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Abstract

This Article examines the tension between the independence of judges in the CIT and the role of stare decisis in the CIT. After an overview of the applicability of the doctrine at the trial court level, the Article will set out two case studies in CIT decision making. The first example, relating to the standard to be applied by the Commission in preliminary antidumping and countervailing duty investigations, is a "worst case scenario" in which judicial inconsistency has caused a great deal of confusion for the Commission and its individual commissioners. The second example, which involves a series of cases relating to the proper role of economic or elasticity analysis in Commission injury determinations, shows how a cogent and consistent body of law has emerged on an issue when the judges of the CIT have taken into account prior decisions and have carefully built upon them in subsequent opinions. Finally, this Article addresses, in light of the two examples, what balance if any may be struck between judicial independence and the application of precedent in CIT review of antidumping and countervailing duty investigations.

STARE DECISIS AND THE U.S. COURT OF INTERNATIONAL TRADE: TWO CASE STUDIES OF A PERENNIAL ISSUE†

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INTRODUCTION

One of the most frequent and, perhaps, most intractable questions relating to practice before the U.S. Court of International Trade (the "CIT") concerns the role of precedent, or stare decisis, in the litigation of antidumping and countervailing duty cases. The topic has elicited considerable comment over the last several years from both government counsel and members of the private bar. Like the application of stare decisis by the CIT, the debate over the application of precedent has been characterized by indistinct boundaries between the positions. Two lines of thought, however, have emerged in the course of comment on the question.

On the one hand, some practitioners hold the view that "[f]rom the perspective of the agencies . . . the present absence of certainty in the administration of the law argues for a stricter interpretation of the effect of stare decisis on subsequent decisions of the court."[1] Moreover, in light of the bur-

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1. Powell & Concannon, *Stare Decisis in the Court of International Trade: One Court or Many?*, U.S. TRADE L. & POLICY 351, 374 (Nov. 24, 1986). Powell and Concannon explore the development of stare decisis in the federal courts in general, and the U.S. Court of International Trade (the "CIT") in particular, with an eye to its role in review of antidumping and countervailing duty investigations. They analyze the use of precedent in the context of decisions evaluating the U.S. Department of Commerce's application of the "specificity test," the requirement that countervailable subsidies are those "provided to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class

geoning number of CIT cases involving similar antidumping and countervailing duty issues, private parties, as well as the U.S. Department of Commerce and the U.S. International Trade Commission (the "Commission"), depend on the CIT to provide a clear and consistent guide for future conduct.[2] Otherwise, it has been urged, the administration of the law is adversely affected by inconsistent decisions, and private parties must resort to unnecessary appeals to lay a particular issue to rest.[3] Such problems cannot, it is argued, be remedied by a "peripatetic" view of stare decisis by the CIT.

On the other hand, some parties intimate that what may be perceived as inconsistency in the positions of various judges of the CIT may represent nothing more than a "period of refinement" of the CIT's position with respect to a particular issue.[4] From this perspective, inconsistency among judges of the CIT with respect to a particular issue tends to be cast in terms of developing law or a period of "tighter analysis" by the CIT of the application of a standard to the facts of a given case.[5] Commentators adopting this view of stare decisis tend to give a "tip of the hat" to the notion, pointing out that conflicts and lack of consistency among various decisions create confusion and offer the affected agency an "out" to nonacquiescence.[6] Nonetheless, those who adopt this viewpoint main-

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or kind of merchandise." 19 U.S.C.A. § 1677(5)(A)(ii) (Supp. 1990). Powell and Concannon discuss a series of apparently inconsistent CIT decisions that use this test, highlighting the problems such lack of consistency pose for the agency and the private litigants. They urge careful examination of precedent and enhanced consideration of three-judge panels for issues of fundamental importance to "lend credence to the Court in the development of the law and speed resolution of controversial issues." Powell & Concannon, *supra*, at 402-03.

2. Powell & Concannon, *supra* note 1, at 401.

3. *Id.* at 401-02.

4. Cameron & Russo, *Recent Trends in the Application of Stare Decisis by the Court of International Trade*, COMMERCE DEP'T SPEAKS 547, 551 (July 27, 1987). Cameron and Russo note that "because of the existence of conflicting decisions from the individual judges, the Department [of Commerce] and private parties did not have clear instruction on the court's position on this issue." *Id.* at 570. They further note that stare decisis would have prevented the need to relitigate the issue as if it were before the CIT for the first time, thereby allowing the CIT to resolve a case with more speed and consistency. *Id.* at 577. At the same time as they urge closer review of precedent by the CIT, Cameron and Russo believe that the application of precedent should not obviate the flexibility necessary to deal with unique variations in antidumping and countervailing duty cases. *Id.* at 579-80.

5. *Id.*

6. *See id.* at 551. The Cameron and Russo article indicates that the lack of prece-

tain that "[t]he trade laws, and in particular the countervailing duty law, often address complex government and corporate transactions and relationships" and that "a single policy or legal standard does not easily resolve the myriad of circumstances these cases regularly contain."[7] Underpinning this line of thought is the idea that rigid adherence to the doctrine of stare decisis may eliminate the flexibility to decide whether "an established rule needs to bend," thus rendering the CIT's decisions "mechanical and essentially blind to the variations of issues inherent in this area of the law."[8]

The hallmark of the discussion over the proper role to be accorded stare decisis, then, has been not so much a question of whether the CIT should apply precedent but the degree to which it should do so. The U.S. Court of Appeals for the Federal Circuit, however, recently moved the debate back to its most basic level. In affirming the CIT's decision in *Algoma Steel Corp. v. United States*,[9] the court addressed the appellants' contention that the judge of the CIT erred in not following the earlier decisions of a judge of the Customs Court, the predecessor of the CIT.[10] The Federal Circuit flatly rejected this notion, pointing out that

> among trial courts it is unusual for one judge to be bound by the decisions of another and, if it is to occur, such a rule should be stated somewhere. That is not done here; with all the criticism directed by appellants towards Judge Restani for not following Judge Newman, nowhere is anything pointed out saying she must . . . . *[S]he is right in making her own decision.*[11]

Thus, the U.S. Court of Appeals for the Federal Circuit firmly

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dential effect has led, in some measure, to nonacquiescence by the agency in particular decisions of the CIT with which it disagrees. *Id.* at 572 (citing suspension agreement in Certain Red Raspberries from Canada, 51 Fed. Reg. 1005, 1007 (Jan. 9, 1986)). Specifically, Cameron and Russo assert that the U.S. Department of Commerce refused to follow a ruling in Cabot Corp. v. United States, 788 F.2d 1539 (Fed. Cir. 1986), on the question of general availability. Cameron & Russo, *supra* note 4, at 571-72.

7. Cameron & Russo, *supra* note 4, at 576.

8. *Id.* at 577-78.

9. 865 F.2d 240, 243 (Fed. Cir.), *cert. denied*, 109 S. Ct. 3244 (1989).

10. *Id.* at 242 (noting that "[a]ppellant seeks to discredit the opinion of the trial court by citation and discussion of a decision by Judge Newman of that court").

11. *Id.* at 243 (emphasis added).

endorsed the fundamental concept of independent decision making among the judges of the CIT.

Does the decision of the Federal Circuit in *Algoma Steel* signify that judicial decision making in the CIT should take place with total disregard for the opinions of other judges on the same issue? Of course not, although the degree to which those prior decisions should or may be taken into account is still a matter of ambiguity. The concerns expressed by those respectively favoring greater or lesser reliance on precedent remain. The lack of consistency often attendant upon greater independence of judicial thought does produce confusion for the parties and for the agencies administering the antidumping and countervailing duty laws. This inevitably results in relitigation of particular issues in order to obtain a definitive decision, and then only after resort to subsequent appeal to the Federal Circuit.[12] Moreover, the affected agency, having litigated a particular issue in several cases, must struggle to fit its practice within an inconsistent judicial framework that may offer only two choices. If the choice selected by the agency does not comport with the alternative argued by a party, then the accusation of nonacquiescence is made. However, because of the complex and case-specific nature of antidumping and countervailing duty investigations, a lockstep approach to the application of precedent by the CIT would deprive the CIT of the flexibility necessary to decision making in this area of the law.

This Article examines the tension between the independence of judges in the CIT and the role of stare decisis in the CIT. After an overview of the applicability of the doctrine at the trial court level, the Article will set out two case studies in CIT decision making. The first example, relating to the standard to be applied by the Commission in preliminary antidumping and countervailing duty investigations, is a "worst case scenario" in which judicial inconsistency has caused a great deal of confusion for the Commission and its individual commissioners. The second example, which involves a series of cases relating to the proper role of economic or elasticity analysis in Commission injury determinations, shows how a co-

12. As we shall see, however, a decision of the Federal Circuit does not necessarily end the debate in the CIT. *See infra* notes 52-120 and accompanying text (discussing *Yuasa* problem).

gent and consistent body of law has emerged on an issue when the judges of the CIT have taken into account prior decisions and have carefully built upon them in subsequent opinions. Finally, this Article addresses, in light of the two examples, what balance if any may be struck between judicial independence and the application of precedent in CIT review of antidumping and countervailing duty investigations.

I. *STARE DECISIS AND THE INDEPENDENCE OF TRIAL COURT JUDGES*

As a general proposition, stare decisis describes the effect of prior judicial decisions on present litigation. The principle of stare decisis, or the doctrine of precedent, dictates that like cases should be decided in like fashion by courts in a single jurisdiction. The aim of stare decisis, like that of former adjudication, is to ensure "stability and consistency in judicial decisions, allowing people to plan their conduct."[13] The notion underlying the principle is that "[t]he law must appear to be rationally consistent if it is to be accepted as an impersonal arbiter of disputes."[14]

While similar to former adjudication, stare decisis is distinguishable on two grounds. First, while former adjudication only precludes subsequent litigation between parties to a previous action and, in some cases those in privity with them, stare decisis applies equally to all litigants regardless of any connection to the earlier action. Second, while former adjudication precludes litigation of questions of both law and fact, stare decisis applies only to questions of law without regard to case-specific facts except as they may illustrate the point of law.[15] Put succinctly, "former adjudication establishes a judgment as final between specific litigants in a particular dispute, whereas stare decisis perpetuates the general principle by which a particular case is decided and incorporates it into the body of law."[16]

U.S. law has never adhered to the more rigid English

13. J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 14.1, at 609 (1985).

14. *Id.*

15. *See generally id.* at 609-10.

16. *Id.* at 610.

model of the doctrine of stare decisis. From its beginning the U.S. Supreme Court asserted its prerogative to change its mind, and has repeatedly done so on various issues throughout its existence.[17] Similarly, the lower federal courts have strayed from stare decisis principles when it was appropriate to permit change.[18] Still, the doctrine of stare decisis plays a significant role in American jurisprudence today. While a court may reconsider its previous decisions, it has no obligation to reconsider settled issues. Where jurisdiction is largely discretionary, the Supreme Court, under principles of stare decisis, may deny the petition for a writ of certiorari. Where jurisdiction is obligatory in the court of appeals, the court may deny oral argument and dispose of the case summarily.[19] Beyond this, however, the binding role of precedent becomes less certain.

Stare decisis applies not only to successive decisions in the same court, but also to decisions in lower courts owing obedience to that court. This obedience principle is crucial to the American hierarchical court system.[20] All state and federal courts owe obedience to the decisions of the Supreme Court on questions of federal law. The district court in a circuit, in turn, owes obedience to a decision of the court of appeals for that circuit.[21] The court of appeals in one circuit owes no obe-

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17. *See* Helvering v. Hallock, 309 U.S. 106, 119 (1940) (noting that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience"); Washington v. W.C. Dawson & Co., 264 U.S. 219, 238 (1924) (stating that stare decisis is not "universal, inexorable command . . . instances in which the Court has disregarded its admonition are many"); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943); *see also* 1B J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE § 0.402 [1], at 10 (2d ed. 1988).

18. *See* 1B J. MOORE, W. TAGGART & J. WICKER, *supra* note 17, § 0.402[1], at 11 n.11 (citing United States v. Cocke, 399 F.2d 433, 448-49 (5th Cir. 1968), *cert. denied*, 394 U.S. 922 (1969); Johns v. Redeker, 406 F.2d 878, 882 (8th Cir.), *cert. denied*, 396 U.S. 853 (1969)).

19. *See* 1B J. MOORE, W. TAGGART & J. WICKER, *supra* note 17, § 0.402[1], at 11.

