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Volume 13
Number 1 *International Business Law*
Conference: Investment and Trade with the
Republic of China

Article 3

10-1-1990

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Recommended Citation

Ronald A. Cass, *Recent Antidumping and Countervailing Duty Cases Involving the Republic of China: A Harbinger of Things to Come*, 13 Loy. L.A. Int'l & Comp. L. Rev. 10 (1990).
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IMPORT AND EXPORT WITH THE REPUBLIC OF CHINA

Recent Antidumping and Countervailing Duty Cases Involving the Republic of China: A Harbinger of Things to Come?

RONALD A. CASS*

INTRODUCTION: TRADE CASE FILINGS AGAINST THE ROC

Title VII of the Tariff Act of 1930 allows the United States to impose additional duties on imports from a particular country if certain criteria are met. The country must be either dumping—selling the product at lower prices in the United States than abroad—or subsidizing imports. This practice must cause, or threaten to cause, material injury to a domestic industry, or materially retard the development of a domestic industry.¹ Two federal agencies, the Department of Commerce and the United States International Trade Commission (“ITC” or “Commission”) share the authority to make this determination. The Department of Commerce, part of the executive branch of the government, is responsible for determining whether dumping or subsidization has taken place. The ITC is an independent agency that assesses whether the dumping or subsidization has resulted in the requisite injury. The trade law terms those practices that produce injury “unfair trade practices.”

The United States has proceeded against nearly all of its major trading partners for dumping and against many of them for subsidizing. Thus, it is not surprising that such cases occasionally involve products imported from the Republic of China (“ROC”), since it is the fourth largest source of United States imports. The volume of dumping and subsidy cases involving the ROC, however, is surprisingly high despite the amount of trade between the United States and the ROC. During the time I served on the Commission, there were

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1. 19 U.S.C. §§ 1671, 1673 (1988).

about as many cases involving imports from the ROC as cases involving imports from all of the European Community countries combined.

Recent cases heard by the Commission, on the surface, provide few clues to explain the large volume of cases against the ROC. The cases do not seem to concentrate on any given type of import. Those cases involving products from the ROC cover a wide range of technologies and industries. For example, some of the dumping and subsidy cases involve expensive products embodying relatively advanced technology which are produced by large industries, such as steel pipes and tubes and business telephone systems. Yet other cases involve such products as martial arts uniforms and residential door locks, which are relatively inexpensive, technologically unsophisticated, and are produced by industries that are small by any standard. The variety of cases involving the ROC, in other words, accurately reflects the variety of dumping and subsidy cases against products from all exporting countries.

To understand the large number of cases involving the ROC, it is first necessary to gain a general understanding of what prompts the filing of these unfair trade cases. Although determining why cases are brought is not an easy task, several explanations are discernible.

The simplest explanation is that the number of filings corresponds to the number of cases with merit. Dumping and countervailing duty (subsidy) petitions are filed when there exists a strong basis for believing that products are sold at lower prices in the United States than in the exporting country or are subsidized by foreign governments, and that these practices are injuring competing United States businesses. Under this view, cases should be filed most frequently against products from nations with significant impediments to competition (and/or strong export-promotion programs) and products that most significantly affect competing United States industries. The characteristics likely to describe the set from which dumping and subsidy cases are brought include substantial government involvement in the economy of the exporting country, large shares of the United States market for the particular imported product, and imported products that are quite similar to those made in the United States. Each factor increases the likelihood that the "unfair" practice is, in fact, occurring, or increases the probability that the practice will noticeably affect United States industry. For example, impediments to competition in a foreign country increase the probability that prices

for products sold there will be high, relative to prices for the same products in the United States.

I do not know enough about the ROC's economy as compared to the economies of other United States trading partners to predict whether this straightforward explanation of unfair trade case filings also explains the volume of cases against ROC products. Nonetheless, based on my familiarity with the workings of government, litigation in general, and trade cases in particular, I suspect that things are not quite so simple. Given the assumption that case filings fit some rational expectations model, there surely will be some correlation of filings to expected outcomes. However, outcomes may not be fully derivative of the simple description of merits (a subject addressed more below) and the gains from filing unfair trade cases may not be confined to formal disposition of the immediate case. The very fact that the proportion of cases generating affirmative findings by the ITC varies over time at least suggests that case filings do not conform to a strict monotonic function of the probability of ultimate success on the merits. This would make alternative hypotheses worth pursuing.

