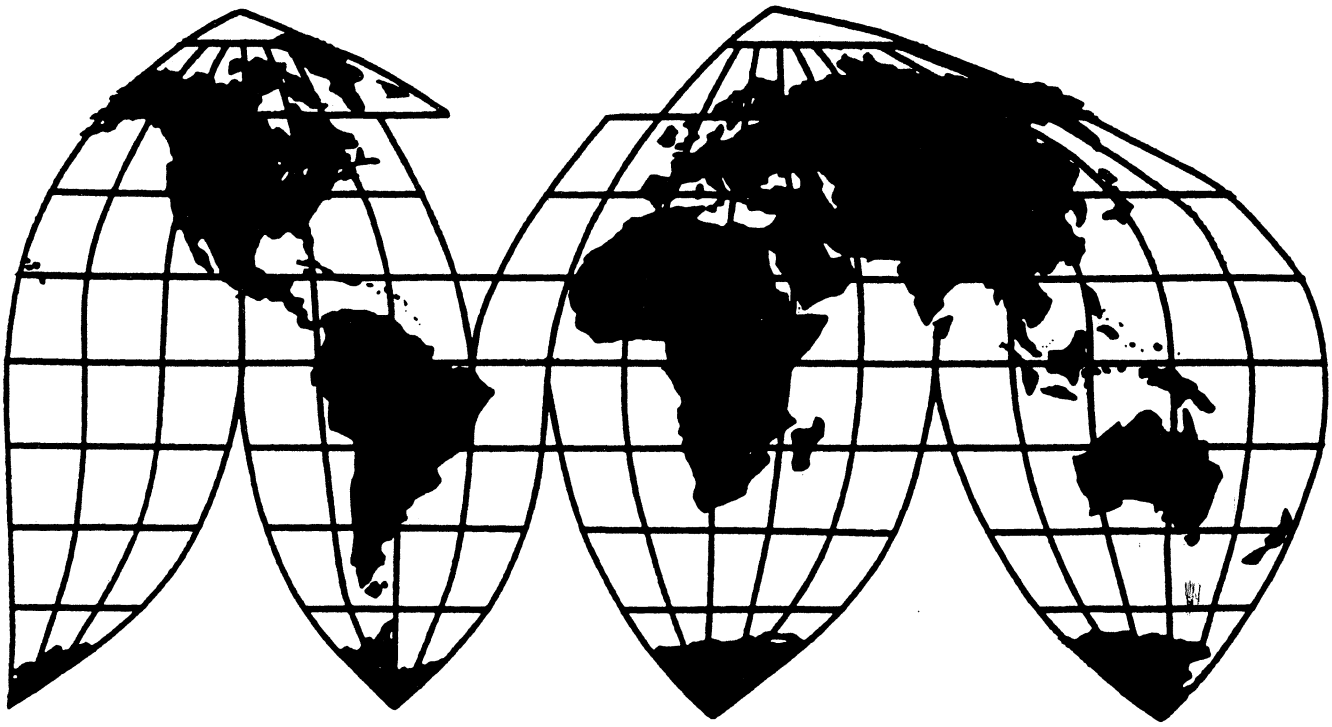
Sulfanilic Acid from The Republic of Hungary

Investigation No. 731-TA-560 (Remand)

Publication 2835 **November 1994**

U.S. International Trade Commission



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U.S. International Trade Commission

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In February 1993, the U.S. International Trade Commission made a determination in investigation No. 731-TA-560 (Final) that an industry in the United States was not materially injured or threatened with material injury, and that the establishment of an industry in the United States was not materially retarded, by reason of less-than-fair-value imports of sulfanilic acid from Hungary (USITC Pub. No. 2603 (1993)). That determination was subsequently appealed to the U.S. Court of International Trade and remanded to the Commission for further consideration (R-M Industries, Inc. v. United States, Court No. 93-03-00184, Slip Op. 94-49, March 18, 1994). The attached views were submitted to the Court in response to the remand (business proprietary information has been deleted from this public version of the views).

VIEWS OF CHAIRMAN NEWQUIST, VICE CHAIRMAN WATSON, COMMISSIONER CRAWFORD, AND COMMISSIONER NUZUM IN RESPONSE TO THE COURT'S REMAND[1]

These views address that portion of the Court's opinion issued in R-M Industries, Inc. v. United States which directed the Commission to reconsider its interpretation of "subject to investigation" and discretionary cumulation with respect to China.[2] The Court's decision resulted from an appeal from the Commission's determination in Sulfanilic Acid from the Republic of Hungary.[3]

In making its original final determinations in Sulfanilic Acid from the Republic of Hungary and India in February 1993, the Commission considered whether it was appropriate to cumulate imports of sulfanilic acid from China entered prior to issuance of an antidumping duty order issued approximately six months earlier in a separate investigation initiated pursuant to a different petition.[4] Each of the Commissioners who reached the issue of causation and cumulation determined not to cumulate the effects of imports from China with those of imports from Hungary and India. Vice Chairman Watson concluded that it was inappropriate to cumulate the Chinese imports because he found those imports had no continuing impact on the domestic industry, since the antidumping duty order was based on threat of material injury.[5] Commissioners Brunsdale and Crawford found that Chinese imports were no longer

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[1] Although Chairman Newquist concurs in these views, he provides further elaboration on the issues presented herein. See Additional Views on Remand of Chairman Newquist

[2] Slip Op. 94-49 (Court No. 93-03-00184)(Mar. 18, 1994) at 22.

[3] Inv. No. 731-TA-560 (Final), USITC Pub. 2603 (Feb. 1993).

[4] On August 19, 1992, imports of sulfanilic acid from China became subject to an antidumping duty order. Final Determination of Sales at Less than Fair Value: Sulfanilic Acid from the PRC, 57 Fed. Reg. 37524 (antidumping order) (Aug. 19, 1992). The Commission made its final determinations regarding imports from Hungary and India in February 1993.

[5] Sulfanilic Acid from the Republic of Hungary and India, Inv. Nos. 701-TA-318 and 731-TA-560-561 (Final), USITC Pub. 2603 (Feb. 1993) at 13 n.2.

"subject to investigation." However, they stated that if the statutory requirements for cumulation are otherwise met, they may cumulate imports subject to recent orders. They then considered whether the Chinese imports had a continuing impact, and concluded that cumulation was not appropriate under the circumstances.[6]

The dissenting and concurring views of Chairman Newquist and Commissioner Nuzum regarding cumulation of Chinese imports were not challenged by plaintiff on appeal. They had only reached the issue of cumulation with respect to their affirmative threat determinations and plaintiff did not appeal that portion of their determinations. The Court, however, has directed Chairman Newquist and Commissioner Nuzum to make a present material injury finding. Thus, Commissioner Nuzum joins in these views for purposes of her present injury determination.[7] [8]

The Court noted that there are at least two possible views as to the meaning of "subject to investigation" as set forth in 19 U.S.C.

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[6] Id. at 27-29.

[7] In addition, see Separate Views of Commissioner Nuzum on Remand. Commissioner Rohr does not reach the issue of causation or cumulation. Consequently, Commissioner Rohr does not join in these views. See Views of Commissioner David B. Rohr.

[8] Commissioner Brunsdale's term as Commissioner has expired. She was replaced by Commissioner Bragg, who entered on duty at the Commission on March 31, 1994. The Court directed the remand of the issue of cumulation of Chinese imports to the Commission as a whole. As a general matter new Commissioners also participate in remand determinations. However, since the Commission was notified of the Court's remand prior to the date that Commissioner Bragg entered on duty, she would have an inadequate amount of time in which to familiarize herself with the entire record of the case below and participate in the remand determination. Furthermore, like many new Commissioners who have not begun participating in determinations immediately upon joining the Commission, Commissioner Bragg has not participated, and does not intend to participate, in Title VII determinations before June 1994. Consequently, she regards it as impracticable and inappropriate to express views in this investigation.