20. *See id.* at 12 n.15.

21. M.A.S., Inc. v. Van Curler Broadcasting Corp., 357 F. Supp. 686, 691 (D.D.C. 1973). A federal district court sitting as a local court in the District of Columbia should defer to the interpretation of local statutes by the U.S. Court of Appeals for the District of Columbia Circuit, at least where federal statutory or constitutional issues are not involved; the U.S. District Court for the District of Columbia would not blindly follow decision of the D.C. Circuit when confronted with factors which were not considered in opinion of the D.C. Circuit and which, if they had been

dience to decisions of a court of appeals in another circuit, although it may find the rationale persuasive.[22]

Similarly, district courts are not bound by the decisions of the courts of appeals in other circuits.[23] When there is a conflict among circuits, decisions of the circuit in which the district court sits must be followed.[24] In cases in which the issue has not been decided in the circuit, however, decisions of the courts of appeals in other circuits may be highly persuasive.[25]

The district courts also do not owe obedience to the decisions of the U.S. Claims Court or the U.S. Court of Appeals for the Federal Circuit.[26] Furthermore, district courts are not

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considered, probably would have produced a contrary result. *Id.*; *see* General Tire & Rubber Co. v. Watson, 184 F. Supp. 344, 350 (D.D.C. 1960) (noting that decisions of D.C. Circuit are binding on U.S. District Court for the District of Columbia); *see also* 1B J. MOORE, W. TAGGART & J. WICKER, *supra* note 17, § 0.402[1], at 14.

22. Securities & Exch. Comm'n v. Shapiro, 494 F.2d 1301, 1306 n.2 (2d Cir. 1974) (stating that cases from other circuits do not bind Second Circuit); City Stores Co. v. Lerner Shops of Dist. of Columbia, Inc., 410 F.2d 1010, 1014 (D.C. Cir. 1969) (noting that decisions of federal district courts and other courts of appeal are not binding on D.C. Circuit and are looked to only for their persuasive effect); *see* 1B J. MOORE, W. TAGGART & J. WICKER, *supra* note 17, § 0.402[1], at 15.

23. *Lerner Shops*, 410 F.2d at 1014; *see* 1B J. MOORE, W. TAGGART & J. WICKER, *supra* note 17, § 0.402[1], at 16 & n.22 (citing United States v. Diamond, 430 F.2d 688, 692 (5th Cir. 1970); United States v. Motte, 251 F. Supp. 601 (S.D.N.Y. 1966); United States v. Florea, 68 F. Supp. 367, 376 (D. Or. 1945); Swiderski v. Moodenbaugh, 45 F. Supp. 790, 791 (D. Or. 1942); Pepsin Syrup Co. v. Schwaner, 35 F.2d 197, 199 (S.D. Ill. 1929)).

24. Owens-Illinois, Inc. v. Aetna Casualty & Sur. Co., 597 F. Supp. 1515, 1520 (D.C. Cir. 1984). The court stated that

> *stare decisis* compels district courts to adhere to a decision of the Court of Appeals of their circuit until such time as the Court of Appeals or the Supreme Court of the United States sees fit to overrule the decision . . . . District courts are not at liberty to resolve splits between Circuits no matter how egregiously in error they feel their Circuit to be.

Id.; *see* Hasbrouck v. Texaco, Inc., 663 F.2d 930 (9th Cir. 1981), *cert. denied*, 459 U.S. 828 (1982); *see* 1B J. MOORE, W. TAGGART & J. WICKER, *supra* note 17, § 0.402[1], at n.22.

25. Oxy Metal Indus. Corp. v. Roper Corp., 579 F. Supp. 664, 678 (D. Md. 1984) (noting that federal district court follows precedent established by U.S. Court of Appeals for the Federal Circuit, available precedent of U.S. Court of Customs and Patent Appeals and Court of Claims, and other case law considered persuasive); Kollsman v. Ladd, 226 F. Supp. 186, 188 (D.D.C. 1964) (stating that decisions of Court of Customs and Patent Appeals are not binding on D.C. District Court but are given great weight and treated with respect); King v. United States, 10 F. Supp. 206, 209 (D. Md.), *aff'd*, 79 F.2d 453 (4th Cir. 1935); *see* 1B J. MOORE, W. TAGGART & J. WICKER, *supra* note 17, § 0.402[1], at n.22.

26. *See* 1B J. MOORE, W. TAGGART & J. WICKER, *supra* note 17, § 0.402[1], at 17 n.24 (citing United States v. United Continental Tuna Corp., 425 U.S. 164 (1976)).

bound by decisions of the CIT, whose decisions are also within the appellate jurisdiction of the Federal Circuit. Federal Circuit decisions bind the CIT and are in turn bound by the Supreme Court, but neither the Federal Circuit nor the CIT owes obedience under the doctrine of stare decisis to the decisions of the district courts or the other courts of appeals.[27] However, the holdings of the Federal Circuit's predecessor courts[28] are treated by the Federal Circuit as binding precedent.[29]

The district courts, like the courts of appeals, owe no obedience to the decisions of their counterparts in other districts.[30] This is true of districts within the same circuit.[31] Furthermore, the decisions of three-judge district courts are held to have no greater authority in this respect than those of a single judge.[32]

Although most treatises consider a district court judge to be bound by the decisions of his colleagues on the court, case law shows that some judges do not believe this to be the case. Instead, they view the precedential effect of the other judges' decisions as persuasive, but not binding authority.[33] The right

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27. *See* 1B J. MOORE, W. TAGGART & J. WICKER, *supra* note 17, § 0.402[1], at 17-18 (citing Watson v. Allen, 254 F.2d 342, 347-48 (D.C. Cir. 1958)).

28. The predecessor courts of the U.S. Court of Appeals for the Federal Circuit were the U.S. Court of Claims and the U.S. Court of Customs and Patent Appeals.

29. South Corp. v. United States, 690 F.2d 1368, 1369 (Fed. Cir. 1982); *see* Algoma Steel Corp. v. United States, 865 F.2d 240, 243 (Fed. Cir. 1989) (stating Customs Court decisions are considered decisions of same court), *cert. denied*, 109 S. Ct. 3244 (1989); Department of Energy v. Westland, 565 F.2d 685, 690 (C.C.P.A. 1977). In an action by the Energy Research and Development Administration (the "ERDA") to have a patent issued to it instead of the inventor or his assignee, the ERDA was bound by rule of stare decisis insofar as it had been judicially decided. *Id.* "The position of this court . . . is clear and consistent with that of the other appellate courts. A readjudication of issues previously determined demands a clear and convincing showing of error." *Id.*; *see* 1B J. MOORE, W. TAGGART & J. WICKER, *supra* note 17, § 0.402[1], at 18.

30. E.E.O.C. v. Pan Am. World Airways, 576 F. Supp. 1530, 1535 (S.D.N.Y. 1984) (stating that prior district court decision not binding on another district court); *see* 1B J. MOORE, W. TAGGART & J. WICKER, *supra* note 17, § 0.402[1], at 16.

31. *See* 1B J. MOORE, W. TAGGART & J. WICKER, *supra* note 17, § 0.402[1], at 16 n.21 (citing In re Bender Body Co., 47 F. Supp. 224 (N.D. Ohio 1942)).

32. *See* 1B J. MOORE, W. TAGGART & J. WICKER, *supra* note 17, § 0.402[1], at 16 n.21 (citing Farley v. Farley, 481 F.2d 1009, 1012 (3d Cir. 1973); Remick Music Corp. v. Interstate Hotel Co. of Neb., 58 F. Supp. 523, 541-42 (D. Neb. 1944), *aff'd*, 157 F.2d 744 (8th Cir. 1946), *cert. denied*, 329 U.S. 809 (1947)).

33. Powell & Concannon, *supra* note 1, at 358 (citing 21 C.J.S. *Courts* § 196 (1966)).

to appeal to the court of appeals, however, makes it unlikely that conflicts of this nature will long survive.

As a result, the precise role of precedent in district court proceedings has never been clearly defined. Even if one concludes that the doctrine of stare decisis is not controlling among judges of a district court, however, the pull of stare decisis nevertheless remains strong.[34] Case law reveals varying attitudes toward stare decisis at the district court level.

In *United States v. Anaya*,[35] for example, the court strongly promoted the doctrine of stare decisis. In *Anaya*, the court confronted eighty-four motions to dismiss criminal indictments arising out of the same action.[36] Pursuant to sections 136 and 137 of title 28 of the United States Code, and according to an order authorized by all active judges and the chief judge, the cases were transferred to the court *en banc* to hear argument and rule on the motions simultaneously.[37] Explaining the reasons for its decision to hear the motions *en banc*, the court emphasized its "disinclination to depart from the doctrine of intra-court comity,"[38] stating that the "doctrine . . . establishes a general rule that, absent unusual or exceptional circumstances, judges of coordinate jurisdiction within a jurisdiction should follow brethren judges' rulings."[39]

In *Mueller v. Allen*,[40] the third division of the District Court of Minnesota voiced a less strict view of stare decisis:

> A court is not irretrievably bound by its own precedents, but in the interests of uniformity, stability, and certainty in the law, will follow the rule of law established in earlier cases unless clearly convinced that the rule was originally

34. *Id.* at 359 (citing Hungerford v. Portland Sanitarium & Benevolent Ass'n, 235 Or. 412, 384 P.2d 1009 (1963)).

35. 509 F. Supp. 289 (S.D. Fla. 1980), *aff'd sub nom.* United States v. Zayes-Morales, 685 F.2d 1272 (11th Cir. 1982).

36. *Id.* at 292.

37. *Id.* at 293.

38. *Id.*

39. *Id.*; *see* Buna v. Pacific Far East Line, Inc., 441 F. Supp. 1360, 1365 (N.D. Cal. 1977) (stating that "[j]udges of the same district court customarily follow a previous decision of a brother judge upon the same question except in unusual or exceptional circumstances"); White v. Baltic Conveyor Co., 209 F. Supp. 716, 722 (D.N.J. 1962) (noting that "by comity and tradition, brother judges in the same district customarily follow the other's decisions"); *see also* Powell & Concannon, *supra* note 1, at 360.

40. 514 F. Supp. 998, 1000 (D. Minn. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 463 U.S. 388 (1983).

> erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent. However, a court's decision is not binding upon courts of equal rank.[41]

On the other end of the spectrum some courts have taken a liberal attitude toward the precedential effect of district court decisions. For example, the U.S. Court of Appeals for the Ninth Circuit has declined to require adherence to the principles of stare decisis. In *Starbuck v. San Francisco*,[42] the court held that "*stare decisis* does not compel one district court judge to follow the decision of another."[43]

Thus, while it is not absolutely clear whether stare decisis is a compelling or a persuasive force at the district court level, the significance of the doctrine is without question. "The decisions indicate that district court judges will ordinarily abide by precedent established within their own districts."[44]

The CIT is an Article III court, possessing all of the powers in law and equity of a district court of the United States.[45] Like a district court, the judicial power of the CIT is exercised by a single judge.[46] Unlike a district court, however, the jurisdiction of the CIT is limited to a particular substantive area of the law; its cases involve claims against the government.[47] CIT appeals are heard exclusively by one appellate court, the U.S. Court of Appeals for the Federal Circuit. Thus, the CIT is bound by decisions of its two superior courts, the Federal Circuit and the Supreme Court.

Structurally, it appears that the CIT operates in much the same way as the federal district courts. The doctrine of stare decisis should apply with at least the persuasive force that it

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41. *Id.* (citation omitted); *see* King v. County of Nassau, 581 F. Supp. 493, 503 (E.D.N.Y. 1984) (refusing to follow precedent set by another judge of same district because other judge had explicitly rejected Supreme Court precedent).

42. 556 F.2d 450 (9th Cir. 1977).

43. *Id.* at 457 n.13; *see* 21 C.J.S. *Courts* § 196 (1966) (finding numerous instances where divisions or departments render conflicting decisions due to feeling they are in same situation as coordinate courts, one of which is not bound by decision of another).

44. Powell & Concannon, *supra* note 1, at 361.

45. U.S. CONST. art. III; *see* 28 U.S.C. §§ 251 & 1585 (1988); Manufacture De Machines Du Haut-Rhin v. Von Raab, 569 F. Supp. 877, 883 (Ct. Int'l Trade 1983).

46. 28 U.S.C. § 254 (1988).

