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Cumulation of Import Statistics in Injury Investigations before the International Trade Commission

William B.T. Mock, Jr.*

CONTENTS

I. INTRODUCTION ........................................... 434
II. UNFAIR IMPORT TRADE LAWS ............................ 435
III. THE HISTORY OF CUMULATION ........................... 439
   A. Cumulation before the 1984 Act ...................... 439
   B. Cumulation under the 1984 Act ....................... 440
IV. “SUBJECT TO INVESTIGATION” ........................... 444
   A. Purposes of the “Subject to Investigation” Standard ... 445
   B. Cumulation between Overlapping Investigations ...... 448
   C. Cumulation with Final Determinations ................ 453
      1. Section 751(a) Reviews as “Investigations” .......... 453
      2. Fitting Final Orders into the Statutory Framework . 456
   D. Cross-Cumulation .................................... 459

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1. History of Cumulation in Countervailing Duty Investigations .............................................. 460
2. Cross-Cumulation under the 1984 Act ........................................... 461
E. Cumulation with Section 303 Countervailing Duty Statistics .................................................. 469
1. Imports not Receiving Injury Determinations under Section 303 ........................................... 470
2. Imports Receiving Injury Determinations under Section 303 ............................................... 472
F. Cumulation with Negative Injury Determinations ................................................................. 472
V. CUMULATION OF DE MINIMIS IMPORTS ................................................................. 474
VI. PROPOSALS .................................................................................................................. 477

I. INTRODUCTION

[A] domestic producer subjected to unfairly priced imports from several sources is like a man assaulted by three assailants in a dark alley—he doesn’t know which one cut his arm and which one put the lump on his head, all he knows is that the three combined injured him.1

United States manufacturers2 have sometimes found themselves unable to identify which unfair import competitors have injured their industries when sources of unfair competition exist in more than one country. These manufacturers have had some redress from unfair trade available to them through various federal trade laws, including, inter alia, the antidumping and countervailing duty laws. Until recently, however, these laws have largely addressed unfair trade competition coming from a single foreign country source at a time; they have not, however, addressed the “hammering effect”3 of unfair competition from many sources operating in the market at once or sequentially.

The International Trade Commission (“Commission”) is the federal agency responsible for determining injury to domestic industries under these trade laws. Over the years the Commission has developed an analytic approach for dealing with multiple-source injury to domestic industries. This approach is known as “cumulation.” When the Commission

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2 In fact, one representative of the United States steel industry phrased the same image in a more dramatic fashion in recent congressional hearings: “[D]eath by one or one hundred blows is equally fatal.” Options to Improve the Trade Remedy Laws: Hearings Before the Subcomm. on Trade of the House Comm. on Ways & Means, Part I, 98th Cong., Ist Sess. 203 (1983) (statement of Dr. Adolph J. Lena, Chairman of the Advisory Committee of the Specialty Steel Industry of the United States)[hereinafter Options to Improve, Part I].
applies this approach, it combines import statistics from all the cumulated sources and assesses their combined impact upon the domestic industry for purposes of determining whether the domestic industry has been injured. When foreign competition is considered en masse, its impact appears more significant, thereby increasing the likelihood that the Commission will make an affirmative injury determination.

A version of this cumulation doctrine was recently carried over from administrative practice into statutory law to become part of the Trade and Tariff Act of 1984 ("1984 Act" or "Act"). Prior to passage of the 1984 Act, the Commission exercised its discretion in deciding whether to cumulate statistics from different sources in an injury investigation under the unfair trade laws. Incorporation of the cumulation provision into the Act has significantly altered Commission practice: cumulative analysis is now mandatory in certain circumstances.

This new law and practice relating to the Commission's use of cumulation forms the subject of this Article. After a short review of the existing laws and procedures in the unfair trade area, this Article reviews cumulation practices adopted by the Commission both before and after the effective date of the 1984 Act. The language of the 1984 Act is construed emphasizing the relevant legislative history. Problems which arise in interpreting the most ambiguous criterion for employing cumulation—that, to be cumulated, the imports must be "subject to investigation"—is analyzed. This Article then interprets this criterion in ways appropriate to the current statute, United States international commitments, and the purposes of laws regulating unfair imports. The propriety of using a de minimis analysis is examined in light of the new statute. Finally, this Article identifies appropriate occasions for the Commission to cumulate.

II. UNFAIR IMPORT TRADE LAWS

A number of practices in international trade are recognized as being unfair or injurious methods of competition against which a nation may act in order to protect its own industries. The two most important practices, for purposes of this Article, are dumping and providing bounties or grants.

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Dumping is the preferential pricing of a product in an export market lower than in the home market, or lower than cost, typically in order to capture a market share for future profits.\(^7\) The existence of such preferential pricing is determined by certain complex statutory calculations made by the Department of Commerce. These calculations produce a "dumping margin," which is the margin of underselling in the United States as compared to the home market or other comparison price. Any sales made with benefit of a dumping margin are said to be made at "less than fair value" ("LTFV").

Bounties and grants are benefits which a government\(^8\) bestows upon an industry or a company in order to promote the competitiveness of that industry or company or accomplish some other policy. Bounties or grants which are used for domestic purposes and which produce purely domestic effects, are unobjectionable. When the effects of that increased competitiveness extend to another country's marketplace, however, the competition is deemed unfair.

Multilateral trade agreements and United States law have created remedies for each of these unfair methods of competition. The United States or any other importing country may impose extra duties upon the incoming unfairly traded merchandise. Those duties are carefully calculated to equal the amount of the unfair benefit gained, whether it be the dumping margin or the government grant. In this way, the importing country can create fairness in the domestic marketplace that would otherwise be absent by reason of the foreign economic decisions.

Certain limitations to this basic remedial scheme exist under the General Agreement on Tariffs and Trade ("GATT").\(^9\) The first of these limitations is that no remedial duties under the antidumping law or countervailing duty laws may be imposed unless a domestic industry is first found to be materially injured or threatened with material injury by reason of the unfairly traded imports.\(^10\) United States law is consistent with

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\(^7\) Because it is only the injury phase of unfair import investigations that is relevant to this Article, summaries of the unfair practices themselves will necessarily be kept brief and general.

\(^8\) It is theoretically possible for a countervailing duty case to be based upon a grant of a subsidy by a private party, but no investigation concerning such an allegation has come to the writer's attention. See 19 U.S.C. § 1671b(b).


\(^10\) Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, art. 6, ¶ 4, 31 U.S.T. 513, 528, T.I.A.S. No. 9619 (countervailing duties)(entered into force on Jan. 1, 1980)[hereinafter Agreement on Articles VI, XVI and XXIII]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, art. 3, ¶ 4, 31 U.S.T. 4919, 4927, T.I.A.S. No. 9650, (antidumping du-
GATT, as it also requires a causal link between the unfairly traded imports and the material injury to the domestic industry before remedial measures may be taken.\textsuperscript{11} Antidumping duties may be imposed only after a finding of LTFV imports and a finding that such imports caused material injury to a domestic industry.\textsuperscript{12} Countervailing duties against GATT countries\textsuperscript{13} may be imposed only after both a finding of subsidized imports and a finding that such imports caused material injury to a domestic industry.\textsuperscript{14}

A second GATT requirement is that no investigation of unfair import practice may proceed without a reasonable basis for claiming that such activity is taking place and causing injury.\textsuperscript{15} A parallel provision in United States law requires that "preliminary determinations" be made to ascertain whether there is a "reasonable indication" that the unfair practice is taking place and a "reasonable indication" that a domestic industry is being injured or threatened with injury.\textsuperscript{16} These requirements in United States law were enacted in direct response to the GATT requirement.\textsuperscript{17}

An affirmative determination during a final injury investigation re-
quires a finding of "material injury," "threat of material injury," or "material retardation of the establishment of a domestic industry." An affirmative finding during a preliminary injury investigation requires "a reasonable indication" of any of the foregoing, which is an easier test to satisfy. "Material injury" is defined under both GATT and United States law as harm that is not inconsequential, immaterial, or unimportant, in view of factors such as the volume of subject imports, the effect of subject imports upon domestic prices for like goods, and the impact of subject imports upon domestic producers of like goods.

Both antidumping law and countervailing duty law arise under Title VII of the Tariff Act of 1930, where these injury standards appear in the common definitional provisions. It is also within such common definitions that the new provision on cumulation appears.

Not all countries in the world are signatories of GATT. Although the United States is under no international obligation to afford nonsignatories the injury test and preliminary determination screening device described above, it has, with one exception, incorporated these tests into various provisions of domestic law. This one exception is with respect to the injury test under countervailing duty law. This exception is embodied in § 303 of the Tariff Act of 1930 ("§ 303").

Under § 303, if the subsidized article entering the United States originates from a country that is not a member of GATT, duties may be imposed following the Commerce Department finding of a subsidy, without any Commission determination that a domestic industry has been injured. However, if the subsidized article normally enters the United States free of duty and the United States has obliged itself, by treaty or otherwise, to afford imports from that country an injury test in countervailing duty investigations, then the Commission must find injury under Title VII before any compensatory duties may be imposed. This struc-

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21 19 U.S.C. §§ 1671-76.
26 19 U.S.C. § 1303(a)(2). Israel is an example of a non-GATT country to which the United States has undertaken to afford an injury test in a countervailing duty investigation of duty-free imports. Potassium Chloride from Israel, 49 Fed. Reg. 18,001 (Dep't Comm. 1984) (Initiation of Countervailing Duty Investigations).
ture may seem odd when viewed in conjunction with the other countervailing law, but it exists for historical reasons. If a violation of § 303 is found, countervailing duties are imposed.

III. THE HISTORY OF CUMULATION

A. Cumulation before the 1984 Act

Prior to passage of the 1984 Act, cumulation of import statistics was discretionary with the Commission. The first appearance of cumulation in a Commission determination occurred in 1968. During most of the time between 1968 and the effective date of the 1984 Act, cumulation was used solely to test injury in antidumping cases. The Commission would cumulate statistics from allegedly dumped imports with those from other allegedly dumped imports to determine whether a domestic industry had been injured. The issue of cumulation arose in a few countervailing duty investigations, but the Commission refused to cumulate in those investigations. Nor was cumulation used to combine the statistics for more than one type of unfair trade practice at a time.

To determine whether cumulation was appropriate in a given case, the Commission developed a standard market analysis approach. Authority for this approach derived from the legislative history of the Trade Act of 1974, which instructed the Commission to consider "the factors and conditions of trade affecting the market in these goods." The par-

28 Section 303 of the Tariff Act of 1930 embodies the pre-1979 United States countervailing duty law under which an injury test was granted only with respect to duty-free imports from GATT countries. Although this restrictive use of an injury test is contrary to Article VI of GATT, it has been grandfathered in under the Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, § 1(b), 61 Stat. A2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308. The 1979 Act did not altogether preempt or repeal § 303. Section 701(c), 19 U.S.C. § 1671(c).
33 See infra text accompanying notes 122-29.
35 According to the Senate report:
Under consistent practice . . . the Commission has considered the combined impact of less-than-fair-value imports in making injury determinations when the facts and economic conditions so warrant. Such result does not follow as a matter of law; it follows, on a case by case basis, only when the factors and conditions of trade show its relevance to the determination of the injury.
ticular factors and conditions the Commission took into account in its market analysis were the:

1) volume of subject imports;
2) trend of import volume;
3) fungibility of imports;
4) competition in the market for the same end users;
5) common channels of distribution;
6) pricing similarity;
7) simultaneous impact; and
8) coordinated action by the importers.\textsuperscript{36}

B. Cumulation under the 1984 Act

The 1984 Act replaced the Commission’s discretion with a statutory standard for cumulating in a given investigation. The language of the Act’s cumulation provision is:

For purposes of clauses (i) and (ii),\textsuperscript{37} the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States.
Thus, the Commission must now consider two criteria in deciding whether to cumulate import statistics in a given investigation. First, the imports to be cumulated must compete with each other and with the domestic product they allegedly injure. Second, the imports to be cumulated must all be "subject to investigation." Precisely what this latter requirement entails is the subject of the greater part of this Article.

Shortly after passage of the 1984 Act, the Commission’s legal staff began briefing the Commissioners on the legal requirements of the new Act. In so doing, the staff set forth the criteria for cumulation they found in the Act. The staff’s criteria differ from the two criteria set forth above in that a third element is included. According to the Commission staff, for imports to be cumulated, they must compete with each other and with the like domestic product, they must be "subject to investigation," and they must be "reasonably coincident" in marketing. The staff purportedly derived this third requirement from the language of the statute and from its legislative history.

