the Department of Commerce ("Commerce") issued a scope ruling that excluded certain AMLCD imports from the scope of the antidumping order. Second, OIS Optical Imaging Systems, Inc. ("OIS"), a petitioner in the original investigation, has stated in this remand proceeding that the order is no longer in the interest of the domestic industry.

In making the negative determination with respect to AMLCD imports, I have not considered this post-order information.

The Commission's Federal Register notice in this remand proceeding requested comments from the parties on the relevance of the scope ruling to the Commission's determinations. At the outset, it is important to note that there is substantial precedent that only the facts as they existed on the record at the time of the Commission's original determination should be considered on remand.<sup>1</sup> As a result, the Commission may not re-open the record

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<sup>1</sup>See Kenda Rubber Industry, Co. v. United States, 10 CIT 120, 126-127, 630 F. Supp. 354, 359 (1986); Budd Co. v. United States, 1 CIT 67, 79-80, 507 F. Supp. 997, 1006-1007 (1981).

of the original investigation absent the clear authority to do so.

Respondents argue that the Commission must consider the scope ruling, citing Borlem S.A. v. United States, 13 CIT 535, 718 F. Supp 41 (1989), aff'd, 913 F.2d 933 (Fed. Cir. 1990) for the proposition that the Commission's determination may not be based on inaccurate data. Petitioners, on the other hand, argue that the Commission should not consider the scope ruling, distinguishing this proceeding from Borlem on the basis of the facts.

Neither party addresses the precise holding in Borlem. In that case, Commerce twice amended its final dumping determination after the Commission made its final injury determination and the antidumping order was issued. In its second amended final determination, Commerce corrected an error in its calculation of the dumping margin for one of the two respondents. That correction resulted in the exclusion of the entire exports of that respondent from the order.

On appeal, the CIT ordered the Commission to determine on remand whether in its discretion it should reconsider its original determination.<sup>2</sup> The CIT did not hold that the Commission has the inherent power to reconsider its original determination.<sup>3</sup> Rather,

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<sup>2</sup>718 F. Supp. at 50.

<sup>3</sup>718 F. Supp at 47.

the CIT held that the Commission "has the authority and power to reconsider a final determination when directed by this court to do so pursuant to this court's remand authority."<sup>4</sup>

The Commission filed an interlocutory appeal with the United States Court of Appeals, Federal Circuit ("CAFC"). The principal question before the CAFC was whether the Commission has the authority and power to reconsider its original determination, when ordered to do so by the CIT pursuant its remand authority.<sup>5</sup>

The CAFC did not find it necessary to address the Commission's authority to reconsider its determination. Rather, the CAFC succinctly stated that "{T}he issue before us is the Court's authority to require the Commission to act, not the Commission's right to act under its own rules."<sup>6</sup> The CAFC held that the CIT had the authority to do so, reasoning that a reviewing court is not precluded from considering events occurring between the agency's determination and the court's decision on appeal, where the events

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<sup>4</sup>718 F. Supp at 49 (emphasis supplied).

<sup>5</sup>913 F.2d at 936

<sup>6</sup>The CAFC discussed Commerce's second amended determination (i.e. the exclusion of the entire exports of one respondent) as an event that may lead to a different result upon reconsideration. The significance of a post-order event, however, is relevant to the proper exercise of the CIT's authority, not the existence of that authority.

are properly brought to the court's attention.<sup>7</sup>

In the instant case, the scope ruling was raised in appeal briefs filed with the CIT. Although properly presented to the court, the remand decision does not address the scope ruling. It clearly therefore does not fall within the ambit of Borlem, as it does not direct the Commission to consider the scope ruling.

The fact that the CIT did not exercise its authority to direct the Commission to consider the scope ruling may imply that the ruling is not especially significant, but silence is not direction. The CIT's decision does not confer authority on the Commission to consider the scope ruling under the Borlem holding.