Two alternative explanations focus on dynamic factors. These alternatives suggest that dumping and subsidy case filings are a function of *changing* patterns of imports and domestic production, with significant deviations from historic patterns in either country likely to increase filings. If change is the impetus of petitions for relief from the effects of these trade practices, then two explanations for trade cases are possible. Looking at the import-supply side, the countries most rapidly gaining market share in the United States would be the most likely targets of dumping and subsidy investigations. Another explanation is that the petitions may be filed in response to declines in the particular United States industry. Such cases would logically be brought against the principal sources of imports competing with the declining industries, although, as described below, other competing suppliers are apt to be swept into these actions as well. Thus, the countries most subject to complaints would be those that compete more with the declining United States industries than with the growing or stable sectors of the United States economy.

There is some basis for believing this last hypothesis. Antidumping and countervailing duty petitions do seem to correlate, after a slight lag, with economic recessions. Additionally, they seem to be filed disproportionately against products competing with United States businesses that are on the decline. Moreover, the manner in

which some of my former colleagues at the ITC have approached dumping and subsidy cases increases the likelihood that the fortunes of United States industry (without respect for whatever congeries of causes determine those fortunes in a given case), rather than the practices of particular trade partners, will significantly influence case filings. These commissioners have read the statutory instruction under which the ITC decides unfair trade cases—to determine whether the relevant United States industry is suffering “material injury by reason of” the dumped or subsidized imports—as if it contained two separate, independent instructions: (1) to decide whether the complaining United States industry is financially healthy or is in decline, and (2) to determine whether imports have any effect on the industry.² As explained further below, this approach allows the changing fortunes of the domestic industry to dominate resolution of trade cases, which might well influence the incidence of case filings.

PREDICTING FUTURE FILINGS: POLITICS, BUSINESS, AND LAW

If United States industry performance, wholly apart from exporters’ trade practices, is at least partially responsible for determining which trade cases get filed, what does that suggest about filings against the ROC? When viewed in combination with the two other factors, industry performance does not provide a strong basis for predicting the volume of trade cases. Rather, it merely provides a basis for guessing what to expect of future trade cases against ROC imports to the United States.

Before attempting to specifically predict the future of ITC cases involving the ROC, however, I should provide one caveat. In general, one should view predictions of the future course of United States trade law and policy with skepticism. In the 1980s, for example, we have seen a confluence of economic and political developments few would have predicted. The United States has experienced unprecedented economic expansion during peacetime under a presidential administration more openly committed to free-market principles than any in half a century. Yet, the range of domestic industries enjoying some form of protection against imports expanded considerably over

2. In a number of cases, I have explained why I believe that this approach is fundamentally at odds with United States law and with this country’s obligations under the General Agreement on Tariffs and Trade. See, e.g., *New Steel Rails from Canada*, USITC Pub. 2217, Inv. Nos. 701-TA-297, 731-TA-422 (Final) (Sept. 1989) (dissenting views of Vice Chairperson Cass). For sharply contrasting opinions, see *id.* (views of Commissioners Eckes and Rohr).

this same period under the same administration. Having made some predictions in print before, I am especially uneasy about venturing my guesses in a form that risks later comparison with actual events.

Nevertheless, for the moment, I will try to suppress my customary caution and suggest that the coming years may see more, rather than fewer, antidumping and countervailing duty cases involving imports from the ROC. I do not believe that the recent flurry of such cases is mere happenstance. In my view, two factors have contributed substantially to the proliferation of antidumping and countervailing duty cases against the ROC.

One such factor is that the ROC is part of the emerging family of economic powers known as the "Asian Tigers." The significance here is that the ROC is an Asian nation with a rapidly expanding economy and a sizeable volume of exports, largely to the United States. This statement conflates three related factors: the geographical locus of the ROC, the ROC's economic growth, and its volume of exports. None of these factors correlates directly with the explanation for trade case filings given above. Certainly, I do not profess that any of these factors, alone, principally explains petitions against products from the ROC, but the three taken together describe a set of considerations that is not entirely irrelevant to case filings and outcomes. There has been much recent discussion in the United States of the perceived threat of Asian imports. The main focus of this discussion has centered on Japan, but other Asian exporters, including the ROC, have received attention as well. Imports from Asia have been discussed in strident terms, creating an overall climate in which many members of the United States business community believe that government decision-makers and policy-makers are more inclined to restrict Asian imports than imports from European Community countries or Canada. For this reason alone, some United States businesspersons may conclude that this is a particularly opportune time to attempt to use the dumping and countervailing duty laws to restrict import competition from the ROC.