§ 1677(7)(C)(iv), and requests clarification of the positions of the respective Commissioners as to this issue.[9] The Court directed the Commission to state whether cumulation of imports entered prior to the issuance of recent antidumping or countervailing duty orders ("recent order cumulation") is discretionary or mandatory. The Court also questioned whether there is any residual discretionary cumulation authority left to the Commission now that Congress statutorily defined an area of discretionary cumulation for threat investigations, but did not explicitly do so for present injury determinations.[10]

As the Court observes, the statute is ambiguous as to whether the term "subject to investigation" refers only to those imports that are subject to an investigation pending at the time that the Commission makes its determinations or encompasses those imports that have been recently subject to a previous investigation and are still present in the marketplace or otherwise continuing to impact the domestic industry. When Congress enacted the mandatory cumulation provision in the Trade and Tariff Act of 1984 ("1984 Act"), it does not appear to have considered the status of imports subject to recent investigations that led to orders being entered.[11] Shortly after the mandatory cumulation provision was enacted, a majority of the Commission in a number of cases expressed views that imports subject to recent investigations

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[9] Slip Op. at 12-14.

[10] Id. at 12-13 & n.7.

[11] We do note that the Senate bill introduced in conjunction with the legislation of the 1984 Act attempted to require the Commission to cumulate imports from countries "subject to final orders, as well as countries under investigation." H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess., at 173 (1984). However, the Senate bill proposal was not adopted.

were within the statutory term "subject to investigation."[12] More recently, however, the Commission has regarded such imports as subject to cumulation under the agency's discretionary authority.[13]

We do not regard the alternative view that imports subject to recent investigations are within the term "subject to investigation" as unreasonable. In any event, regardless of whether the Commission has interpreted imports entered prior to issuance of recent orders as "subject to investigation" or not, it has applied the same test. In either case, the Commission considers whether the outstanding antidumping or countervailing duty order is sufficiently recent such that imports entered prior to the order are continuing to impact the domestic industry. Indeed, in most cases, the Commission has not addressed the interpretation of "subject to investigation" and simply considers the impact of the imports at the time of the subsequent investigation. Thus, although theoretically this issue may be approached in different ways, the end result has been the same.

We find that cumulation of imports entered prior to issuance of outstanding antidumping or countervailing duty orders issued in wholly

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[12] See, e.g., Certain Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden, and Venezuela, Inv. Nos. 701-TA-225-234 and 731-TA-213-217, 219, 221-226, and 228-235, USITC Pub. 1642 (Feb. 1985) at 13-14; Butt-Weld Pipe Fittings from Japan, Inv. No. 731-TA-309 (Final), USITC Pub. 1943 (Jan. 1987) at 8; Oil Country Tubular Goods from Israel, Inv. Nos. 701-TA-271 and 731-TA-318 (Final), USITC Pub. 1952 (Feb. 1987) at 11.

[13] See, e.g., Certain Stainless Steel Butt-Weld Pipes from Taiwan, Inv. No. 731-TA-564 (Final), USITC Pub. 2614 (June 1993) at 8 (Views of the Commission); Sulfur Dyes from India, Inv. No. 731-TA-550 (Final), USITC Pub. 2619 (April 1993) at 13-14 (Views of Vice Chairman Watson and Commissioners Crawford and Rohr) at 25-30 (Separate Views of Chairman Newquist and Commissioner Nuzum) and at 33-35 (Concurring Views of Commissioner Anne Brunsdale).

separate investigations that were not simultaneously instituted remains a matter within the Commission's discretion. In our view, while Congress amended the statute in the 1984 Act to mandate cumulation for purposes of present material injury under particular circumstances, it did not eliminate the Commission's preexisting discretion to cumulate in circumstances that this amendment did not plainly address.[14] Nowhere in the legislative history of the 1984 Act is there any evidence of Congressional intent to prohibit the Commission from cumulating in circumstances falling outside the parameters of the specific statutory cumulation provisions. Rather, the legislative history reveals general Congressional approval of the doctrine of cumulation, to ensure that the Commission's application of the injury test adequately addresses simultaneous unfair imports from different countries.[15] As noted by the Federal Circuit in Bingham & Taylor, in enacting the mandatory cumulation provision, Congress wanted "to cover the broad category of 'simultaneous unfair imports from different countries.'"[16]

Furthermore, Congress was dissatisfied with the Commission's restrictive approach to cumulation prior to the 1984 Act's cumulation provision.[17] Thus,

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[14] As this Court noted, plaintiff agrees that "although Congress defined an area of mandatory cumulation of unfairly traded imports for purposes of present material injury investigations, it did not mean to preclude discretionary cumulation." Slip Op. at 12 (citations omitted).

[15] H.R. Rep. No. 725, 98th Cong., 2d Sess., at 37 (1984). See also Chaparral Steel Co. v. United States, 901 F.2d 1097, 1101 (Fed. Cir. 1990).

[16] Bingham & Taylor Div., Virg. Indus. v. United States, 915 F.2d 1482, 1487 (Fed. Cir. 1987).

[17] The court in Bingham & Taylor cited to hearings before the House Ways and Means Subcommittee on Trade to discern Congress' intent regarding cross-cumulation, which is not specifically addressed in the 1984 Act's cumulation provision. 915 F.2d at 1486. Those hearings revealed that there was Congressional discontent with the Commission's hesitancy to cumulate under its pre-1984 discretionary authority. Options to Improve the Trade Remedy Laws: (continued...)

it is improbable that Congress intended the statute to outlaw cumulation in circumstances that the legislation did not expressly cover.[18] Indeed, to conclude that the statute prohibits cumulation of simultaneous unfair imports in circumstances that do not fall expressly within the statutory cumulation provisions, could be seen as contrary to Congressional intent.[19]

In our view, since Congress did not expressly encompass imports entered prior to issuance of a recent order in a wholly separate investigation within

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[17](...continued)
Hearings Before the Subcomm. on Trade of the Comm. on Ways and Means, 98th Cong., 1st Sess. 197, 203 (1983).

[18] In the U.S.-Canada Binational Panel Review of New Steel Rails from Canada, the Panel considered whether it was appropriate to cross-cumulate less-than-fair-value and subsidized imports from the same country, and in this context considered whether the Commission had residual discretionary authority to cumulate. The Panel found that the legislative history of the 1984 and 1988 Acts expressed general approval of the doctrine of cumulation, to prevent material injury caused by several unfair acts and to address the hammering effect of simultaneous unfairly traded imports. The Panel stated that:

> Since the 1988 amendments do not mandate a cumulative analysis in threat of material injury determinations, it is apparent that the amendment and the corresponding legislative history are primarily a statement of approval for cumulation and an indication that even where not mandated by statute, the Commission has authority -- and, in fact, the encouragement of Congress -- to cumulate where appropriate.

The Panel concluded that "absent a Congressional directive either mandating or prohibiting a cumulative analysis, the Commission has the inherent authority -- and Congressional and judicial encouragement -- to conduct cumulative analyses in circumstances that it finds appropriate." USA-89-1904-09 and USA-89-1904-10 (Aug. 13, 1990) at 26-31.