Zenith Electronics Corp. v. United States, 699 F. Supp. 296 (CIT 1988) also imposes major limits on the Commission's authority to consider the scope ruling. Under the statutory provisions for judicial review of Title VII investigations, a Commerce determination in that case was appealed to the CIT. While the appeal was pending, Commerce attempted to correct ministerial errors under a specific statute granting it authority to do so. The CIT held that its appellate jurisdiction over the final determination required Commerce to obtain the Court's permission to amend the final determination. The CIT stated that, "once the final determination becomes the subject of an action in court, one

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<sup>7</sup>913 F. 2d at 938.

way or another, allowing Commerce to take independent steps to alter the determination is in conflict with the authority of the Court."<sup>8</sup> In short, the CIT ruled that its jurisdiction over the matter prevented Commerce from exercising its express statutory authority.

As in Zenith, the Commission's original final determination in this investigation was appealed to the CIT. Unlike Zenith, however, there is no express statutory provision on which the Commission may assert the authority to consider the scope ruling. Absent specific statutory authority, the Commission would be less justified than Commerce was in Zenith to assert authority to consider the scope ruling. Accordingly, I conclude that the Commission must obtain the CIT's permission to consider the scope ruling.

Based on the holdings in Borlem and Zenith, the Commission does not have the authority to consider the Commerce scope ruling without being directed to do so by the CIT.

The Commission also does not have the authority to consider the OIS submission in this remand proceeding. Under the holdings of Borlem and Zenith, the Commission does not have the authority to consider the OIS submission unless directed to do so by the CIT.

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<sup>8</sup>699 F. Supp. 296 (1988)

Equally important, the OIS submission is an event of a fundamentally different nature.

OIS was a petitioner when the Commission made its original determination. As such, the Commission determined that OIS was part of an industry that was materially injured by reason of subject AMLCD imports. The OIS post-order submission does not assert that the factual information on which the Commission relied was incorrect, incomplete, or has changed. Rather, OIS is bringing to the Commission's attention changed circumstances since the order was issued. Thus, the question before the Commission is not whether the post-order changes would have affected the Commission's original determination, but whether OIS' current circumstances warrant a revocation of the order.<sup>9</sup> I conclude that a changed circumstances review under the Commission's revocation authority is the appropriate proceeding in which to consider the OIS submission.

Finally, I do not believe that the Commission may take administrative notice of the scope ruling and the OIS submission in this remand proceeding. Doing so would supplement the record of the original administrative proceeding and, in effect, assert authority to consider these events. The limits on the Commission's

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<sup>9</sup>The Commission has the authority to revoke an antidumping order when changed circumstances are sufficient to warrant revocation. 19 U.S.C. 1675(b)(1). I believe that OIS' lack of interest in the order is a sound basis for the Commission to consider revoking the order.

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authority in accordance with Borlem and Zenith cannot be eliminated by taking administrative notice.



## ADDITIONAL VIEWS OF COMMISSIONER JANET A. NUZUM

Based on the record in the final investigation as supplemented by the remand investigation, I determine that an industry in the United States is not materially injured or threatened with material injury by reason of LTFV imports of electroluminescent ("EL") high information content ("HIC") flat panel displays and display glass therefor from Japan.

My analysis of the issues of like product, domestic industry and condition of the industry is set forth above in Views of Chairman Newquist, Commissioner Rohr and Commissioner Nuzum. That analysis applies equally to my determination on EL HIC flat panel displays as well as my determination on AMLCDs, and therefore, I will not repeat that analysis here.

I. No material injury by reason of LTFV imports of EL Flat Panel Displays

A. Volume of Imports

The Commission is required to consider the volume of the subject imports, and whether "the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to domestic production or consumption in the United States, is significant."<sup>1</sup> I start by noting that, of all imports of flat panel displays, whether subject or non-subject, and whether EL, active matrix or other technology, the volume of imports of EL flat panel displays generally was the smallest in terms of quantity and value.<sup>2</sup> The statute directs the Commission to consider not only the volume of imports, but also whether any increase in imports was significant when compared to domestic consumption or production. Here,

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<sup>1</sup> 19 U.S.C. §1677(7)(C)(i).