The second factor likely to keep the number of case filings against ROC products high concerns a technical aspect of United States trade law that makes countries more vulnerable to trade sanctions for even modest and inadvertent trade violations. Such practices include selling products in the United States markets in which the foreign products have already seriously affected United States businesses. Under United States law, an antidumping or countervailing

duty case need not be brought solely against imports from a single country. Such an action is often brought against imports from many countries at the same time. Moreover, in such a multi-country proceeding, the impact of imports from each country is not usually considered in isolation. Imports from all countries subject to investigation are generally considered collectively to determine whether, as a group, they have materially injured domestic industry. The reason for this is that under United States law, in order to determine whether there has been material injury from "unfairly traded" imports, the Commission must cumulatively analyze the volume and effect of imports subject to investigation from two or more countries³ if such imports "compete with each other and similar products of the domestic industry in the United States market."⁴

The Commission has generally considered the following four factors in determining whether the statutory criterion for competition has been met: (1) the degree of fungibility of imports from different countries, and between imports and the domestic like product, including consideration of specific requirements and other quality related questions; (2) the presence of sales or offers to sell imports from different countries in the same geographical markets as the domestic like product; (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and (4) whether the imports are simultaneously present in the market.⁵ These four factors do not add to or replace the two basic statutory requirements that imports from different countries are to be subject to investigation and are to compete with each other and with the domestic like product. Rather, these factors are used to assess whether the second statutory requirement is satisfied.

Following this approach, the Commission has found that the statutory criteria for cumulation has been met in almost all recent

3. 19 U.S.C. § 1677(7)(C)(iv) (1988). Under the statute, however, the Commission is not required to cumulate imports from a particular country if that country's exports to the United States are "negligible" and have "no discernable [sic] adverse impact on the domestic industry." *Id.* § 1677(7)(C)(v).

4. *Id.* § 1677(7)(C)(iv). The Commission may, but is not required to, cumulate the price and volume effects of imports subject to investigation for the purposes of determining whether there is a threat of material injury. *See, e.g.,* *Asociacion Colombiana de Exportadores de Flores v. United States*, 693 F. Supp. 1165, 1171-72 (Ct. Int'l Trade 1988).

5. *See* *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, USITC Pub. 2185, Inv. Nos. 303-TA-19, 20, 731-TA-391-99 61-62 (Final) (May 1989) (views of the Commission).

cases where this issue has been presented. The low threshold for cumulation reflects the statute's suggestion that even a minimal showing of direct competition between imports from different countries, and between those imports and the domestic like product, makes cumulation mandatory. Of course, competition cannot be treated as a binary phenomenon—one that either does or does not exist—but rather is a continuum of consumer choices on expenditure of finite resources. At some point, the consumers' decisions can be seen as sufficiently zero-sum for competition to be deemed "direct," even if the products are only modestly substitutable. At that point, the Commission will cumulate, responding to a statute framed in terms of existence rather than degrees of competition.

The statute's legislative history also significantly colors the Commission's treatment of these cumulation issues. The cumulation provision was added to the statute in 1984⁶ to express Congress' view that in multi-country antidumping and countervailing duty investigations, the Commission should not require that each country's imports by themselves cause material injury.⁷ While Congress was satisfied that most commissioners were applying the cumulation principle correctly without explicit statutory authorization or direction, it expressed concern that certain commissioners were imposing unjustified conditions on the doctrine's use.⁸ In short, Congress made it clear that cumulation was to be the rule, rather than the exception.

With cumulation, it will often be advantageous for a party bringing an antidumping or countervailing duty action against imports of a particular product from one country to also make similar allegations respecting imports of the same product from other exporting countries. This is true even when the volume of those other imports is relatively small. For the reasons previously suggested, such action will increase, even if only marginally, the likelihood of an affirmative determination. Domestic industry will benefit from an affirmative determination if the antidumping or countervailing order covers more countries. Furthermore, the only cost of adding countries to an antidumping or countervailing duty petition is the cost of compiling whatever additional information may be required to support charges against the additional countries.⁹

6. Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 3033 (codified as amended at 19 U.S.C. § 1677 (1988)).

7. H.R. REP. NO. 26, 98th Cong. 2d Sess., 27 (1984).

8. *Id.* at 26.