However, neither the language of the statute nor its legislative history support this third element. Language requiring that the imports to be cumulated be reasonably coincident was contained in the original House bill, but was later cut in the House Committee on Ways and Means version. This revised version of the cumulation provision later became part of the 1984 Act. Thus, Congress appears to have elimi-
nated reasonably coincident marketing as a distinct criterion for cumulation. It was not eliminated as being irrelevant, but as being unnecessary. Reasonably coincident marketing is an aspect of competition and as such should be subsumed in the first element set forth above.46

The majority of the Commission has accepted the staff’s three-element cumulation test.47 Only Commissioner Liebeler has used the two-part test set forth above,48 although without providing any significant critique of the majority and staff position.49

The majority’s three-part cumulation test is accompanied by a five-part subtest as to whether the first element—competition—is satisfied. The five elements are:

1) the degree of fungibility between imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality-related questions;
2) the presence of sales or offers to sell in the same geographic markets of imports from different countries and the domestic like product;
3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product;
4) whether the prices of imports and the domestic like product are within a reasonable range; and
5) whether the imports are simultaneously present in the market.50

The Commission could properly interpret the final element as including reasonably coincident marketing, making that element of the ma-

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46 "The Committee does intend, however, that the marketing of the imports that are cumulated be reasonably coincident." REFORM ACT REPORT, supra note 44, at 37. This statement, which is carried unchanged through later portions of the legislative history, is best seen as an effort to rebut any assumptions arising from this change to the effect that reasonably coincident marketing is not all relevant to a cumulation analysis.


49 In her frequent and extensive opinions, Vice-Chairwoman Liebeler has sought to define legal standards in a number of areas but has not focused on this detail in particular.

50 Certain Carbon Steel Pipes and Tubes from the People's Republic of China, the Philippines and Singapore, USITC Pub. 1796, Inv. Nos. 731-TA-292 to -296 (Prelim.) 10 n.9 (Dec. 1985); Certain Cast-Iron Pipe Fittings from Brazil, the Republic of Korea and Taiwan. supra note 47; Oil Country Tubular Goods from Argentina, Canada and Taiwan, supra note 47; Certain Welded Carbon Steel Pipes and Tubes from India, Taiwan, Turkey and Yugoslavia, supra note 47.
Cumulation of Import Statistics
7:433(1986)

Majority's three-part cumulation test redundant. This is, however, only a minor quibble. To conform the test to the statutory language, a two-part test should be used and the final element of the competition standard should include a time aspect. This would render the analysis more precise. Without such a time element, an inappropriate result might be reached in an investigation in which the imports to be cumulated were on the outer reaches of contemporaneity. In such a case, the three-part test might result in a refusal to cumulate, whereas the two-part test might result in cumulation, provided the other competition elements were sufficiently persuasive.

In comparing the old standards with the new standards, certain facts become evident. Elements three through seven of the market analysis approach to cumulation have continued under the guise of the five competition elements of the new standard. The only noteworthy change is the more precise wording and geographical bent of the old fourth element—competition for end users—as it has metamorphosed into the second competition element. Interestingly, old element seven—simultaneous impact—has now appeared in both the competition test, as simultaneous presence, and in the staff's three-part cumulation test, as reasonably coincident marketing. Three of the market analysis elements have also changed. The first two—volume and volume trend—have been dropped in response to certain statements in the legislative history. The final element—coordinated action by the importers—has likewise been dropped, although one commissioner refused to yield it until the 1984 Act finally became effective.

Apart from the confusion surrounding the proper role of the timing element of competition in a new cumulation analysis, the overall analytic elements used by the staff and the Commission majority are appropriate. What remains to be investigated is how certain of these elements should be interpreted.

51 This change is particularly relevant to a consideration of whether there is any remaining ground for a de minimis exception to the cumulation mandate. See infra text accompanying notes 222-41.

52 "Until such time as the provisions of the [1984 Act] relating to cumulation become effective, I shall continue to require a showing of coordinated activity by the importers as a necessary but not sufficient condition of cumulation." Carbon Steel Wire Rod from Argentina and Spain, USITC Pub. 1598, Inv. Nos. 731-TA-157, -160 (Final) 18 n.7 (Nov. 1984)(views of Vice-Chairwoman Liebeler). This coordinated activity standard may have been what the legislative history of the 1984 Act referred to in commenting vaguely on the use by some commissioners of standards deemed "inappropriate." See, e.g., REFORM ACT REPORT, supra note 44, at 37, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5164 ("Commissioners have imposed conditions which do not seem justified."). Presumably, the "coordinated action" standard was based on the idea that cross-responsibility could only be founded upon something akin to, if not actually, a conspiracy.
IV. "SUBJECT TO INVESTIGATION"

When are imports "subject to investigation?" The clearest case is presented when imports from several countries enter the United States at the same time, when they all benefit from the same kind of unfair practice, and when the domestic industry files petitions simultaneously. In such a case, there can be little doubt that Congress intended the Commission to cumulate import statistics when considering whether the domestic industry has been injured. The more difficult cases arise when the petitions are filed at different times, some of the petitions have already received final injury determinations, different unfair practices are alleged, or some of the cases do not receive injury determinations under the United States trade laws.

The legislative history of the 1984 Act clarifies little in these areas of inquiry. The hearings did not address these issues at all. Relevant discussion focused merely on the simplest cases, without considering the more complex situations. The bills which became the Act, together with the congressional reports, merely repeat the phrase "subject to investigation" without explaining it. The question therefore remains: When is it appropriate to cumulate in these more complex situations?

In answering this question, one must be careful to distinguish "subject to investigation" from the timing of marketing the imports. In es-


54 A report by the House Ways and Means Committee on H.R. 4784, later absorbed into the bill that became the 1984 Act, referred to mandating "cumulation of imports of like products from two or more countries under simultaneous investigation." REFORM ACT REPORT, supra note 44, at 8, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5134 (emphasis added). A representative of domestic interests similarly stated: "We do specifically request that Congress require the International Trade Commission to cumulate where the product is fungible and where cases are brought simultaneously." Options to Improve the Trade Remedy Laws, Hearings Before the Subcomm. on Trade of the House Comm. on Ways & Means, Part 2, 98th Cong., 1st Sess. 617 (1983)(statement of Terence P. Stewart, Esq.) (emphasis added)


56 See generally 1984 U.S. CODE CONG. & ADMIN. NEWS 4910.

57 "Of course, imports of like products from countries not subject to investigation would not be included in such cumulation." H.R. REP. No 1156, supra note 45, at 173, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5290; REFORM ACT REPORT, supra note 44, at 37, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5164; see SUBCOMM. ON TRADE, HOUSE COMM. ON WAYS & MEANS, 98TH CONG., 2D SESS., REPORT ON H.R. 4784: TRADE REMEDIES REFORM ACT OF 1984 27 (Comm. Print 1984).
sence, "reasonably coincident" marketing creates the possibility of multiple causation of injury to the domestic industry.\textsuperscript{58} In contrast, the "subject to investigation" standard relates to administrative efficiency, international obligations, and fairness of substantive result.\textsuperscript{59} Naturally, there is some correlation between the two concepts in that coincident imports are more likely to lead to simultaneous or overlapping investigations. Nonetheless, it does not follow that the two concepts are coterminous.

A. Purposes of the "Subject to Investigation" Standard

The following are the purposes most likely intended by the "subject to investigation" standard: 1) promoting administrative economy; 2) maintaining parallelism of result for essentially similar cases; 3) promoting fairness by limiting the effect of an injury finding to those countries or importers actually participating in the Commission proceeding; 4) satisfying GATT standards of causation; 5) encouraging domestic diligence in bringing petitions; and 6) not burdening domestic parties with the responsibility for investigation timing beyond their control. A discussion of these six purposes of the standard is given below.

1) Divided investigations harm administrative efficiency and economy because new investigations of the same industry will require essentially duplicative steps to be taken. Duplicative staff time is also involved. Although some work duplication may be avoided,\textsuperscript{60} much of the numerical analysis and summarization must be redone. In addition, largely duplicative requests for information must be made, at least to members of the domestic industry, if not to members of the channels of common distribution and to end users.\textsuperscript{61} Since the Commission sometimes has difficulty obtaining relevant information,\textsuperscript{62} divided investigations of industries may render accurate information gathering more

\begin{itemize}
\item \textsuperscript{58} See supra text accompanying notes 41-46.
\item \textsuperscript{59} See infra text accompanying notes 60-80.
\item \textsuperscript{60} Questionnaires, for example, may be reused with a minimum of revision. Congress has to be concerned with designing legislation to avoid "unnecessary and costly investigations which are an administrative burden" on the Commission. S. REP. No. 1298, 93d Cong., 2d Sess. 171, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7186, 7308.
\item \textsuperscript{61} Completed questionnaires are part of the Commission record in a Title VII investigation. 19 C.F.R. § 207.2(i)(1) (1986). Such questionnaires may have subpoena force. 19 C.F.R. § 207.8 (1986).
\item \textsuperscript{62} See Certain Welded Carbon Steel Pipes and Tubes from Taiwan and Venezuela, USITC Pub. 1639, Inv. Nos. 731-TA-211 to -212, at 13 (Feb. 1985). Timely questionnaire responses were received from manufacturers representing less than 10% of domestic shipments of line pipes and tubes. The Commission voted in the negative as to line pipes and tubes largely on the basis of this "extraordinarily low" response. Id.
\end{itemize}
difficult. Such investigations may also affect substantive results in an un-
desirable way.\textsuperscript{63}

2) If statistics in one investigation, for example, imports from the
country Alpha, can influence the outcome of another investigation, for
example, imports from country Beta, then equitably, the Beta statistics
should influence the outcome of the Alpha investigation. Balancing
against this is the argument that allowing the Alpha investigation to be
decided on partial information is no reason to allow the Beta investiga-
tion to be decided on partial information, now that full information is
available. The only real risk is that imports from Alpha will not have a
duty imposed on them that would have been imposed had the Beta im-
port statistics been considered. Weighing the merits of the latter argu-
ment requires balancing the achievement of some substantively proper
results against the arbitrariness of reaching different results in essentially
identical investigations brought at different times.\textsuperscript{64}

3) If injury could be found by cumulating all imports, whether or
not under investigation, into an investigation of imports from the country
Gamma, then primary injury causation could be from fairly-traded im-
ports, with the unfairly traded imports being only an ancillary cause. In
effect, statutory remedies would be used to counter competition as a
whole, rather than against only those elements of competition which are
unfair. The United States import relief statute,\textsuperscript{65} which is designed to
protect domestic industries against injurious \textit{fair} trade, requires that the
imports be a "substantial cause" of injury.\textsuperscript{66} This is defined as requiring
the imports to be at least as important a cause of injury as any other
cause.\textsuperscript{67} Any attempt to use fair imports as part of a cumulative injury
analysis directed against allegedly unfair imports would therefore result
in holding the fair imports to too low a standard of injury causation.
Furthermore, it is inequitable to hold one source responsible for produc-
ing all the fairly-caused injury from another source.

4) To the extent that cumulation allocates injury causation from
one source to another, GATT may be violated.\textsuperscript{68} Under GATT, no com-
 pensatory duty may be imposed on a signatory's unfair imports unless

\textsuperscript{63} Id. at 17-21 (dissenting views of Commissioner Eckes concerning line pipes and tubes).

\textsuperscript{64} In congressional hearings prior to passage of the 1984 Act, one witness suggested that Con-
gress should consider allowing respondents in trade actions to join third parties as corespondents, to
limit the risk of this kind of arbitrariness. \textit{Options to Improve, Part 2, supra} note 54, at 906-07
(statement of Robert M. Gottschalk, Esq.).

\textsuperscript{65} 19 U.S.C. § 2251.

\textsuperscript{66} 19 U.S.C. § 2251(b)(1).

\textsuperscript{67} Id.

\textsuperscript{68} See Agreement on Articles VI, XVI and XXIII. \textit{supra} note 10, at 524. For an expression of
Congress' desire to avoid "impediment[s] to trade" arising from the unfair trade statutes, see H.R.
injury causation is shown.\textsuperscript{69} GATT requires a direct causal link for each country.\textsuperscript{70} Cumulation may be used to impute injury to each country by reason of a direct causal link to a group of countries. If so used, cumulation may violate GATT.\textsuperscript{71}

5) Domestic industry diligence in bringing petitions is desirable. The domestic industry is usually in the best position to know which imports are causing it harm. Further, the domestic industry is usually the only party bringing petitions.\textsuperscript{72} It is difficult, however, to establish a uniform standard of diligence that is fair to impose upon all domestic industries. Unless there are special considerations behind a failure of a domestic industry to bring all petitions relevant to the same product at or near the same time,\textsuperscript{73} perhaps the domestic industry should be held responsible for not doing so.

6) Although domestic parties bring petitions at times of their choosing, they do not control the timing of the ensuing investigations.