47. Powell & Concannon, *supra* note 1, at 363.

does in the district courts. In fact, however, the CIT has taken a somewhat inconsistent approach to the doctrine.[48]

The binding aspect of judicial precedent varies depending on the nature of the question decided. Courts are generally more reluctant to deviate from a rule established by precedent "where rights of the public are concerned, where a precedent has guided numerous people in their conduct, . . . or where the precedents have become rules governing commercial transactions."[49] Likewise, the nature of the issue influences the CIT's adherence to principles of stare decisis.[50] In the adjudication of disputes arising out of the customs laws, the force of stare decisis has consistently been strong.[51] By contrast, in the adjudication of disputes arising out of the antidumping and countervailing duty laws, the force of stare decisis has been anything but strong.

II. *THE* YUASA *PROBLEM*

A. *The Development of the Preliminary Standard*

Turning to the first case study, we examine the case in which the independence of CIT judges has created ambiguity in the application of a particularly important legal question: the standard governing the Commission's determinations in preliminary antidumping investigations.[52] Section 733(a) of the Tariff Act of 1930, as amended, requires that the Commission determine whether, based on the best information avail-

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48. *Id.* at 364.

49. *Id.* at 362 (citing 20 AM. JUR. 2d *Courts* § 194 (1965)).

50. *See* De Laval Separator Co. v. United States, 511 F. Supp. 810, 814 (Ct. Int'l Trade 1981) (stating applicability of stare decisis lies within discretion of CIT) (citing Hertz v. Woodman, 218 U.S. 205 (1910); Marianao Sugar Trading Corp. v. United States, 29 Cust. Ct. 275 (1952), *aff'd*, 41 C.C.P.A. 236 (1954)).

51. *See* Inter-Pacific Corp. v. United States, 594 F. Supp. 739, 741 (Ct. Int'l Trade 1984) ("*[s]tare decisis* is applicable [in customs action] where a decision in a prior case involves the same merchandise and the same issues as those in the present case (citation omitted). Where the merchandise or issues are not the same the doctrine of stare decisis is not controlling (citation omitted)."); General Elec. Co. v. United States, 476 F. Supp. 1082, 1085 (Cust. Ct. 1979) ("unless shown to be erroneous, a prior decision [of the Customs Court] should be regarded as *stare decisis* in a subsequent case involving same merchandise and legal issues"), *aff'd*, 620 F.2d 883 (C.C.P.A. 1980); Allen Forwarding Co. v. United States, 340 F. Supp. 412, 416 (Cust. Ct. 1972) (stare decisis is applicable since no showing of error in prior decision).

52. The applicable statutory standard is the same in preliminary countervailing duty investigations. 19 U.S.C. § 1671b (1988).

able, there is a reasonable indication of material injury to a domestic industry, or threat thereof, or material retardation of the establishment of an industry, by reason of the subject imports.[53] The definition of material injury is the same in both preliminary and final investigations, but in preliminary investigations an affirmative determination is based on a reasonable indication of material injury, as opposed to the finding of actual material injury or threat thereof required in a final determination. The statute is otherwise silent as to the precise nature of a reasonable indication, or, conversely, what situations might lead to a finding that a reasonable indication does not exist.

The history of the reasonable indication standard at the agency level and before the CIT is somewhat checkered. By 1984, a controversy had arisen over the proper application of the standard in the course of several decisions of the CIT which held that the Commission could not weigh conflicting evidence in arriving at a preliminary determination. In the first of these decisions, *Republic Steel Corp. v. United States*,[54] the CIT remanded to the Commission two countervailing duty determinations on the ground that the Commission had impermissibly weighed conflicting evidence in rendering the negative preliminary determinations.[55] The CIT held that the purpose of the preliminary determinations

> should have been simply to find whether there were any facts which raised the possibility of injury. The resolution or interpretation of conflicting facts should have been reserved for a possible final injury determination.[56]

Subsequently, in *Jeannette Sheet Glass Corp. v. United States*,[57] the CIT again rejected the proposition that the Commission could weigh evidence in its preliminary determinations. The CIT noted that the standard to be applied in Commission preliminary investigations "was intended by Congress to be administered as a very low evidentiary threshold."[58]

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53. *Id.* § 1673a.

54. 591 F. Supp. 640 (Ct. Int'l Trade 1984).

55. *Id.* at 650.

56. *Id.* (emphasis omitted).

57. 607 F. Supp. 123 (Ct. Int'l Trade 1985), *appeal dismissed*, 803 F.2d 1576 (Fed. Cir. 1986), *vacated in part*, 654 F. Supp. 179 (Ct. Int'l Trade 1987).

58. *Id.* at 129.

Shortly after the *Jeannette Sheet Glass* decision, the Commission's position that it was entitled to weigh evidence in preliminary investigations resurfaced in *American Lamb Co. v. United States*.[59] In this appeal from a preliminary negative determination in *Lamb Meat from New Zealand*,[60] the Commission invited Judge DiCarlo of the CIT not to follow the earlier decisions of his fellow judges and approve the Commission's weighing of evidence.[61] The CIT declined to adopt this argument in light of the fact that the Commission's arguments had been rejected three times within the previous year by two judges of the CIT.[62] Judge DiCarlo stated that "[u]nder these circumstances, *stare decisis* counsels the Court to follow the prior decisions" and indicated that the Commission should address its arguments to the Federal Circuit.[63]

On appeal, the Federal Circuit upheld the Commission's practice of weighing evidence in deciding whether information in a preliminary investigation raises a "reasonable indication" of material injury or threat thereof and thus under the statute warrants proceeding to a final investigation.[64] The Federal Circuit stated that the purpose of preliminary investigations is to avoid the cost and disruption to trade caused by unnecessary investigations.[65] Accordingly, the Federal Circuit held that the reasonable indication standard requires more than a finding that there is a "possibility" of material injury, and the Commission is to weigh the evidence it has obtained to determine if that evidence demonstrates that a reasonable indication exists.[66]

The terms, however, in which the decision was framed introduced a confusion into the law as to what standard the Commission should apply. The Federal Circuit found that

> [s]ince the enactment of the 1974 Act, ITC has consistently viewed the statutory "reasonable indication" standard as one requiring that it issue a negative determination, as

59. 611 F. Supp. 979 (Ct. Int'l Trade 1985), *aff'd*, 785 F.2d 994 (Fed. Cir. 1986).
60. USITC Pub. 1534, Inv. No. 731-TA-188 (Preliminary) (1984).
61. *American Lamb Co.*, 611 F. Supp. at 981.
62. *Id.*
63. *Id.* This was the first instance in which the Commission was afforded the opportunity for an interlocutory appeal of this issue to the Federal Circuit. *Id.*
64. American Lamb Co. v. United States, 785 F.2d 994 (Fed. Cir. 1986).
65. *Id.* at 1004.
66. *Id.*

> above indicated, only when (1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation. That view, involving a process of weighing the evidence but under guidelines requiring clear and convincing evidence of "*no reasonable indication*", and no likelihood of later contrary evidence, provides fully adequate protection against unwarranted terminations.[67]

Based on this language, there is an apparent ambiguity whether the relevant part of the standard is clear and convincing evidence of no material injury, or clear and convincing evidence of *no reasonable indication* of material injury, the latter arguably being a far tighter standard for a negative determination than the former.

Following the *American Lamb* decision, the Commission moved the CIT to reconsider its previous orders in the *Jeannette Sheet Glass* case.[68] The CIT acknowledged that the Federal Circuit had expressly overruled *Republic Steel* and its "progeny," and had approved the Commission's practice of weighing evidence in preliminary determinations.[69] Further, the CIT, applying the preliminary indication standard articulated by the Federal Circuit in *American Lamb*, held that there was "a rational basis" for the Commission's original negative preliminary determination.[70] Without expressly reiterating the language of the Federal Circuit, the CIT recognized that the Commission had properly applied the reasonable indication standard and correctly weighed the conflicting evidence.[71]

The CIT next addressed the preliminary standard in *Wells Manufacturing Company v. United States*,[72] which was an appeal from the Commission's negative preliminary determination in

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67. *Id.* at 1001 (emphasis added). The clear and convincing evidence standard requires that the evidence supporting a negative determination be more than "substantial," or a preponderance of the evidence on the record. Because the Commission is permitted to weigh evidence, it may issue a negative preliminary determination even if *some* evidence supports an affirmative determination. *See* Buildex, Inc. v. Kason Indus., Inc., 849 F.2d 1461, 1463 (Fed. Cir. 1988).

68. Jeannette Sheet Glass Corp. v. United States, 654 F. Supp. 179 (Ct. Int'l Trade 1987).

69. *Id.* at 182.

70. *Id.* at 182-83.

71. *Id.* at 183-84.

72. 677 F. Supp. 1239 (Ct. Int'l Trade 1987).

Iron Bars from Brazil.[73] The CIT, applying *American Lamb*, held that there was a rational basis in the record for the Commission's negative preliminary determination.[74] Again without addressing the precise language of the standard set forth in *American Lamb*, the CIT recognized the Federal Circuit's approval of the weighing of evidence by the Commission and the rejection of the "mere possibility" test previously articulated by the CIT.[75]

The following year in *Maverick Tube Corp. v. United States*,[76] the CIT applied the *American Lamb* standard in remanding for further consideration several aspects of the separate views, respectively, of Commissioners Liebeler, Brunsdale, Lodwick, and Rohr.[77] In the review of Commissioner Liebeler's and Commissioner Brunsdale's views, the CIT found that elements of each commissioner's causation analysis were not based on substantial evidence and were not in accordance with the law.[78] In its review of the views of Commissioners Lodwick and Rohr, the CIT remanded a portion of their determination concerning treatment of a specific lost sale evidence "to consider whether the likelihood that contrary evidence will arise in a full investigation changes the Commissioners' assessment of material injury or threat of material injury."[79]

Addressing the *American Lamb* standard, Judge DiCarlo noted that the Commission's role in a preliminary determination is to decide, based on the best information available, whether there is a reasonable indication that a domestic industry is materially injured or threatened with material injury by reason of the merchandise under investigation.[80] Judge DiCarlo further recognized that

> [O]ur appellate court affirmed the administrative interpretation of this statute as meaning that the Commission should reach a negative injury finding in a preliminary investigation only when the record as a whole contains clear

73. USITC Pub. 1472, Inv. No. 701-TA-208 (Preliminary) (1983).
74. *Wells Mfg.*, 677 F. Supp. at 1246.
75. *Id.*
76. 687 F. Supp. 1569 (Ct. Int'l Trade 1988).
77. *Id.* at 1577.
78. *Id.* at 1575.
79. *Id.* at 1577.
80. *Id.* at 1573.

> and convincing evidence that there is no material injury or threat of material injury by reason of imports, and there is no likelihood that contrary evidence will arise in a final investigation.[81]

Thus, the Commission's interpretation of the preliminary standard as approved in *American Lamb* was expressly incorporated in the decisions of several judges of the CIT.

Following close upon Judge DiCarlo's opinion in *Wells Manufacturing*, Judge Carman discussed the preliminary standard in the context of a review of a Commission determination dismissing a request for review and revocation or modification of an antidumping order pursuant to section 751 of the Tariff Act of 1930.[82] In *Avesta AB v. United States*,[83] the plaintiffs had urged that the Commission should base its decision whether to commence a review proceeding upon a reasonable indication of changed circumstances.[84] Plaintiffs argued that "reasonable indication" in this context corresponded to the "mere possibility" test articulated in *Republic Steel* and that the Commission was precluded from weighing evidence in determining whether to institute a section 751 review investigation.[85] Rejecting these arguments, the CIT held that in deciding whether to commence a review proceeding under section 751(b), the Commission need not apply the reasonable indication standard applicable to preliminary injury determinations, interpreting *American Lamb* as having "affirmed the [Commission's] longstanding interpretation of 'reasonable indication.' "[86] Further, Judge Carman specifically noted that the Federal Circuit had categorically rejected the mere possibility standard of *Republic Steel* and its prohibition against considering and weighing all of the evidence of record.[87]

Roughly one month after the *Avesta* decision, Judge Aquilino handed down his second remand decision in the appeal of the Commission's negative preliminary determination

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81. *Id.* (citing American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986)).

82. 19 U.S.C. § 1675 (1988).

83. 689 F. Supp. 1173 (Ct. Int'l Trade 1988).

84. *Id.* at 1179.

85. *Id.*

86. *Id.* at 1180.