9. This burden may not be as great as it first appears. The courts have held that the

Several cases involving the ROC which have recently come before the Commission appear to reflect this one-sided cost-benefit calculation. Perhaps the best example is the recent decision of *12-Volt Motorcycle Batteries from Taiwan*.¹⁰ Since the 1985 filing of the petition in this case, the Commission has twice reached negative determinations in preliminary investigations.¹¹ Both times, the Commission determined that the domestic industry producing 12-volt motorcycle batteries was not experiencing or threatened with material injury by reason of unfairly traded imports from the ROC.¹² In both instances, the Court of International Trade, the first-stage reviewing court for such cases, reversed the Commission's finding on the issue of threat of material injury. In an unusual move, the court did not simply remand for further ITC consideration but instead ultimately instructed the Commission to make an affirmative preliminary determination.¹³ The Commission then instituted its final investigation. Shortly thereafter, apparently recognizing that the Commission was again likely to rule against it, the petitioner filed an antidumping petition against imports of 12-volt motorcycle batteries from Korea, asserting that the Commission was legally compelled to cumulate the volume and effects of the Korean imports with those associated with the imports from the ROC. While the Commission agreed that it was required to cumulate the Korean and ROC imports for the purposes of its material injury analysis, it again unanimously reached a negative determination. Thus, the petitioner won the battle but lost the war.

Another case involving the ROC and the cumulation doctrine is *Light-Walled Rectangular Pipes and Tubes from Taiwan*.¹⁴ The Com-

Commission has a duty to conduct an independent investigation of the allegations set forth in an antidumping or subsidy petition, irrespective of the evidence that may, or may not, be advanced by the petitioner. See *Budd Co. Ry. Div. v. United States*, 507 F. Supp. 997 (Ct. Int'l Trade 1980).

10. USITC Pub. 2109, Inv. No. 731-TA-238 (Final) (Aug. 1989).

11. See USITC Pub. 1654 (Feb. 1985); see also USITC Pub. 2109, Inv. No. 731-TA-238 (Final) (Aug. 1989).

12. In preliminary investigations, the Commission's task under the statute is to determine whether there is a "reasonable indication" that subject imports have materially injured or materially retarded the development of a domestic industry, or threatened such injury. See 19 U.S.C. §§ 1671(b), 1673(b) (1988). If the Commission makes an affirmative determination, the petition goes forward to a final investigation. By contrast, in final investigations, the petitioner must persuade the Commission that material injury or retardation, or the threat of material injury in fact exists. See *id.*

13. See *Yuasa-General Battery Corp. v. United States*, 688 F. Supp. 1551 (Ct. Int'l Trade 1988).

14. USITC Pub. 2169, Inv. No. 731-TA-410 (Mar. 1989).

mission reached an affirmative determination by a 4-2 vote in this investigation, as it did in a companion case involving imports of the same product from Argentina.¹⁵ The Commission's decision in the Taiwan case is noteworthy in several respects. Cumulation was critical to the outcome of this case. Chairman Brunsdale and I found that the domestic industry producing the steel pipes and tubes at issue was materially injured by the dumping of the subject imports. Two other commissioners found only the threat of material injury, although one of two commissioners also stated that he believed the record evidence could support a finding of present material injury.¹⁶ While I cannot speak for the two commissioners who made an affirmative determination based on a finding of threat, I can say that the Chairman and I probably would have reached a different conclusion if we had been considering only the imports from the ROC.

Due to the relatively low threshold for mandatory cumulation under the statute, we could not look at the ROC imports in isolation. We were required to assess cumulatively the volume and effect of imports from Argentina and the ROC. Nevertheless, from my standpoint, the case was a close one. The share of the domestic market held by the ROC and Argentine imports was relatively small. However, other evidence in the record indicated that dumping by the two countries had a significant impact on prices and sales of the domestic like product, and hence, on investment and employment returns in the domestic industry producing that product. The dumping margins calculated by the Department of Commerce for the various ROC and Argentine exporters were quite large in some cases, and in context, suggested a significant effect on prices and sales of domestically produced steel pipe and tube. As is the case with most steel products, demand for steel pipes and tubes is quite inelastic and there is a high degree of substitutability between the domestic and imported products. This evidence was sufficient to compel an affirmative determination.