\textsuperscript{69} Agreement on Articles VI, XVI and XXIII of the General Agreement, supra note 10, at 523-25. If cumulation is used to tie together injury and unrelated imports (scapegoats) then GATT is violated. But this statement, though true, begs the issue since cumulation is only defensible to the extent that it is a method of determining injury causation. This may suggest, however, that a \textit{de minimis} standard is appropriate for GATT signatories in the cumulation analysis. See infra text accompanying note 223-41.

\textsuperscript{70} See supra notes 10-14 and accompanying text.

\textsuperscript{71} Cumulation may also be used to allocate injury causation from non-GATT sources to GATT sources. This would also be a violation of the letter and the spirit of GATT. See infra text accompanying notes 202-12.

\textsuperscript{72} A domestic industry is not the only party that may commence an antidumping or countervailing duty action, as the Department of Commerce may "self-initiate" an investigation. 19 U.S.C. §§ 1671a(a), 1673a(a). However, this self-initiating power has rarely been invoked. An exception existed under the Steel Trigger Price Mechanism operating in the late 1970s and early 1980s. The Trigger Price Mechanism worked to establish floor price levels below which imported steel products could not fall without the Department of Commerce initiating \textit{sua sponte} an antidumping investigation. Proposed Amendments to the Customs Regulations Relating to the Documents and Information Required to be filed at the Time of Importation of Certain Articles of Steel, 42 Fed. Reg. 65,215 (Dept. Treas. 1977). E.g., Certain Steel Wire Nails from Japan, the Republic of Korea, and Yugoslavia, USITC Pub. 1175, Inv. Nos. 731-TA-45 to -47 (Prelim.) (Aug. 1981). For a good analysis of the background and workings of the Trigger Price Mechanism, see Note, \textit{Effective Enforcement of U.S. Antidumping Laws: the Development and Legal Implications of Trigger Pricing}, 10 LAW & POL.'y INT'L BUS. 969 (1978). More recently, the Commerce Department announced that it was self-initiating an antidumping investigation against 256K dynamic random access memory chips from Japan. Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan, 50 Fed. Reg. 51,450 (Dept. Treas. 1985) (initiation of antidumping investigation). This remains, however, an isolated incident at the time of writing of this article.

\textsuperscript{73} For example, information resources in the domestic market may be inadequate to identify with ease all import sources, or the domestic industry might be so fragmented that individual petitioners may not care about injury to other segments of the industry.
Designation of some actions as "extraordinarily complicated," the extension of an antidumping investigation, or the suspension and later recontinuation of an investigation may delay some investigations. In at least one case, a country chose to become a GATT member while an action under the non-GATT countervailing duty law was underway. This required termination of that investigation and commencement of a new one under a different statutory provision. This timing factor mitigates the influence of the domestic diligence factor.

Precisely how these combined factors guide the interpretation of "subject to investigation" remains to be seen. The significance of these factors will vary from context to context. This Article now turns to defining the scope of "subject to investigation" in contexts that vary in terms of the timing of the investigations, the phase of the investigations, and the types of unfair trade practices alleged by domestic industries.

B. Cumulation between Overlapping Investigations

When petitions are filed under the same statutory provision at different times, the Commission investigations may overlap some or not at all. To better understand overlapping investigations, assume domestic widget manufacturers file on March 1 an antidumping petition against imports from Alpha. If the domestic widget industry then brings a petition against allegedly dumped widgets from Beta, the industry could do so at any time after March 1. If the petition regarding Beta widgets is filed after March 1 and before the preliminary injury determination concerning Alpha imports is reached, the preliminary injury investigations will overlap to some degree and will be able to inform and influence each other. This is a clear case of "subject to investigation" coverage and no

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74 19 U.S.C. § 1671c(c)(countervailing duty investigations); 19 U.S.C. § 1673c(c)(antidumping investigations).


76 19 U.S.C. § 1671c(g)(countervailing duty investigations); 19 U.S.C. § 1673c(g)(antidumping investigations).

77 Options to Improve, Part 2, supra note 54, at 771.


79 Prestressed Steel Wire Strand from Spain, USITC Pub. 1281, Inv. No. 701-TA-164 (Final) at A-1 (Aug. 1982)(notice of Spain joining GATT was transmitted to the Commission on Apr. 26, 1982, while a § 303 investigation regarding Spanish imports was underway).

80 Id. For a domestic perspective on the effect of the Spanish accession to GATT upon the trade investigations, see Options to Improve, Part 2, supra note 54, at 617.

81 A countervailing duty petition would lead to the same analysis. Details of the timing, not relevant here, would differ.

82 There is no suggestion from any source that the Commission should not cumulate, as not being "under investigation," imports from two countries as to which petitions were filed on the same day.
dispute arises as to the applicability of the cumulation analysis. This case demonstrates adequate domestic diligence, permits administrative efficiency, limits the causation analysis to allegedly unfairly traded imports, allows cross-fertilization of results, obviates the need to inquire as to why the domestic parties were unable to control the timing of investigation, and presents no greater case for arguing that GATT has been violated than is presented by any other circumstance of timing and cumulation.

This situation has arisen repeatedly in recent Commission investigations both before and after the effective date of the 1984 Act. Where there has already been an affirmative preliminary determination with respect to Alpha imports, the Commission has normally cumulated Alpha statistics with Beta statistics for purposes of the Beta preliminary determination. This approach seems sound. Although domestic diligence may not be as evident, the domestic industry must have acted with reasonable diligence to have brought petitions within a few months of each other. Administrative resources may be saved to some extent by assigning personnel familiar with the Alpha analysis to the Beta investigation. The importers were probably aware of each others' investigations and may have pooled defense information and resources to demonstrate health in the domestic industry.

If the domestic widget industry brings the petition regarding Beta widgets between the preliminary and the final injury investigations concerning Alpha imports, then the two investigations will overlap. However, the Alpha final determination may precede the preliminary Beta determination. Furthermore, the injury tests for final determinations are more difficult to satisfy than are the tests for preliminary determinations. These disparities in timing and tests may cause difficulties if the Commission attempts to cumulate statistics from Alpha and Beta in either investigation.

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83 Certain Carbon Steel Pipes and Tubes from the People's Republic of China, the Philippines, and Singapore, supra note 50; USITC General Counsel Memorandum GC-F-196 (June 1982) (LEXIS, Itrade library, Gcm file).

84 See, e.g., Oil Country Tubular Goods from Argentina, Canada, and Taiwan, supra note 47; Certain Welded Carbon Steel Pipes and Tubes From India, Taiwan, Turkey and Yugoslavia, supra note 47; Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela, supra note 53; Certain Welded Carbon Steel Pipes and Tubes from Taiwan and Venezuela, supra note 62; Certain Steel Products from Spain, USITC Pub. 1255, Inv. Nos. 701-TA-155 to -163 (Prelim.) (June 1982). See also Carbon Steel Wire Rod from Poland, Portugal, and Venezuela, USITC Pub. 1701, Inv. Nos. 701-TA-243, -244 (Prelim.), 731-TA-256 to -258 (Prelim.) (May 1985) (Chairwoman Stein and Vice-Chairwoman Liebeler acted with respect to the German Democratic Republic).

85 For example, importers may combine efforts to show a pattern of sales lost by them to the domestic industry. Antitrust and other business considerations may prevent some types of information sharing.

86 See supra text accompanying notes 15-20.
Even if the Alpha statistics are relevant to the Beta preliminary investigation, two questions remain: 1) Should the statistics being developed in the Beta investigation be used to help find injury in the final determination for Alpha, even if a preliminary affirmative determination for Beta has not yet been made?; and 2) Should the Alpha statistics and results, if affirmative, be used not only for the Beta preliminary analysis but also for the Beta final analysis?

With respect to the first question, such cross-fertilization would do much to prevent an inequality in the results. The risk, however, is that there may be a preliminary negative determination with respect to Beta or that a preliminary affirmative Beta determination may be followed by a negative final Beta determination. This could happen even without the cumulation of Alpha statistics in the Beta investigations if, for example, new facts or statistics indicated that no domestic injury existed or if the Commerce Department issued a "no dumping" or "no subsidy" determination. Beta imports would then not be subject to any antidumping or countervailing duties, yet would have been considered a part of the causal link attributed to Alpha. This is obviously an unfair result. There appears to be no easy answer to this analysis unless, perhaps, a *de minimis* analysis is used to decrease the incidence of such inequities.

As the Beta negative determination by either the Commission or the Commerce Department could arise from a variety of circumstances beyond low market share and changes for the better in domestic statistics, even a *de minimis* approach would not eliminate all unfair results.

The Commission legal staff has suggested an alternative remedy to this problem. They propose that, if Beta is later found to be noninjurious, Alpha could file for a § 751(b) review. This would be a viable approach to rectify the problem. This approach could, however, be made an even more viable option if the Commission were to present its analysis of Alpha in the alternative: "if Beta is cumulated, then Alpha is injuri-

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87 Remember, cumulation is a causation analysis, not an injury analysis.
88 See *infra* text accompanying notes 201-20.
ous; if Beta is not cumulated, then . . . .” This would signal the outcome of a § 751(b) review, thereby discouraging unnecessary reviews and allowing expedited treatment of necessary ones.

As to the second question, a conflict arises between common sense and the most restrictive reading of the words “subject to investigation.” The basic purpose of a preliminary investigation is to weed out nonmeritorious petitions on the basis of initial factual findings. The final investigation, in contrast, is designed to develop a much greater store of information for the Commission to consider. For information to be considered relevant to a preliminary investigation and then discarded in a final investigation stands the process on its head. It moves from more to less information rather than the other way around. There would be no point in continuing the Beta investigation through preliminary cumulation analysis, knowing that cumulation would be improper during the final investigation. Indeed, this might encourage fishing expeditions for other causal analyses at the expense of Commission staff time. Although the Alpha imports are no longer “subject to investigation” at the time of the Beta final determination, a similar objection could be made even if the petitions were filed one day apart and the final determinations came down one day apart. This restrictive linguistic analysis goes too far in seeking to prevent cumulation.

Potential inequality of result is not severe enough to warrant noncumulation whenever petitions are filed somewhat out of phase. To refuse to cumulate on this basis would require a domestic industry seeking redress from combined-source injury to control the timing of petitions to within a period of a few months. This may be possible for an essentially monolithic industry. Where, however, no strong central power or interest group exists in the industry, the act of one industry member filing a petition against imports from Alpha should not preclude other industry members from filing petitions in the coming months. Where there is no uniformity of structure among the industries filing un-

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90 American Lamb Co., 785 F.2d at 1004.
91 Admittedly, it is not the information that is discarded, but the analysis. This has the effect of disregarding an aspect of causation that may have led to the initial finding of a reasonable indication of injury.
92 There is one additional twist in the area of overlapping investigations that deserves mention. In one preliminary determination where the Commission was faced with overlapping investigations of the type under consideration here, Chairwoman Stern cumulated the Alpha statistics into the Beta analysis to determine whether there was a reasonable indication of material injury, but refused to cumulate to determine whether there was a reasonable indication of the threat of material injury. Oil Country Tubular Goods from Austria, Romania, and Venezuela, supra note 53. This article expresses no opinion on this intriguing distinction.
fair trade petitions, flexibility is needed. Any other reading would strain the meaning of "subject to investigation."

The Commission staff has proposed a possible solution to the problem of overlapping investigations. They have suggested on several occasions that cumulation of imports may be proper after the date of a final determination of injury with respect to all imports arriving in the United States prior to the date cash deposits\textsuperscript{93} to remedy the unfair trade practice\textsuperscript{94} are made. This suggestion is based upon the observation that it is not until the cash deposits are posted that the imports cease to create new injury to the domestic industry.\textsuperscript{95} However, the staff acknowledges that this proposal concerning cash deposits is not based upon a strict reading of the statutory language.\textsuperscript{96}

This cash deposit analysis creates unnecessary problems. There may be some delay and difficulty in determining import volume just before the date the cash deposits are posted. There may also be serious grounds for review if the amounts of the cash deposits are later challenged as being insufficient. In addition, by conceding that the cash deposit analysis is not strictly based upon the terms of the statute, the staff exposes to court challenges the Commission determinations based upon this approach. Finally, this acknowledgment reveals the strained nature of the analysis.

In great part, the staff's choice to use the date of the cash deposits may arise from its institutional concern over specific deadlines for determinations. By focusing on the date of a determination as the decisive criterion of the "subject to investigation" standard, the staff is forced into this intriguing, although flawed, analysis in order to reach even minimally out-of-phase investigations. By focusing on the period of the investigation, rather than the date of the determination, the approach suggested by this Article avoids these problems while remaining within a fair reading of the statutory language.

