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Proving Causation in Antidumping Cases

To prevail in an antidumping[1] case, a petitioner must prove that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded, "by reason of" imports or sales of merchandise sold at less than fair value (LTFV).[2] Antidumping duty relief will be denied if a

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1. The antidumping laws, formerly codified in the Antidumping Act of 1921, 19 U.S.C. §§ 160–171 (1976), are now codified at 19 U.S.C. §§ 1673–1677g (1982). Congress enacted the Trade Agreements Act of 1979, Pub. L. No. 96–39, 93 Stat. 144 and thereby amended the antidumping statute and recodified these laws under the Tariff Act of 1930 (*see* 19 U.S.C. §§ 1673–1677g (1982)).

2. 19 U.S.C.A. § 1673 (West. Supp. 1985). This statutory section provides:

> If—
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> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
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> (2) the Commission determines that—
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> (A) an industry in the United States—
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> (i) is materially injured, or
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> (ii) is threatened with material injury, or
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> (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise,
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> then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise. For purposes of this section and section 1673d(b)(1) of this section, a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of the merchandise.

19 U.S.C.A. § 1673 (West. Supp. 1985). The "by reason of" standard can be compared to the more stringent "substantial cause" standard applied in "escape clause" cases. 19 U.S.C. § 2251(b)(1) (1982). *See also* Kennedy, *Causation Under the Escape Clause: The Case for Retaining the 'Substantial Cause' Standard*, 3 DICK. J. INT'L L. 185 (1985). The "by reason of" standard is also applied in countervailing duty cases. *See* 19 U.S.C. § 1671 (West. Supp. 1985).

petitioner fails to demonstrate that a causal nexus exists between the LTFV imports and the material injury of the domestic industry.

The antidumping laws do not provide explicit guidance in how to apply the "by reason of" standard. The International Trade Commission (ITC or the Commission) has relied, however, upon the causation-related aspects of the statutory definition of "material injury"[3] and evidence of congressional intent contained in the legislative history of the Trade Agreements Act of 1979.[4] The Commission is presented with a difficult task in making its causation determination when there is evidence that the material injury of the domestic industry has also been caused by factors other than the LTFV imports.[5] While it must consider such other factors, relevant legislative history instructs that the Commission may not weigh the injurious effects from the LTFV imports against those associated with the other injury causing factors.[6]

The causation requirement has become an intensely litigated issue in recent years, and a number of petitions have been denied on causation grounds, even though it was established that imports were sold at LTFV and a domestic industry suffered material injury.[7] Moreover, several new non-LTFV injury causative factors advanced by respondents have been relied upon by the Commission with the result that establishing a causal nexus between the LTFV imports and the material injury experienced by the domestic industry has become increasingly more difficult.[8]

The purpose of this article is to aid international trade practitioners by examining the causation standard in antidumping cases. This article will examine the relevant statute (Part I), Commission standards for causation determination contained in its regulations and legislative history (Part II-A), and Commission application of the causation standard (Part II-B). After reviewing judicial treatment of the issue (Part II-C), this article will summarize how the Commission adheres to its legislative guidelines in applying the "by reason of" standard (Part II-D). Finally, this article will present important considerations in applying a "reasonable" causation standard, particularly where other injurious factors not related to the imports have contributed to the material injury (Part III).

3. The statute defines material injury as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (1982).

4. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2072 (1974); Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979), 19 U.S.C. § 1671 *et seq.*

5. *See* S. REP. No. 249, 96th Cong., 1st Sess. 75, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 461.

6. *Id.* at 75, U.S. CODE CONG. & AD. NEWS at 460.

7. *See infra* notes 44-92 and accompanying text.

8. *See infra* notes 67-92 and accompanying text.

I. Background

Dumping is generally defined as price discrimination between national markets and exists when goods from one country are sold in another country's market at prices less than "fair value."[9] Under United States law, an antidumping duty determination consists of two separate findings. First, the Department of Commerce (Commerce or the Department), as the administering authority,[10] must determine that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value."[11] In determining whether sales have been made at "less than fair value" (LTFV) of the merchandise in question, Commerce will compare the United States price[12] of the import with its foreign market value. The foreign market value is usually the product's selling price in the exporter's home market.[13] When Commerce determines that there are insufficient sales in the exporter's home market to compare the exporter's U.S. sales price, it will use the price of the goods when sold in third country markets.[14] Where the Department is unable to determine foreign market value based on home market or third country prices or if these prices are below costs, it will rely on a "constructed value" to determine foreign market value."[15]

Second, the Commission must determine that a domestic industry is materially injured or is threatened with material injury, or that the establishment of a U.S. industry is materially retarded, *by reason of imports* of the merchandise.[16] A causal nexus is thus required between the imported goods and the material injury or threat thereof to the domestic industry. Hence, even if there are LTFV imports and the relevant domestic industry has suffered material injury, the Commission will reach a negative determination unless the LTFV imports caused the material injury. Only after both Commerce and the ITC reach affirmative determinations will Commerce

9. S. REP. No. 249, 96th Cong., 1st Sess. 37, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 423. *See generally* J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE (1923).