TRADE LAW'S LEANINGS: CUMULATION AND CAUSATION

Pipes and Tubes is worth perusing for another reason. Although the commissioners drew the same conclusion respecting cumulation,

15. Light-Walled Rectangular Pipes and Tubes from Argentina, USITC Pub. 2187, Inv. No. 731-TA-409 (Final) (May 1989).

16. Light-Walled Rectangular Pipes and Tubes from Taiwan, USITC Pub. 2169, Inv. No. 731-TA-410 (Mar. 1989) (views of Commissioners Eckes and Newquist).

the Commission's decision in *Pipes and Tubes* highlights the differences in the commissioners' understandings of the law governing dispositions of the underlying merits, that is, their views respecting the appropriate analysis for determining whether the requisite material injury or threat of material injury exists. Two of the commissioners voting negatively found no material injury because, in their view, various indicators of the performance of the industry, such as the overall level of industry employment, production, and operating income, indicated that the condition of the industry had improved relative to an "already healthy condition" in 1985.¹⁷ The two commissioners who made an affirmative determination based on a finding of threat employed a similar analysis, although they reached a different conclusion respecting the ultimate disposition of the case.¹⁸

In *Pipes and Tubes*, then, as in many recent ITC cases, a majority of commissioners treated the industry's health as the key issue. Four commissioners made no serious attempt to assess critically the effects that dumping actually had on the domestic industry. Instead, they relied on intuitive assessments of rudimentary data regarding trends in industry performance and product prices.¹⁹

The Commission's resolution of the substantive issues and its treatment of cumulation may prove important to other ROC cases before the Commission.²⁰ Two important cases, pending at the time this paper was delivered, involve imports of small business telephone

17. *Id.* (dissenting views of Commissioner Lodwick and additional and dissenting views of Commissioner Rohr).

18. *Id.* As previously noted, Commissioner Eckes suggested that the evidence "could support" a finding of material injury. See *id.* (views of Commissioners Eckes and Newquist). Commissioner Newquist's findings on this issue, if any, were left unclear. *Id.*

19. With the possible exception of Commissioner Lodwick, these commissioners are generally hostile to using economic analysis in antidumping and subsidy cases.

20. It should also be noted that in two other recent cases, the Commission reached negative determinations respecting unfairly traded imports from the ROC. This occurred even though the Commission cumulated the volume and effects of those imports with those associated with imports from several other countries for the purposes of analyzing the existence of actual material injury. In *Industrial Belts from Israel, Italy, Japan, Singapore, South Korea, Taiwan, the United Kingdom, and West Germany*, USITC Pub. 2194, Inv. Nos. 701-TA-293, 731-TA-412-19 (May 1989), the Commission decided by a 4-2 vote that dumped imports of industrial belts from the ROC were not causing or threatening material injury to any domestic industry. (By a 3-3 vote, however, the Commission rendered affirmative determinations with respect to many of the other subject countries. I voted in the negative as to all subject countries.) In *Thermostatically Controlled Appliance Plugs and Internal Probe Thermostats Therefor from Canada, Japan, Malaysia and Taiwan*, USITC Pub. 2152, Inv. Nos. 701-TA-292, 731-TA-400, 402-04 (Final) (Jan. 1989), the Commission made a unanimous negative determination respecting all of the subject countries.

systems and system subassemblies from Japan, Korea, and the ROC,²¹ and imports of sweaters made of man-made fibers from Hong Kong, Korea, and the ROC.²² These cases now have been decided, and a few comments on them may be in order. Both illustrate the interplay of cumulation with the alternative substantive approaches to dumping and subsidy cases.

The *Certain Telephone Systems and Subassemblies Thereof from Japan and Taiwan* case is one of the most important to come before the Commission in recent years.²³ The volume of trade affected by this publicly visible case is great. The domestic market for small business telephone systems is huge, with total sales of equipment for such systems approaching or exceeding \$2 billion annually.

Although the outcome may be affected by the analytical approach adopted by the Commission, the effect of cumulation in *Telephone* is unambiguously negative to ROC exporters to the United States no matter which approach is followed. First, if one attempts to assess actual economic effects of dumping, cumulation changes two analytical inputs. Importantly, the volume of imports changes sharply. Total imports of equipment for these small business telephone systems from all countries that were examined amounted to several hundred million dollars, even though imports from the ROC have consistently accounted for only a very small proportion of these subject imports.