In summary, it would seem that investigations which overlap to some degree will, as a general rule, be appropriate for cumulation. Elements of economy and efficiency, domestic diligence, and the purposes


\textsuperscript{95} USITC General Counsel Memorandum GC-I-230 (Nov. 1985)(LEXIS, Itrade library, Gcm file); GC-I-109, supra note 93; GC-I-082, supra note 93; GC-I-060, supra note 93.

\textsuperscript{96} GC-I-188, supra note 93; GC-I-082 supra note 93; GC-I-060 supra note 93.
behind a cumulation analysis suggest that this result is reasonable, even where the investigations are out of phase to a considerable degree. This result can be reached within a fair reading of the statutory provision. This approach should, however, be limited to exclude investigations with so little overlap that no meaningful cross-fertilization of analysis or result can occur. In these cases, elements of fairness of substantive outcome are very different from the usual overlap case, diligence is less obvious, and efficiency is greatly diminished. For these reasons, the situation of "no effective overlap" should be considered as being a "no-overlap" situation.97

C. Cumulation with Final Determinations

Where investigations do not overlap—where Beta files after Alpha's final order has been issued—a serious question arises as to whether cumulation of Alpha into Beta's investigation would be appropriate. The operative language of the new cumulation provision, "subject to investigation," appears to require some present investigatory risk98 to imports before their statistics must be cumulated. The legislative history of the 1984 Act would appear to support this view. A Senate provision that would have required cumulation of imports from countries subject to final orders, as well as from countries under investigation, was rejected in Conference Committee in favor of the House language requiring that the imports to be cumulated all be "subject to investigation."99

1. Section 751(a) Reviews as "Investigations"

Arguments have been made before the Commission that imports subject to a final dumping or countervailing duty order might still be subject to investigation under the unfair trade laws and thus must be cumulated in current investigations. In particular, the Commission has been urged to consider the potential for a § 751(a) annual review of an

97 See infra text accompanying notes 98-121.

98 In one memorandum to the Commission, dated between the passage of the 1984 Act and its effective date, the legal staff notes petitioners' views that the "subject to investigation" standard "should be deemed to include imports which were covered by an investigatory stage of an unfair trade proceeding at a time during the three year period of analysis in the instant investigation." The staff did not support this view. USITC General Counsel Memorandum GC-H-307 (Oct. 1984)(LEXIS, Itrade library, Gcm file)[hereinafter GC-H-307].

99 H.R. REP. No. 1156, supra note 45, at 173, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5290. Curiously, the Commission legal staff, in support of its position favoring cumulation of statistics from past investigations into ongoing investigations, has referred to this legislative history as illustrating how Congress "removed the limitation regarding final orders contained in the Senate version of the provision." GC-H-060, supra note 93 (emphasis added).
existing final duty order\textsuperscript{100} as satisfying the "subject to investigation" requirement.\textsuperscript{101} There are several reasons why it should not satisfy the requirement.

First, potential for review is an overly broad argument.\textsuperscript{102} If such potential could satisfy the "subject to investigation" requirement, then a \textit{a fortiori} potential for § 701 or § 731 action could also satisfy "subject to investigation." Yet imports from every country are subject to potential investigation under these provisions. Hence, every country, whether or not subject to a current investigation, could be cumulated into an ongoing investigation.

Second, if actual, not potential, § 751(a) status were the determinant, the outcome might be dictated by arbitrary timing. Such reviews are conducted on an annual basis.\textsuperscript{103} On the one hand, whether a country subject to a final order was cumulated into a new investigation would depend upon the happenstance of when the filing of the current petition occurred. In contrast, it is unlikely that the domestic industry would ignore the timing of an upcoming § 751(a) review when selecting its filing date. This would create a situation akin to grabbing the gold ring in an old-fashioned merry-go-round: attorneys for domestic industries would concentrate their energies upon selecting a filing date based upon the scheduling of a § 751(a) review, lest they be required to wait until the next review period. Congress could hardly have meant to impose this arbitrary link of timing and substantive outcome on the statutory scheme and the domestic industry. Further, if several nonoverlapping § 751(a) reviews were scheduled to occur with respect to a number of outstanding final orders relating to the same industry, then domestic parties would have to choose their timing and, in so doing, select some, but not all, countries for cumulation. This choice would not have been written silently into the statute.

Third, finding a § 751(a) review to satisfy the statutory language is improper in that § 751(a) involves a "review," which is more limited than an "investigation."\textsuperscript{104} Technically, the words do not fit. Therefore,

\textsuperscript{100} 19 U.S.C. § 1675(a).
\textsuperscript{101} Certain Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden, and Venezuela, USITC Pub. 1642, Inv. Nos. 701-TA-225 to -234 (Prelim.), 731-TA-213 to -217, -219, -221 to -226, -228 to -235 (Prelim.) 48 (Feb. 1985)(views of Vice-Chairwoman Liebeler). This was the first injury investigation to be conducted under the terms of the 1984 Act.
\textsuperscript{102} \textit{Id.} at 49.
\textsuperscript{103} 19 U.S.C. § 1675(a).
\textsuperscript{104} Section 751, 19 U.S.C. § 1675, is entitled "Administrative Review of Determinations" and use of the term "review" is consistent throughout the section. \textit{But see AI Tech Specialty Steel Corp. v. United States}, 745 F.2d 632 (Fed. Cir. 1984).
applying the plain terms of the statute, and interpreting the trade remedy statutes in pari delicto, imports subject to a § 751(a) review are not "subject to investigation" and should not be cumulated with ongoing investigations.

Fourth, the purposes of § 751(a) belie the argument that such a review satisfies the "subject to investigation" requirement, thus allowing cumulation to occur. Section 751(a) was designed to estimate the current amounts of duties owed and to provide a sunset for outstanding antidumping and countervailing duty orders once the importer can establish that the goods are no longer being traded unfairly.\(^\text{105}\) Thus, § 751(a) was enacted, in part, for the benefit of importers and foreign parties who are conforming their behavior to fair standards. It was also enacted, in part, to conform with GATT requirements\(^\text{106}\) that imports be both unfair and injurious before antidumping or countervailing duties may be imposed. Imports which are no longer both unfair and injurious should no longer be subject to outstanding duty orders. By removing fairly-traded or noninjurious imports from the list of outstanding orders, the Customs Service is left free to concentrate its enforcement energies on presently injurious unfair imports.\(^\text{107}\)

Thus, § 751(a) operates to benefit compliant foreign interests, multilateral trade policy, and administrative efficiency. It was not enacted as a further weapon against imports from other countries or as a tool to allow domestic parties a greater chance of establishing injury before the Commission. It may be that countries subject to outstanding final orders should be cumulated with current investigations, but § 751(a) is not appropriate support for this argument.

It might be argued that outstanding final orders include imports that are subject to investigation in that these imports are subject to the results of an investigation previously undertaken by the Commission.\(^\text{108}\) Clearly this strains the statutory language. Unless imports from Alpha are under investigation at the same time as the Beta investigation is under way, Alpha imports are not "subject to investigation" and should not be cumulated under § 771(7).

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\(^{106}\) See supra notes 11-14 and accompanying text.


\(^{108}\) See Certain Welded Carbon Steel Pipes and Tubes from Taiwan and Venezuela, supra note 62.
2. Fitting Final Orders into the Statutory Framework

Underlying the efforts to bring outstanding final orders into the language of "subject to investigation" is a belief that such final orders should be cumulated for policy and analytic reasons despite the strictures of the statutory language. Although it can easily be argued that this is a decision for Congress to make, this belief has some merit. Perhaps these concerns could be addressed by another method, consistent with the statute and legislative intent, for taking into account the earlier investigation.

The basic reason proponents put forth to include final orders in a cumulation analysis is that inclusion is necessary to remedy the "hammering effect" of injury from multiple-source imports. It was this hammering effect that concerned Congress when it considered cumulation. That the unfair and injurious imports have been subjected to an outstanding final order does not mean the domestic industry has recovered from the injury. The order signifies that the domestic industry should suffer no new injury from that source. If Beta imports subsequently enter domestic commerce at an unfair price, they find an already weakened industry more prone to injury. This greater likelihood of injury, proponents say, is why the imports should be cumulated.

Several counterarguments exist to the hammering effect argument. The one raised most frequently is that, once a final order has been entered, the imports subject to that final order are, by definition, no longer causally relevant to a new injury analysis. This counterargument, while superficially attractive, overlooks economic reality and congressional concerns. A domestic industry does not recover from a period in which it has been suffering material injury merely because a final order has been entered against the unfair imports. Nor does the domestic industry recover simultaneously with such an order. Congress instructed the Commission to determine material injury after analyzing domestic industry trends in profitability, market share, capacity utilization, return on investments, employment, and product pricing, among other factors. The statistics in this area do not reach appropriate noninjury-demonstrating levels immediately upon removal of the offending import advantage. Several of these factors indicate injury precisely because

109 See supra note 3.
110 See supra notes 1-2 and accompanying text.
111 Certain Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden, and Venezuela, supra note 101.
112 Id.
114 "In the case of the steel industry, a large measure of our current capital shortfall is attributable to the cumulative effect of years of lost sales and price suppression at the hands of unfairly traded
they are long-term in effect. Lost market share may be difficult to recapture. Skilled employees may be difficult to rehire or replace. Steady declines in capacity utilization may have led to actual diminishment of capacity and take years to replace.

Thus, although final order imports are now fairly traded, the concern over the injury caused while they were unfairly traded has not ended. While this old source may have caused no new injury, there may be a causal link between this old source and injuries inflicted by another source. How much of a causal link there will exist will vary from case to case. Three factors relevant to such an inquiry are: 1) the length of time between the final order for Alpha and the injury investigation for Beta; 2) the nature of the injury to the domestic industry from the Alpha imports; and 3) the nature of the industry subject to investigation. A discussion of each factor is given below.

1) The longer the time, the less likely it is that imports from Beta will have been able to inflict an injury related to the injury caused by Alpha. Thus, the longer the time span, the more appropriate it is to allow the Beta investigation to proceed without reference to the Alpha statistics.

2) If Alpha’s imports inflicted a flesh wound—e.g., market share, price, and unskilled labor hours fell by small percentages; the domestic industry was still profitable but at lower than anticipated levels; and there were no other indications of significant domestic injury—then imports from Beta are unlikely to inflict an injury related to that produced by the Alpha imports. If, however, Alpha’s imports dealt the domestic industry a more severe blow—e.g., industry losses increased over several years, factories shut down, layoffs of skilled labor occurred, industries lost technological edge, and commitments for long-term contracts went to others—then the Beta imports are likely to inflict a related injury. In either situation, it is not the Alpha import statistics that are relevant, but the nature of the injury caused by the Alpha imports.

3) Although this factor is closely related to the second factor, it is worth considering separately. Some industries are able to recover from serious injury more quickly than others. Factors including capital investment requirements, long-range contract patterns within the industry, and development times for input materials, processes, and product development are all relevant to the industry’s ability to recover quickly from injury.

Each of these factors must be analyzed on a case-by-case basis. De-
pending upon the factor under examination, the relevance of the Alpha-induced injury to the Beta injury will vary.

The greatest difficulty in analyzing Beta by cumulating Alpha with Beta statistics arises from the fact that cumulation is an all-or-nothing tool. Commissioners must cumulate statistics totally or not at all, prompting arbitrary decisions as to cumulation in marginal cases. What is needed is a flexible approach reflecting the impact of the shifting time frames, injuries, and industries involved.

Pre-1984 Act determinations may provide a solution. During this period, a prior pattern of injurious, unfair imports was sometimes treated as relevant to a new injury analysis. This was achieved by considering the prior injury to the domestic industry as one of the aspects of competition by which the injury to the domestic industry had to be measured. In investigations utilizing this "competitive factors approach," the Commission considered the imports not under investigation as factors indicating increased competitive pressure on the domestic industry. This approach, which does not involve cumulation, would be sufficiently flexible to allow the domestic industry some measure of protection from repeated unfair competition, yet would focus the inquiry on the condition of the industry and its whole or partial recovery from the previous injury.

In the competitive factors approach, imports not being cumulated, but considered relevant to an injury analysis, are considered to have placed the domestic industry in a more vulnerable state than the industry would have been in otherwise. Extending this analysis to its logical conclusion, the existence of a large number of noncumulated imports that

115 For example, in Certain Welded Carbon Steel Pipes and Tubes from Taiwan and Venezuela, supra note 62, at 12, Chairwoman Stern cumulated allegedly less than fair value ("LTFV") imports from Brazil and LTFV imports from Taiwan in her analysis of allegedly LTFV Venezuelan imports, while Commissioner Rohr cumulated LTFV imports from Korea as well. See also Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela, supra note 84; Certain Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden, and Venezuela, supra note 101.