10. 19 U.S.C. § 1677(1) (1982). The Secretary of the Treasury was the "administering authority" under the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979), codified at 19 U.S.C. § 1671 *et seq*. The President's Reorganization Plan No. 3 of 1979 (44 Fed. Reg. 69275 and 45 Fed. Reg. 9931) transferred Treasury's responsibility for the administration of the antidumping laws to the Department of Commerce on January 2, 1980.

11. 19 U.S.C.A. § 1673 (West. Supp. 1985).

12. United States price "means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate." 19 U.S.C. § 1677a(a) (1982). Purchase price is defined as "the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation from a reseller or the manufacturer or producer of the merchandise for exportation to the United States." 19 U.S.C. § 1677a(b) (West. Supp. 1985).

13. 19 U.S.C.A. § 1677b(a)(1)(A) (West. Supp. 1985); *see also* 19 C.F.R. § 353.3(a) (1985).

14. 19 U.S.C. § 1677b(a)(1)(B) (1982); *see also* 19 C.F.R. § 353.4 (1985).

15. 19 U.S.C. § 1677b(a)(2) (1982); 19 U.S.C.A. § 1677b(e) (West. Supp. 1985); *see also* 19 C.F.R. §§ 353.6, 353.7 (1985).

16. 19 U.S.C. § 1673 (West. Supp. 1985).

then impose an "antidumping duty." This antidumping duty equals the amount by which the foreign market value of the merchandise exceeds its United States price.[17]

II. The "By Reason of" Causation Standard

A. Commission Standards of Causation Determination

Under the Commission regulations, in determining whether injury has occurred "by reason of" LTFV imports,[18] the Commission will examine the causation related aspects of (1) the volume of imports, (2) the effect of imports of that merchandise on prices in the United States for like products, and (3) the impact of imports on domestic producers of like products.[19]

1. *Volume of imports*

In analyzing the first causation related criterion, the Commission must determine whether the volume of imports was "significant" during the time the domestic industry suffered material injury.[20] Although the regulations do not define the term "significant," the ITC examines the volume of imports both in absolute amounts and as a market share percentage relative to domestic production and consumption.[21] The timing of the increase must

17. 19 C.F.R. § 353.48(a)(1) (1985).

18. 19 C.F.R. § 207.26 (1985).

19. 19 C.F.R. §§ 207.26(a)(1–3) (1985). Although these criteria are listed under the "material injury" section of the statute, 19 U.S.C. §§ 1677(7)(B)(i–iii) (1982), they underlie the ITC's causation analysis. *See infra* notes 44–92 and accompanying text.

There has been some question as to whether the ITC must make a determination of material injury separate from the consideration of causality. Chairwoman Stern believes that it is neither desirable nor necessary to separate these two issues while Commissioner Eckes believes that the Commission must make a determination on material injury in each case. Certain Red Raspberries from Canada, USITC Pub. No. 1743, at 5, n. 11–12 (Preliminary) (1985). The ITC noted that the Court of International Trade recently held that:

> The Commission must make an affirmative finding only when it finds *both* (1) present material injury (or threat to or retardation of the establishment of an industrial) *and* (2) that the material injury is "by reason of" the subject imports. Relief may not be granted when the domestic industry is suffering material injury but not by reason of unfairly traded imports. Nor may relief be granted when there is no material injury, regardless of the presence of dumped or subsidized imports is irrelevant, because only one of the two necessary criteria has been met, and any analysis of causation of injury would thus be superfluous. American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984) (emphasis supplied) *aff'd sub nom.*, Armco Inc. v. United States, 760 F.2d (C.A.F.C. 1985).

USITC Pub. No. 1743 at 5.

20. 19 C.F.R. § 207.26(b)(1) (1985).

21. Congress recognized the difficulty in attempting to define "significant" as it related to volume of imports and the need to focus on the conditions of trade of each individual industry. As Congress noted, "For one industry, an apparently small volume of imports may have a significant impact on the market; for another, the same volume might not be significant." S. Rep. No. 249, 96th Cong., 1st Sess. 88, *reprinted in* 1979 U.S. Code Cong. & Ad. News 474.

also be reviewed in examining volume of LTFV imports.[22] The ITC will analyze whether the volume of imports increased in absolute terms at the same time that domestic production and consumption also increased. Relatedly, the Commission will determine whether the condition of the domestic injury actually improved when the LTFV imports increased, and whether the increased LTFV amounts depressed prices of domestic producers of the like products. Thus, where the ITC determines that the volume of LTFV imports is insignificant in absolute terms or relative to domestic production or consumption, a causal nexus is not established.