[19] Prior to enactment of the 1988 Act's provision regarding discretionary cumulation in threat determinations, this Court directed the Commission to consider whether cumulation in a threat determination was appropriate given the facts of that particular case, despite the fact that the statute did not require or even allow cumulation in those circumstances. In so doing, this Court noted that the Commission had discretion to cumulate for purposes of its threat determinations. Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1172 (Ct. Int'l Trade 1988); Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp. 1068, 1070 (Ct. Int'l Trade 1988).

the term "subject to investigation," cumulation of such imports is not mandated under the statute. Nonetheless, we find it appropriate to cumulate such imports if those imports satisfy the other statutory cumulation factors (e.g., the imports compete with each other and the domestic product and are reasonably coincident). Specifically, we find it appropriate to cumulate imports entered prior to issuance of outstanding orders in wholly separate investigations where the order is sufficiently recent that those imports are continuing to have an impact on the domestic industry at the time the Commission makes its determination in the subsequent investigation(s). It has been consistent Commission practice, which has been upheld by the courts, to consider imports entered subsequent to an antidumping or countervailing duty order to be fairly traded, thus, the Commission does not cumulate those imports.[20]

In one of the leading cases to address recent order cumulation, Chaparral Steel Co. v. United States, the Federal Circuit upheld the Commission's decision not to cumulate imports from South Africa and Spain entering the United States prior to the issuance of outstanding countervailing duty orders.[21] In that case, however, the court did not explicitly consider whether recent order cumulation was pursuant to the statute or based on the Commission's residual discretionary authority. The actual basis for the Court's affirmance was that the imports from South Africa and Spain entered prior to issuance of the orders did not compete contemporaneously with the

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[20] Slip Op. at 12 n.6; Chaparral Steel Co. v. United States, 901 F.2d 1097, 1105 (Fed. Cir. 1990).

[21] Chaparral, 901 F.2d at 1101.

Norwegian imports, i.e., they were not "reasonably coincident."[22]

What the Chaparral court did establish, however, was that the term "subject to investigation" is not defined in the statute or the legislative history and, therefore, the Commission's interpretation should be upheld if reasonable.[23] The court stated that "[w]e cannot say that the ITC was unreasonable in evaluating candidates for cumulation on the basis of their unfair trading or the effects of proven unfair trading as of vote day."[24]

Additionally, although the legislative history does not specifically define "subject to investigation," our recent order cumulation analysis takes into account the purpose of the cumulation provision, which is designed to ensure that the injury test adequately addresses simultaneous unfair imports from different countries.[25] Thus, despite the fact that we find that an investigation terminates upon issuance of an order from an earlier, separate investigation, if imports entered prior to that order compete with, and were present simultaneously with, the imports subject to the current investigation(s), we will consider them candidates for cumulation. We are

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[22] Id. at 1099, 1103, 1104-05. See also Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608, 621 (Ct. Int'l Trade 1993)(Court in Chaparral affirmed the Commission's decision not to cumulate because imports failed to compete contemporaneously, not because imports were no longer subject to investigation).

[23] In Chaparral, the Federal Circuit rejected the Court of International Trade's interpretation of the statute as requiring cumulation of all imports which were subject to investigation at any point during the period of investigation in the case at hand, rather than cumulation of imports subject to investigation as of vote day. The Federal Circuit stated "[w]e cannot agree to this interpretation of how the provision 'must be interpreted' because neither the statutory language nor the legislative history is clear." 901 F.2d at 1101 (statute fails to define "subject to investigation," thus the provision cannot be said to have a plain meaning).

[24] Id. at 1105 (emphasis added).

[25] Id. at 1101; H.R. Rep. No. 725, 98th Cong., 2d Sess., at 37 (1984).

also mindful of the fact, however, that antidumping duties are remedial in nature, intended to prevent continued and future unfairness to the domestic industry by reason of imports that are currently causing or threatening injury to the domestic industry.[26] Therefore, we only cumulate imports entered prior to an outstanding antidumping or countervailing duty order, issued in an earlier and wholly separate investigation that was not simultaneously instituted, if those imports are having a continuing (i.e., present) impact on the domestic industry at the time of the subsequent determination(s).[27]

We note that such an approach is clearly consonant with post-1984 indications of Congressional intent.[28] While Congress has considered proposals that would have created a clear test requiring the Commission to cumulate, inter alia, imports subject to outstanding orders entered within 12 months preceding initiation of an investigation, Congress has not amended the cumulation provision.[29] The House Report stated that clarification was needed as to the time frame within which cumulation is appropriate.[30] This proposal would have eliminated the Commission's discretion in determining under what circumstances it was appropriate to cumulate imports entered prior to issuance of outstanding orders by requiring it to do so in all instances that met the

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[26] Chaparral, 901 F.2d at 1103.

[27] We also find consideration of imports entered prior to issuance of orders to be a relevant economic factor which we are allowed pursuant to the statute to take into account. 19 U.S.C. § 1677(7)(B)(ii). Furthermore, as noted in the Additional Views on Remand of Chairman Newquist, we also find consideration of such imports a relevant condition of trade distinctive to the domestic industry. 19 U.S.C. § 1677(7)(C)(iii).

[28] Commissioner Nuzum does not agree with this discussion of Congressional intent and therefore does not join in the discussion in this paragraph.

[29] House Committee on Ways and Means, Trade and International Policy Reform Act of 1987, H.R. Rep. No. 40, pt. 1, 100th Cong., 1st Sess. 130-31 (1987).

[30] Id. at 129.

proposed time frame of 12 months prior to initiation of an investigation. Congress was apparently aware of Commission practice and declined to enact specific provisions establishing the time frame for the Commission's cumulation analysis. We regard this history as confirming Congress' acquiescence in the Commission's practice.[31] Thus, we do not believe that a view that Congress prohibited recent order cumulation simply because it did not expressly provide for it in the statute would be consistent with Congressional intent.

In 1988, Congress enacted the current provision addressing cumulation for purposes of threat determinations.[32] We do not regard that amendment as supporting a conclusion that Congress intended to prohibit cumulation for material injury purposes in circumstances that the statute did not plainly address. This Court in Asociacion Colombiana de Exportadores de Flores v. United States, had previously held that the Commission should as a discretionary matter consider whether to cumulate in threat determinations.[33] Congress' enactment of the statutory threat cumulation provision effectively confirmed that the court's interpretation, that the Commission had discretionary authority in threat determinations, coincided with legislative intent. Congress, as we see it, cannot in that amendment be regarded as having limited the Commission's discretionary authority with respect to recent order cumulation for present material injury determinations, especially when it expressly considered and rejected a limitation on the Commission's

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[31] Congressional silence implies approval, especially where subsequent legislative proposals are rejected. See Chaparral, 901 F.2d at 1106; Kelly v. United States, 826 F.2d 1049, 1052 (Fed. Cir. 1987).

[32] 19 U.S.C. § 1677(F)(iv).

[33] 704 F. Supp. 1068, 1070 (Ct. Int'l Trade 1988).

discretion in that same legislation.[34]

In the case at hand, imports from China were no longer "subject to investigation" at the time the Commission made its determinations regarding imports from Hungary and India, although imports from China were subject to investigation at the time the petition on imports from Hungary and India was filed. Therefore, we consider whether Chinese imports entered prior to the issuance of the antidumping duty order on those imports continued to impact the domestic sulfanilic acid industry at the time of the subsequent determinations involving imports from Hungary and India. Chinese imports were found not to be a cause of present material injury, but only posed a threat thereof, which was remedied by the imposition of the antidumping duty order. We find no evidence of any continuing impact of those Chinese imports, nor has plaintiff introduced any evidence that would suggest such an impact. We find it particularly relevant that there were *** inventories in the United States of Chinese sulfanilic acid reported from January through August 1992, before the Chinese antidumping duty order went into effect, and thus *** unfairly traded imports still present that could have exerted a continuing impact on the industry subsequent to issuance of the Chinese antidumping duty order.[35]

Therefore, for the reasons set forth above, we decline to cumulate imports of sulfanilic acid from China with imports from Hungary and India for purposes of our finding of no material injury by reason of imports from Hungary and India.

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[34] Commissioner Nuzum does not join in this statement.
[35] Confidential Staff Report at D-8 (Table D-4), List 2, Doc. No. 27.

ADDITIONAL VIEWS ON REMAND OF CHAIRMAN NEWQUIST

Although I concur in the majority's views of cumulation, those views do not, in my opinion, address additional important cumulation questions. Accordingly, I offer this further discussion. Also, the court instructs me[36] to clarify a portion of my determination in Sulfanilic Acid from the Republic of Hungary and India.[37] I satisfy this latter objective first.