A second parameter affected by cumulation also worked to the detriment of ROC exporters in *Telephone*, but its interaction with cumulation does not *on average* affect the outcome in unfair trade cases. This parameter is the "dumping margin" (percentage by which the foreign market price, or its surrogate, exceeds the United States price for the imports) calculated by the Department of Commerce. In *Telephone*, the Department of Commerce found that there was dumping

21. *Certain Telephone Systems and Subassemblies Thereof from Japan and Taiwan*, USITC Pub. 2237, Inv. Nos. 731-TA-426, 428 (Final) (Nov. 1989); *Certain Telephone Systems and Subassemblies Thereof from Korea*, USITC Pub. 2254, Inv. No. 731-TA-427 (Final) (Feb. 1990).

22. *Sweaters Wholly or in Chief Weight of Manmade Fibers from Hong Kong, the Republic of Korea, and Taiwan*, USITC Pub. 2234, Inv. Nos. 731-TA-448-50 (Preliminary).

23. The only other case that may be comparable from this standpoint is *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom*, USITC Pub. 2185, Inv. Nos. 303-TA-19-20 and 731-TA-391-99 61-62 (Final) (May 1989).

of the subject imports from all three subject countries.²⁴ A wide range of dumping margins was calculated for the various respondents. For Japanese companies, the dumping margins averaged more than 150%. Because the Japanese respondents elected to withdraw from the Department of Commerce's investigation, these margins were derived from information provided by the petitioner, AT&T,²⁵ under the statutory provision allowing the Department of Commerce to treat AT&T's allegations as the "best information available."²⁶ The dumping margins assigned to the Korean respondents were much lower, amounting in each case to less than 10%.²⁷ ROC respondent, Sun Moon Star, Inc., was able to persuade the Department that it was not guilty of dumping at all. Another ROC respondent, Taiwan Nitsuko Co., Ltd., however, was assigned a huge margin of 129.73%. Because Nitsuko failed to provide the Department of Commerce with certain essential information, the Department also derived the "best information available" from the petitioner's data.²⁸

The high margins for several respondents significantly affected the evaluation of economic effects of dumping by the cumulated class of respondents. It was not dispositive of the *Telephone* case for any of the participating commissioners, but for those commissioners who saw critical analysis of economic effects as central to the determination, the margins were of considerable importance. Together with other information respecting the United States and foreign markets, the margins suggested that the ability to price differently in the United States and the foreign (home) markets greatly altered the price charged for the imported components of telephone systems.²⁹ Even though the companies with low margins had little impact on the competing United States industry, the high margin companies arguably did have an impact. In the end, three commissioners decided that other information concerning the nature of the competition between the United States-produced and imported systems reduced the effect of the lower import prices on the United States industry to a level too

24. See 54 Fed. Reg. 31,978, 31,980, 31,987 (1989) (Japan, Korea, and the ROC, respectively).

25. *Id.* at 31,980 (1989).

26. 19 U.S.C. § 1677e(C) (1988).

27. 54 Fed. Reg. 53,141-53 (1989).

28. See *id.* at 31,989-90.

29. See *Certain Telephone Systems and Subassemblies Thereof from Japan and Taiwan*, USITC Pub. 2237, Inv. Nos. 731-TA-426, 428 at 270-80 (Final) (Nov. 1989).

low to be deemed "material injury."³⁰ These commissioners made it clear, however, that this was a close judgment.

Even if these commissioners had ruled the other way, the result could not be ascribed simply to the cumulative assessment of effects of imports from several nations. Their decision would rest on the combination of: high margins for several companies with high market share in the United States; conditions that cause those margins to translate to substantial price declines for the import; competition between the imported products and the United States-produced products so intense that the lowered import prices significantly affect the sales and prices of United States-produced products; and the cumulation of several smaller effects into an effect sufficient to be material.

Nonetheless, the cumulative assessment of effects moved the dumped ROC products from the position of clearly not causing material injury to the position of very nearly causing material injury along with other, cumulated products. Further, cases could arise in which cumulation increased the perceived effects of dumping from less than material to more than material injury because it jointly assessed the effects of a small volume of low margin imports from one country with the effects of a large volume of high margin imports from another. This could be especially problematic as individual companies' decisions not to participate in the Department of Commerce investigation could be dispositive, as the decision of the Japanese respondents in *Telephone* almost was for half the Commission.

This is troubling in no small measure because it allows strategic considerations to play a serious role in the disposition of trade cases. The non-participating Japanese respondents, which consequently received high constructed margins, assertedly were planning to establish production facilities for telephone equipment in the United States. If so, those companies could have decided that a course of conduct likely to produce high margins would be advantageous, as it increased the probability that duties would be placed on other imports with which their (prospectively United States-produced) products would be competing.