2. *Effect on prices for like products*

The second criterion examined by the ITC is the effect of the LTFV imports on prices in the United States for like products. Under the regulations, the ITC will examine whether there has been "significant price undercutting" compared to the price of like products in the United States and whether the LTFV imports depress prices to a significant degree or prevent price increases that otherwise would have occurred but for the LTFV imports.[23] For example, even if LTFV imports in significant amounts enter the United States market, failure to demonstrate that these imports undercut or depressed prices of like products in the United States or prevented price increases to a significant degree could undermine establishment of a causal nexus.[24]

3. *Impact on domestic producers*

The third criterion analyzed by the ITC is the impact of the LTFV imports upon the domestic industry.[25] In examining impact of the LTFV imports for causation purposes, the ITC will examine certain economic indices. These indices include, but are not limited to, actual and potential decline in output, sales, market share, profits, productivity, return on investments, utilization of capacity as well as actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital and invest-

22. *See generally infra* notes 45 and 51 and accompanying text.

23. 19 C.F.R. § 207.26(b)(2)(i–ii) (1985).

24. It should be noted that the price undercutting discussed here is not the same price issue considered by Commerce in its LTFV determination. *See supra* notes 10–15 and accompanying text for a description of the determination made by Commerce. Commerce determines whether the imports in question are being sold LTFV by comparing the United States price of the import typically with the price charged by the exporter in its home market. The price undercutting referred to here, in contrast, compares the United States price of the import with the price of like products in the United States. Thus, it is entirely possible for a LTFV import to have extremely high margins but still not undercut or depress prices of like products in the United States.

25. *See infra* notes 46, 58, 62, and 81, and accompanying text.

ment and other factors affecting prices.[26] The ITC has paid particularly close attention to evidence of lost sales.[27] The presentation of documented evidence of lost sales provides the Commission with evidence of a specific dollar amount lost by the domestic company, and also helps establish that "but for" the LTFV imports, the buyer would have purchased the domestic product.[28]

4. *"Other" injurious factors and legislative guidelines*

The ITC will utilize the above factors in its application of the "by reason of" standard to determine whether a causal nexus exists between the foreign imports and the injury to the domestic industry. The Statements of Administrative Action from the Trade Agreements Act of 1979 (Statements) established how the ITC should apply the "by reason of" standard.[29] The Statements first note that while the "by reason of" standard establishes a causal link requirement, the standard does not "involve a weighing of injury by reason of subsidized imports or sales at less than fair value against the effects of other factors which may, at the same time, also be injuring the industry."[30] The LTFV imports do not have to be the "principal" or a "major" or "substantial" cause of overall injury to an industry.[31] Such a requirement would make "relief more difficult to obtain for those industries facing difficulties from a variety of sources."[32]

The Senate Report to the 1979 Trade Agreements Act emphasized that current law was retained by requiring the Commission to continue to examine the effects of LTFV imports upon the domestic industry. Such an analysis would include examining the competitive conditions and structure

26. 19 C.F.R. §§ 207.26(b)(3)(i–iii) (1985). These indices, however, are really measures of whether the domestic industry has suffered material injury and are discussed in the "Condition of the Domestic Industry" section of the Commission decisions.

27. *See infra* notes 46, 52, 58, 62, and 92, and accompanying text.

28. Despite past Commission reliance on lost sales information, three Commissioners in Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes from Canada (USITC Pub. 1808) (1986), underplayed the significance of the presence or absence of lost sales in analyzing the causal link between LTFV imports and material injury to domestic industry. The Commissioners noted that typically, "an import that is sold at less than fair value affects the domestic industry in the same way regardless of whether it is a confirmed lost sale." USITC Pub. 1808 at 12, n. 28. The Commissioners further stated that although it might be appropriate to "inquire whether a sale by a respondent has been in lieu of sales by the domestic industry or, alternatively, at the expense of imports from other countries, Commission information on lost sales cannot normally provide an answer to such a question because the data are based on a small and biased sample." *Id.*

29. Statements of Administrative Action, H.R. Doc. No. 153, Pt. II, 434, *reprinted in* 1979 U.S. Code Cong. & Ad. News 700.