87. *Id.*

in *12-Volt Motorcycle Batteries from Taiwan*.[88] In this decision, captioned *Yuasa-General Battery Corp. v. United States* ("*Yuasa II*"),[89] following an initial remand[90] the CIT reversed and remanded the Commission's second preliminary negative determination, holding that the opinions in support of the majority's determination "are unpersuasive that the requirement of *clear* and *convincing evidence* of *no reasonable indication* of a *threat* of material injury and *no likelihood* of later contrary evidence is sustainable on the existent record."[91] Further, the CIT stated that the commissioners' opinions "do not appear to take the approach *American Lamb* contemplates," specifying that "the plurality seems to have considered the evidence for an indication of the affirmative, rather than of the negative."[92] In light of this language, it appears that at least one judge of the CIT has adopted an interpretation of the preliminary standard at odds with that of other judges of the CIT and, arguably, with the *American Lamb* decision.

B. *Application of the Preliminary Standard and the Effect of* Yuasa II

Following the *American Lamb* decision, the Commission immediately began to frame its discussion of the preliminary standard in the language of the first "test" set forth in the decision of the U.S. Court of Appeals for the Federal Circuit. For example, roughly one month after the *American Lamb* opinion the Commission made the following statement of the preliminary standard in *Top-of-the-Stove Stainless Steel Cooking Ware from Korea and Taiwan*:

> In a preliminary investigation the Commission's "reasonable indication" determination is based upon weighing all of the available information, which includes the factual allegations made by petitioners, contrary arguments presented by respondents, and data obtained through Commission questionnaires and other information-gathering techniques. The Commission will find that there is no reasonable indi-

88. USITC Pub. 2126, Inv. No. 731-TA-238 (Preliminary) (Sept. 1986).

89. 688 F. Supp. 1551 (Ct. Int'l Trade 1988).

90. Yuasa-General Battery Corp. v. United States, 661 F. Supp. 1214 (Ct. Int'l Trade 1987).

91. *Yuasa*, 688 F. Supp. at 1554 (emphasis in original).

92. *Id.*

> cation of material injury where: (1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) nothing in the record indicates a likelihood that contrary evidence will arise in the event of a final investigation.[93]

The Commission periodically discussed the standard in these terms in its preliminary determinations over the ensuing two years.[94] Indeed, all members of the Commission agreed that the two-prong test of clear and convincing evidence of no material injury and no likelihood of contrary evidence in a final investigation was the judicially approved predicate for a negative preliminary determination.[95] However, this agreement ended shortly after the decision of Judge Aquilino in *Yuasa II*.[96]

In *Shock Absorbers and Parts, Components, and Subassemblies Thereof from Brazil*,[97] Acting Chairman Brunsdale and Commissioners Liebeler, Lodwick and Cass reaffirmed that the statutory reasonable indication standard requires a negative preliminary determination if: "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that con-

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93. Top-of-the-Stove Stainless Steel Cooking Ware from Korea and Taiwan, USITC Pub. 1820, Inv. Nos. 701-TA-267-268 & 731-TA-304-305 (Preliminary) (Mar. 1986) at 3-4 (Views of Commissioners Stern, Liebeler, Eckes, Lodwick, Rohr, and Brunsdale).

94. *See, e.g.*, Color Picture Tubes from Canada, Japan, the Republic of Korea, and Singapore, USITC Pub. 1937, Inv. Nos. 731-TA-367 - 370 (Preliminary) (Jan. 1987) at 6-7 (stating that Commission should continue preliminary investigation unless there is clear and convincing evidence of no material injury, and no likelihood that contrary evidence will arise in final investigation); Certain Copier Toner from Japan, USITC Pub. 1960, Inv. No. 731-TA-373 (Preliminary) (Mar. 1987) at 12 n.36 (involving clear and convincing evidence of no material retardation and no likelihood of contrary evidence arising in final investigation).

95. *See* Certain All-Terrain Vehicles from Japan, USITC Pub. 2071, Inv. No. 731-TA-388 (Preliminary) (Mar. 1988) at 17-18 (Views of Commissioners Eckes, Rohr, Lodwick, and Cass); *id.* at 21 (Additional Views of Commissioners Liebeler and Brunsdale).

96. Yuasa-General Battery Corp. v. United States, 688 F. Supp. 1551 (Ct. Int'l Trade 1988). At approximately the same time as the decision in *Yuasa II*, the Commission issued a determination following its previously articulated understanding of the *American Lamb* standard. Sewn Cloth Headwear from the People's Republic of China, USITC Pub. 2096, Inv. No. 731-TA-405 (Preliminary) (July 1988) at 10-11 & 41 (Views of Commissioner Cass).

97. USITC Pub. 2128, Inv. No. 731-TA-421 (Preliminary) (Sept. 1988).

trary evidence will arise in a final investigation."[98] These Commissioners stated that the standard as applied by the Commission had been affirmed by the Federal Circuit in *American Lamb* and that the CIT has on several occasions followed that case to affirm preliminary negative determinations by the Commission.[99] Further, the Commission majority noted that the CIT had reversed a preliminary negative determination in *Yuasa II*, stating that

> [t]he *Yuasa* court appears to have viewed the Commission as analyzing only how strong was the case favoring an affirmative determination. The Commission does not read the *Yuasa* decision as mandating a change in the Commission's standard, which has been sustained by the Court of Appeals for the Federal Circuit.[100]

In his concurring views to *Shock Absorbers*, Commissioner Eckes stated that his "reading of *Yuasa* raises important and unanswered questions about how the Commission is to implement *American Lamb*."[101] Commissioner Eckes asked

> Does a determination that there is "clear and convincing evidence of no material injury" rely on a standard which is compatible with the statutory requirement that the Commission shall make a determination of whether there is a *reasonable indication* that an industry is materially injured, or is threatened with material injury?
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> For this Commissioner, and I believe my colleagues, this slight variation in language raises additional fundamental questions about the proper standard for making preliminary title VII decisions. Indeed, is there one standard, or

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98. *Id.* at 4 (Views of Acting Chairman Brunsdale, Commissioners Liebeler, Lodwick, and Cass).

99. *Id.* at 5-6 & n.12.

100. *Id.* at 6 n.13; *see* Electrolytic Manganese Dioxide from Greece, Ireland, and Japan, USITC Pub. 2097, Inv. Nos. 731-TA-406 - 408 (Preliminary) at 21-25 (July 1988). In his additional views in *Shock Absorbers*, Commissioner Cass stated positively the *American Lamb* standard as meaning that "the Commission should reach negative [preliminary] determinations when the evidence of record 'on balance does not lend enough support to the Petitioner's claim to provide at least a colorable basis for an affirmative determination and when the relevant information that remains to be gathered does not leave open the prospect that any judgement made on the current record well might be changed at the final determination stage.' " *Shock Absorbers*, USITC Pub. 2128, at 51 (Views of Commissioner Cass) (citing *Electrolytic Manganese*, USITC Pub. 2097, at 24 (Additional Views of Commissioner Cass)).

101. *Shock Absorbers*, USITC Pub. 2128, at 35 (Views of Commissioner Eckes).

> are there now two? Did the CIT improperly modify the CAFC [Federal Circuit] standard? Or, was the CIT telling the Commission that it has incorrectly implemented the *American Lamb* standard?[102]

Commissioner Eckes then concluded that, "[b]ased on the best available information, I find there is *clear and convincing* evidence of *no reasonable indication of material injury or a threat of material injury and no likelihood of contrary evidence in a final investigation.*"[103]

Following the *Shock Absorbers* determination, various commissioners undertook an extensive discussion of the appropriate preliminary standard in *New Steel Rails from Canada*.[104] In separate views, Acting Chairman Brunsdale, Commissioner Eckes, and Commissioner Cass each commented on the reasonable indication standard, particularly in light of the *Yuasa II* decision.

In her views, Acting Chairman Brunsdale summarized in the following manner past Commission practice implementing the *American Lamb* standard: "The Commission thus has rendered negative determinations *either* because the evidence supporting the allegations in the petition does not amount to a 'reasonable indication of injury' or because the contrary evidence is so clear and convincing that any evidence supporting the petition did not amount to a '*reasonable* indication.' "[105] Commissioner Brunsdale added that

> [t]he addition [by the CIT in *Yuasa*] of the "no reasonable indication" language to the original *American Lamb* standard is troublesome because it draws the key statutory phrase into the standard purporting to implement the statute, rendering the entire exercise circular. Moreover, while the change in the *American Lamb* language was most likely a transcription error, it does raise the unlikely possibility that the

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102. *Id.* at 37-38 (footnote omitted) (emphasis in original).

103. *Id.* at 39 (emphasis in original). Commissioner Eckes also noted that his determination would have been the same had he employed the " 'clear and convincing evidence that there is no material injury or threat of such injury' standard." *Id.* at 39 n.7.

104. USITC Pub. 2135, Inv. Nos. 701-TA-297 & 731-TA-422 (Preliminary) (Nov. 1988).

105. *Id.* at 67-68 (emphasis in original). Commissioner Brunsdale also referenced the *Shock Absorbers* determination. *Id.* at 68 n.41 (citing *Shock Absorbers*, USITC Pub. 2128, at 5).

> court intended to modify the original *American Lamb* language by lowering the threshold at which the Commission must render affirmative determinations.[106]

Commissioner Eckes reiterated his view that "considerable ambiguity remains" with respect to the preliminary standard and that the CIT's decisions in *Maverick, Wells Manufacturing*, and *Jeannette Sheet Glass* with respect to preliminary negative Commission determinations "do not provide unequivocal guidance nor do they help resolve the ambiguities raised by the most recent application of the standard in the *Yuasa* decision."[107] The Commissioner also stated that his interpretation of the preliminary standard as articulated, for example, in the *Shock Absorbers* determination is not "tantamount to resurrecting the CIT's 'mere possibility' standard from *Republic Steel*."[108] Commissioner Eckes pointed out that the "no likelihood [of] contrary evidence" portion of the *American Lamb* test obviates the application of the "mere possibility" standard employed in *Republic Steel*.[109] Finally, the Commissioner noted that "[u]ncertainty regarding the standard for Commission decision-making can only frustrate predictability and consistency in the administration of our trade laws."[110]

In his additional views, Commissioner Cass noted that there may be confusion over the appropriate standard as a result of the *Yuasa II* decision. Commissioner Cass maintained that "[t]here is no basis, either in *American Lamb* or elsewhere, for the argument that the Commission *must* issue affirmative determinations in preliminary investigations unless respondent offers clear and convincing evidence of the absence of material injury."[111] Commissioner Cass interpreted the preliminary standard to mean that

> the Commission may issue a negative determination either because the evidence presented in support of a petition

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106. *Id.* at 58-59.

107. *New Steel Rails*, USITC Pub. 2135, Inv. Nos. 701-TA-297 (Preliminary) (Nov. 1988) at 17 (Additional Views of Commissioner Eckes).

108. *Id.*; *see* Republic Steel Corp. v. United States, 591 F. Supp. 640 (Ct. Int'l Trade 1984). *But see* American Lamb Co. v. United States, 785 F.2d 994 (Fed. Cir. 1986) (disapproving of *Republic Steel*).

109. *New Steel Rails*, USITC Pub. 2135, at 18.

110. *Id.*

111. *Id.* at 29 (Additional Views of Commissioner Cass) (emphasis in original).

> does not, standing alone, amount to a reasonable indication of injury or threat of injury, or because the contrary evidence is so clear and convincing that the evidence supporting the petition cannot on the record as a whole be said to provide *reasonable* indication of injury.[112]

Following these two preliminary determinations, it became apparent that, where there had been one Commission approach to the preliminary standard before the *Yuasa-General Battery Corp. v. United States* ("*Yuasa I*")[113] decision, three approaches emerged following that decision. The majority of commissioners continued to use the two-prong "clear and convincing evidence of no material injury/no likelihood of contrary evidence" language of *American Lamb*.[114] Commissioner Eckes adopted the "clear and convincing evidence of no reasonable indication" statement from *American Lamb* that was relied upon in *Yuasa II*.[115] Finally, Commissioners Brunsdale and Cass recast the standard they believed had been adopted by the Commission as allowing the issuance of a preliminary negative determination if one of two standards were met: the evidence presented in support of the petition, standing alone, did not amount to a reasonable indication, *or* the evidence contrary to that supporting the petition was clear and convincing that there was no reasonable indication of material injury.[116]

While these three articulations of the preliminary standard post-*Yuasa II* have remained fairly constant, the question continues to elicit comment by the Commission and its members. For example, five of six commissioners recently noted that the *American Lamb* decision stated that (1) the purpose of preliminary determinations is to avoid the cost and disruption to trade caused by unnecessary investigations, (2) the reasonable indication standard requires more than a finding that there is a possibility of such injury, and (3) the Commission may weigh the evidence before it to determine whether there is clear and

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112. *Id.* at 30 (emphasis in original). In his Views, Commissioner Cass referenced the "Additional Views of Vice Chairman Brunsdale and Commissioners Liebeler and Cass" in Electrolytic Manganese Dioxide from Japan, Ireland and Greece, USITC Pub. 2097, Inv. Nos. 731-TA-406 - 408 (Preliminary) (July 1988) at 23-24. *New Steel Rails*, USITC Pub. 2135, at 25-26 n.14.