116 The investigations in which the Commission used this approach did not involve all of the situations in which this Article proposes the approach as an appropriate solution. See infra text accompanying notes 130-214. Nevertheless, the basic concept the Commission used in those investigations is sound and deserves wider application in light of increased pressure upon the Commission to extend its injury analyses beyond consideration of single import factors in isolation. "Although we did not cumulate imports from [the country under investigation] with imports from other countries, we did consider these [latter] imports . . . as factors in the market which may have contributed to the overall condition of the domestic industry." Prestressed Concrete Steel Wire Strand from the United Kingdom, USITC Pub. 1343, Inv. No. 731-TA-89 (Final) 7 n.23 (Feb. 1983).

117 "Competitive factors approach" is a name adopted for convenience in this article. This approach never received a name from the Commission.

118 See, e.g., Prestressed Concrete Steel Wire Strand from the United Kingdom. supra note 116; Prestressed Concrete Steel Wire Strand from Spain, supra note 79.
are considered as competitive factors in the marketplace would strongly support an argument that the unfair imports under investigation found a weakened industry readily susceptible to injury.\footnote{This is somewhat akin to the tort concept of having a tortfeasor be responsible for the injury he or she has done to a victim, even if the victim was unusually prone to such an injury.} Thus, for example, import volume and market share statistics that might otherwise indicate no injury to the domestic industry would now support an affirmative injury determination. Injury would be readily found. Injury would not, however, be found automatically if, for example, the imports under investigation were cumulated with imports subject to a recent affirmative injury determination.

In conclusion, there is no statutory basis for cumulation of statistics with respect to imports already subject to a final order when a new petition is filed. Yet imports already subject to a final order have caused injury. This injury, though no longer being freshly caused, may have persisted up until the present. If this is true, the prior determination is relevant to the new petition.\footnote{This continuing injury should not be used against the petitioner as an alternate causal explanation for injury from a source other than the imports under investigation.} The nature of continuing injury, as opposed to continuing causation, suggests that the old harm should be viewed as a condition of the domestic industry as it faces new unfair imports, not as a factor establishing causation for injury from the new imports. Prior injury should be considered, along with its degree of attenuation or recovery, and new injury or a limitation of recovery would constitute the material injury sought in the statute. Threat of material injury could thus encompass the threat of material limitation of recovery.\footnote{This is analogous to how price suppression can be as telling as price depression in a Commission injury analysis. 19 U.S.C. § 1677(C)(ii)(II).}

D. Cross-Cumulation

One area of cumulation law which has been the subject of considerable debate following the passage of the 1984 Act is that of cross-cumulation. Cross-cumulation is the cumulation of statistics relating to dumped imports into a countervailing duty injury investigation or of statistics relating to subsidized imports into an antidumping injury investigation. In the simplest form of this issue, if the Commission is conducting simultaneous injury investigations with respect to dumped widgets from Alpha and subsidized widgets from Beta, should or must it cumulate the import statistics in assessing injury to the domestic widget industry? Although the Commission has frequently been called upon to cross-cumulate, it
has never done so. Whether the 1984 Act requires cross-cumulation is the subject of this section.

I. History of Cumulation in Countervailing Duty Investigations

The Commission has only recently come to accept the position that it may cumulate in dealing with subsidy investigations. This issue first arose in 1982.\textsuperscript{122} The issue arose late because of the nature of the unfair act involved, namely subsidization.

In countervailing duty investigations, as opposed to dumping investigations, the exporting country is directly involved. The domestic industry complains of a subsidy provided by a country or political entity within a country.\textsuperscript{123} In contrast, the identity of the exporting country is irrelevant in antidumping investigations, whereas in countervailing duty investigations it is central. Hence, this argument may be stated: cumulating different countries, with different subsidies, makes no sense.

One exception always noted to this analysis is the customs union.\textsuperscript{124} Where a customs union acts as one entity to provide a subsidy, combining the import statistics with respect to different countries involved is proper. This does not represent cumulation in the strict sense. Rather, the customs union is treated as a single “country under the Agreement,” the Agreement being the GATT Subsidies Code. Since the customs union is defined as one country,\textsuperscript{125} cumulation is not needed to combine the import statistics. Furthermore, because the Commerce Department, and not the Commission, makes this determination, it is procedurally different from cumulation, although the effect of aggregating statistics is the same.\textsuperscript{126}

Countering the argument that the country is important in countervailing duty investigations is the argument that the Commerce Department deals with the country of origin of the unfairly traded goods, whereas the Commission makes only the injury determination. Injury

\textsuperscript{122} Hot-Rolled Carbon Steel Plate from Belgium and Brazil, \textit{supra} note 32; Hot-Rolled Carbon Steel Sheet from France, USITC Pub. 1206, Inv. No. 701-TA-85 (Prelim.)(Jan. 1982); Hot-Rolled Carbon Steel Plate from Romania, \textit{supra} note 32; GC-E-337, \textit{supra} note 31, at n.3. Interestingly, as early as June 1982, the Staff agreed with a petitioner that both the European Community Commission and the Canadian Antidumping Tribunal appear to cumulate imports under investigation regularly, even in countervailing duty investigations. GC-F-186, \textit{supra} note 31.

\textsuperscript{123} \textit{See supra} note 8.

\textsuperscript{124} An example of such an entity is the European Community. \textit{See} USITC General Counsel Memorandum GC-F-034 (Feb. 1982)(LEXIS, Itrade library, Gcm file)[hereinafter GC-F-034]; Sodium Gluconate from the European Communities, USITC Pub. 1169, Inv. No. 701-TA-79 (Prelim.) (July 1981).

\textsuperscript{125} 19 U.S.C. § 1677(3).

\textsuperscript{126} Sodium Gluconate from the European Communities, \textit{supra} note 124, at 8-9.
Cumulation of Import Statistics
7:433(1986)

determinations focus on the impact the imports have on the domestic industry, not the injury's source. Hence, this argument stresses the similarities between antidumping and countervailing duty investigations rather than their disparities. Recognizing these similarities, the Commission staff recommended the use of cumulation in countervailing duty investigations and the Commission accepted the recommendation.

With the passage of the 1984 Act, countervailing duty cumulation is no longer an issue. The cumulation requirement of § 612(a)(2)(A)(iv) specifically relates to countervailing duty investigations. Thus, cumulation is now proper in countervailing duty injury investigations as it has long been recognized to be in antidumping injury investigations.

2. Cross-Cumulation under the 1984 Act

The issue remaining is: What should the Commission do when faced with simultaneous countervailing duty and antidumping investigations? Only one commissioner, no longer with the Commission, had ever voted to cross-cumulate. He did so without much, if any, analysis of the ramifications of such a vote. Most of the current commissioners who have addressed the issue have rejected the idea. Yet the issue continues to survive. Indeed, the Commission’s own legal staff has repeatedly stated that cross-cumulation is not only permissible under federal law and international obligations, but is the preferable position under the

127 GC-E-337, supra note 31; GC-F-186, supra note 31.
128 See, e.g., Certain Steel Products from Belgium, Brazil, France, Italy, Luxembourg, the Netherlands, Romania, the United Kingdom, and West Germany, supra note 36.
129 See supra notes 37-38 and accompanying text.
130 Commissioner Frank expressly cumulated dumped British imports and subsidized imports from other countries with subsidized imports from Spain to find injury from the latter in his dissenting opinion in Prestressed Concrete Steel Wire Strand from Spain, supra note 79. In addition, it appears that he may have cross-cumulated in his separate opinion in an earlier determination, where he stated, “I conclude that there is a reasonable indication that allegedly dumped and/or subsidized imports . . . . are causing material injury . . . .” Certain Steel Products from Belgium, Brazil, France, Italy, Luxembourg, the Netherlands, Romania, the United Kingdom and West Germany, supra note 36.
131 One unanimous opinion stated that the Commission is not required to cross-cumulate and refused to do so, without further analysis. Iron Construction Castings from Brazil, Canada, India, and the People’s Republic of China, USITC Pub. 1720, Inv. Nos. 701-TA-249, -262 to -265 (Prelim.) 12 (June 1985)(Commission Eckes, however, did not join the discussion regarding cross-cumulation. Id. at 12 n.38). However, since the Court of International Trade’s decision in Bingham & Taylor Div. v. United States, 627 F. Supp. 793 (Ct. Int’l Trade 1986), holding that cross-cumulation is required under the 1984 Act, this refusal to cross-cumulate appears to have broken down. Commissioners Eckes and Lodwick, at a minimum, are now willing to cross-cumulate. Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, Kenya, Mexico, The Netherlands, and Peru, USITC Pub. 1877, Inv. Nos. 303-17, -18 (Prelim.), 701-TA-275 to -278 (Prelim.), 731-TA-327 to -334 (Prelim.) 26 n.18 (July 1986)
1984 Act. 132

Numerous arguments have been presented in support of cross-cumulation. A discussion of the pertinent arguments is set forth below.

(1) The cumulation provision is in the common definitional portion of Title VII relating to material injury 133 thus the provision is relevant to both antidumping and countervailing duty investigations. This provision is to be used in both types of investigations and does nothing to distinguish between the two or to treat them differently. 134

(2) Refusing to cross-cumulate would be to read an additional requirement into the statute—that the imports to be cumulated benefit from the same type of unfair trade practice. 135

(3) The language of the original House bill focused on the trading’s impact upon the domestic industry, not the type of unfair practice involved. 136

(4) The original House Report stated that the purpose of the cumulation provision was “to ensure that the injury test adequately addresses simultaneous unfair imports from different countries.” 137 This language does not distinguish different types of unfair trade. 138

(5) The injury standards for preliminary antidumping and countervailing duty investigations do not require the finding of a specific causal link between the injury and imports resulting from the particular type of unfair trade under investigation. This suggests that cross-cumulation is permitted (although not mandated) in preliminary investigations. To interpret the statute as permitting cross-cumulation in preliminary investigations without allowing it in final investigations is illogical and inconsistent. 139

(6) Under the 1984 Act, the Commerce Department is required to extend the date of a final subsidy determination to coincide with the date of a final LTFV determination if the petitioner requests and if the two investigations are initiated simultaneously and involve imports of the

132 See, e.g., GC-I-188, supra note 93; See also GC-H-307, supra note 98, in which the USITC's legal staff recommended that the Commission cross-cumulate even prior to the effective date of the 1984 Act, based on a perceived congressional mandate.
134 See GC-I-082, supra note 93; GC-I-060, supra note 93.
135 See GC-I-082, supra note 93; GC-I-060, supra note 93.
136 See GC-I-082, supra note 93; GC-I-060, supra note 93.
137 REFORM ACT REPORT, supra note 44, at 37, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5164.
138 See GC-I-060, supra note 93.
139 Id.
same class or kind of merchandise.\textsuperscript{140} This provision may have been designed to give the Commission greater opportunity to cumulate between investigations,\textsuperscript{141} however, it may also have been intended to provide greater administrative efficiency at the Commission.

(7) In investigations where the dumped imports are from nonmarket economies ("NMEs"),\textsuperscript{142} the unfair trade action will naturally resemble a subsidy because of the pervasive pricing control by the home country government. Indeed, because the Commerce Department has decided as a matter of law that the countervailing duty statute does not apply to NMEs,\textsuperscript{143} the refusal to cross-cumulate might very well hide a combined impact that otherwise would be cumulated. Dumping from a NME inevitably involves some government benefit comparable to a subsidy. Therefore, refusal to cross-cumulate is arbitrary, at least with respect to NME imports.\textsuperscript{144} However, the Court of International Trade in Continental Steel Corporation v. United States\textsuperscript{145} recently rejected the Commerce Department's interpretation of the countervailing duty law as inapplicable to NMEs. As a result, this argument is no longer valid.

(8) The unfair trade statutes are remedial, not criminal, and should be interpreted broadly.\textsuperscript{146} This assumes that a reading of the statute mandating cross-cumulation is broader than a reading favoring administrative discretion.

(9) The effects of the injuries from the two types of unfair trade practices are identical—lost sales, lower market shares, and lower profits

\textsuperscript{140} Trade and Tariff Act of 1984 § 606, 19 U.S.C. § 1671d(a)(1) (amending the 1930 Tariff Act, § 705(a)(1)).

\textsuperscript{141} Petitioners in one investigation may have made this argument, albeit not forcefully. See USITC General Counsel Memorandum GC-I-031, at n.5 (Feb. 1985)(LEXIS, Itrade library, Gem file).

\textsuperscript{142} A nonmarket economy is characterized by state central planning and the absence of a market structure. Comment, Dumping by State-Controlled-Economy Countries: The Polish Golf Cart Case and the New Treasury Regulations, 128 U. Pa. L. Rev. 217, 218 (1979) [hereinafter State-Controlled-Economy Countries].