30. Id.

31. *Id.*

32. *Id.*

of the relevant domestic industry as well as the quantity, nature and rate of importation of the imports subject to the investigation and how the "effects of the margin of dumping relate to the injury, if any, to the domestic industry."[33] The Senate Report discusses other factors that may be considered by the Commission other than the LTFV imports that may have caused the material injury to the domestic industry. These factors include the volume and prices of imports sold at fair value, contraction in demand or changes in patterns of consumption, trade, restrictive practices of and competition between foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry.[34] The Senate Report notes, however, that the antidumping duty law does not "contemplate that the effects from the LTFV imports be weighed against the effects associated with these other factors."[35] In fact, the Report states that the issue is not whether the LTFV imports are the "principal," "substantial" or a "significant" cause of material injury.[36] Therefore, the ITC is not allowed to weigh the effects of the LTFV imports against the other effects listed above that may have contributed to the other domestic industry's overall injury.[37]

Trying to satisfy these standards, the Report notes, would have the "undesirable result of making relief more difficult to obtain for industries facing difficulties from a variety of sources; industries that are often the most vulnerable to less-than-fair value imports."[38] The petitioner will not be required to bear the burden of proving that material injury is not caused by such other factors, nor will the Commission be required to make "any precise mathematical calculations as to the harm associated with such factors and the harm attributable to less-than-fair value imports."[39] The Commission, after reviewing all the evidence on causation, must "satisfy itself" that "there is a sufficient causal link between the less-than-fair-value imports and the requisite injury."[40] The Commission's determination with respect to causation will be complex and difficult, but nevertheless a matter for its independent judgment.[41]

Three interesting points arise from the Commission's adherence to its

33. S. REP. No. 249, 96th Cong., 1st Sess. 74, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 460.
34. *Id.*
35. *Id.*
36. *Id.* at 75, U.S. CODE CONG. & AD. NEWS 461.
37. 19 C.F.R. § 207.27 (1985).
38. S: REP. No. 249, 96th Cong., 1st Sess. 75, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 461.
39. *Id.*
40. *Id.*
41. *Id.*

congressional mandate. First, although the ITC is not allowed to weigh the injurious effects upon the industry caused by factors other than the LTFV imports against the effects caused by the LTFV imports, it still must take the former into account. The ITC is obviously faced with a difficult determination in a case where it appears the domestic industry has suffered material injury as a result of LTFV imports *and* by other factors unrelated to the LTFV imports. Once the ITC takes all factors into account, the question is raised as to how it must determine whether injury is "by reason of" the LTFV imports if it does not weigh them. Analysis of the ITC decisions below will demonstrate the difficulty involved with this assessment.[42] Second, although the petitioner is not required to prove that material injury is not caused by such other factors, the petitioner should be prepared to rebut any arguments to the contrary. Failure to rebut arguments that the injurious effects were caused by factors other than the LTFV imports could result in a negative injury determination. Third, the antidumping duty case is virtually an "all or nothing" relief situation. In other areas of law, a plaintiff who is injured by a defendant's actions as well as by unrelated factors is still allowed to recover damages for the injury caused by the defendant.[43] In antidumping law, there is no pro rata scaling down of an antidumping duty margin to account for injury caused by factors other than the LTFV imports. Instead, if the Commission is not satisfied that such a causal nexus exists, it will reach a negative injury determination and no antidumping duty will be imposed by Commerce.

B. Commission Application of the Causation Standard

1. *Three critical factors —negative injury determinations*

The Commission's decisions emphasize the causation aspects of the related LTFV factors of volume of imports, effects on domestic prices and impact on the domestic industry. In some cases, the insignificance of any of

42. *See infra* notes 53–92 and accompanying text.

43. In an antitrust case, for example, a court will determine damages based upon economic harm suffered by the plaintiff resulting from the defendant's practices that the antitrust laws were designed to protect. *See* P. Areeda, Antitrust Law at 227–29 (¶ 343) (1978). Injury suffered by the plaintiff which is unrelated to the defendant's anticompetitive conduct will not preclude recovery for damages resulting from the defendant's antitrust violations. Although courts in antitrust cases may require greater proof of the fact of injury, the "courts have tolerated less proof of the quantum of damages." *Id.* at 228 (¶ 343).

An analogy can be drawn to the theory of "comparative negligence" in the law of torts. Under comparative negligence, damages would be apportioned between the parties at fault. W. Prosser & W. Keeton, The Law of Torts 472 (5th ed. 1984). Under "pure" comparative negligence, a plaintiff's contributing negligence does not operate to bar recovery, but does serve to reduce damages in proportion to fault.

these factors leads to a negative injury determination, even though the domestic industry experiences material injury and there are LTFV imports. For example, in *Bicycles from Taiwan*,[44] the Commission determined that the LTFV imports, though significant in absolute volume terms, did not depress prices or suppress price increases of like products in the United States because in most product categories, prices of the domestic bicycles increased during the time of the LTFV imports. The ITC noted that as to market penetration, the market share held by the U.S. producers remained stable during the time period of the investigation, while the share of the market of the two largest U.S. producers increased during those years.[45] In assessing the effect on the domestic industry, the Commission examined lost sales evidence and confirmed only four instances in which the imports subject to the investigation were involved.[46] Because the lost sales amounted to only one one-thousandth of apparent U.S. consumption for the time period, its effect was insignificant.[47] The Commission concluded that with the low market penetration of the imports, increased domestic selling prices and overall lack of nexus between increased import volumes and domestic selling prices,[48] the LTFV imports from Taiwan were not a cause of material injury to the domestic bicycle industry.