113. 661 F. Supp. 1214 (Ct. Int'l Trade 1987).

114. *See supra* notes 96-102.

115. *See supra* note 103 and accompanying text.

116. *See supra* notes 104-06 and accompanying text.

convincing evidence of no material injury or threat thereof and no likelihood of contrary evidence in a final investigation.[117] Commissioner Cass, while generally agreeing with this discussion, offered additional views in which he stated that "the Commission need not in all investigations have clear and convincing evidence of the absence of material injury before reaching a negative preliminary determination."[118] Without further explanation of what circumstances might warrant such a determination, the Commissioner further noted that there was "sufficient evidence already on the record to make it clear that a negative determination would in all likelihood be reached if this investigation were to proceed to the final stages."[119] Ensuing preliminary determinations have periodically set forth further refinements of these views of the preliminary standard.[120]

The foregoing case study shows that a single decision by a judge of the CIT that is inconsistent with the decisions of other judges on the same legal question can result in significant uncertainty in agency administrative proceedings. Here, the standard for preliminary determinations had seemed a settled matter and Commission opinions reflected a common line of thinking at least with respect to that issue. With the *Yuasa II* decision, however, a new uncertainty over the issue was introduced. Despite the extensive prior litigation on the point, the appropriate standard for preliminary determinations will remain an open question for at least some commissioners and, concomitantly, the parties to Commission proceedings, until the matter is again resolved in the Federal Circuit.

III. *THE ECONOMIC ANALYSIS CASES: A SCENARIO IN COHESIVE DECISION MAKING*

While the first case study presented the problems that

117. Dry Aluminum Sulfate from Sweden, USITC Pub. 2174, Inv. No. 731-TA-430 (Preliminary) (Mar. 1989) at 3 n.2. Commissioner Eckes relied on the "clear and convincing evidence of no reasonable indication" standard he articulated in *Steel Rails*. *Id.*

118. *Id.* at 28.

119. *Id.*

120. *See, e.g.*, Certain Steel Rails from Mexico, USITC Pub. 2205, Inv. No. 731-TA-435 (Preliminary) (July 1989) at 3-4, 17-20 (Views of Vice Chairman Cass); 12-Volt Motorcycle Batteries from the Republic of Korea, USITC Pub. 2203, Inv. No. 731-TA-434 (Preliminary) (July 1989) at 3-4, 25-30 (Views of Vice Chairman Cass).

arise from the complete independence of the judges of the CIT, the second case study is illustrative of the benefits conferred by careful attention by the various judges to their colleagues' decisions. The cases discussed in this scenario relate to the use of economic analysis or, more specifically, elasticity analysis by the Commission. In reviewing this issue, the judges of the CIT have rendered four decisions that have set the parameters under which the Commission may employ elasticity analysis. The cases reflect a clear understanding and application of the prior decisions of individual judges by each subsequent judge to address the question. This has inured to the benefit of those commissioners who employ elasticities in their determinations, providing consistent, coherent guidelines for the administrators of the statute and the parties appearing before them.

At the outset of this discussion, it is necessary briefly to set forth the meaning of elasticity analysis. The statute directs the Commission in making its determinations to consider the volume of the imports subject to investigation, the effect of such imports on domestic prices, and the impact of such imports on the domestic industry in the context of production operations in the United States.[121] In evaluating these factors, the Commission must consider (1) whether the volume of imports, or any increase in that volume, is significant; (2) whether there has been significant price underselling by the imported products; and (3) whether imports have otherwise depressed prices to a significant degree, or have prevented price increases.[122] In addition, the Commission must assess all relevant economic

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121. 19 U.S.C. § 1677(7)(B) (1988), *as amended* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1328(1), 102 Stat. 1107 (1988).

122. 19 U.S.C. § 1677(7)(C)(i-ii) (1988). Specifically, the statute provides that in assessing the volume of imports and their price effects the Commission must consider the following:

> (i) Volume—In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.
>
> (ii) Price—In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—
>
> > (I) there has been significant price underselling by the imported merchandise as compared with the price of like products in the United States, and
> >
> > (II) the effect of imports of such merchandise otherwise depresses

factors bearing on the state of the domestic industry, such as actual and potential changes in profits, productivity, capacity utilization, and investment.[123] Finally, the statute provides that no one factor is dispositive,[124] and the Commission may consider other economic factors relevant to its analysis of the domestic industry in question, so long as it identifies such factors and fully explains their significance.[125]

While the statute identifies specific factors to be "evaluated" by the Commission, it is silent as to how these factors are to be considered. Commission majority practice has involved analyzing the factors of output, sales, profits, productivity, return on investment, capacity utilization, cash flow, inventories, employment, wages, growth, ability to raise capital, and invest-

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prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

Id. The 1988 Trade Act changed "price undercutting" to "price underselling" to clarify that this provision does not require evidence of predatory pricing. *See* Pub. L. No. 100-418, § 1328(2)(B), 102 Stat. 1107 (1988).

123. 19 U.S.C. § 1677(7)(C)(iii) (1988). The so-called impact factors include, but are not limited to:

(I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

(II) factors affecting domestic prices,

(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and

(IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.

Id.

124. *Id.* § 1677(7)(E)(ii) (stating that "presence or absence of any factor . . . shall not necessarily give decisive guidance with respect to the determination by the Commission of material injury"), *cited in* Atlantic Sugar, Ltd. v. United States, 519 F. Supp. 916, 922 (Ct. Int'l Trade 1981).

The 1988 Trade Act further provides that the Commission "shall evaluate all relevant economic factors described in [IV above] within the context of the business cycle and conditions of competition that are distinctive to the affected industry." *See* Pub. L. No. 100-418, § 1328(2), 102 Stat. 1107 (1988).

125. Section 1328(1) of the 1988 Trade Act states that 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 goes on to require that the Commission "explain its analysis of each factor considered . . . and identify each [nonspecified] factor and explain in full its relevance to the determination." Pub. L. No. 100-418, § 1328(1), 102 Stat. 1107 (1988). The conference report states: "[t]he ITC may consider, on a case-by-case basis, such other economic factors as are relevant to an injury determination. If any other factor is considered, however, it must be identified and its relevance explained." H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 616 (1988).

ment to determine the existence of material injury.[126] After concluding that an industry is materially injured, the Commission then examines the condition of the industry in light of the absolute volume of imports, the relative volume of imports (*e.g.*, market share), import prices, and domestic prices, to determine whether a causal nexus between the imports and material injury exists.[127] In its causation analysis, the Commission is expected to, and does, focus on the conditions of trade, competition, and development concerning the industry involved.

In the typical investigation, the Commission majority has accomplished the foregoing analysis by examining data gathered by questionnaires or submitted by parties to ascertain trends relating to the enumerated statutory and other relevant factors over a given period of time, usually three years.[128] This approach has been challenged by several commissioners who urge that trend analysis is a difficult means for determining the effect of dumped imports on a domestic industry, separating the effects of imports from those of other market factors, or for divining whether the effects of dumped imports are material. For these commissioners, the use of the "time tested tools of elementary economics, including explicit consideration of relevant elasticities," is the only way to analyze such issues as causation in a way that is transparent and predictable.[129] By employing the concept of elasticity,[130] commissioners who rely on economic tools assert that they can better evaluate whether the facts relating to the volume and price effects of imports have a causal relationship to the various industry performance factors.[131]

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126. *See, e.g.*, Mechanical Transfer Presses from Japan, USITC Pub. 2257, Inv. No. 731-TA-429 (Final) (Feb. 1990) at 15.

127. A difference exists among commissioners regarding the propriety of analyzing material injury and causation on a bifurcated basis (*i.e.*, material injury in an objective sense divorced from the unfairly traded imports). *See, e.g.*, New Steel Rails from Canada, USITC Pub. 2217, Inv. No. 701-TA-297 (Final) (Sept. 1989) at 125-59.

128. British Steel Corp. v. United States, 593 F. Supp. 405, 411 (Ct. Int'l Trade 1984).

129. Certain Internal Combustion Industrial Forklift Trucks from Japan, USITC Pub. 2082, Inv. No. 731-TA-377 (Final) (May 1988) at 34 (Views of Chairman Liebeler); *id.* at 72-73 (Views of Vice Chairman Brunsdale).

130. Elasticity is defined in this context as the responsiveness of one variable, such as price, to changes in another, such as volume.

131. *Forklift Trucks*, USITC Pub. 2082, at 74.

The CIT first examined the Commission's use of elasticity analysis in *Alberta Pork Producers' Marketing Board v. United States*,[132] which was a review of the Commission's final affirmative determination on live swine imports in *Live Swine and Pork from Canada*.[133] In its final *Live Swine* determination, the Commission found that live swine prices are very sensitive to changes in supply and used elasticity estimates submitted by the parties to gauge the effect on domestic swine prices of changes in the market share of Canadian volumes.[134] The Commission majority found that the elasticity estimates indicated that an increase in market penetration would result in a significant decrease in price in the domestic market.[135]

Plaintiff argued before the CIT that the majority's use of the elasticity estimates was inappropriate. The plaintiff set forth three reasons for this. First, the estimates do not take into account nonsupply factors such as feed price and availability. Second, the Commission did not test the confidence level of the estimates to a scientifically acceptable level of certainty, and third, the elasticity estimates were derived from models using changes in the supply of both live swine and pork rather than live swine only.[136]

The CIT, per Judge DiCarlo, rejected plaintiff's argument that the Commission majority ignored nonsupply factors, holding that evidence concerning such factors did not prevent the Commission from finding that imports significantly depressed or suppressed domestic prices.[137] The CIT also declined to require the Commission to "reassess data collected and accepted in its determination in order to verify its consistency with some ambiguous level of scientific reliability."[138]

The CIT, however, remanded the case to the Commission because the record was ambiguous as to whether the elasticity

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132. 669 F. Supp. 445 (Ct. Int'l Trade 1987), *aff'd on remand*, 683 F. Supp. 1398 (Ct. Int'l Trade 1988).

133. *Live Swine*, USITC Pub. 1733, Inv. No. 701-TA-224 (Final) (July 1985). The Commission made a negative determination concerning pork imports, and the CIT affirmed the Commission's determination in National Pork Producers Council v. United States, 661 F. Supp. 633 (Ct. Int'l Trade 1987).

134. *Live Swine*, USITC Pub. 1733, at 13.

135. *Id.*

136. *Alberta Pork Producers*, 669 F. Supp. at 462.

137. *Id.* at 463.

138. *Id.*

estimates used to make a determination on live swine imports were derived from data on live swine alone, or were derived from data covering both live swine and pork.[139] Noting that the Commission had found live swine and pork to be different like products, the CIT held that if the latter were true, the estimates would be inappropriate for use in making a determination as to live swine alone.[140] The CIT instructed the Commission on remand to determine on what data the estimates were based.[141] If the estimates were based on both live swine and pork data, then the Commission was to reconsider its determination and either collect new data or explain what existing data in the record supported the determination.[142]

On remand, the Commission acknowledged that the elasticity estimates were based on both live swine and pork data.[143] However, the Commission determined that the estimates were the best information available within the meaning of 19 U.S.C. § 1677e(b) and again used the estimates in its determination after adjusting them for any bias introduced by the data on pork.[144] The Commission again made an affirmative determination on live swine imports.[145]

The CIT subsequently affirmed the Commission's remand determination.[146] The plaintiff argued that the Commission should not have relied on the elasticity estimates that were based on live swine and pork, because new and better estimates could have been developed during the remand proceeding.[147] The CIT rejected this argument, finding that the Commission could properly use the existing estimates once they were adjusted for bias, particularly given the limited time available for conducting the remand investigation.[148]

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139. *Id.* at 464.