<sup>2</sup> Report at Table 35.

however, the volume of these imports did not increase, but rather remained steady in terms of quantity and declined in terms of value relative to domestic consumption; relative to domestic production, the volume of imports decreased in terms of quantity.<sup>3</sup> The record shows that the volume of imports of subject EL flat panel displays from Japan, in terms of quantity and value, initially increased in absolute terms between 1988 and 1989, but then decreased in 1990 to a level slightly below the 1988 level.<sup>4</sup>

Although importers' shipments of imports of EL FPDs showed an increase in volume in absolute quantity over the period of investigation, the increase was only slight, particularly when compared to the increases in consumption, U.S. producers' shipments of HIC flat panel displays and importers' shipments of subject AMLCD flat panel displays.<sup>5</sup> Moreover, when measured in terms of value, importers' U.S. shipments of subject EL imports increased slightly between 1988 and 1989, but then declined between 1989 and 1990 to a level only slightly higher than the 1988 level.<sup>6</sup> In terms of market share, importers' U.S. shipments of EL flat panel displays from Japan declined steadily throughout the period of investigation.

Given the small size of the market accounted for by subject EL imports, the overall decrease in the volume of these imports in absolute terms and relative to domestic consumption and production, and in light of the court's

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<sup>3</sup> See Memorandum INV-Q-038 (Feb. 26, 1993), Summary Table 1. References in these additional views to the decline in the market share of consumption held by shipments of EL imports from Japan are expressed in terms of the value of importers' U.S. shipments, not quantity. (The quantity of the share of U.S. consumption remained flat.)

<sup>4</sup> Report at Table 35.

<sup>5</sup> Memorandum INV-Q-038, Table 38a.

<sup>6</sup> Id.

admonition against cumulating the classes or kinds of merchandise in this investigation, I cannot say that I find the volume of imports of EL FPDs to be significant.

B. Price Effects of Subject Imports of Flat Panel Displays

Meaningful pricing information with respect to imports of EL flat panel displays from Japan in this investigation is sparse. Part of the reason for the difficulty in making pricing comparisons is the substantial degree of customization that goes into separate models of HIC flat panel displays, both in general and even within a specific display technology.<sup>7</sup>

The little pricing information that is available consists of purchase prices for two types of EL displays.<sup>8</sup> Four firms purchased 640 x 200 EL displays; three from domestic sources and one from Japan. The pricing information indicates that the prices of these domestic EL displays were generally lower than the prices of the subject imports.

Purchase price information for 640 x 400 displays also was gathered.<sup>9</sup> That information, as well, does not indicate that EL displays from Japan had price suppressing or depressing effects. Specifically, the prices for the subject imports were lower than domestic prices. However, the prices for the

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<sup>7</sup> Report at A-79; see also, Minivans from Japan, Inv. No. 731-TA-522 (Final) USITC Pub. 2529 (July 1993) at 84 (Dissenting Views of Chairman Newquist and Commissioner Nuzum). "For a consumer product that is available on a differentiated basis, actual prices are less important than relative prices; the nature of the product is such that price differentials . . . may be explained as a reflection of the premium consumers are willing to pay for a particular package of features. . . . Rather than comparing 'apples to apples,' such comparisons are more akin to comparing 'fruit baskets to fruit baskets.'"

<sup>8</sup> Report at A-97.

<sup>9</sup> Id.

subject imports fluctuated over the period of investigation, while domestic prices rose.<sup>10</sup>

In sum, the record does not contain substantial evidence that EL imports were underselling domestic HIC flat panel displays, or that EL imports had significant price depressing or suppressing effects. Indeed, the little pricing evidence available tends to support the lack of price suppression or depression. Nevertheless, as noted in the discussion on price effects of AMLCDs in the Views of Chairman Newquist, Commissioner Rohr and Commissioner Nuzum, the lack of pricing data in this industry and market is not altogether surprising. Consequently, I am especially careful to closely examine the complete record for other evidence of a causal link between subject EL imports and the condition of the domestic industry.