I. CONDITION OF THE DOMESTIC INDUSTRY

In the initial determination, in joint views with Commissioner Nuzum, I concluded that unfair imports from both the Republic of Hungary and India threatened the domestic sulfanilic acid industry with material injury.[38] In reaching this conclusion, I found that the domestic industry was "extremely vulnerable to the effects of unfairly traded imports."[39] Having made such a determination, I then proceeded to examine whether imports from the two countries threatened material injury.

In its opinion, the court instructs that I "state [my] views on present material injury."[40] It appears that the court is requiring that I do one of

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36 R-M Industries, Inc. v. United States, Slip. Op. 94-49 (Ct. Int'l Trade March 18, 1994).

37 Invs. Nos. 701-TA-318 (Final), 731-TA-560 & 561 (Final), USITC Pub. 2603 (February 1993).

38 USITC Pub. 2603 at 49-67.

39 USITC Pub. 2603 at 54.

40 Slip. op. at 21.

two things: (i) determine whether the domestic industry is presently experiencing material injury -- commonly referred to as a "bifurcated analysis"; or (ii) determine why imports from the two countries are not a cause of present material injury to the domestic industry -- in effect, a "negative causation analysis." I address each in turn.

Since becoming a Commissioner in 1987, I have consistently conducted a bifurcated analysis and I did so in these investigations. My statement that the domestic industry is "vulnerable to the effects of unfair imports," is intended to imply that the industry is not currently experiencing material injury. I have made such "vulnerability only" findings in previous opinions. For purposes of this remand, however, I modify this condition of the industry determination to include the phrase, "not currently experiencing material injury

but . . . "

Since I have concluded that the domestic industry is not currently experiencing material injury, I cannot conduct a present causation analysis -- there is no material injury.

II. CUMULATION

As noted at the outset, although I concur with the majority's discussion of cumulation of imports from the Republic of Hungary and India with those from the People's Republic of China[41] which are subject to an outstanding antidumping order, I believe that the discussion should go further.

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[41] Sulfanilic Acid from the People's Republic of China, Inv. No. 731-TA-538 (Final), USITC Pub. 2542 (August 1992).

The court requests the Commission to explain whether it views imports from China as "subject to investigation."[42] The court indicates that it cannot know what standard of review to apply to the Commission's determination not to cumulate imports from China without first knowing whether the Commission deems such imports subject to investigation. That is, if the Commission considers such imports subject to investigation, then cumulation is mandated for purposes of a present injury analysis. Conversely, if the Commission does not consider such imports to be subject to investigation, then cumulation would be discretionary. As I understand the court's instructions, the standards governing its review of the Commission's cumulation determination are dependent upon whether such cumulation is mandatory or discretionary.

In my view, while this is an important question, it is not necessarily one asked in the instant investigations. More significantly, the question ignores the rationale historically underlying de facto cumulation -- a rationale which, in the past decade or so, has been somewhat lost and obscured in the administration of the antidumping and countervailing duty statutes. As I view Commission decisions prior to the 1984 enactment of the mandatory cumulation provision,[43] cumulation was concerned more with whether there was a continuous battering effect of unfair imports from more than one country than upon whether imports were simultaneously "subject to investigation" or whether such imports were simultaneously present in the marketplace.

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42 Slip. Op. at 15.

43 19 U.S.C. § 1677(7)(C)(iv).

Thus, for example, in Portland Gray Cement from Portugal, AA1921-22, TC Pub. 37 (October 1961), a majority of the Commission determined that cement from Portugal continued an injury to the domestic industry which was initially caused by unfair cement imports from other countries. In affirming the Commission's determination, the U.S. Customs Court stated that

> [t]he intent of Congress in the court's opinion, was to protect domestic industry from sales of imported merchandise at less than fair value which either *caused or continued* an injury to competitive domestic producers . . . . Congress did *not* limit such protection to sales *that caused* or initiated injury.

City Lumber Co. v. United States, 290 F. Supp. 385, 392 (U.S. Cust. Ct. 1968)(emphasis in original).

Upon review of that court's affirmance, the Appellate Term of the Customs Court provided further guidance on the question of continuation of injury:

> The Tariff Commission fully complied with its procedural rules in investigating the economic impact on the market under investigation of *successive importations* of portland gray cement at less than fair value. Indeed, an investigation of imports from only one country, in disregard of the effect on the market area in question, of sales at less than fair value from other countries, would result in a study and conclusions that would be *myopic and unrealistic. An investigation so limited and restricted would not help achieve the statutory remedy envisaged by the enabling legislation.* It would seem clear that the mischief that the act aimed to remedy required a broad solution. *Surely Congress did not seek to fashion a remedy to the problem of dumping 'by solutions only partially effective.'*

City Lumber Co. v. United States, 311 F. Supp. 340, 348 (U.S. Cust. Ct., First Division, Appellate Term 1970)(emphasis added)(citation omitted). Quoting the above passage in almost its entirety, the U.S. Court of Customs and Patent

Appeals upheld the two lower courts and the Commission. City Lumber Co. v. United States, 457 F.2d 991, 995 (U.S. Ct. Cust. and Pat. App. 1972).

Significantly, in my view, recent Commission cumulation practice with respect to imports both subject to an outstanding antidumping duty order and subject to a current investigation, has tended to focus more on whether the earlier imports have been made "fair" by reason of the order rather than whether the injury caused by imports entered prior to the order continues. By its very nature, an antidumping order imposes a higher duty on the dumped imports and generally eliminates prospective unfairness of the subject imports. Such order, does not, however, eliminate injury previously caused to the domestic industry by imports which at that time were unfair.

In short, in my view, whether imports subject to an outstanding order are also subject to investigation may yield the "right" answer for the "wrong" reasons. In my opinion, a strong case may be made that the Commission's authority to cumulate imports subject to an outstanding order is a discretionary authority because, in fact, it may not be a cumulation decision at all. To the contrary, it is the deliberate acknowledging of the continuation of injury or continuing effects of previously unfair imports, which is after all, a condition of trade which the Commission has the discretion to consider.[44]

Thus I concur that imports subject to an outstanding order can be regarded as not technically subject to investigation at the time of the determination; more importantly, however, it is my view that imports preceding

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[44] 19 U.S.C. § 1677(7)(C)(iii).

the entry of an order may continue to have an injurious effect on the domestic industry even after the order has been entered.

ADDITIONAL VIEWS OF VICE CHAIRMAN WATSON ON REMAND

In its remand Opinion, the Court instructed the Commission to reconsider its view on the meaning of the phrase "subject to investigation" in 19 U.S.C. section 1677(7)(C)(iv)(I) both in a general sense and specifically in regard to cumulation of imports from China.[45] In addition, the Court has instructed me to reconsider my view on cumulation of Hungarian and Indian imports for purposes of my present material injury determinations.[46]

In these separate views I reconsider only whether the domestic industry is experiencing present material injury by reason of cumulated subject imports from Hungary and India.[47] At the outset, I note that the statute clearly requires the Commission to cumulate imports in making present material injury determinations if certain criteria are met.[48] Unfortunately, my final determination did not clearly state that I had, in fact, cumulated the subject imports from Hungary and India in reaching my negative present material injury determination.[49] In order to avoid any further confusion, I provide herein the full reasoning behind my negative present material injury determinations in this case.[50]

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[45] R-M Industries, Inc., v. United States, Slip Op. 94-49 (C.I.T. March 18, 1994) at 15, 22.

[46] Id.

[47] See Views of Chairman Newquist, Vice Chairman Watson, Commissioner Crawford, and Commissioner Nuzum in Response to the Court's Remand for my view on the meaning of "subject to investigation" and cumulation in regard to imports from China. As discussed in those Views, the Commission did not find it appropriate to cumulate imports from China with imports from Hungary or India.