140. *Id.*

141. *Id.*

142. *Id.*

143. Live Swine and Pork from Canada, USITC Pub. 2108, Inv. No. 701-TA-224 (Final) (Remand) (Aug. 1988) at 5.

144. *Id.* at 3.

145. *Id.*

146. Alberta Pork Producers' Mktg. Bd. v. United States, 683 F. Supp. 1398, 1399 (Ct. Int'l Trade 1988).

147. *Id.* at 1402.

148. *Id.* Plaintiff attacked the estimates on other grounds, but those grounds had not been raised in the initial appeal and the CIT held them to be beyond the scope of the remand. *Id.* at 1401-03.

In sum, the CIT specifically approved the use of elasticity estimates in material injury determinations, provided that the elasticities relate to the specific product under investigation and are based on substantial evidence of record. The CIT noted, however, that "econometric estimates are not a substitute for the overall assessment required by the statute, especially concerning impact of imports on the domestic producers of like products."[149]

At roughly the same time as *Alberta Pork* was decided after remand, Judge Carman issued his opinion in *Copperweld Corp. v. United States*,[150] examining the use of an elasticity-based analysis. The *Copperweld* case involved judicial review of the Commission's final negative determination in *Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes from Canada*.[151] In making its determination, the Commission plurality[152] considered various factors, including the performance of the domestic industry with respect to production capacity utilization and profitability.[153] In the section of its views dealing with these two factors, the plurality cited to the hearing testimony of Dr. Robert A. Leone,[154] who commented on the elasticity of supply in the domestic industry and its effect on the industry's performance.

Dr. Leone testified before the Commission that he had examined the performance of the domestic heavy-walled rectangular pipe and tube industry and the impact of the subject imports from Canada. He believed the domestic industry to be operating in the highly elastic portion of its supply curve, and further found that the domestic industry was operating at a low level of production capacity utilization. In Dr. Leone's view, this should in theory mean that increases in production should

149. *Id.* at 1402.

150. 682 F. Supp. 552 (Ct. Int'l Trade 1988).

151. USITC Pub. 1808, Inv. No. 731-TA-254 (Final) (Feb. 1986).

152. Chairman Stern, Vice Chairman Liebeler, and Commissioner Brunsdale issued a joint plurality opinion. Commissioner Lodwick and Commissioner Rohr issued a joint concurrence. Commissioner Eckes dissented. *Id.*

153. *Id.* at 5.

154. Dr. Leone was presented as a witness by a respondent in the investigation, Titan Industrial Corp., which subsequently appeared in the case before the CIT as defendant-intervenor. *Id.* at 12 n.27; *see* List of Witnesses Appearing at the Commissioner's Hearing, *id.* at B-11.

not lead to significant increases in price or profitability.[155] Dr. Leone also testified that the domestic heavy-walled rectangular pipe and tube industry was highly competitive, especially after the entry of imports from Canada into the market, and that the more competitive an industry is, the more elastic its supply curve becomes.[156] This in turn leads to downward pressure on prices, pressures on productivity and wage restraints, low profits, and stable or decreasing employment.[157] Dr. Leone concluded that if these developments were to be observed, and they would be expected to occur in the absence of Canadian competition, imports from Canada would have neither created nor intensified the competitive conditions of the market.[158]

The Commission plurality found, based on the record in the investigation including Dr. Leone's testimony, that the domestic industry was competitive and capital-intensive, and that the industry's "short-run supply curve is highly elastic in the relevant range."[159] The plurality further found that increases in domestic production and shipments had not led to significant increases in industry profits.[160] After an increase from 1982 to 1983, profitability had remained flat during the remainder of the period of investigation.[161] The plurality explained this performance by the fact that the domestic industry was operating at a low level of capacity utilization, suggesting that an increase in demand for the domestic product would not result in a significant short-run increase in domestic price. The plurality concluded that even were the imports to decline substantially and entirely to the benefit of the domestic industry, capacity utilization would not increase enough to raise significantly industry profits.[162]

Upon review, plaintiffs took issue with several aspects of the Commission's determination, including the plurality's consideration in its causation analysis of the margin of dumping

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155. Transcript of Commission Hearing at 35, *cited in* Copperweld Corp. v. United States, 682 F. Supp. 552, 574 (Ct. Int'l Trade 1988).

156. *Id.* at 35.

157. *Id.*

158. *Id.* at 30-32.

159. Heavy-Walled Rectangular Welded Carbon Steel Plates and Tubes from Canada, USITC Pub. 1808, Inv. No. 731-TA-254 (Final) (Feb. 1986) at 12 n.27.

160. *Id.* at 11.

161. *Id.*

162. *Id.* at 11-12.

found by the U.S. Department of Commerce.[163] In particular, plaintiffs put forward several arguments concerning Dr. Leone's testimony and the Commission plurality's reasoning based on that testimony.[164] Plaintiffs claimed that Dr. Leone incorrectly analyzed conditions in the market, and contended, in particular, that Dr. Leone improperly ignored demand for the product.[165] Further, they took issue with such statements of his as that new entrants would take the market price rather than undersell, and that price would not be significantly affected by the elimination of the subject imports.[166]

The CIT rejected plaintiffs' arguments, finding that Dr. Leone's conclusions were fully supported by the condition of the domestic industry as reported in the investigation record.[167] Whether or not demand was an integral part of Dr. Leone's analysis, the CIT found that the supply curve he had postulated was borne out in practice.[168] The CIT also found that Dr. Leone's statement concerning new entrants was supported by evidence that purchasers of imports valued nonprice factors such as delivery and service.[169] Finally, the CIT accepted Dr. Leone's statement that the imports' loss of market share would not affect price as in accord with the record.[170]

While the CIT in *Copperweld* did not squarely address a set of parameters for the use of economic analysis, it is quite apparent that the decision was rendered with the first *Alberta Pork* decision in mind. *Copperweld* reflects the CIT's concern that the elasticity estimate relied upon by the Commission be firmly anchored in the information on the record of the specific investigation. More importantly, the CIT extensively compared the economic analysis relied upon by the plurality with the evidence relating to the enumerated statutory factors to justify its use.[171] Accordingly, the two principles—that economic analysis must be grounded in the present, product-specific record

163. Copperweld Corp. v. United States, 682 F. Supp. 552, 556 (Ct. Int'l Trade 1988).

164. *Id.* at 573-75.

165. *Id.* at 573-74.

166. *Id.* at 574-75.

167. *Id.* at 573.

168. *Id.*

169. *Id.* at 574-75.

170. *Id.* at 575.

171. *See id.* at 573-75.

and that it must not supplant the statute—were firmly reinforced by the CIT's analysis in *Copperweld*.

The CIT followed *Alberta Pork* and *Copperweld* with what has been perhaps its most important statement on the use of elasticities to date, the opinion of Judge Restani reviewing the Commission's remand determination in *USX Corp. v. United States* ("*USX II*").[172] The *USX* line of cases began with CIT review of the Commission's final negative antidumping determination in *Cold-Rolled Carbon Steel Plates and Sheets from Argentina*.[173] That determination did not involve the use of elasticities and was remanded to the Commission on various grounds, including inadequate investigation of lost sales allegations and failure to seek recent foreign production capacity data.[174]

In particular, the CIT remanded the case to the Commission on the issue of causation because of a perceived flaw in the Commission's discussion of import penetration, which, as is discussed below, is of particular relevance to the use of elasticities.[175] The CIT remanded the case in part because the Commission "failed to articulate any rational connection between low levels of market penetration by Argentine imports and its final negative determination."[176] In its determination, the Commission had stated that the level of market penetration achieved by the subject imports remained low during the period of investigation, and concluded that the domestic industry had not been materially injured by reason of such imports. The CIT found this to be insufficient as an explanation of the Commission's determination, stating that the Commission must be guided by the significance of a quantity of imports and not absolute volume alone.[177]

In *USX Corp. v. United States* ("*USX I*"),[178] the CIT quoted from the legislative history of the Trade Agreements Act of 1979 a statement to the effect that an apparently small volume of imports may affect one industry significantly, while the same

172. 682 F. Supp. 60 (Ct. Int'l Trade 1988).

173. USITC Pub. 1637, Inv. No. 731-TA-175 (Final) (Jan. 1985). Chairwoman Stern, Vice Chairman Liebeler, and Commissioners Lodwick and Rohr issued a joint plurality opinion. *Id.* Commissioner Eckes dissented. *Id.*

174. USX Corp. v. United States, 655 F. Supp. 487 (Ct. Int'l Trade 1987).

175. *Id.* at 490.

176. *Id.*

177. *Id.*

178. 655 F. Supp. 487 (Ct. Int'l Trade 1987).

volume might not so affect another industry.[179] The CIT noted that the Commission in the past had recognized that the effect of imports on the cold-rolled steel industry could not be evaluated by looking only at import volume, in view of the inherent price sensitivity and fungibility of the product.[180] The CIT pointed to one investigation in which the Commission had based an affirmative determination on an import penetration roughly one half the level involved in *USX I*, and had stated that small import volumes of cold-rolled steel products can have a magnified effect in the marketplace.[181]

In its determination on remand, the Commission again found that the domestic industry was neither experiencing nor was threatened with material injury by reason of the subject imports.[182] Each commissioner issued his or her own individual views. Chairman Liebeler based her negative causation finding on her frequently used analysis of five factors enumerated in her views in *Certain Red Raspberries from Canada*.[183] Commissioner Lodwick conceded that under certain market conditions even a small import penetration could have a significant adverse effect on the domestic industry.[184] He stated, however, that market conditions such as a large growth of domestic demand and the passivity of import pricing behavior showed that the imports were not a cause of material injury to the domestic industry.[185] Commissioner Rohr also based his negative causation finding on an analysis of import penetration in the light of growing demand, and argued that the instant case was distinguishable from the *Spanish Steel* investigation cited by the CIT because the domestic industry had been worse off in that case and because Spain, unlike Argentina, was a new and aggressive supplier of cold-rolled steel products to the United

179. H.R. REP. No. 317, 96th Cong., 1st Sess. 46 (1979) (*quoted in USX Corp.*, 655 F. Supp. at 490).

180. USX Corp. v. United States, 655 F. Supp. 487, 490 (Ct. Int'l Trade 1987).

181. *Id.* (citing Certain Carbon Steel Products from Spain, USITC Pub. 1331, Inv. Nos. 701-TA-155, 157, 158, 159, 160, & 162 (Final) (Dec. 1982) at 16-17 (View of the Commission)).

182. Cold-Rolled Carbon Steel Plates and Sheets from Argentina, USITC Pub. 1967, Inv. No. 731-TA-175 (Final) (Remand) (March 1987).

183. *Id.* at 14-23 (citing *Certain Red Raspberries*, USITC Pub. 1680, Inv. No. 731-TA-196 (Final) (June 1985) at 11-19 (Additional Views of Vice Chairman Liebeler)).

184. *Id.* at 49-50.

185. *Id.* at 50.

States.[186] Commissioner Eckes dissented from the majority's negative determination, as he had in the initial investigation.[187]

Vice Chairman Brunsdale made a negative determination. She began her opinion by adopting the Commission's prior determinations, which were not questioned by the CIT, that the like product was cold-rolled carbon steel plates and sheets, that the domestic industry was all producers of the like product, and that the domestic industry was experiencing material injury.[188] On the issue of causation, however, she used an analysis based on elasticity estimates. The Vice Chairman examined the levels of market penetration achieved by the subject imports from Argentina, which ranged from .8% to .9% of the U.S. market, and found the levels to be "relatively small."[189] She also looked at the weighted average margin of dumping reported by the U.S. Department of Commerce, which was 122.3%, and found it to be "very high."[190]

Vice Chairman Brunsdale stated that for purposes of her analysis, she would assume that the subject imports from Argentina had their price reduced by the entire amount of the dumping margin. She noted that this assumption probably overstated the adverse effect of the subject imports on the domestic industry, because it was unlikely that the entire margin would be passed through to the imports. Having made the assumption, the Vice Chairman found that if imports had not been dumped but had been sold at a fair price, the imports would have been priced entirely out of the market. The resulting increase in demand for products from other sources would then have benefitted domestic firms and importers from countries other than Argentina such as Brazil and Korea.[191]

However, the Vice Chairman assumed that all of the business had gone to domestic firms, because she stated an inten-

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186. *Id.* at 65.

187. *Id.* at 71 (dissenting views of Commissioner Eckes).