Similarly, in *Cold-Rolled Carbon Steel Sheet from Brazil*,[49] the ITC noted that although the domestic industry was still experiencing material injury, recent improvement in the industry's economic indicators was significant.[50]

44. Bicycles from Taiwan, USITC Pub. No. 1417 (1983), *reprinted in* 5 INT'L TRADE REP. DEC. 1767 (BNA) (1983).

45. *Id.* at 9; 5 INT'L TRADE REP. DEC. at 1771.

46. *Id.* at 10; 5 INT'L TRADE REP. DEC. at 1772. The evidence demonstrated in fact that selling prices of domestic manufacturers increased in all five bicycle categories in the mass-merchandise segment examined by the Commission and increased in two of the three categories of the independent dealer segment of the market. In the one category in which the domestic prices decreased, the prices of the relevant imports had increased. *Id.* at 10–11; 5 INT'L TRADE REP. DEC. at 1772.

47. *Id.* at 12; 5 INT'L TRADE REP. DEC. at 1772.

48. *Id.* at 13; 5 INT'L TRADE REP. DEC. at 1773. *See also* Certain Welded Carbon Steel Pipes and Tubes from Taiwan, USITC Pub. No. 1799 at 9 (1986) (where the Commission in reaching a negative injury determination noted that domestic prices increased as prices for imports increased and declined when prices of imports declined, thus belying the argument that the imports suppressed the price of the domestic goods); Hydrogenated Castor Oil from Brazil, USITC Pub. No. 1804 at 8 (1986) (where the Commission reached a negative injury determination and noted that the prices of the domestic goods were relatively high when the volumes and market penetration of the imports were at their peak).

49. Cold-Rolled Carbon Steel Sheet from Brazil, USITC Pub. No. 1579 (1984). "Notice of Determination" appears in 49 Fed. Reg. 39119 (1984).

50. *Id.* at 5. The Commission noted that U.S. production of cold-rolled carbon steel sheet was 15.3 million tons in 1981, declined to 12.1 million tons in 1982, but then increased to 15.3 million tons in 1983. For the first quarter of 1984, the consumption was 9.2 million tons in January–June 1984, which represented an increase over 7.5 million ton level for the first quarter of 1983. *Id.* at 5. Operating losses doubled from 1981 to 1982 (from 301 to 641 million dollars),

Not only did conditions in the domestic industry improve while LTFV imports entered the market, but even with evidence of some undercutting, the prices of both domestic and Brazilian producers rose since mid-1983. In the absence of greater volumes of imports from the LTFV produce, the Commission considered the level of underselling to be insufficient to show an impact on the domestic producers from these imports.[51] The Commission also concluded that the allegations of lost sales to the LTFV producer were not specifically connected to offers from the LTFV producer. As a result, the ITC concluded, "Such information alone in the absence of more significant import volume and penetration levels is insufficient in this investigation to support a finding of a causal connection."[52]

2. *Consideration of non-LTFV factors—affirmative injury determination*

Besides analyzing the three related LTFV factors of volume of imports, effect on prices of like products, and impact on domestic producers, the

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but decreased by over fifty percent in 1983 to a level of $317 million. *Id.* at 5, n. 10. Net sales increased from the first quarter of 1983 to the first quarter of 1984 (from $1.0 to $1.3 billion respectively). *Id.* at 5–6, n. 10.

Although the market penetration for the LTFV imports from the one LTFV Brazilian producer was not disclosed, market penetration for total Brazilian imports went from 0.1 in 1981 to 2.2 percent in 1983, but the first half of 1984 market penetration figure was 1.9 percent. Because there were other Brazilian producers of non-LTFV imports of the same product, the LTFV figures were less than the totals above. In addition, Chairwoman Stern concluded that the weighted average LTFV margin of 1.4 percent for the lone Brazilian LTFV producer constituted a "minor part of the much larger margins of which the Brazilian imports have undersold the domestic product" and thus these LTFV sales did not play a "significant role in the ability of the Brazilian product to penetrate the U.S. market." *Id.* at 7.

51. *Id.* at 7.