\textsuperscript{146} USITC General Counsel Memorandum GC-F-345 (Oct. 1982) (LEXIS, Itrade library, Gem file)[hereinafter GC-F-345].
for the domestic industry. 147 This argument, while attractive, proves too much. Both § 337 148 violations and violations of the antitrust laws can produce the same effects upon domestic industries, yet there has been no suggestion that these violations should be considered simultaneously with violations of either the antidumping or countervailing duty laws. Although identity of effect may suggest that cross-cumulation is appropriate, such identification cannot provide an independent basis for a mandate of cross-cumulation in the absence of identity of cause.

(10) A literal reading of the statutory language requiring that injury be found “by reason of imports of that merchandise” 149 or “by reason of that merchandise” 150 would prevent cumulation of imports subject to simultaneous countervailing duty investigations or subject to simultaneous antidumping investigations. 151 This argument requires a more narrow reading of the federal causal link requirement 152 than has ever been seriously proposed for use in practice.

Many arguments in opposition to cross-cumulation have also been presented. These arguments include those discussed below.

(i) The Commission has never cross-cumulated in the past. 153 There is no reason to assume that Congress intended to change this consistent practice without explicit direction. 154 Indeed, Congress does not appear to have contemplated cross-cumulation. 155

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149 19 U.S.C. § 1671(a) (countervailing duty law).
152 Cf. arguments viii & xi in opposition to cross-cumulation, infra text accompanying notes 165-67 and 172-76.
153 In one case challenging a negative injury determination arising prior to the 1984 Act, “petitioners conceded at oral argument that no case law compels cumulation between LTFV and subsidized imports and no statute ... appears to mandate such treatment.” Gifford-Hill Cement Co., 615 F. Supp. at 590 n.16.
154 Certain Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden, and Venezuela, supra note 101, at 46 (views of Vice-Chairwoman Liebeler). This is the first determination decided under the 1984 Act. See GC-I-082, supra note 93; GC-I-060, supra note 93.
155 Certain Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden, and Venezuela, supra note 101. There is no evidence in the legislative history of the 1984 Act that Congress considered the issue of cross-cumulation, although the issue was raised briefly by one witness during the House hearings: There also has been some question about cumulation of the same product in separate countervailing duty and antidumping cases. We believe that it would be helpful to amend the statute to require cumulation in certain circumstances. Such an amendment would help to ensure that domestic industries are not denied relief because of an unwise exercise of discretion by the Commission. Options to Improve, Part I, supra note 2, at 203 (statement of Dr. Adolph J. Lena).
(ii) Nothing in the statute directs the Commission to cross-cumulate.156 This argument, unfortunately, begs the issue.

(iii) The antidumping and countervailing duty investigations are treated in different sections of Title VII, raising a presumption to treat the two separately.157 However, these investigations do use the same basic injury test which arises in the same statutory provisions.

(iv) Two separate unfair acts are involved. For commissioners employing a margin analysis,158 this argument may be particularly relevant as the margins in the two types of investigations require very different types of computations and standards.159

(v) The statutory timetables for the two types of unfair trade actions are different. In a countervailing duty case, the Commerce Department’s preliminary determination must be completed within eighty-five days, whereas 160 days are allowed for preliminary determinations in antidumping cases.

[A]ny effort to cumulate allegedly dumped and allegedly subsidized imports would require the Commission to make a final determination in an antidumping case well before the time it ordinarily would, thereby unfairly depriving the respondent of vital time in which to present and explain data and otherwise make its case on the LTFV issue.160

The Commission legal staff disputed the validity of this argument because of its procedural rather than its substantive bearing upon the issue of cumulation.161

(vi) Identification of a home country is much more important in countervailing duty investigations than in antidumping investigations. Consequently, cross-cumulation, which would blur national distinctions,

156 Iron Construction Castings from Brazil, Canada, India, and the People’s Republic of China, supra note 131; GC-I-082, supra note 94; GC-I-060, supra note 94.

157 Certain Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden, and Venezuela, supra note 101, at 46 (views of Vice-Chairwoman Liebeler).

158 In this context, there are two major approaches to causation analysis. One approach is to determine whether the unfairly traded imports are injuring a domestic industry. The other is to determine whether the pricing margin bestowed upon the imports by the unfair trade practice is injuring the domestic industry. The latter approach is termed “margin analysis.” Assume that large numbers of widgets are entering the country and taking customers away from the domestic widget industry on the basis of a 20% price advantage. If the unfair trade practice were a 0.5% export bonus, a commissioner following a margin analysis might find no causation because the unfair benefit is so minor compared to the fairly-traded competitive advantage. Chairwoman Stern, for one, uses a margin analysis. See Oil Country Tubular Goods from Brazil, Korea, and Japan, USITC Pub. 1633, Inv. Nos. 701-TA-215 to -217 (Final) 11-29 (Jan. 1985) (separate views of Chairwoman Stern)(provides an excellent exegesis of her reasons for using this approach).

159 GC-I-082, supra note 93; GC-I-060, supra note 93.

160 GC-F-034, supra note 124. See also GC-E-337, supra note 32, at n.20.

161 GC-F-034, supra note 124, at n.19. See also GC-E-337, supra note 31, at n.20.
is totally inappropriate. 162

(vii) Commerce determinations under § 705 are country-specific. 163 Cross-cumulation runs counter to this standard. 164 Note, however, that this argument would also militate against cumulation in any countervailing duty investigation involving subsidized imports from more than one country, even if such cumulation is now expressly mandated.

(viii) Section 705(b) requires the Commission to make a final determination as to whether the injury is caused “by reason of imports” which have been found to benefit from a subsidy. 165 Section 735(b) makes a similar provision for final antidumping determinations. 166 This causal link in the federal law eliminates any possibility of cross-cumulation. 167

(ix) Congress has recognized “technical dumping” 168 but not “technical subsidization.” This establishes that the injury provisions are not identical 169 and undercuts the argument for cross-cumulation based upon the identity of the injury standards for the two types of unfair trade investigations. 170

(x) Same-country cross-cumulation is not mandated by the statute. 171 Thus, why cross-cumulate in different-country situations if it is not done in same-country situations? This distinction may have been a legislative oversight based upon the fact that same-country cumulation within a countervailing suit neither is automatic nor is even called cumu-

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162 GC-F-186, supra note 31. See supra text accompanying note 123.
163 See also H. GREENWAY, TRADE POLICY AND THE NEW PROTECTIONISM 88 (1983) (Article VI of GATT permits discriminatory action “against goods which are dumped by a particular country. . . ”).
164 GC-F-345, supra note 146.
165 19 U.S.C. § 1671d(b).
166 19 U.S.C. § 1673d(b).
167 GC-I-082, supra note 93; GC-I-060, supra note 93.
168 The Senate Report on the 1974 Trade Reform Act defines technical dumping as “selling an imported product at a price which is not lower than that needed to make the product competitive in the U.S. market, even though the price of the imported product is lower than its home market price.” H.R. REP. NO. 1298, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7186, 7316.
169 For other differences between the injury provisions under the antidumping and countervailing duty laws, compare 19 U.S.C. § 1671d(b)(4) with § 1673d(b)(4)(critical circumstances findings); see also 19 U.S.C. §§ 1677(7)(E), and (F)(i)(considerations of nature of subsidy in determining threat of material injury).
170 Certain Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden, and Venezuela, supra note 101.
171 The new cumulation provision directs the Commission to “cumulatively assess the volume and effect of imports from two or more countries . . . .” 19 U.S.C. § 1677(7)(C)(iv) (emphasis added). For the full text of this new provision, see supra text accompanying notes 37-38.
lation, nor is it the same procedure within an antidumping suit. Yet this argument at least shows that cross-cumulation was probably not considered by Congress.

(xi) The Agreement on the GATT Subsidies Code and the parallel provision of the Agreement on the Anti-Dumping Code require that injuries caused by factors other than the subsidized (or dumped) imports must not be attributed to the subsidized (or dumped) imports. A footnote to this Code provision states that "[s]uch factors can include, inter alia, the volume and prices of nonsubsidized imports of the product in question . . . ." Thus, GATT appears to require a causal link.

(xii) Greater interference with foreign sovereigns results from imposing duties against subsidized goods than against dumped goods, for the latter are the result of private action only. The former are the result of a conscious governmental policy. Such interference is most odious when the subsidy has little or nothing to do with export promotion—when it is a "domestic subsidy" within the terms of the Subsidies Code. Cross-cumulation is more likely to produce a finding of injury, and thus interfere with a foreign sovereign, for reasons only marginally related to that sovereign's actions.

(xiii) A United States practice of cross-cumulation would provide a significant disincentive to possible signatories of the GATT Subsidies Code. Signing the Code would expose a country's exports to the United States to a risk of countervailing duties because of dumped goods from third countries.

As mentioned above, the staff view is slightly, but definitely, in favor of cross-cumulation. They have requested that the Commission adopt a strong and consistent position upon which the various parties may rely. It is ironic, however, that the staff has continued to favor cross-cumulation even after the Commission had adopted a strong and consistent position against it. Of the present Commissioners, Chairwoman Stern and Vice-Chairwoman Liebeler have written against cross-cumula-

172 Agreement on Articles VI, XVI and XXIII, supra note 10, at 528.
173 Apr. 12 Agreement on Implementation, supra note 10 at 4927.
174 See GC-F-034.
175 Agreement on Articles VI, XVI and XXIII, supra note 10 at n.20; Apr. 12 Agreement on Implementation, supra note 10 at 4927 n.5.
176 GC-F-186, supra note 31.
177 See Agreement on Articles VI, XVI, and XXIII, supra note 10, art. 11.
178 Bingham & Taylor Div., 627 F. Supp. at 797-98. See supra notes 68-71 and accompanying text. See also infra text accompanying notes 198-214.
180 GC-I-188, supra note 93; GC-I-082, supra note 93.
tion explicitly. Until recently, only Commissioner Frank ever voted for cross-cumulation. Commissioner Calhoun asked for further information and advice from the staff and called the issue "very troublesome," but never committed either way on the subject.

In Bingham & Taylor Div. v. United States, the Court of International Trade ruled that the 1984 Act requires the Commission to cross-cumulate. The court relied upon several arguments raised in favor of cross-cumulation. With reference made to the arguments listed above, the court’s five arguments were: the lack of an explicit additional requirement (2), general congressional concern over simultaneous unfair acts (4), the identity of impact of the unfair acts (9), the placement of the cumulation mandate in the common definitional section of the statute (1), and, the dangers of a literal reading of the statutory requirement for a causal link (10). The court rejected arguments based upon: continuing past practice in the face of congressional silence (i), the statutory causal link requirement (viii), United States international obligations (iii), the need to encourage countries to sign the Subsidies Code (xiii), and differing aspects of the injury investigation provisions (ix). None of the other arguments presented above, on either side of this debate, appear to have entered into the court’s decision. The Commission has appealed Bingham to the Court of Appeals for the Federal Circuit. Based upon the considerations set forth above, the 1984 Act should not be construed to require cross-cumulation. The most persuasive arguments are those relating to the causal link requirement in GATT (xi) and the federal law (viii) and interference with a foreign sovereign (xii). The

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181 Certain Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden, and Venezuela, supra note 101, at 43-44 (views of Vice-Chairwoman Liebeler).
182 Certain Steel Products from Belgium, Brazil, France, Italy, Luxembourg, the Netherlands, Romania, the United Kingdom, and West Germany, supra note 36.
183 GC-I-082, supra note 93, at n.19 (citing Carbon Steel Wire Rod from Brazil, Belgium, France, and Venezuela, USITC Pub. 1230, Inv. Nos. 701-TA-148 to -150 (Prelim.) (1982)).
184 627 F. Supp. at 793.
185 Id. at 794.
186 Id. at 796.
187 Id.
188 Id. at 797.
189 Id. at 798.
190 Id. at 794.
191 Id. at 795.
192 Id. at 796.
193 Id. at 797-98.
194 Id. at 798.
195 No. 86-1440 (Fed. Cir. filed July 8, 1986).
statutory structure argument (1) is the strongest point in favor of cross-cumulation. The congressional message is ambiguous at best (compare (2), (3), and (4) with (i) and (x)), suggesting that any change such as cross-cumulation, which might significantly alter the injury test causal link requirements and conflict with internal economic obligations and relations, should be more clearly mandated by Congress. A change in a long-standing administrative practice, especially one in which international political significance may eclipse the economic consequences, should not be presumed from congressional silence and lack of consideration of the issue.

Consistent with these concerns, the general congressional desire to protect domestic industries should be respected whenever possible. For that reason, the Commission should, as an administrative matter, undertake cross-cumulation of goods coming from the same country in both subsidized and dumped formats. Since these would be single-source imports, there would not be the potential for international claims of interference with a foreign sovereign through penalizing that sovereign for the actions of third countries or exporters in third countries. Where imports under investigation from one country are dumped and those from another are subsidized, however, the Commission should consider the subsidized and dumped imports separately under the competitive factors approach as market factors may weaken the domestic industry and make it more prone to injury from either set of unfair imports.

