

## **U.S. INTERNATIONAL TRADE COMMISSION**

### **CRITERIA FOR DETERMINING MATERIAL INJURY AND THREAT THEREOF**

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#### **I. Like Product and Domestic Industry**

"Like product" is defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation . . ." "Like" and "most similar in characteristics and uses" is decided by the Commission on a case-by-case basis.

"Domestic industry" is defined as "the domestic producers as a whole of the like product or those producers whose output of the like product constitutes a major proportion of the total domestic production of the product."

The U.S. International Trade Commission ("ITC") generally considers a number of factors in analyzing like product issues, including:

- (1) physical characteristics
- (2) uses
- (3) interchangeability of products
- (4) channels of distribution
- (5) customer or producer perception
- (6) common manufacturing facilities and production employees
- (7) production processes, and
- (8) price

No single factor is necessarily dispositive, and the Commission may consider other factors it deems relevant.

While the ITC may find a like product to be broader than the scope determined by the Commerce Department, it has never found minor variations to be a sufficient basis for a separate like product analysis. Rather, it looks for a clear dividing line among possible like products.

## **II. Condition of the U.S. Industry**

The Commission is instructed to consider all the "relevant economic factors which have a bearing on the state of the industry in the United States." In undertaking that assessment, the ITC considers, among other factors, the following economic indicia of the health of the relevant U.S. industry:

- (1) consumption
- (2) production
- (3) shipments
- (4) capacity utilization
- (5) employment
- (6) wages
- (7) financial performance
- (8) capital investment, and
- (9) research and development expenses

In each investigation, the Commission considers the particular nature of the industry under investigation, including the "conditions of competition that are distinctive to the affected industry."

## **III. Material Injury by Reason of Less Than Fair Value Imports**

The Commission considers:

- (1) the volume of imports of the merchandise which is the subject of the investigation;
- (2) the effect of imports of that merchandise on the prices in the United States for like products, and
- (3) 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.

In addition, the ITC may consider "such other economic factors" as are relevant to the determination.

In considering the effect of dumped imports on domestic prices and domestic producers, the ITC believes that an important consideration is the substitutability of the imported and domestic products. If they are close substitutes, customers are more likely to switch in response to a change in their relative prices. Therefore, the relative substitutability of the products will affect the volume of domestic production lost to subject imports. As an example, the ITC may divide the domestic market of the product under investigation into "grade" for the purpose of analyzing substitutability.

Based on its overall analysis of the record, the volume of the subject imports, the effect of subject imports on domestic prices and the impact of subject imports on domestic producers, the ITC will determine whether there is material injury to a U.S. industry by reason of dumped imports.

#### IV. Threat of Material Injury

If the Commission finds no current material injury, it then considers whether there is a threat of material injury to the domestic industry by reason of dumped imports. The statute requires that any "threat of material injury [be] real and that actual injury [be] imminent," and that the determination not be based on mere conjecture or supposition.

The Commission in the past has characterized the issue of threat as whether the foreign industry has both the ability and the incentive to increase exports to the United States in such quantities and at such prices as to cause material injury.

First, with regard to existing unused or under-utilized foreign production capacity, the record may indicate that underutilized capacity exists in the foreign country. The record evidence may suggest, however, that full capacity utilization in that country is not likely to increase significantly the U.S. market share of the subject imports.

Next, the ITC examines the probability that imports will increase rapidly and that import penetration will rise to an injurious level. The Commission may consider whether the quantity and value of imports declined steadily in the period of investigation. If so, and if the imported product's share of domestic consumption by quantity remained fairly constant over the period of investigation, it may find no threat of injury. Further, if it finds that the foreign government has export quotas, or if the imports are of inferior quality, such that the respondents' ability to penetrate rapidly the U.S. market in the near term are hampered, it will be less likely to find threat of material injury.

The Commission also must assess the probability that imports of the merchandise will enter the U.S. at prices that will have a depressing or suppressing effect on domestic prices of the merchandise.

The Commission also must consider any substantial increase in inventories of the imported product in the U.S. that might easily enter the domestic market in the near future. If importers' inventories have generally declined over the period of investigation and at no time represented more than five percent of total domestic consumption, then it is less likely to find threat of material injury.

The potential for product shifting also is analyzed. Thus, the ITC will consider whether equipment used to produce other products already under an antidumping order or to produce other products under investigation can be switched to the product under investigation. If this possibility is severely limited, the ITC will be less likely to find threat of injury.

The Commission also will consider whether subject imports will have any actual or potential negative effects on development and production efforts. It will look at the domestic producers' production capability and compare that to domestic consumption. Also, it will look at the trends in research and development expenditures.

The Commission also will consider "whether dumping in markets of foreign countries" (as evidenced by dumping findings or antidumping remedies in other WTO member markets against the same class or kind of merchandise manufactured or exported by the same party as under investigation) suggests a threat of material injury to the domestic industry. If a dumping margin exists in a foreign country against the same producing country, those exports may then be directed to the U.S. The mere investigation of the same product in a foreign country does not suffice for this purpose.

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