52. *Id.* at 8. The Commission also reached a negative determination on material injury on causation grounds in Heavy-Walled Rectangular Carbon Steel Pipes and Tubes from Canada, USITC Pub. No. 1808 (1986). In reviewing the condition of the domestic industry, the Commission noted that its condition had improved significantly during the investigation, but stated that "our negative determination rests primarily on the following analysis of causal factors." *Id.* at 8. First, the Commission noted that Canadian imports as a share of domestic consumption declined during the period of investigation. *Id.* at 9–10. Although there was an absolute increase in Canadian imports, such imports did not take market share from domestic producers. Secondly, the Commission failed to find any overall pattern of underselling by the Canadian product. In fact, it noted that the prices of the Canadian and the domestic producers increased and decreased at the same time throughout the investigation. *Id.* at 10–11. Third, as to allegations of lost sales, the Commission confirmed that though price was one consideration listed by domestic purchasers, such purchasers also listed delivery time, reliability, availability and service as alternate purchasing considerations. Further, none of the lost revenue allocations were confirmed. Fourth, and one factor that the Commission placed particular emphasis upon, was the extremely low weighted average dumping margin. The weighted average dumping margin was an "almost negligible 0.65%." *Id.* at 13. The Commission noted that because factors other than price also affected the purchasers' decisions on source of supply, a small change in price would not have a "significant effect on sales since buyers highly value services related to price." *Id.* at 14. For all these causal factors, the Commission concluded that the domestic industry was not materially injured by reason of the imports from Canada.

Commission has also examined other non-LTFV injurious factors, as it is required, that arguably caused injury to the domestic industry. Although the Commission still reached affirmative injury determinations, the other non-LTFV factors considered seemed to signal what types of non-LTFV factors the Commission would conclude in later cases had undercut establishment of a causal nexus. For instance, in *Barium Chloride from the People's Republic of China*,[53] after determining that the domestic barium chloride industry was suffering material injury,[54] the ITC examined the causal nexus between the LTFV imports and the material injury. As to volume of imports, the Chinese LTFV exports of barium chloride to the United States dramatically increased simultaneously with material deterioration of the domestic industry.[55] As to the effect of the imports, the Commission determined that while barium chloride imports generally increased in 1981, and leveled off in 1982, the domestic prices for crystalline barium chloride fell during 1983 and continued to fall through the second quarter of 1984.[56] The margins of underselling were "substantial" during the time period and still were "significant" even when the Chinese imports had diminished somewhat in the first quarter of 1984.[57] In examining the impact of the LTFV imports, the Commission analyzed evidence of lost and depressed sales. The ITC confirmed the petitioner's allegations of lost sales to seven customers. These seven purchasers stated that the Chinese product was considerably less in price, and that the low price for the Chinese product relative to the domestic product was the principal reason for purchasing the former.[58]

53. Barium Chloride from the People's Republic of China, USITC Pub. No. 1584 (1984).

54. The ITC noted that the domestic industry decreased greatly during the 1981–1983 period. Domestic consumption decreased during the time period largely because of new alternative products and processes that replaced the use of barium chloride. *Id.* at 4–5. Domestic industry employment did not decrease during the decline but production cutbacks led to declines in the output of barium chloride per man-hour and an increase in the unit labor cost of production. Moreover, during the 1981–1983 period, net sales, profitability and cash flow all declined. *Id.* at 5. The major economic indicators did improve slightly during January–June 1984, but the Commission ruled that the domestic industry had deteriorated greatly during the investigation and had thus suffered material injury. *Id.* at 5–6.

55. *Id.* at 6. The LTFV imports in absolute terms increased from 4.0 to 5.3 million pounds from 1981 to 1983. The ITC did note that imports declined greatly from January–June 1984. The Commission concluded, however, that this reduction was largely in response to a preliminary antidumping finding, and not an indication of a long term trend. The Commission based this conclusion upon the fact that idle capacity existed in China because Chinese production capacity did not decline and, in conjunction with a dumping determination against the PRC by the European Economic Community (EEC), China's largest market, Chinese shipments to the EEC fell drastically, thereby making the U.S. market that much more important.

56. *Id.* at 6.

57. *Id.* at 6–7. Because the price data submitted by the parties was confidential business information, the ITC decision did not contain specific data such as margins of underselling.

58. *Id.* at 7. The ITC also noted that purchasers confirmed fifty percent of the instances in which the petitioner was required to offer price concessions to make sales in 1983.