One should note that the relation between cumulation and the votes of the three commissioners who comprised the plurality in *Telephone* is less certain. Those commissioners appear to view the assessment of economic effects of the unfair trade practices at issue to be

30. See *id.* at 101-41 (Chairperson Brunsdale, dissenting), 143-315 (Vice Chairperson Cass, dissenting), 317-51 (Commissioner Lodwick, dissenting).

less central to the ultimate judgment. They clearly do not regard the cumulation of volumes of imports from various countries as irrelevant to the decision of the case and are sensitive to the increased probability of material harm that follows from greater import volumes. Their disposition of trade cases, however, does not show any clear relation between the outcome and the volume of imports. And they expressly do not concern themselves with the unfair trade practice itself, eschewing consideration of the magnitude of dumping or subsidy in most cases. Indeed, in many cases these commissioners do not even assess the effects of the unfair trade practice or the imports with which it is associated; they dispose of cases, instead, on the basis of the current condition (or trend in condition) of the domestic United States industry, apart from the effects of dumping or subsidization on that industry.³¹ Under these commissioners' approach, cumulation may often be of no consequence.

The other important, recent case where cumulation played a significant role is *Sweaters Wholly or in Chief Weight of Manmade Fibers from Hong Kong, the Republic of Korea, and Taiwan*.³² In *Sweaters*, the Commission placed duties on imports totalling about one billion dollars in 1989. Again, the finding of material injury from dumped imports was based on the effects of dumped imports from all three nations. The final decision represented the view of only two commissioners. One commissioner dissented, one was recused, and two seats were vacant.

The industry in this case is typical of ones that might frequently generate trade cases, and also is typical of cases in which cumulation is likely. The United States industry has long been in decline, making it likely that commissioners who do not carefully analyze the economic effects will find the domestic industry injured. The extensive system of quotas and related restraints assure that no one country is likely to dominate the market. This raises the probability of complaints against imports from several nations.

31. For discussion of the approach taken by these commissioners, see R. CASS, *ECONOMICS IN THE ADMINISTRATION OF U.S. INTERNATIONAL TRADE LAW*, (Ontario Centre for International Business Working Paper No. 16, 1989); Cass & Schwartz, *Causality, Coherence, and Transparency in the Implementation of International Trade Laws*, in M. TREBILCOCK & R. YORK, *REFORMING TRADE REMEDY LAWS* (1990); Kaplan, *Injury and Causation in USITC Antidumping Determinations* (March 1990) (unpublished); Morkre & Kruth, *2 DETERMINING WHETHER DUMPED OR SUBSIDIZED IMPORTS INJURE DOMESTIC INDUSTRIES: INTERNATIONAL TRADE COMMISSION APPROACH, CONTEMPORARY POLICY ISSUES* 7 (1989).

32. USITC Pub. 2234, Inv. Nos. 731-TA-448-50 (Preliminary) (Nov. 1989); the Commission rendered its final decision in September 1990.

The most significant, visible restraints are those of the Multifiber Arrangement ("MFA")³³ which restricts trade in product categories covering the sweaters under investigation in that case. The MFA, originally signed in 1973 by the United States and about 50 other countries,³⁴ and subsequently extended three times,³⁵ establishes a structure under which countries may reach bilateral agreements for country-specific quotas regulating trade in textiles and apparel to avoid "market disruption" in the importing nation. Under the MFA, the United States has negotiated bilateral agreements with more than 40 exporting countries, including the ROC.³⁶

As one might expect in markets not characterized by highly differentiated products and substantial economies of scale, but which do allow efficient production through large inputs of relatively low-skilled labor, country-specific quotas have led to considerable dispersion of imports across countries. This is visible simply from history. In the late 1950s, industry concern over imports of cotton fabrics and blouses from Japan prompted the United States government to press Japan to establish a five-year "voluntary" program of export controls.³⁷ Imports from other areas, such as Hong Kong, increased substantially during the time that program was in effect, and the United States then sought broader controls.³⁸ In 1961, the United States convened a conference of exporting and importing nations which agreed on controls under the so-called Short-Term Arrangement Regarding International Trade in Cotton Textiles.³⁹ A "Long-Term Arrangement" was reached shortly thereafter, and was subsequently extended twice.⁴⁰ While cotton import constraints were being expanded "horizontally," imports of textiles and apparel made of fabric other than cotton had begun to increase. The United States then sought to expand textile constraints "vertically," and in 1971, the United States reached bilateral agreements with its larger Asian suppliers (including Japan, Hong Kong, the ROC, and South Korea) to restrict trade in

33. The text of the MFA is set forth at 25 U.S.T. 1001, T.I.A.S. No. 7840.

34. The Economic Effects of Significant U.S. Import Restraints, Phase I: Manufacturing, USITC Pub. 2222, Inv. No. 332-262, 4-4 (Oct. 1989).