E. Cumulation with Section 303 Countervailing Duty Statistics

From time to time the Commission has been asked to cumulate import statistics from § 303 countervailing duty investigations into ongoing § 701 investigations. Section 303 provides for an injury test only with respect to otherwise duty-free imports from non-GATT countries to

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196 The new cumulation provision limits mandatory cumulation to situations involving two or more countries. See supra note 171. This should not prevent the Commission from exercising its discretion to cumulate where imports from only one country are involved. Naturally, if the same imports are both subsidized and sold at LTFV, the statistics for those imports should not be double-counted under any spurious cumulation analysis.

197 See supra notes 115-21 and accompanying text.

198 See, e.g., Potassium Chloride from Israel and Spain, USITC Pub. 1596, Inv. Nos. 303-TA-15, 701-TA-213 (Final) at A-2 n.4 (Nov. 1984) ("Petitioners urged the Commission to cumulate the market shares of Israel [receiving an injury test under § 303(a)(2)], Spain [receiving an injury test under § 701], East Germany [receiving no injury test under § 303(a)(2)], and the U.S.S.R. [receiving no injury test under § 303(a)(2)] in all statistical analyses."); see also Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, Kenya, Mexico, The Netherlands, and Peru, supra note 131, at 26 n. 18; Potassium Chloride from East Germany, Israel, Spain, and the U.K., USITC Pub. 1529 Inv. Nos. 303-TA-15, 701-TA-213 (Prelim.), 731-TA-181 to -187 (Prelim.) (May 1984).
which the United States has obligated itself, by treaty or otherwise, to provide an injury test. Unless such an international agreement exists, § 303 provides for compensatory duties after a Commerce Department finding of a bounty or grant without any Commission injury investigation.

I. Imports not Receiving Injury Determinations under Section 303

The Commission legal staff has repeatedly encouraged the Commission to cumulate statistics from noninjury-test imports under investigation by the Commerce Department pursuant to § 303(a) into investigations arising under § 701, the countervailing duty law for GATT-source imports. One commissioner has cumulated statistics from noninjury-test investigations in the past. Recently, a majority of the Commission has voted to cumulate statistics from § 303(a) investigations into an ongoing § 701 investigation. Such cumulation is inappropriate for several reasons.

First, such cumulation allocates to GATT countries injury caused by non-GATT countries. This is the clearest case of holding one party liable for the injury caused by a group of parties. This is improper. In part, such a position defeats the advantages of joining GATT and, in so doing, discourages nonmember countries from joining GATT.

Second, to cumulate noninjury-test statistics would be to require the Commission to consider injury from Alpha and Beta together without ever considering injury from Alpha alone. The Alpha imports may not be injurious, yet, by inflating the statistics under Commission consideration, they may contribute to an injury finding against Beta.

Third, the cumulation provision does not apply to § 303, as § 303 is not within the list of material injury sections referred to in

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200 These terms are essentially identical to the term "subsidy" used in §§ 701-06, 19 U.S.C. §§ 1671-76.
203 Chairwoman Stern has so cumulated. See Oil Country Tubular Goods from Austria, Romania, and Venezuela, supra note 53; Certain Carbon Steel Wire Rod from Spain, USITC Pub. 1544, Inv. No. 701-TA-209 (Final) 8 n.21 (June 1984).
204 Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, Kenya, Mexico, The Netherlands, and Peru, supra note 131, at 26 n.18.
205 "[I]t may serve to undermine the benefit of signing the Subsidies Code." GC-I-060, supra note 93, at n.33.
206 Respondents, in one investigation, contended that including imports from non-signatories denied the respondents their own injury test. USITC General Counsel Memorandum GC-H-084 (Mar. 1984)(LEXIS, Ittrade library, Gcm file).
§ 1677(7)(B). Congress could have easily added an instruction to consider these noninjury test statistics if it desired. This objection is not a problem in cross-cumulation analysis, because the "subject to investigation" language might be read to include both antidumping and countervailing duty investigations, thus permitting cross-cumulation. Section 303 does not appear within Title VII, where the new cumulation provision appears, therefore, it is questionable that the cumulation term "investigation" includes a Commerce Department investigation without any Commission investigation.

Despite these arguments, domestic industries are validly concerned with the impact of multiple source imports. Whether certain imports are entitled to an injury test under domestic law is irrelevant to the fact that the imports may actually be injuring domestic industries. The hammering effect will continue to occur regardless of Commission investigations.

There is no risk that a non-GATT country not receiving an injury test under a § 303 investigation could escape compensatory duties due because of a Commission failure to cumulate. The lack of an injury test

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207 See supra note 37.
208 See supra text accompanying notes 122-208.
209 The Commission's legal staff has argued that limiting cumulation to Title VII investigations without express Congressional authority is unwarranted. USITC General Counsel Memorandum GC-I-060, supra note 93. The staff may be correct on this point. However, limiting the cumulation mandate of the 1984 Act to Title VII investigations is warranted and within the clear terms of the statute.
210 Indeed, it could be argued that such an action would be totally beyond the Commission's authority. See id. Despite the fact that § 303 does not even appear within Title VII, a majority of the Commission recently stated that "[w]e note that imports from [three countries whose import statistics were being cumulated into a countervailing duty injury investigation] are not subject to injury investigations before the Commission. However, the statute does not require that imports be subject to an injury investigation for cumulation to be required." Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, Kenya, Mexico, The Netherlands, and Peru, supra note 131, at 26 n. 18 (July 1986) (emphasis in original). Such a conclusion is dangerously broad. Would any investigation of imports, by any federal agency, open the door to cumulation in countervailing duty or antidumping duty injury investigations before the Commission?
211 The Commission legal staff has raised one argument in favor of cumulating § 303 investigation statistics into a § 701 injury investigation in the special instance where a § 731 investigation against the same imports from the same countries is also ongoing. Failure to cumulate § 303 statistics with § 701 statistics could lead to a negative finding in the § 701 investigation. This result might be inconsistent with the results in the § 731 investigation against those same imports, where the Commission would have cumulated the import statistics. See id. While this "inconsistency" might arise, it is not of great moment. For the § 701 investigation to result in a negative injury determination, and the § 731 investigation regarding those same imports to have resulted in a positive injury determination, it is apparent that those imports could have been no more than a minor contributing factor in causing injury to the domestic industry. The imposition of dumping duties as a result of the § 731 determination should then suffice to restore this trade to a sufficiently fair basis to prevent further injury to the domestic industry.
for such imports protects against such a result. However, some protection is needed to ensure that offending GATT imports do not escape compensatory duties because of the essentially irrelevant fact that the other imports are from non-GATT countries.

The answer, once again, is to consider the non-GATT imports under the competitive factors approach, as factors in the marketplace weakening the domestic industry.212 In this way, other imports could be considered as factors in the domestic marketplace which increase the likelihood that the imports under investigation by the Commission have injured or will injure the domestic industry.

2. Imports Receiving Injury Determinations under Section 303

Imports accorded an injury test under § 303(a)(2) are more appropriate for cumulation than those that are not, as the former are subject to a Commission investigation arising under Title VII.213 Whether cumulation is appropriate here will be determined by the kind of trade action into which the § 303(a)(2) imports are to be cumulated. If the injury investigation into which these § 303(a)(2) imports are to be cumulated is a countervailing action, then cumulation is appropriate. If, however, it is an antidumping action, then a competitive factors approach should be used. This is consistent with this Article's conclusion that cross-cumulation is not appropriate, but that a competitive factors approach may be used in its place.214

F. Cumulation with Negative Injury Determinations

The Commission has, on occasion, been asked to cumulate statistics relating to imports no longer under investigation and subject to a recent negative injury determination into a new injury investigation.215 The logic of the petitioners has been that the earlier case did not consider every factor cumulatively, but considered only the one source in isolation.216 Normally, the Commission should refuse to cumulate in such a situation, even though the Commerce Department found an unfair trade

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212 See supra notes 115-21 and accompanying text.
213 In 1979, Congress amended § 303 by, inter alia, incorporating by reference Title VII with respect to any Commission injury investigations under § 303(a)(2). Trade Agreements Act of 1979 § 103(b). However, the new cumulation provision contains no such cross-reference to § 303. Hence, noninjury-test countervailing duty investigations are not relevant to a cumulation analysis by the Commission.
214 See supra note 197 and accompanying text.
215 See, e.g., Prestressed Concrete Steel Wire Strand from the United Kingdom, supra note 116.
216 See id.
practice in the previous investigation. Naturally, if a sufficiently long time has elapsed since the negative determination, the situation would be as if there had been no finding at all and the domestic industry had never filed any prior petition with regard to the imports.

When a new petition is filed with respect to the previous source, alleging either changed circumstances in the industry or a new opportunity to cumulate as a result of the passage of the 1984 Act, the Commission is faced with a difficult choice. If the Commission cumulates, it invites future duplicative procedures. Indeed, the staff recognized the risk of repetitive filings when it urged the Commission to apply the cumulation terms of the 1984 Act even before the Act's effective date.

If the Commission fails to cumulate, it might reach a faulty, or lopsided, substantive result, one that fails to protect fully a domestic industry which may be suffering material injury. For that reason, the Commission has reconsidered and cumulated imports which received negative

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217 Obviously, if the previous investigation was terminated because there was a negative finding by the Commerce Department as to the existence of any unfair trade practice, then no cumulation would be proper at all (but not for “subject to investigation” reasons).

218 See e.g., Oil Country Tubular Goods from Argentina, Canada, and Taiwan, supra note 47 (reasonable indication of material injury found from allegedly dumped imports from Argentina, under the 1984 Act). Argentina had been the subject of a negative injury determination in an investigation conducted prior to the 1984 Act. Oil Country Tubular Goods from Argentina, Brazil, Korea, Mexico, and Japan, USITC Pub. 1555, Inv. Nos. 701-TA-215 to -217 (Prelim.), 731-TA-191 to -195 (Prelim.)(July 1984).

Petitioners have brought virtually the same case as their previous one on the grounds that the Trade and Tariff Act of 1984 has changed the law on cumulation. Since the Commission elected not to consider Argentina for cumulation in the prior case, petitioners argue in this investigation that the Commission should reconsider Argentina within the context of the new statute.

Petitioners do allege new facts, however...
injury determinations just prior to the 1984 Act.\textsuperscript{220}

This policy may have been acceptable during the transition to the 1984 Act. In the long run, however, a willingness to reconsider recent negative determinations absent a showing of changes in the industry or the marketplace would be an adverse development. Such willingness would result in piecemeal determinations, raise costs for both sides as well as the taxpayer, produce uncertainty of substantive result for a successful importer,\textsuperscript{221} and require general administrative duplication of efforts.

A domestic industry should have no difficulty filing a new petition following a prior negative determination where changed circumstances exist that would present the Commerce Department or the Commission with a significantly altered investigation. Presumably the passage of a specified time—two or three years—would provide a \textit{prima facie} showing of changed circumstances. However, the filing of a new petition following a negative injury determination under the 1984 Act should not be permitted merely because cumulation of statistics relating to additional respondents is now sought when those respondents could easily have been named in the original petition. Without this limitation, Commission time is wasted, domestic diligence is not encouraged, and importers previously successful before the Commission would be subject to harassing actions. Changed circumstances would include the existence of a new and significant market entrant, but would not include naming as new respondents previous market participants or previously successful respondents. Such a limitation on the refiling of petitions would probably lie with Congress, not the Commission.

V. CUMULATION OF \textit{DE MINIMIS} IMPORTS

Prior to the passage of the 1984 Act, the Commission sometimes found unfair imports noninjurious and not appropriate for cumulation because the imports were \textit{de minimis} in volume.\textsuperscript{222} With the passage of the 1984 Act, however, the staff and most of the Commission now believe

\textsuperscript{220} See \textit{supra} note 218.

\textsuperscript{221} \textit{Res judicata} applies to Commission determinations, but is easily overcome by a showing of "new facts" in the marketplace or industry under investigation. See GC-I-176, \textit{supra} note 218.

\textsuperscript{222} See, e.g., Titanium Sponge from Japan and the United Kingdom, USITC Pub. 1600. Inv. Nos. 731-TA-161, -162 (Final) (Nov. 1984)(United Kingdom imports "insignificant" except for successful GSA bids, not cumulated); Certain Steel Wire Nails from Japan, the Republic of Korea, and Yugoslavia, USITC Pub. 1175, Inv. Nos. 731-TA-45 to -47 (Prelim.) (Aug. 1981)(Yugoslavian imports' market share "insignificant [at] 1 or 2 percent of apparent U.S. consumption," not cumulated); \textit{but see} GC-H-133, \textit{supra} note 89 (Certain Steel Wire Nails from Japan, the Republic of Korea, and Yugoslavia also rested on fact that the Yugoslavian nails were of inferior quality).
that a *de minimis* exception is no longer possible where there is at least one non-*de minimis* source into which to cumulate the smaller source.\(^2^{23}\) Whether this position is required or even advisable is the topic of this portion of the Article.