An interesting feature in this case is the extent to which the ITC considered evidence of reduced domestic demand for the product resulting from new, alternative substitutes. Instead of treating this factor for causation purposes as an injurious factor other than the LTFV imports, as the regulations and legislative history would support, the Commission considered it as another indicator of the poor financial condition of, and the material injury suffered by, the domestic industry.[59]

The ITC in *Chloropicrin from the People's Republic of China*,[60] also considered to what extent injurious non-LTFV factors may sever the causal nexus between injury to the domestic industry and LTFV imports. The ITC noted that chloropicrin imports increased significantly from 1980 to 1982, but declined somewhat in 1983. These imports undersold the domestic chloropicrin by margins of 3.7 to 29.0 percent. This underselling forced the domestic producers to reduce their prices to compete with the LTFV imports from the People's Republic of China (PRC).[61] The ITC thus concluded that the LTFV imports from PRC resulted in "domestic producers losing significant sales volume and market share to imports, which impacted upon the domestic industry."[62]

One of the largest importers of chloropicrin argued, however, that it purchased chloropicrin from the PRC not because of its lesser price, but because of quality and supply problems with one of the domestic producers. The domestic producer, however, argued that although such problems existed, they had been solved, with the importer's knowledge, prior to the importation of PRC chloropicrin.[63] The ITC concluded that even if the quality problems caused the importer to import Chinese chloropicrin initially, the importer purchased the Chinese chloropicrin beyond its needs and sold additional amounts in competition with the domestic producers. The price of the chloropicrin which was resold to other domestic users was less than the domestic producer's price who had no quality problems. It was this price and not the alleged quality differentials that was the significant factor in the importer's importation of Chinese chloropicrin.[64] The ITC determined that the importer entered into different contractual terms with the Chinese, assumed the cost of inventorying, and even became a vendor of

59. *Id.* at 4–5.

60. Chloropicrin from the People's Republic of China, USITC Pub. No. 1505 (1983) (Notice of Determination appearing at 49 Fed. Reg. 11893 (1984)).

61. *Id.* at 5.

62. *Id.* at 6.

63. *Id.* at 7. No quality problem was raised with respect to the second major domestic chloropicrin producer.

64. *Id.* at 8. Moreover, as to the supply problem the ITC noted that the contractual supply terms for the Chinese products were different from those of the domestic producers, who argued that no supply problems would have existed if the importer reached the same contractual terms with them.

chloropicrin because "it had a low priced product which allowed it to resell the product at a profit."[65] The interesting question raised by the decision is whether the ITC still would have ruled affirmatively if the quality issue persisted through the time the PRC chloropicrin was imported. The issue is made more difficult because, as noted above, congressional intent prevents the ITC from weighing various injury causative factors.[66]

3. *Consideration of non-LTFV factors—negative determinations*

In several recent decisions, the Commission failed to find a causal nexus between the LTFV imports and the material injury suffered by the domestic industry, largely because of injurious factors not related to the LTFV imports. For instance, in *Potassium Chloride from the U.S.S.R.*,[67] the Commission considered several non-LTFV factors and trade conditions that influenced its conclusion that material injury to the domestic industry was not caused by the LTFV imports from the Soviet Union.[68] One such factor, and one of the most critical, involved the dominant position of Canadian imports in the United States. During each year of the investigation, Canadian imports of the potassium chloride accounted for 70 percent of the domestic consumption. The USSR imports accounted for only 1.3 percent of apparent U.S. consumption in 1984 and constituted less than 2 percent of the market share of Canadian imports in the United States. Although the ITC conceded that these imports undersold domestic potassium chloride during most of the period of investigation, it noted that all purchasers except for one that reported lesser delivered prices for the USSR imports stated that the lower price was necessary because the Soviet Union product was of lesser quality.[69] In fact, some purchasers stated that the discount necessary

65. *Id.* at 9.

66. *See supra* notes 29–32 and accompanying text.

67. Potassium Chloride from the U.S.S.R., USITC Pub. No. 1656 (1985). "Notice of Determination" appearing in 50 Fed. Reg. 11256–57 (1985).

68. Petitioners in the case requested that the ITC cumulate the LTFV imports from the Soviet Union with the subsidized imports from Israel which the Commission recently determined were not a cause of material injury to the domestic industry. Petitioners' argument concerned the proper interpretation of the Trade and Tariff Act of 1984, Pub. L. No. 98–573, 98 Stat. 2948 (1984). The Commission did not apply the provisions of this Act to this case, however, because the investigation was initiated prior to the effective date of the Act. *Id.* at 7, n. 27. Section 612 of the Trade and Tariff Act of 1984 requires the ITC to cumulate "the volume and effects 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." Prior to this addition, the Commission had the discretion to cumulate merchandise from different countries that were the subject of the investigation. *See* Bello & Holmer, *The Trade and Tariff Act of 1984: Principal Antidumping and Countervailing Duty Provisions*, 19 INT'L LAWYER 639, 661–62 (1985).