[48] 19 U.S.C. section 1677(7)(C)(iv)(I).

[49] See Sulfanilic Acid from the Republic of Hungary and India, Inv. Nos. 701-TA-318 and 731-TA-560 and 561 (Final), USITC Pub. 2603 (Feb. 1993).

[50] In addition to the views expressed herein, I adopt and incorporate herein by reference the discussion of "Fairly traded Imports" and "Substitutability"

(continued...)

In determining whether there is material injury by reason of the subject imports, the Commission is required to assess cumulatively the volume and effect of imports from two or more countries subject to investigation if such imports compete with each other and with the domestic like product.[51] In considering whether imports compete with each other and with the domestic like product, the Commission has generally considered four factors, including:

> (1) the degree of fungibility between the imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;
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> (2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product;
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> (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product;
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> (4) whether the imports are simultaneously present in the market.[52]

Only a "reasonable overlap" of competition is required, and the Commission

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[50](...continued)
in the Views of Commissioners Brunsdale and Crawford. Id. at 33-38.

I also adopt and incorporate herein by reference in their entirety sections I. and II. entitled "Like Product and Domestic Industry" and "Condition of Industry" from the Views of Vice Chairman Watson, Commissioner Rohr, Commissioner Brunsdale and Commissioner Crawford in Sulfanilic Acid from the Republic of Hungary and India, Id. at 6-12. My views on threat of material injury by reason of imports from Hungary and India remain unchanged. Id. at 13-23.

[51] 19 U.S.C. section 1677(7)(C)(iv)(I).

[52] See Certain Cast-Iron Pipe Fittings from Brazil, the Republic of Korea, and Taiwan, Inv. Nos. 731-TA-278-280 (Final), USITC Pub. 1845 (May 1986), aff'd, Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898 (Ct. Int'l Trade 1988), aff'd, 859 F.2d 915 (Fed. Cir. 1988). While no single factor is determinative and the list of factors is not exclusive, these factors are intended to provide the Commission with a framework for its analysis of this issue. See Wieland Werke, AG v. United States, 718 F.Supp. 50-52 (Ct. Int'l Trade 1989); Granges Metallverken AB v. United States, 716 F.Supp. 17 (Ct. Int'l Trade 1989); Florex v. United States, 705 F.Supp. 582 (Ct. Int'l Trade 1989).

need not find that "all imports compete with all other imports and all domestic like products."[53]

An examination of these factors in these investigations shows that there exists a reasonable overlap of competition between the Hungarian and Indian subject imports and between the subject imports and the domestic like product. With respect to the fungibility of the products, the record in the final investigations indicates that from 1989 through 1991 almost all of the subject imports from both countries were refined grade sulfanilic acid and were sold to importers or end users for similar purposes.[54] In addition, evidence in the record supports a conclusion that there is a certain degree of fungibility between the subject imports of refined acid and the domestic product which is primarily the salt form of sulfanilic acid. Although purchasers of sulfanilic acid generally have strong preferences regarding the form of sulfanilic acid they use in their production, a number of purchasers can and have used all forms of sulfanilic acid during the period of investigation.[55]

Subject imports and the domestic product have been simultaneously

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[53] See Wieland Werke, AG v. United States, 718 F.Supp. 50-52 (Ct. Int'l Trade 1989) ("Completely overlapping markets are not required."); Granges Metallverken AB v. United States, 716 F.Supp. 17, 21, 22 (Ct. Int'l Trade 1989) ("The Commission need not track each sale of individual sub-products and their counterparts to show that all imports compete with all other imports and all domestic like products...the Commission need only find evidence of reasonable overlap in competition"); Florex v. United States, 705 F.Supp. 582, 592 (Ct. Int'l Trade 1989) ("[c]ompletely overlapping markets is [sic] not required.").

[54] Confidential Report (hereinafter "CR") at I-69-82. There was only one very small sale of Indian technical grade sulfanilic acid made in early 1991. CR at I-98, Table 17.

[55] See CR at I-34-35. For example, Warner-Jenkinson has indicated that although the refined form of sulfanilic acid is currently the firm's product of choice, it has purchased both the technical and salt forms of sulfanilic acid during the period of investigation in order to keep its plant operating during times of shortages. CR at I-36,37.

present and sold in the same geographic markets.[56] U.S. producers and importers reported that the market is generally concentrated in the Northeast, Southeast, and Midwest, where the large consumers are located.[57] Subject imports and the domestic product have also been sold through similar channels of distribution. The record indicates that the majority of domestically produced sulfanilic acid is sold directly to end users; importers of sulfanilic acid from Hungary and India also sell directly to end users.[58] Accordingly, I find that a reasonable overlap of competition exists between subject imports and the like product of the domestic industry.

Subject imports from either country are not negligible. Although the volume and market share of the subject imports from India was relatively small in 1991, the nine month interim 1992 period shows a substantial and significant increase.[59] The volume and market share of the subject imports from Hungary, which were many times greater than Indian subject imports, have risen throughout the period of investigation.[60]

In making its present material injury determinations, the Commission is required to consider the volume of subject imports, the effect of such imports on domestic prices and the impact of subject imports on the domestic industry. In addition, the Commission "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports" and is directed to evaluate relevant economic factors in the "context of the business cycle and conditions of competition that are

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56 CR at I-84-85, Table 14.
57 CR at I-96.
58 CR at I-42.
59 CR at C-3, Table C-1.
60 Id.

distinctive to the affected industry."[61]

The volume and market share of the cumulated subject imports in terms of both quantity and value has increased steadily over the period of investigation.[62] In light of my discussion below, I do not find subject imports' volume and market share to be significant.

The record does not support a finding of significant price effects by the subject imports. Because the domestic like product consisted almost exclusively of the salt form of sulfanilic acid while the subject imports were almost exclusively of the refined acid form, relevant price comparisons between the domestic product and the subject imports were almost non-existent and inconclusive.[63] Although, the record indicates that some purchasers can and will use both the salt and refined acid forms of sulfanilic acid, the salt form, which was produced by R-M during the period of investigation, is not easily or readily substitutable with the refined acid form of sulfanilic

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[61] 19 U.S.C. section 1677(7)(B) and (C).

[62] CR at C-3, Table C-1.

[63] Price comparisons between domestic and imported sulfanilic acid were very limited during the period of investigation. There were only four quarters in 1989 where comparisons between Hungarian and domestic refined product could be made and there were no comparisons between the domestic and Indian refined sulfanilic acid. CR at I-100. Furthermore, there was only one reported price for Indian technical sulfanilic acid that could be compared to prices of domestic technical sulfanilic acid in the first quarter of 1991. CR at I-98, Table 17.

Although these few comparisons indicate that the Hungarian and Indian products were priced below the domestic product, I find that such minimal evidence and evidence so early during the period of investigation is insufficient to support any conclusions regarding price effects. CR at I-103-104, Table 20.

The minimal pricing data indicates that prices of the subject imports from both countries generally rose over the period of investigation. Moreover, the price trends from 1989 to 1991 demonstrate that domestic salt prices have not been depressed. CR at I-100, Table 18 and 19.

acid.[64] I also note that lost sales and revenue allegations were not confirmed by the Commission.[65]

Although the volume and market share of the cumulated imports from Hungary and India increased during the period of investigation, I do not find that the subject imports had an impact upon the domestic industry. Almost all of the cumulated subject imports were refined grade sulfanilic acid.[66] The record supports a conclusion that the sole U.S. producer did not manufacture that grade of sulfanilic acid in commercial quantities during the period of investigation.[67] In addition, an examination of certain relevant trends, that were laid out in detail in the "Condition of the Industry" section of my earlier views in the final investigations, does not support a conclusion that the cumulated subjects imports negatively impacted upon the domestic industry during the period of investigation. I find it particularly relevant that domestic market share, production and shipments increased steadily over the period of investigation at the same time as apparent consumption increased.[68] During the same time domestic capacity utilization, productivity and operating

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[64] Substitutability is significantly limited by a purchaser's quality requirements, production process and facilities and the costs of switching from one grade to another. In fact, many purchasers require only the refined grade which R-M did not produce in commercial quantities during the period of investigation. See generally CR at I-15-19; E-6-11; see also Views of Commissioners Brunsdale and Crawford on "Substitutability", Inv. No. 731-TA-560 and 561 (Final), USITC Pub. 2603 at 34-38.