35. *Id.* at 4-1. A protocol recently extended the MFA from July 1986 to July 1991 and expanded the MFA's coverage to include silk blend and non-cotton vegetable fiber products. *Id.* at 4-4.

36. *Id.* at 4-1, 4-2.

37. *Id.* at 4-3.

38. *Id.*

39. *Id.*

40. *Id.* at 4-4.

textiles and apparel made of wool and man-made fibers.⁴¹ These agreements were viewed as a stop-gap measure, and the MFA soon followed.

The expansion of MFA-linked restraints—both as to the scope of coverage and number of countries—illustrates the economic advantage enjoyed by countries with relatively low wage rates in the production of textiles and apparel. This story also suggests the strength of the political forces supporting restrictions on imports of textiles and apparel into the United States and other industrialized nations. At some point, the cost of restrictions on such imports to consumers in industrialized nations may become so great as to tip the political balance away from such restrictions. Estimates of the current cost of these restrictions to United States consumers put the figure as high as \$30 billion, and a recent study estimates the overall gain to the United States economy from elimination of these restrictions as at least \$2 billion per year.⁴² The United States government supports some modification of the current system, but is not willing to act unilaterally.

One final case which merits discussion is *Martial Arts Uniforms from Taiwan*.⁴³ Sales of martial arts uniforms in the United States at any given time are strongly affected by the extent to which martial arts movies currently are popular. Because United States interest in the martial arts has declined over the past several years,⁴⁴ domestic consumption of martial arts paraphernalia has declined. Consequently, the performance of the domestic martial arts uniform industry has weakened considerably.

At the same time, the evidence in the *Martial Arts Uniforms* case showed conclusively that dumping had very little, if any, effect on prices of the subject imports. Similarly, it had little, if any, effect on prices or sales of domestically produced martial arts uniforms, or investment and employment in the domestic industry producing that

41. *Id.*

42. *Id.* at 4-19. These estimates take into account the gains to domestic consumers that would result from lower prices for textiles and apparel, losses to domestic producers and employees in the domestic industry, and lost tariff revenues. *Id.* at 4-6.

43. USITC Pub. 2216, Inv. No. 731-TA-424 (Final) (Aug. 1989).

44. With all due respect to Chuck Norris, my own view is that martial arts movies just have not been the same since Bruce Lee passed away. In any event, the level of mass interest in martial arts clearly has declined somewhat over the past few years and there is nothing at the moment like the seemingly inexplicable Ninja craze that we experienced several years ago. The current popularity of the Teenage Mutant Ninja Turtles does not appear to have the same impact on the martial arts uniform market, although I believe it has boosted sales of Turtle Wax considerably.

product. In fact, the real source of the difficulties being experienced by the domestic martial arts uniforms industry can be found in factors unrelated to ROC imports. In light of this evidence, the Commission concluded that lower-priced ROC martial arts uniforms did not materially injure the competing domestic United States industry.

The surprise in this case was not the conclusion, but the tally that produced it. The Commission rejected duties in that investigation by only a 4-2 vote, the narrowest of margins by which a negative vote can be sustained by the ITC when fully conditioned with six participating commissioners.⁴⁵ The outcome of the case is noteworthy, primarily because it confirms that, in most antidumping and countervailing duty cases, an ailing domestic industry can count on support from at least some commissioners without respect to the record evidence on actual effects of unfairly traded imports.

For businesses that export to the United States and compete principally on the basis of price, this cannot be seen as a favorable straw in the wind. These businesses may find their susceptibility to an antidumping or countervailing duty case more dependent on the health of the domestic United States industry than on any specific action of the businesses. This approach to deciding international trade cases reflects a protectionist viewpoint on the part of some of the commissioners, and contradicts United States objectives of reducing barriers to trade. It is my hope that the commissioners apply a more even-handed approach to deciding antidumping and countervailing duty cases in the future, so that ROC and United States businesses can compete on an even footing.

45. Under United States law, an evenly decided vote is treated as an affirmative vote by the Commission. 19 U.S.C. § 1677(11) (1988).