There are three basic grounds for the *de minimis* exception. The first ground concerns the causal link requirement in both GATT and the wording of the domestic law.\(^2^{24}\) If imports from a source are sufficiently low as to be termed *de minimis*, it is difficult to see how any injury could have been caused by those imports.\(^2^{25}\) A second ground is the concern for efficient use of administrative resources, both by the Commission and the Customs Service, the enforcement agency.\(^2^{26}\) Third, an injury finding against *de minimis* imports could disrupt trade and trade relations without any corresponding economic benefit to a domestic industry.\(^2^{27}\)

Whether imports were found to be *de minimis* was almost entirely the result of considering import volume and trends and the percentage that volume represented of apparent domestic consumption.\(^2^{28}\) This formed the first element of the old market analysis approach to cumulation.\(^2^{29}\) Following passage of the 1984 Act, the staff concluded that volume (and volume trend) could not be considered in deciding whether to cumulate.\(^2^{30}\) The staff derived its conclusion from the legislative history

\(^{2^{23}}\) See Certain Carbon Steel Product from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden and Venezuela, *supra* note 101 (Chairwoman Stern, Commissioners Eckes and Rohr); *Cf.* *id.* at 52 (Vice-Chairwoman Liebeler). See also GC-I-060, *supra* note 93; GC-I-018, *supra* note 41.

\(^{2^{24}}\) See *supra* text accompanying notes 9-14, 172-76.

\(^{2^{25}}\) "In such situations, the linkage between imports and injury is based only on speculation." USITC General Counsel Memorandum GC-H-095 (Mar. 1984) (LEXIS, Itrade library, Gcm file). For an extreme example, arising after the effective date of the 1984 Act, consider the Commission’s refusal to cumulate Yugoslavian welded carbon steel line pipes in Certain Welded Carbon Steel Pipes and Tubes from India, Taiwan, Turkey, and Yugoslavia, *supra* note 47. The refusal arose from the fact that there had been no such imports for three years. In GC-I-051, *supra* note 202, the Staff recommended against inclusion of France in a cumulative analysis, where there had been no imports for ten months. They did so not on a *de minimis* theory, however, but on the grounds that the French imports were not “reasonably coincident” with the other imports. See also Certain Steel Products from Belgium, Brazil, France, Italy, Luxembourg, the Netherlands, Romania, the United Kingdom, and West Germany, *supra* note 36.

\(^{2^{26}}\) GC-H-133, *supra* note 89.

\(^{2^{27}}\) *Id.*

\(^{2^{28}}\) See, e.g., Titanium Sponge From Japan and the United Kingdom, *supra* note 222 (Final)(Nov.1984); Certain Steel Products from Belgium, Brazil, France, Italy, Luxembourg, the Netherlands, Romania, the United Kingdom and West Germany, *supra* note 36 (Commissioner Frank objecting to a uniform definition of what constitutes a *de minimis* volume despite differences in industries); Certain Steel Wire Nails from Japan, the Republic of Korea, and Yugoslavia, *supra* note 72.

\(^{2^{29}}\) See *supra* text accompanying notes 34-36.

in which Congress eliminated "contributing cause" as one criterion for cumulation.\textsuperscript{231} The staff interpreted this rejection as prohibiting any consideration of volume and volume trend on an individual country basis when determining whether to cumulate.\textsuperscript{232} The majority of the present commissioners have fully accepted this staff position\textsuperscript{233} and believe that it is now impossible to apply a \textit{de minimis} test before cumulating.\textsuperscript{234}

An example of how the Commission has approached miniscule imports in one case under the 1984 Act will illustrate the absurdity of this analysis. In \textit{Certain Welded Carbon Steel Pipes and Tubes From Thailand and Venezuela},\textsuperscript{235} the Commission faced the latest in a long series of investigations with respect to the welded carbon steel pipe and tube industry.\textsuperscript{236} In this particular investigation, the commissioners all felt constrained to cumulate Thai import statistics with statistics regarding like imports from Venezuela. What makes this position noteworthy is that the Thai imports comprised less than 0.05\% of the United States market.\textsuperscript{237} In fact, out of a total import value from all countries of approximately $575 million in 1984, these Thai imports were worth only

\textsuperscript{231} The original House bill, H.R. 4784, explicitly utilized the contributing cause standard in § 104(a)(2). \textit{See} STAFF OF SUBCOMM. ON TRADE, HOUSE COMM. ON WAYS & MEANS, 98TH CONG., 2D SESS. 26 (Comm. Print 1984). This was rejected by the entire Ways and Means Committee, however: "The requirement in the bill as introduced that imports from each country have a 'contributing effect' in causing material injury would have precluded cumulation in cases where the impact of imports from each source treated individually is minimal but the combined impact is injurious." REFORM ACT REPORT, supra note 44, at 37, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5164. The Senate version of the House bill into which H.R. 4784 was merged, H.R. 3398, reintroduced the contributing cause standard in § 703. Finally, the language adopted by the Ways and Means Committee was reinstated in Conference. H.R. REP. NO. 1156, supra note 45, at 173, 1984 U.S. CODE CONG. & ADMIN. NEWS at 5290. This language went on to enactment.

\textsuperscript{232} See, e.g., USITC General Counsel Memorandum GC-I-040 (Mar. 1985) (LEXIS, Intrade library, Gem file); GC-I-018, supra note 41.

\textsuperscript{233} Certain Carbon Steel Product from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland Romana, Sweden and Venezuela, supra note 101, at 12 (Chairwoman Stern, Commissioners Eckes and Rohr).

\textsuperscript{234} This must be distinguished from the application of a \textit{de minimis} test before cumulating. Once cumulated, there is no longer even a perceived problem with looking at volume. Vice-Chairman Liebeler utilizes an explicit \textit{de minimis} standard of 2.5\% of apparent domestic consumption at this latter phase. Her analysis is contingent upon certain assumptions as to elasticity in the industry under investigation. For the fullest analysis, see her views in Certain Welded Carbon Steel Pipes and Tubes From Thailand and Venezuela, supra note 84. In fact, Vice-Chairman Liebeler has suggested that the new cumulation mandate includes an implicit Congressional acceptance of a \textit{de minimis} standard. "It is precisely because Congress was aware that certain levels of imports were insufficient to satisfy the causation standard that Congress required a summation of imports across nations in certain cases." \textit{Id}. Her views on a general \textit{de minimis} exception are of considerable interest, but are beyond the scope of this article.

\textsuperscript{235} \textit{Supra} note 84.

\textsuperscript{236} \textit{Id}. at 7 n.8.

\textsuperscript{237} \textit{Id}. at A-33 (Table 16).
$15,000. With a dumping margin calculated at 21.1% to 40.7%, dumping duties on such a volume of Thai imports would have amounted to less than $6,100.

Should the congressional rejection of a “contributing cause” standard necessarily result in the Commission rejecting a de minimis standard prior to cumulation? The rejection of the contributing cause standard does indicate a decision by Congress not to allow administrative efficiency to be a basis for rejecting cumulation. However, it cannot be seen as a rejection of the causal link requirement already embodied in the federal law and in GATT.

The rejection of this approach leads to the possibility of a streamlined de minimis analysis. Perhaps the Commission should no longer undertake a de minimis analysis prior to cumulation unless the importers seeking to avoid cumulation of their imports with those of other countries allege and prove that the required causal link to domestic injury is lacking. Such proof could, for example, consist of a demonstration that the importer’s few sales acted merely to expand the market’s customer base, rather than to displace domestic sales. Under this approach the new statutory language could be construed as shifting the burdens of going forward and persuasion with respect to a precumulation de minimis argument.

Another approach would be to recognize that imports which have a very low volume and which have captured a very small percentage of apparent domestic consumption may be inappropriate for cumulation because they do not compete in the marketplace in any meaningful way. These imports would fail to meet the first element of the cumulation standards proposed by either the staff or this Article under the 1984 Act. It is unclear what evidence must be adduced to justify excluding imports in such a manner, but situations might arise.

VI. PROPOSALS

As a result of the analysis of cumulation law and practice carried out earlier in this Article, certain proposals may now be made.

1) The Commission should adopt the two-part test for cumulation now used by Commissioner Liebeler: mutual competition and “subject to investigation.” Reasonably coincident marketing should be considered

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238 Id. at A-30 (Table 14).
239 Id. at A-5.
240 Cf. supra notes 39, 41.
241 See Certain Welded Carbon Steel Pipes and Tubes from India, Taiwan, Turkey, and Yugoslavia, supra note 47 (views of Commissioner Lodwick on imports from Turkey).
as an element of the competition aspect of the cumulation test.\(^{242}\)

2) The Commission should interpret “subject to investigation” as referring to overlapping periods of investigation. The Commission should not interpret “subject to investigation” as Commissioner Liebeler interprets the phrase, requiring that all imports to be cumulated be under active investigation as of the precise date determination is to be made. Nor should the Commission interpret “subject to investigation” as permitting cumulation of statistics from all past affirmative determinations within an arbitrary time period prior to the instant determination date, as do the rest of the commissioners.\(^{243}\)

3) Where only a partial overlap exists, and a final affirmative finding is made as to one country on the basis of cumulation of imports from another country which may finally receive a negative determination, the Commission should provide an alternate causal analysis, not utilizing cumulation. This would obviate the need for a § 751 review, as the case would be fit for summary judgment in the Court of International Trade if no injury would have been found but for the cumulation. In the alternative, if an injury were found even without cumulation, there would be no basis for a successful challenge or demand for reconsideration.\(^{244}\)

4) Where the domestic industry continues to feel injury from prior imports subject to a past affirmative final injury determination, the Commission should use the competitive factors approach. The old injury, and the degree to which the domestic industry has recovered from it, should be considered as factors of competition in the domestic marketplace. In this context, material injury (and threat thereof) should be interpreted to include suppression of the recovery (or threat of suppression of the recovery) of the domestic industry.\(^{245}\)

5) The Commission should not adopt a general cross-cumulation analysis. Rather, LTFV imports should be considered as weakening the domestic industry for the onslaught of subsidized imports and, vice versa, under the competitive factors approach.\(^{246}\)

6) Where imports from a single country include items supported by subsidies as well as other items being sold at LTFV, the Commission should exercise its discretion to cumulate the statistics from these two sets of imports, but should not count twice statistics relating to any im-

\(^{242}\) See supra notes 39-52 and accompanying text.

\(^{243}\) See supra notes 93-96 and accompanying text. The staff’s “cash deposit” analysis is similar to, though less satisfactory, than this suggested approach.

\(^{244}\) See supra note 89.

\(^{245}\) See supra note 117 and accompanying text.

\(^{246}\) See supra note 197 and accompanying text.
ports receiving both kinds of unfair trade advantage.\textsuperscript{247}

7) Where the Commission is asked to cumulate statistics from subsidized imports being investigated by either the Commerce Department or the Commission under § 303 into a § 701 or § 731 investigation, the Commission should refuse. Instead, the Commission should utilize the competitive factors approach.\textsuperscript{248}

8) If the Commission chooses to adopt the principle of cross-cumulation, then it should be limited to those types of investigations utilizing a Title VII injury test: § 731 antidumping investigations, § 701 countervailing duty investigations, and § 303(a)(2) countervailing duty investigations with respect to duty-free imports from countries with which the United States has undertaken to afford an injury determination. Apart from these situations, the competitive factors approach should be used.\textsuperscript{249}

9) A \textit{de minimis} test should be applied to import volume statistics even prior to the decision to cumulate. However, only a very low level of import penetration and share of domestic consumption should be considered \textit{de minimis}. In this way, the causal link requirements in GATT and the federal law may be satisfied. Furthermore, the burden of showing that the imports caused no injury to the domestic industry would be placed on the importers before noncumulation is permitted. Only if the lack of a causal link to domestic injury is established should particular imports be removed from the cumulative analysis. In the alternative, a \textit{de minimis} level of competition could lead to a refusal to cumulate.\textsuperscript{250}

These proposals would, if adopted, go far in making unfair trade practice laws more responsive to both domestic needs and international obligations.

\textsuperscript{247} \textit{See supra} note 196 and accompanying text.
\textsuperscript{248} \textit{See supra} text accompanying notes 122-97.
\textsuperscript{249} \textit{See supra} text accompanying notes 122-224.
\textsuperscript{250} \textit{See supra} text accompanying notes 222-41.