[65] ***

[66] See footnote 10 supra.

[67] The sole U.S. producer, R-M Industries, Inc. ceased production of refined sulfanilic acid in 1989. It was not until August of 1992 that R-M resumed production of refined sulfanilic acid. R-M only reported one small test sale of refined sulfanilic acid in interim 1992. Although the petition alleges that R-M ceased production of the refined grade as a result of the subject imports, the record indicates that R-M discontinued production due to costs associated with new environmental requirements. See CR at I-30-32.

[68] CR at C-3, Table C-1.

income all increased.[69] Significantly, full year data indicate RM's financial performance improved markedly at the time of the increase in the market share of the cumulated subject imports.[70]

Upon consideration of all of the above, I conclude that the domestic industry is not currently experiencing material injury by reason of the cumulated subject imports from Hungary and India.

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[69] Id. Although there were declines in some indicators in interim 1992, I do not find those declines to be significant and most of the interim 1992 figures exhibited an improvement in domestic industry's performance as compared to the early part of the period of investigation.

[70] See Sulfanilic Acid from the Republic of Hungary and India, Id at 8-12.

VIEWS OF COMMISSIONER DAVID B. ROHR

I determine, in this remand investigation, that the domestic industry is not materially injured nor is it threatened with material injury by reason of imports of sulfanilic acid from Hungary that have been found by the Department of Commerce to be sold in the United States at less than fair value.[71] In making this determination I readopt my findings in my original determinations.[72] In accordance with the remand instructions from the Court of International Trade, I supplement those views with the additional analysis herein regarding how I weighed the trends in the 1992 interim data (for the months January through September) in reaching my decision.

In general, I note that I typically place less weight on interim data than full year data. This does not mean I discount it entirely. Where, as here, the interim period includes nine months of data, such data is better than data from a three-month or six-month interim period. Nonetheless, I do not view it as probative as data from a full year.

Having made that point, I now proceed to examine the interim data. First, I note that overall U.S. consumption was down almost 14 percent in interim 1992 compared to interim 1991.[73] This followed a 48 percent increase over the previous three year period.[74] The overall market trend which is exemplified by this downturn provides the context in which I evaluated the

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[71] Because the Commission's determination with regard to India was not remanded, I did not consider it necessary to make any further determination with regard to India even though my conclusions in the original determination with regard to the condition of the domestic industry were dispositive in both investigations.
[72] USITC Pub. 2603 (Feb 1993) at 5-23.
[73] Report at Table 1.
[74] *Id.*

significance of the interim period changes in the industry's performance. While a decline from the highs of 1991, the 1992 market still reflects an improvement over the beginning of the period of investigation.

U.S. production was down in the interim period by *** percent, following an increase over the previous three years of *** percent.[75] This downturn was less than the decline in consumption, and still reflects improvement over the beginning of the period of investigation. I do not view this decline as a significant indicator of injury. Capacity was stable in the interim period comparison following an increase in full year 1991.[76] This resulted in a decline in capacity utilization of *** percentage points. While a negative indicator of the performance of the industry, given that this decline reflects in part the decline in consumption in 1992, I do not view this as a significant indicator of injury.

U.S. shipments were down by less than *** percent in the interim period following an increase of over *** percent in the previous three-year period.[77] When compared to the decline in consumption, I viewed this decline of less than *** percent in shipments as a positive rather than a negative indicator. Further, as a result of this small decline in shipments compared to the larger overall decline in consumption, domestic market share actually increased in the interim period by over *** percentage points where it had actually declined in the three-year period by under *** percentage points.[78] I viewed this as a positive rather than a negative indicator of the performance of the industry. Inventories declined both absolutely and as a percentage of

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[75] Report at Table 2.
[76] *Id.*
[77] Report at Table 3.
[78] Report at Table 16.

production and shipments in the interim period.[79] This is also a positive indicator.

With respect to employment, I note that there were *** less workers in the industry in interim 1992 compared to interim 1991.[80] Hours worked and total wages also declined commensurately, while hourly wages and hourly total compensation actually increased.[81] There were declines in productivity and in increases in unit labor costs.[82] In particular, given that the declines in productivity and increases in Unit costs still left the industry better off than it had been prior to 1991, I did not view the declines in the employment data to reflect material injury to the industry.

The financial experience of the single commercial U.S. producer reflects a great deal of variation in financial performance. After significant losses in 1989 and 1990, the profitability of the company was very substantial in 1991.[83] While profits in the interim 1992 period are significantly less than the profits in the interim 1991 period, they remained substantial, and were a significant improvement over those during most of the period of investigation.

As reflected in these data, the market for sulfanilic acid turned downward in interim 1992 compared to interim 1991, but still reflected overall improvement over the period of the investigation. The downturns in most of the indicators must be read in this context. They reflect the downturn in the market but were generally smaller than the declining market reflected in the decrease in apparent consumption. In most cases, they, too, continued to reflect an overall improvement over the period of investigation. In 1991, the

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[79] Report at Table 4.
[80] Report at Table 5.
[81] *Id.*
[82] *Id.*
[83] Report at Table 7.

domestic industry captured most of the increase in the market in increased sales, market share and profits. In 1992, the market softened, but the domestic industry experienced a continued increase in market share, although its profits declined. The industry's overall performance reflected in the interim data thus remains positive, although not as good as in 1991. The overall trend over the period of the investigation is the same regardless of the slight downturns in 1992. I find that the declines in the interim data do not outweigh the overall conclusion that the industry is not currently experiencing material injury.

Having determined that the industry is not experiencing material injury, I make a negative determination and do not address the issues of causation or cumulation. With respect to the issue of whether "recent order cumulation" is an exercise of discretionary cumulation or statutory cumulation as an interpretation of "subject to investigation," I note that the issue is a purely legal matter that has not previously been raised before the Commission to my knowledge.

SEPARATE REMAND VIEWS OF COMMISSIONER JANET A. NUZUM ON SULFANILIC ACID FROM THE REPUBLIC OF HUNGARY INV. NO. 731-TA-560

In response to the instructions of the U.S. Court of International Trade in its order of March 18, 1994, R-M Industries v. United States, Slip. Op. 94-49, my original affirmative determination finding a threat of material injury by reason of unfairly traded imports of sulfanilic acid from the Republic of Hungary is hereby supplemented by a negative determination on the issue of present material injury.[1]

At the outset, I wish to express some confusion as to why my dissenting affirmative determination with respect to imports from Hungary is even at issue in this remand. The Commission majority, composed of four Commissioners, made a negative determination with respect to imports from Hungary; the plaintiff challenges that negative determination; hence, the views of those four Commissioners voting in the negative are properly within the scope of review and remand. Chairman Newquist and I, however, voted in the affirmative. Whether our affirmative determinations were based on a finding of present material injury or threat of material injury is, frankly, immaterial -- either way, our views are dissenting views and cannot affect the outcome of the

[1] My views on remand with respect to cumulation of imports from China are presented jointly with Chairman Newquist, Vice Chairman Watson, and Commissioner Crawford.

agency's determination.[2]

I realize that, if one or more of the four Commissioners voting in the negative were, on remand, to switch his or her vote and join Chairman Newquist and me in making an affirmative determination, the agency's determination would then be affirmative, and my views would then be subject to review as part of the Commission majority.[3] At the time of the Court's remand order, however, this was not yet the case so the dissenting views were not yet ripe for review.[4]

I note that the Court did not address the issue of ripeness in its opinion. Instead, the Court simply addressed mootness and

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[2] See, e.g., Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 734 (Ct. Int'l Trade 1989) (Court rejected plaintiffs' argument that dissenting views contradicted majority's determination. "The function of this Court is . . . to ascertain whether the Commission's determination is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'") (citations omitted) (emphasis added).