C. Impact of the Subject EL FPD Imports on the Condition of the Domestic Industry

An analysis of the impact of the subject imports on the condition of the domestic industry is to be based on all relevant economic factors which have a bearing on the state of the industry, including certain specified factors enumerated in the statute.<sup>11</sup> Furthermore, this analysis should focus on the particular nature and structure of the industry involved, in the context of the business cycle and conditions of competition that are distinctive to the affected industry.

As discussed earlier, the conditions of competition distinctive to the domestic flat panel display industry include the rapidly developing and changing nature of the various display technologies. They also include a domestic industry consisting of small, generally underfinanced producers

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<sup>10</sup> Id.

<sup>11</sup> 19 U.S.C. §1677(7)(C)(iii).

competing against larger, more prosperous Japanese producers with better manufacturing facilities and experience in high-volume production. The technologies compete with one another for end-uses. The success of one technology over another in the marketplace depends not only on the particular characteristics of that technology, but also on the resources and financial stability of the manufacturer offering the product.

Inasmuch as I find that the like product is the same one for each class of subject imports, I am troubled by the CIT's instructions against aggregating the effects of the two classes of subject imports on the domestic industry. I think that cumulating the effects of the subject imports is more consistent, frankly, with the realities of the marketplace in which this industry competes. Nonetheless, I am mindful of my legal obligation to follow the instructions of the Commission's reviewing courts.

Given the absence of significant volume or price effects caused by imports of EL flat panel displays from Japan, I have carefully examined the record for other evidence of adverse effects on the domestic industry from the subject EL flat panel displays. The record does contain evidence of one sale lost to the subject imports.<sup>12</sup> However, that sale consisted of no more than ten units; as such, I find no evidence that this particular sale had any more than a de minimis effect on the domestic industry. In short, compared to the trends of domestic producers' shipments, and imports of AMLCD FPDs and gas plasma FPDs from Japan, as well as imports of EL FPDs from Finland, imports of EL displays from Japan have had a very minor, stable presence in the market.

The causation standard under Title VII of the Act is admittedly a low one, but it does, nevertheless, require more than the mere presence of

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<sup>12</sup> Report at A-182.

imports. Given the declining presence of imports of EL FPDs from Japan in the U.S. market and the absence of evidence of more than de minimis sales lost to subject EL imports by the domestic industry, I do not find sufficient evidence of a causal link between these imports and the condition of the domestic industry to warrant an affirmative determination.

II. No threat of material injury by reason of subject EL Flat Panel Displays

Having arrived at a negative determination with respect to present injury, I now turn to examine whether the subject imports are a threat of material injury to the domestic industry. Section 771(7)(F) of the Act directs the Commission to determine whether a U.S. industry is threatened with material injury by reason of imports "on the basis of evidence that the threat of material injury is real and that actual injury is imminent." The statute specifically states, "Such a determination may not be made on the basis of mere conjecture or supposition."<sup>13</sup> The Commission considers as many of the ten statutory factors as are relevant to the facts of the particular investigation before it, as well as any other relevant economic factors.<sup>14</sup> Our reviewing court has stated that the ten statutory factors primarily serve as guidelines for the Commission's analysis of the likely impact of future imports.<sup>15</sup> I discuss each of the factors relevant to the facts of this investigation below.

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<sup>13</sup> 19 U.S.C. §1677(7)(F)(ii). See Metallverken B.V. v. United States, 744 F. Supp. 281, 287 (Ct. Int'l Trade 1990).

<sup>14</sup> Factor I, regarding the nature of the subsidy, Factor VIII, regarding product shifting, and Factor XI, regarding raw agricultural products, are not relevant to this investigation.

<sup>15</sup> Calabrian Corp. v. United States, Slip Op. 92-69 at 23 (Ct. Int'l Trade May 13, 1992).