188. The Vice Chairman noted in her opinion that she had not been at the Commission at the time of the initial determination. *Id.* at 26.

189. *Id.* at 26-27. These figures were calculated on a volume basis. Vice Chairman Brunsdale noted that she generally finds it more appropriate to analyze import penetration on a value basis, but stated that in this case there was little difference between the two measures. She stated that the import penetration level calculated on a value basis would be .7%. *Id.* at 27 n.2.

190. *Id.* at 27.

191. *Id.* at 28.

tion to find the upper bound for the effects of the subject imports on the domestic industry. In this vein, she also assumed that none of the subject imports would be present in the market if priced fairly. She noted that demand for steel plates and sheets, as intermediate products, is low to moderate, and cited to a memorandum by Commission staff for a discussion of demand elasticity.[192] By adding the volume of the subject imports to the shipments of domestic firms, the Vice Chairman calculated that the domestic industry could have increased its shipments by one percent in the absence of less than fair value sales. Alternatively, the dumped imports caused a reduction in domestic shipments of one percent at most.[193]

Vice Chairman Brunsdale next determined an upper bound for the suppressive effect of the subject imports on domestic prices. For this determination, she used an estimate obtained from the Commission's Office of Economics of the price sensitivity of domestic supply, or the elasticity of supply, which, she noted, "other things remaining the same, is defined as the percentage change in quantity supplied divided by the percentage change in price."[194] This, the "best estimate of this price sensitivity," indicated that a one percent rise in the price of the domestic product would lead to a 3.5% increase in the quantity supplied by the domestic industry.[195] The Vice Chairman concluded from this that if demand for the domestic product increased by one percent, as would have occurred in the absence of LTFV sales, the domestic price would increase by .29%.[196] This last figure was derived by multiplying one percent by the fraction 1/3.5.[197] The Vice Chairman therefore found that the subject imports could have depressed domestic prices by at most .3%.[198]

Vice Chairman Brunsdale then calculated the maximum amount by which the subject imports could have reduced the domestic industry's sales. To do so, she added the reduction in domestic shipments of one percent to the reduction in do-

192. *Id.* at 28-29 n.6 (citing Staff Memorandum, INV-K-029, at 24 n.3).
193. *Id.* at 29-30.
194. *Id.* at 29 n.8.
195. *Id.* at 29-30.
196. *Id.* at 30.
197. *Id.*
198. *Id.*

mestic prices of .3%, and reached the amount of 1.3% as the amount of lost sales that the domestic industry could have experienced by reason of the dumped imports.[199] Based on her analysis, Vice Chairman Brunsdale found that the subject imports could have had only a "very tiny" adverse effect on the domestic industry, and concluded that such imports were not a cause of material injury.[200]

On review of the Commission's first remand determination, the CIT again remanded the case. Although the CIT found no fault with the individual commissioners' threat analyses, the CIT questioned the handling of both the cumulation and the causation issues. As to causation, the CIT focused on only the views of Chairman Liebeler and Vice Chairman Brunsdale, finding fatal flaws in both opinions.[201] The CIT then rejected the Chairman's five-factor analysis as improperly requiring predatory intent as a prerequisite to an affirmative determination and assuming rational behavior on the part of importers.[202]

The CIT took a less critical view of Vice Chairman Brunsdale's analysis. Although the CIT rejected the particular application of that analysis in the subject determination, Judge Restani stated that "this approach to causation analysis has the potential for explaining, within the confines of the statutory framework and in an improved manner, how less than fair value imports affected the domestic industry."[203] As the CIT noted, *Alberta Pork* had already approved the use of elasticity

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199. Vice Chairman Brunsdale noted that certain commissioners use the term "lost sales" to refer to the anecdotal data in the "lost sales" section of the staff report. She stressed the difference between that view and her own, because she does not generally find the anecdotal data to be probative on the issue of causation. *Id.* at 30-31.

200. *Id.* The Vice Chairman, as did the other commissioners, also discussed the issues of cumulation and threat which were remanded by the CIT. Those discussions do not involve the use of elasticities and are beyond the scope of this Article. *Id.* at 31.

201. The CIT did not discuss the approaches of Commissioner Lodwick and Commissioner Rohr, finding that it would be "poor judicial economy" to examine them, because, without the Chairman and the Vice Chairman, the two remaining Commissioners did not constitute a majority. USX Corp. v. United States, 682 F. Supp. 60, 63 n.3 (Ct. Int'l Trade 1988).

202. *Id.* at 64-68.

203. *Id.* at 69.

estimates to assist in the Commission's causation analysis.[204]

USX II arguably goes further than *Alberta Pork*, however, in that it suggests that the economic model-based approach may be an improvement on more traditional types of analyses. *USX II* also builds on *Alberta Pork*. In the earlier case, the CIT held that the Commission need not establish the accuracy of elasticity estimates to a scientific degree of accuracy. In *USX II*, the CIT accepted this precept, but stated that if a commissioner relies almost exclusively on such estimates, the CIT can require "that some threshold degree of reliability be established in the record."[205]

The CIT rejected the Vice Chairman's particular use of the 3.5% supply elasticity estimate "because of the exclusive reliance on an elasticity estimate which the determination does not link to the specific facts of this case."[206] In so doing, the CIT expressly contrasted the subject determination with the elasticity analysis approved in *Alberta Pork*. In the latter case, the Commission heard witnesses and accepted elasticity estimates from both sides. The Commission chose to rely on a range of estimates, recognizing the difficulty of obtaining a precise figure. The CIT found that the expert testimony and adversarial process helped assure the reliability of the estimates used. In *USX II*, no parties were permitted to participate in the formulation of the elasticity analysis.

Moreover, the CIT questioned the source from which the elasticity estimate was derived, expressing particular concern about the age of the estimate and the data on which it was based. While the investigation covered the period 1981 to 1984, the estimate was taken from a study published in 1981, and was apparently based on data compiled between 1956 and 1976.[207] In view of the changes in technology and other factors in the industry from 1956 to 1984, the CIT expressed doubt that such an estimate based on old data could be used reliably, particularly if the estimate controls the determination.

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204. *Id.*

205. *Id.* at 69.

206. *Id.*

207. *Id.* at 70 (citing R. Crandall, Confidential Record Document Number (CR) 17, at 24 n.3 & 28 n.1 (supplemental analysis by the Commission's Office of Ecomonics)); *see* R. CRANDALL, THE U.S. STEEL INDUSTRY IN RECURRENT CRISIS, POLICY OPTIONS IN A COMPETITIVE WORLD (1981).

The CIT also took issue with the use of an elasticity estimate derived from the performance of the carbon steel industry as a whole to analyze the performance of the cold-rolled plates and sheets industry, which is only a segment of the carbon steel industry. The CIT could find no explanation in the record for why such an estimate would be relevant, nor for why the 3.5% estimate was chosen over the other estimates presented in the record.[208] As in *Alberta Pork*, the CIT rejected the use of an elasticity estimate that did not correspond to the specific product under investigation.[209]

The CIT found the need for relevance to the subject product to be particularly important in *USX II* because of the central role played by the elasticity estimate in the Vice Chairman's determination. While in *Alberta Pork* the estimates were only used in evaluating price effects, the estimate at issue in *USX II* was used to derive both price effects and impact on the domestic industry. The central importance of the estimate also led the CIT to find that the Vice Chairman's assumptions in favor of the domestic industry could not "save an analysis flawed at its core."[210]

The CIT also remanded the case for a further explanation of the methodology Vice Chairman Brunsdale used to calculate lost sales, a methodology which involved the equation summing the Vice Chairman's estimate of reduction in domestic shipments and her estimate of reduction in price. The CIT stated that "[u]ntil such equations are accepted as the everyday subject of antidumping decisions, however, they must be explained for the benefit of the parties and the court."[211] The CIT suggested that it "would seem prudent" to relate such equations to the facts of the individual investigation and to allow the parties to comment on it.[212]

The CIT concluded that the views of the Vice Chairman were "legally flawed and not based on substantial evidence."[213] Summing up the CIT's comments on those views, we can discern several points of importance in the CIT's opin-

208. USX Corp. v. United States, 682 F. Supp. 60, 70 (Ct. Int'l Trade 1988).
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*

ion, which carefully build on and expand the *Alberta Pork* and *Copperweld* decisions:

> (1) The use of elasticities is permissible, and indeed may be an improvement over more traditional approaches.
> (2) A threshold showing of the elasticity estimate's reliability must be made, particularly if the estimate is central to the determination.
> (3) The elasticity-based analysis must be expressly linked to the facts of the individual investigation, and the elasticity estimate must describe the product under investigation.
> (4) The parties to the investigation must be permitted to comment on the elasticity estimates.
> (5) There must be an explanation of the equations and estimates used, particularly if a choice has been made between various estimates in the record.[214]

Thus, rather than adopt a wholly new approach, the judge in *USX II* apparently carefully expanded upon several elements approved by other judges in the two earlier cases.

Soon after the issuance of Judge Restani's opinion, Judge DiCarlo issued a decision in *Maverick*, which closely paralleled its predecessor *USX II*.[215] *Maverick* involved review of the Commission's preliminary negative determination in *Certain Line Pipes and Tubes from Canada*.[216]

Commissioner Lodwick and Commissioner Rohr issued a joint opinion, finding that the domestic industry exhibited improving trends and that there was no reasonable indication that the subject imports were either causing or threatening material injury. Chairman Liebeler and Vice Chairman Brunsdale each issued individual views, although both concurred, as did Commissioner Eckes, in the views of Commissioner Lodwick and Commissioner Rohr on the questions of like product and domestic industry. The Chairman found that the record indicated that the industry was materially injured, a conclusion in which the Vice Chairman concurred. Chairman Liebeler based her negative determination on a rebuttable presumption that the subject imports could neither cause nor threaten material injury, because the imports never captured even a 2.5% share

214. *See id.* at 68-70.

215. Maverick Tube Corp. v. United States, 687 F. Supp. 1569 (Ct. Int'l Trade 1988).

216. USITC Pub. 1965, Inv. No. 731-TA-375 (Preliminary) (Mar. 1987).

of the U.S. market. While Vice Chairman Brunsdale based her negative threat determination on such factors as foreign production capacity and capacity utilization, she based her negative causation determination on an analysis which involved the use of elasticity estimates.[217]

The Vice Chairman began her discussion of causation by stating that she would focus on the level of market penetration achieved by the subject imports and on the margins of dumping alleged by petitioners.[218] She noted that the subject imports had never made a large penetration into the U.S. market, ranging from .7% to 1.1% of the market. She calculated an average dumping margin of 44.3% by dividing the sum of Canadian prices by the sum of U.S. prices as alleged in the petition.[219]

Vice Chairman Brunsdale then proceeded to her analysis of elasticities, pointing out that she made certain assumptions in this analysis which favored petitioners. She assumed that the whole dumping margin is passed through to depress prices in the United States. This assumption led her to the conclusion that the absence of LTFV pricing would have priced the subject imports out of the market, leaving the domestic industry to reap the benefit of sales increased by the full amount of the allegedly dumped imports' market penetration. She further noted that her assumption ignored the possible inability of domestic supply to "rise to the occasion" due to such factors as a strike against the domestic industry.[220]

The Vice Chairman explained that her petitioner-favoring assumptions allowed her to calculate with some precision the outer bound of the effect that the subject imports could have

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217. *Id.* Chairman Liebeler's presumption that a 2.5% domestic market share is insufficient to cause material injury was rebuttable by a showing that both domestic supply and demand for the subject product is highly inelastic. Her approach therefore left the door open for the consideration of elasticities. Unlike Vice Chairman Brunsdale's approach, however, Chairman Liebeler's presumption left to the parties the task of estimating supply and demand elasticities. Since the parties did not make a showing of supply or demand inelasticity, her opinion does not discuss actual elasticity estimates.

218. As she had in her views in the *USX I* remand, the Vice Chairman cited for background to the Office of Economics Memorandum, EC-J-010 (Jan. 7, 1986). *Id.* at 38 n.10.

219. *Id.* at 38-40.