[3] See, e.g., Trent Tube Division v. United States, 752 F. Supp. 468, 470 (Ct. Int'l Trade 1990) (In appeal of a final negative determination, the Court "declined as unnecessary" to examine the minority views of a Commissioner to see whether that Commissioner's affirmative determination complied with the statutory requirements. Upon remand, a majority of the Commission made affirmative determinations, whereupon the Court "examine[d] the individual views of each Commissioner who made an affirmative determination on remand for compliance with this Court's remand instructions and to see if these determinations are supported by substantial evidence on the record or otherwise in accordance with law").

[4] Specifically, I do not see how my views have anything more than a hypothetical impact on the plaintiff, R-M Industries. See Schwartz, Administrative Law (1984) at § 9.1 ("The effect of the challenged act must not be nebulous or contingent, but must have ripened to finality. Conflicts of interest are not 'ripe for determination' unless they arise in the context of a justiciable controversy. That is true only when the challenged act has actual, not hypothetical, impact.") (Emphasis added).

justified its remand of the dissenting Commissioners' views by stating, "[t]he issue must be addressed as it likely will continually evade review." Slip Op. at 21.

I note that the issue -- of the necessity of making a present injury determination before addressing threat of injury -- will not evade review once any Commissioner in a majority affirmative determination makes an affirmative threat determination without expressing any view on present injury. Although I understand the difficulties the Court describes in responding to a motion for injunction of liquidation, it appears to be premature to force the issue here by reaching dissenting Commissioners' views.

Moreover, I am not persuaded that "the structure of the statute clearly requires a finding as to present injury." Slip Op. at 21. The Court states that "the statute cannot be rewritten simply by substituting the word 'and' each time the word 'or' appears." Id. That is precisely the point. The statute does not require a finding of present material injury and a finding of threat of material injury; it uses the disjunctive "or."

I will take this opportunity to explain my approach in making affirmative threat determinations, and why I do not always address present material injury prior to explaining an affirmative threat determination. First, in certain investigations, there may be sufficient evidence to support an affirmative determination based either on present material injury

or on threat of material injury. The Court itself acknowledges that an injured industry may also be threatened with injury. Slip Op. at 21. In such cases, I will consider the strength of the evidence supporting each conclusion, and would likely present my views based on the stronger basis for an affirmative.

That is not, however, the only factor I consider. As a member of a collegial decision-making institution, I often consider the views of my colleagues before finalizing my own determination. If I believe the evidence supports either of two alternative determinations (i.e., either affirmative present injury or affirmative threat) and my colleagues favor an affirmative threat determination, I may join in the approach shared by my colleagues in the interests of institutional unity. Indeed, I suspect that institutional unity is looked upon with favor by the Court; it tends to make judicial review of an agency action easier for reviewing courts.

Where the evidence supports two separate bases for an affirmative determination, I do not read the statute as requiring explanation for both bases; a finding of <u>either</u> present material injury <u>or</u> threat of material injury by reason of the subject imports is sufficient to justify an affirmative determination. For this reason, I do not always articulate my analysis of present material injury in opinions setting forth an affirmative threat determination.

Notwithstanding my questions and reservations about the Court's remand of my dissenting determination, I am mindful of my

legal obligation to comply with remands by our reviewing courts. These remand views, therefore, respond to the Court's order that "Chairman Newquist and Commissioner Nuzum state their views on present material injury."

DISCUSSION OF PRESENT MATERIAL INJURY

In determining whether the domestic industry is materially injured by reason of the imports under investigation, the statute directs the Commission to consider:

> (I) the volume of imports of the merchandise which is the subject of the investigation;
>
> (II) the effect of imports of that merchandise on prices in the United States for like products, and
>
> (III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States.[5]

In making this determination, the Commission may consider other economic factors that are relevant to the determination.[6] Although we may consider information that indicates that injury to the industry is caused by factors other than the unfairly traded imports, we do not weigh causes. I note that the Commission need not determine that the subject imports are "the principal, a substantial or a significant cause of material injury."[7] Rather, a finding that the subject imports are a cause

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[5] 19 U.S.C. § 1677(7)(B)(i).

[6] 19 U.S.C. § 1677(7)(B)(ii).

[7] S. Rep. No. 249, 96th Cong., 1st Sess. 57 and 74 (1979).

of material injury is sufficient.[8]

Cumulation

For purposes of present injury analysis, imports from two or more countries subject to investigation are required to be cumulated, if the imports compete with each other and the domestic like product.[9] Notwithstanding this general requirement of cumulation, the statute allows an exception to mandatory cumulation if the imports subject to investigation are negligible and have no discernible adverse impact on the domestic industry.[10]

In this investigation of sulfanilic acid imports from Hungary, I found a reasonable overlap of competition between the imports from Hungary and the imports from India sufficient to warrant cumulation. My reasons for this finding are presented in my original views.[11] As discussed in the joint remand views,[12] the statute neither requires nor prohibits cumulation of the

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[8] See e.g., Metallverken Nederland, B.V. v. United States, 728 F. Supp. 730, 741 (Ct. Int'l Trade 1989); Citrosuco Paulista v. United States, 704 F. Supp. 1075, 1101 (Ct. Int'l Trade 1988).

[9] See 19 U.S.C. §1677(7)(C)(iv)(I).

[10] See 19 U.S.C. §1677(7)(C)(v).

[11] See Sulfanilic Acid from the Republic of Hungary and India, Inv. Nos. 701-TA-318, 731-TA-560, 561 (Final) USITC Pub. 2603 (Feb. 1993), Views of Chairman Newquist and Commissioner Nuzum, Concurring in Part and Dissenting in Part (hereinafter cited as "Original Newquist and Nuzum Views") at 55-57.

[12] See Views of Chairman Newquist, Vice Chairman Watson, Commissioner Crawford and Commissioner Nuzum in Response to the Court's Remand.

imports from China with the imports from Hungary and India, and cumulation of imports from China is not warranted in this investigation. The following discussion of present material injury, therefore, is based on cumulation of imports from Hungary and India.

Volume of Imports

In considering the volume of the subject imports, the Commission is directed to consider 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."[13] As noted in my original determination, there was a rapid increase in market penetration by the subject imports in terms of both quantity and value during the period of investigation, and this increase was especially sharp in interim 1992 as compared to interim 1991.[14] The subject imports nearly doubled in volume during the three full years of the period of investigation.[15] The volume more than doubled between interim 1991 and interim 1992.[16]

It is important to analyze these increases in the context of other developments in the market, including evidence concerning

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[13] 19 U.S.C. §1677(7)(C)(i).

[14] Original Newquist and Nuzum Views at 61.

[15] See Table 14, Confidential Report ("CR") at I-85; Public Report ("PR") at I-51.

[16] Id.

consumption and the imports from China and from other sources. Domestic consumption of sulfanilic acid increased more than 30 percent from 1989 to 1990, in terms of both volume and value.[17] It increased again from 1990 to 1991, although not as substantially as before.[18] In interim 1992, domestic consumption declined by less than 15 percent, again both in volume and value.[19]

As noted in my original determination, testimony from U.S. purchasers in this investigation as well as testimony by the petitioner in the previous investigation involving imports from China highlighted the large degree of instability and unpredictability in the world-wide sulfanilic acid market.[20] The trends in the import volumes from China and other sources reflect this instability. Japanese producers of sulfanilic acid largely exited the U.S. market in mid-1990.[21] The volume of imports from sources other than China and the subject countries fell by more than 50 percent from 1990 to 1991,[22] and U.S. shipments of these imports fell by more than two-thirds during the same period.[23] These imports declined further in absolute volume in interim 1992

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[17] See Table 1, CR at I-28, I-29; PR at I-19, I-20.