Foreign capacity and unused capacity. The record indicates production capacity for EL flat panel displays in Japan increased slightly between 1988 and 1989, and then increased fairly significantly between 1989 and 1990.<sup>16</sup> However, capacity utilization rates also increased significantly between 1989 and 1990 after declining slightly between the first two years of the period for which data were collected.<sup>17</sup> Further, Japan has a substantial home market for EL flat panel displays. The increase in capacity appears to be directed primarily to increasing demand in the home market, rather than exports to the United States (which actually declined between 1989 and 1990). I do not find, therefore, that the increase in foreign capacity is "likely to result in a significant increase in imports to the United States."

Increases in market penetration. There has been no "rapid increase" in market penetration; as discussed above, the market penetration of subject imports of EL flat panel displays remained steady in terms of quantity and declined in terms of value during the period of investigation.

Price depression/suppression. As discussed above, there is no clear evidence of price depression or price suppression caused by subject imports of EL flat panel displays. Of course, the relatively stronger position of the Japanese producer of EL displays compared to domestic HIC flat panel display producers could enable the respondent to underbid the domestic producers for a contract at some time in the future. This general observation of the relative competitive positions of the Japanese and U.S. producers in the marketplace, however, is not sufficient evidence of a "real" threat of "imminent" actual injury by reason of these subject imports.

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<sup>16</sup> See Report at Table 34.

<sup>17</sup> Id.

Increases in U.S. inventories. U.S. importers' inventories of EL flat panel displays from Japan increased significantly between 1988 and 1989 and then declined slightly between 1989 and 1990.<sup>18</sup> As a ratio of U.S. importers' shipments, EL displays increased significantly between 1988 and 1989, and then declined between 1989 and 1990. I note, however, that EL displays had a significantly high ratio of inventories to shipments when compared to other imports of HIC flat panel displays from Japan.<sup>19</sup>

Any other demonstrable adverse trends. I do not find evidence of any other demonstrable adverse trends that are relevant to determining whether imports of EL displays from Japan threaten material injury to the domestic industry.

Actual and potential negative effects on development and production efforts of domestic industry. I do not find any specific evidence that indicates imports of EL flat panel displays are having an actual or potential negative effect on the domestic industry's development and production efforts, including efforts to produce derivative products. The record indicates that domestic flat panel display producers have experienced substantial difficulties in obtaining financing. One of the reasons given by various sources is the dominant presence of the Japanese HIC flat panel display producers in the market. None of these sources, however, specifically

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<sup>18</sup> See Report at Table 31.

<sup>19</sup> Id. It appears the increase in inventories accounts for the disparate trends between imports of EL displays and importers' shipments of EL displays from Japan.

pinpoints imports of Japanese EL FPDs as a cause of the domestic industry's difficulties in obtaining financing.<sup>20</sup>

As the foregoing analysis of the statutory threat factors indicates, only U.S. importers' inventories is an affirmative indicator of threat of material injury. Even with that increase in inventories, however, U.S. market share of EL displays from Japan declined during the period of investigation. An affirmative determination of threat must be based on positive evidence that demonstrates the likelihood that material injury will occur by reason of these subject imports; that the threat is real and actual injury is imminent. Based on the record as a whole, that standard is not met here. Accordingly, I am compelled to make a negative determination.

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<sup>20</sup> As Commissioners Rohr and Newquist noted in the original determination, the Commerce Department's change in the class or kind of merchandise three days before the Commission's hearing created substantial problems for the Commission in terms of data-gathering. USITC Pub. 2413 at 5, n.5. Up to that point, the Commission had operated on the presumption that there was a single class or kind of subject merchandise, namely, all HIC flat panel displays. Hence, many of the questions asked by the staff of importers and purchasers were general in scope, rather than focusing on specific types of HIC flat panel displays. Nevertheless, I must base my determination on the record as I find it, not as I would like to find it.