220. *Id.* at 40-41.

had on the domestic industry. Assuming, then, that domestic sales would have increased in the absence of dumping by the full amount of import penetration, she calculated that the presence of the allegedly dumped imports caused a drop of 1.9% in domestic industry shipments.[221]

She next calculated the suppressive effect of the subject imports on domestic prices, using an estimate of the price sensitivity of domestic supply (the elasticity of supply). To obtain this estimate, she relied on the short-term supply elasticity of approximately 3.5% for carbon steel manufacturing set out in economic texts.[222] She stated that this was a lower bound estimate for line pipe, which would have an elasticity of at least 3.5%, and that the use of such a figure would give petitioners the benefit of the doubt because it would suggest greater price suppression by the subject imports. Using the estimate thus obtained, she found that a one percent rise in price would lead to a 3.5% increase in domestic supply. This meant that the increase in demand of 1.9% that she had found would result from the absence of dumping would raise domestic prices by (1%/3.5%) x 1.9%, or .6%. In other words, the subject imports suppressed domestic prices by .6%.

From her conclusions that allegedly dumped imports could at most reduce domestic shipments by 1.9% and depress domestic prices by .6%, Vice Chairman Brunsdale concluded that the imports could have had, at a maximum, a negative effect on the domestic industry's sales of 2.5%, the sum of 1.9% and .6%. She found that "the adverse effects of dumped imports from Canada on the domestic industry were too small to be a cause of material injury to that industry."[223]

On review of the Commission's determination, the CIT in *Maverick* remanded the case to the Commission on several grounds. The CIT rejected Chairman Liebeler's rebuttable 2.5% market penetration presumption as based on an analysis requiring predatory intent for an affirmative determination. Specifically citing *USX II*, the CIT found predation analysis inappropriate in a dumping case. As to the views of Commissioner Lodwick and Commissioner Rohr, the CIT remanded

221. *Id.* at 41.

222. *See, e.g.*, R. CRANDALL, *supra* note 207.

223. *Line Pipes*, USITC Pub. 1965, at 43.

the case for reconsideration of their handling of a lost sales allegation. The CIT also remanded the case because of flaws it perceived in Vice Chairman Brunsdale's elasticity analysis.[224]

The CIT noted that the use of elasticity estimates had been approved in *USX II* and *Alberta Pork*. The CIT stated, however, that this approval was conditioned in *USX II* on a threshold showing that the elasticity estimates used by the Commission are reliable. The CIT pointed out that the same 3.5% domestic supply elasticity estimate which Vice Chairman Brunsdale used in the investigation reviewed in *Maverick* was rejected in *USX II* as unreliable and thus legally flawed. In *Maverick*, the CIT listed the very same flaws found in *USX II*: the lack of input from the parties, the age of the data underlying the estimate, and the lack of a showing that an estimate for the carbon steel industry as a whole is relevant to a segment of that industry.[225]

The CIT similarly found in *Maverick* that no showing of reliability had been made for the 3.5% estimate in the investigation under review in that case. The CIT pointed out that, far from supporting the use of the estimate in an investigation concerning the pipe and tube industry, the text from which the estimate was obtained warned that many conclusions based on the behavior of the domestic carbon steel industry "cannot be extended to the specialty steel industry."[226]

The CIT also quoted from plaintiffs' brief a statement to the effect that the line pipe industry is not the same industry as the basic steel industry, but rather a customer of the latter. Thus, suggested the CIT in *Maverick*, there was even less chance that the 3.5% elasticity estimate, derived from the performance of the carbon steel industry, could be relevant to the entirely separate line pipe industry, than in *USX II*, in which the steel plates and sheets industry was a part of the carbon steel industry. Citing *Alberta Pork*, the CIT rejected the elasticity estimate since it did not describe the specific product under investigation. The CIT held that "[f]ollowing *USX Corp.*, the Court finds that the use of the 3.5% elasticity estimate in this

224. Maverick Tube Corp. v. United States, 687 F. Supp. 1569 (Ct. Int'l Trade 1988).

225. *Id.* at 1574-75.

226. *Id.* at 1575 (quoting R. CRANDALL, *supra* note 207, at 5).

determination is not based on substantial evidence and is not in accordance with law."[227]

IV. *APPLICATION OF THE DECISIONS AT THE COMMISSION*

While the majority of commissioners have not relied upon elasticity analysis, those commissioners who do employ such analytical tools in their determinations have had clear guidance from the CIT and have modified their approaches accordingly. For example, following her remand opinion in *USX II*, Vice Chairman Brunsdale addressed the case law in Additional Views in *Internal Combustion Engine Forklift Trucks from Japan*.[228] Addressing the sources of the elasticity estimates used in this investigation, the Vice Chairman made the following observations:

> the Commission's Office of Economics now routinely prepares and delivers to the Commission and the parties prior to the hearing a detailed analysis and estimation (in numbers or ranges) of the relevant elasticities that characterize the aggregate forces at work *in the industry under investigation*. This analysis is based on the Staff's thoughtful consideration of the information then available in the record, including producer, importer, and purchaser questionnaire responses, telephone interviews, field work, and secondary research. The parties are then given an opportunity at the hearing and in their posthearing submissions to reply to Staff's analysis and provide their own estimates for consideration by the Commission.[229]

Thus, the Vice Chairman noted that the Commission staff had adjusted the elasticity information she relied upon to address various criteria developed in the cases: the estimates relating to the industry under investigation are grounded in the evidence of that investigation, and the parties are routinely afforded an opportunity to comment on the estimates.

Again, in Additional Views in *Digital Readout Systems and Subassemblies Thereof for Japan*,[230] Vice Chairman Brunsdale indicated that the elasticity analysis she employed was that ap-

227. *Id.*
228. USITC Pub. 2082, Inv. No. 731-TA-377 (Final) (May 1988).
229. *Id.* at 82 (emphasis added).
230. USITC Pub. 2150, Inv. No. 731-TA-390 (Final) (Jan. 1989) at 36 n.34.

proved by the CIT in *Alberta Pork*, *Copperweld*, and *USX II*. She pointed out that "[e]xplicit examination of the mechanism through which the imports affect *domestic producers of the like product* using simple elasticity analysis provides the degree of insight into the Commission's reasoning process that Congress sought when it amended the dumping statute."[231] In examining the elasticities in the digital readout market, the Vice Chairman made clear that the elasticity ranges developed by the staff related to information gathered in the course of the investigation, particularly as to characteristics of demand, related to the like product in question, and had been subjected to the test of party comment and argument.[232] Similarly, in *Certain All-Terrain Vehicles from Japan*,[233] the Vice Chairman specifically indicated that her use of elasticities was in accord with the CIT's decision in *Copperweld*.[234] She then discussed in detail how the elasticity estimates she relied upon took into account the comments of petitioner and respondents, weighing carefully the arguments presented by respondents as to the supply elasticity.[235] Moreover, the Vice Chairman's views make clear that the elasticities she relied upon relate specifically to all-terrain vehicles and are based upon the investigation-specific evidence.[236]

Those commissioners who criticize the use of elasticity analysis have generally done so in the context of the legal tests for their use developed by the CIT. For example, Commissioner Eckes placed no reliance on the elasticity numbers in *Certain Brass Sheet and Strip from Japan and the Netherlands*[237] because of his concern that the "elasticity was derived in large part from information concerning a product other than the one under investigation."[238] Again, in *Digital Readout Systems and Subassemblies Thereof from Japan*, Commissioner Eckes noted that he did not rely on the elasticity estimates in reaching his determination.[239] Based upon his questioning of staff at the

231. *Id.* at 36 (emphasis added).
232. *See generally id.* at 37-48.
233. USITC Pub. 2163, Inv. No. 731-TA-388 (Final) (Mar. 1989).
234. *Id.* at 41 n.7.
235. *Id.*
236. *See generally id.* at 41-48.
237. USITC Pub. 2099, Inv. Nos. 731-TA-379 - 380 (Final) (July 1988).
238. *Id.* at 28.
239. USITC Pub. 2150, Inv. No. 731-TA-390 (Final) (Jan. 1989) at 24 n.86.

public briefing and vote in this investigation, Commissioner Eckes expressed a number of concerns about the elasticity estimates in light of such concerns as whether they specifically related to the products under investigation.[240] Finally, Commissioner Eckes, in remarks before the Conference on Economic Issues and Trade Policy, discussed at length his general concerns that elasticity analysis is difficult to conform to the standards enunciated by the CIT in *Alberta Pork*, *Copperweld*, *USX II*, and *Maverick*.[241] He observed that it was rare for the staff to derive product-specific elasticities based on data from the usual three-year period examined in Commission investigations, and that even where "the staff actually formulate estimates based on data in the investigation record, the data are usually insufficient to permit a reliable estimate."[242]

Thus, the effect of even a limited application of stare decisis is apparent from individual commissioner's treatment of the role of elasticity analysis in Commission decision making. Clearly, there is disagreement over the applicability of such analysis to Commission determinations. This debate, however, is not focused on the appropriate standard or legality of using elasticity estimates. Rather, the disagreement is grounded on whether such analyses can satisfy the tests that have emerged through careful, cohesive decision making by the CIT.

CONCLUSION

From the foregoing discussion, we are able to draw several conclusions concerning the application of stare decisis by judges of the CIT in antidumping and countervailing duty cases.

> Although [the CIT], when [considering] the unfair trade laws, does not simply ignore the existence of the doctrine, the opinions of the judges, evidence a strong belief that flexibility and independence are of paramount importance in deciding disputes arising out of the antidumping and

240. *See id.* at 24-26 (transcript of Commission hearing) (Jan. 4, 1989).

241. *Economic Illusions and Trade Remedies: An ITC Commissioner's Perspective*, Speech by A. Eckes (Apr. 15, 1988) (copy on file at the *Fordham International Law Journal* office).

242. *Id.* at 11-13.

countervailing duty laws.[243]

The second case study demonstrates that while the doctrine of stare decisis does have some role in subsequent decisions of the CIT, the force of that doctrine is not clear, with the judges themselves apparently disagreeing on what that role should be.[244]

From the perspective of the agencies, the absence of certainty in the administration of the law illustrated by the effects of *Yuasa II* is a compelling argument for a stricter application of stare decisis in subsequent decisions of the CIT. Admittedly, it is difficult to argue that the opinions of various judges of the CIT, whose decisions are appealable as of right, should be absolutely binding on the CIT in future cases. However, the benefits to be derived from greater adherence to precedent deserve greater attention than has been given in the past. This is especially true in light of the Federal Circuit's decision that a ruling by the CIT may not be appealed as final, regardless of the controlling issue of law it establishes, until the completion of a remand by the agency.[245]

The denial by the Federal Circuit of an immediate appeal as of right concerning a controlling issue of law, coupled with the conflicting decisions of the CIT on frequently recurring legal issues, has resulted in a highly problematic scenario for the Commission in its administration of the antidumping and countervailing duty laws. The difficulties arising from the appellate court's refusal to hear an appeal on an important issue of law prior to the conclusion of a remand proceeding are serious from purely an agency perspective. They are exacerbated when the agency, and individuals who appear before it, are forced to engage in lengthy administrative proceedings without any degree of certainty as to what the law will eventually govern the outcome. Moreover, as the number of cases before the CIT increases, it is imperative that stare decisis be applied more frequently in the resolution of recurring issues in the antidumping and countervailing duty area.[246]

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243. Powell & Concannon, *supra* note 1, at 369.

244. *Id.* at 373.

245. *See* Cabot Corp. v. United States, 788 F.2d 1539 (Fed. Cir. 1986); Jeannette Sheet Glass Corp. v. United States, 803 F.2d 1576 (Fed. Cir. 1986).

246. Kennedy, *Binational Dispute Settlement under the Canada-U.S. Trade Agreement*, 13 MD. J. INT'L L. & TRADE 71, 100 (1988).

This is not to say that the CIT should adopt a lockstep approach to stare decisis. As noted at the outset of this Article, the complexity of the antidumping and countervailing duty laws and the "government relationships" implicated in their administration preclude the rendering of CIT decisions in a mechanical fashion. This need for flexibility, however, should not vitiate the role of precedent, as certainly has been the case in some instances. Moreover, the concerns of clarity and consistency warrant that the balance tip more in favor of adherence to precedent.

In sum, "*[s]tare decisis* is ordinarily a wise rule of action. But it is not a universal, inexorable command."[247] The CIT must retain flexibility, but at the same time lend a degree of predictability to the law. As the cases relating to the use of economic analysis demonstrate, the CIT has achieved this delicate balance in the analysis of a very complex question in Commission practice. By carefully taking into account other decisions on the question, the judges of the CIT have demonstrated that the necessary element of consistency in the interpretation of the trade laws can be achieved without the adoption of mechanistic approaches.

247. Washington v. W.C. Dawson & Co., 264 U.S. 219, 238 (1924) (Brandeis, J., dissenting).