[18] Id.

[19] Id.

[20] Original Newquist and Nuzum Views at 52.

[21] CR at I-87; PR at I-53.

[22] Table 14, CR at I-85; PR at I-51.

[23] Table 1, CR at I-28; PR at I-19.

as compared to interim 1991, although their market penetration actually increased a marginal amount in terms of quantity due to the decline in consumption.[24]

Imports from China increased substantially from 1990 to 1991, with their market share reaching more than one-third of domestic consumption.[25] In interim 1992, however, imports from China dropped sharply, and their market share was cut almost in half.[26] The concomitant increase in the imports from Hungary and India indicates that the subject imports replaced some consumption -- but by no means all -- that was no longer served by imports from China in interim 1992.[27]

The domestic industry's market share, in the meantime, increased from 1990 to 1991.[28] It increased a greater degree in interim 1992 as compared to interim 1991.[29] Although its shipments declined, they declined less than did consumption during this period.[30]

As discussed below, the industry experienced declines in a variety of indicators in interim 1992. Nevertheless, its market

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[24] See Tables 14 and 16, CR at I-85 and I-90; PR at I-51 and at I-55.

[25] Tables 14 and 16, CR at I-85, and I-90; PR at I-51 and I-55.

[26] Id.

[27] Table 14, CR at I-85; PR at I-51.

[28] Table 16, CR at I-90; PR at I-55.

[29] Id.

[30] Table 1, CR at I-28; PR at I-19.

share in interim 1992 was vastly improved as compared to 1989 and 1990, before the substantial increases in imports from China and later increases in imports from Hungary and India had occurred.[31] The conclusion I draw from this is that, while the mix of imports that served the market changed, neither subject imports nor non-subject imports necessarily displaced domestic market share to a significant degree as of the end of the period of investigation. Thus, although I find the increase in the volume of subject imports from Hungary and India in interim 1992 was significant, I also find that the significance of that increase is mitigated by a variety of factors, including the domestic producer's overall improved market share and the trends in imports from China and other sources.

Price Effects

With respect to price, the statute directs the Commission "to consider whether . . . there has been significant price underselling by the imported merchandise."[32] The statute also directs the Commission to consider whether "the effect of imports . . . otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred to a significant degree."[33]

Prices for Hungarian acid undersold the domestic industry's

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[31] Table 16, CR at I-90; PR at I-55.

[32] 19 U.S.C. § 1677(C)(ii)(I).

[33] 19 U.S.C. § 1677(7)(C)(ii)(II).

sodium sulfanilate throughout the period of investigation. Hungarian refined grade acid also was priced considerably below R-M's refined grade acid, both when R-M was selling refined grade acid in 1989 and again in 1993, after R-M re-entered the refined grade market.[34]

With respect to India, there is only one price comparison available for technical grade sulfanilic acid. That comparison showed underselling in that particular quarter.[35] Further, domestic prices for technical grade fluctuated upward and downward significantly.[36]

Prices for imports of refined grade acid from India are available only for three out of the 15 quarters covered during the period examined. The comparisons do indicate underselling of both sodium sulfanilate and refined grade sulfanilic acid.[37]

Notwithstanding the widespread and nearly consistent underselling by the subject imports, it does not appear that the imports had significant price depressing or suppressing effects during the period examined. Domestic prices for sodium sulfanilate (powder) increased steadily from 1989 through the first half of 1991, and then began to decline.[38] They remained

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[34] See Table 19, CR at I-100, and I-101, n. 201; PR at I-61 and n. 198 at I-61; and Petitioner's Post-hearing Brief (attaching copy of contract with Sandoz).

[35] Table 17, CR at I-98; PR at I-60.

[36] Id.

[37] Tables 18 and 19, CR at I-100; PR at I-60, I-61.

[38] Table 18, CR at I-100; PR at I-60.

far above the 1989 prices, however.[39] Domestic prices for sodium sulfanilate (solution) peaked in late 1990, declined slightly in 1991 and then more so in the interim period.[40] Again, however, the prices remained above the 1989 levels.[41]

I noted in the original determination that R-M Industries changed senior management in late 1990.[42] In the investigation concerning sulfanilic acid from China, the Commission majority observed:

> In order to put the company on a sounder financial basis, the new management changed R-M's pricing policy, which is reflected in the higher prices that R-M charged for sodium sulfanilate in late 1990 and 1991. One issue we must address, therefore, is whether R-M can maintain prices adequate to recover costs in the face of unfair imports.[43]

During most of the period examined, it appears that the domestic producer managed to maintain higher prices. Although there was some slippage towards the end of the period of investigation, prices were still relatively high compared to the beginning of the period of investigation. Given the improvement in the domestic industry's performance during the period examined (discussed below), I conclude that the subject imports did not have significant price depressing or suppressing effects.

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[39] Id.

[40] Id.

[41] Id.

[42] Original Newquist and Nuzum Views at 62.

[43] Sulfanilic Acid from the People's Republic of China, Inv. No. 731-TA-538 (Final) USITC Pub. 2542 at 21 (August 1992).

Impact of Subject Imports on the Domestic Industry

In my original determination, I addressed in the "Condition of the Industry" section the statutory factors the Commission is required to consider in evaluating the impact of subject imports on the domestic industry.[44] For purposes of responding to the Court's remand instructions, I will elaborate here why I concluded that those factors did not support a finding of present material injury by reason of the imports.

The domestic industry was in dire financial condition during the first part of the period of investigation. The petitioner, R-M Industries, incurred substantial operating losses in 1989 and 1990.[45] Several key industry indicators showed downward trends from 1989 to 1990, including production, capacity utilization, and net sales.[46] Although the industry suffered fewer operating losses in 1990 than it did in 1989, those losses were still quite considerable.[47]

In 1991, however, the industry showed a remarkable recovery. Shipments, production, capacity, capacity utilization, and net sales all increased significantly.[48] Operating losses were

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[44] Original Newquist and Nuzum Views at 50-54.

[45] Table 7, CR at I-60; PR at I-37.

[46] Tables 2 and 7, CR at I-45, I-60; PR at I-29, I-37.

[47] Table 7, CR at I-60; PR at I-37.

[48] Tables 1, 2 and 7, CR at I-28, I-45, I-60; PR at I-19, I-29, I-37.

turned into operating income.[49] All this occurred at the same time that imports from Hungary and India were increasing, albeit more slowly than in the interim period.[50] Thus, as of the end of 1991, the record did not indicate that subject imports were causing material injury to the domestic industry.

In interim 1992, however, several industry indicators again showed declines, including production, net sales and operating income.[51] The declines occurred at the same time that the subject imports increased their market share to more than 20 percent.[52] Notwithstanding the increase in subject imports and the declines in industry indicators, however, the industry was still operating profitably.[53]

As noted above, although the increase in the subject imports during the interim 1992 period was significant, several factors mitigate the significance of that increase, including the fact that the subject imports appeared to have largely replaced other imports, and not the domestic like product. Further, notwithstanding the evidence of underselling by the subject imports, R-M Industries managed to increase its prices to profitable levels by 1991 and maintained prices at profitable levels through interim 1992. The slippage in the domestic

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[49] Table 7, CR at I-60; PR at I-37.

[50] Table 14, CR at I-85; PR at I-51.

[51] Table 2, CR at I-45; PR at I-29.

[52] Table 16, CR at I-90; PR at I-55.

[53] Table 7, CR at I-60; PR at I-37.

industry's position in interim 1992 indicates that it remains vulnerable to the adverse effects of dumped and subsidized imports. In my judgment, however, the declines in the industry's performance in interim 1992 did not rise to the level of present material injury.

Accordingly, I make a negative determination with respect to present material injury by reason of the subject imports from Hungary.