69. USITC Pub. No. 1656, *supra*, note 67, at 10–11.

to induce them to buy the Soviet Union product was over 9 percent.[70] Therefore, the USSR imports did not have the ability to affect market prices or conditions.[71]

Another factor was the practical depletion of the United States' supply of potassium chloride.[72] Canada and the Soviet Union have 74 percent and 16 percent of all reserves, respectively, the Commission noted, while the United States has only 0.5 percent of worldwide reserves of the substance. As potassium chloride reserves deplete, U.S. production capacity would continue to decrease.[73] United States consumption, on the other hand, was forecast to increase by 25 percent from 1981 to 1990. Because of the increase in consumption and the decrease in domestic availability and production, the ITC concluded that the domestic market would become increasingly dependent upon imports and that domestic industries' market share would continue to decrease.[74]

The level of transportation costs within the United States was a factor in the examination of the causal nexus issue. Transportation costs from New Mexico, where 85 percent of the U.S. supply of potassium chloride was produced, accounted for 50 percent or more of the delivered price of the product.[75] On the other hand, ocean rates for shipping potassium chloride from the USSR were substantially lower than rates for transportation of the domestic supply as were inland freight costs from the port of entry to the customers in the eastern gulf coast states and barge shipping rates on the Mississippi River to customers in the Midwest. While the ITC could not precisely calculate the transportation cost advantages and disadvantages, it concluded that some, if not all, of the differences in price between the USSR and domestic potassium chloride resulted from transportation cost differentials.[76] A dramatic decline in export sales also was a factor in explaining the condition of the domestic industry. Export shipments declined by 39 percent in 1980 to 20 percent of total sales in 1983. The decline was due to economic profit in overseas markets and reduced worldwide demand.[77]

The Commission's decision in *Potassium Chloride*, *supra*, is interesting

70. *Id.* at 11. The Commission also noted that the LTFV imports from the USSR had a larger market share in the southeastern region than in the domestic region as a whole. However, the price trends were stronger in the southeast than the overall price trends. These factors led the Commission to conclude that the USSR imports did not have a suppressive or depressive effect on domestic chloride prices. *Id.* at 11.
71. *Id.* at 8.
72. *Id.* at 9.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 9–10.
77. *Id.* at 10.

because of the existence and use of a number of factors injurious to the domestic industry other than the LTFV imports. The emphasis on the depletion of the United States' supply of potassium chloride seems problematic. Unlike factors such as the industry's export sales performance, ability to negotiate lower cost contracts with domestic transportation concerns or control over the quality of its products, the fact that the domestic supply of a scarce, finite resource is rapidly depleting is a factor that the industry has little or no control over. In effect, a domestic producer in such a situation is caught between the Scylla of extracting less of the resource, thus reducing its sales revenues, and the Charybdis of increasing production to keep up with increased import competition, thereby depleting the resource at a faster pace. Emphasis on depletion, moreover, places the domestic company in a country such as the United States which has a scarce supply of many minerals and resources relative to the rest of the world in a very disadvantageous position.

The Commission in *Fall Harvested Round White Potatoes from Canada*,[78] failed to find a causal nexus partly because of non-LTFV factors such as quality and marketing techniques. The ITC first noted that LTFV imports had increased when prices of the like domestic product were at their highest during the time period under investigation. Moreover, the domestic industry experienced losses when imports were relatively low and domestic production high.[79] It was domestic production, and not the volume of imports, that causally affected domestic prices and losses.[80] The effect of Canadian imports on U.S. prices was minimal or non-existent.[81] Non-price factors also contributed to the competitiveness of Canadian potatoes. The record indicated that one type of Canadian potato was subject to "tighter and more uniform size requirements." Another type of Canadian potato was preferred because it was grown in a reddish soil that resulted in a more preferable appearance.[82] In addition, while some Canadian potatoes were sold through a centralized marketing organization that provided price and quality certification, the Maine growers were represented by many independent, low volume shippers whose relatively decentralized marketing prac-

78. Fall-Harvested Round White Potatoes from Canada, USITC Pub. No. 1463 (1983), *reprinted in* 5 INT'L TRADE REP. DEC. 2520 (BNA) (1983). As Commissioners Stern and Lodwick noted, "whether a domestic industry is materially injured *by reason of* imports sold in this market at LTFV therefore includes a finding that there is a requisite causal link between the imported LTFV goods sold and the material injury experienced by the domestic industry." 5 INT'L TRADE REP. DEC. at 2524.

79. 5 INT'L TRADE REP. DEC. at 2520.

80. *Id.*

81. The record indicated that the average wholesale price of round white potatoes in the New York terminal market increased 114 percent although Canadian imports in the Northeast region increased 132.5 percent. *Id.* at 2524–25 (citing Staff investigation at A-51).

82. *Id.* at 2525–26.

tices created internal price competition.[83] The lost sales data examined by the ITC underscored the extent to which non-price factors affected sales. Almost none of the nineteen alleged lost sales were due to lower Canadian prices and some of the buyers indicated they purchased the Canadian potatoes because of higher quality. In sum, the ITC held that "the importance of these non-price factors in an assessment of the Canadian products' success in the U.S. market," together with the lack of evidence demonstrating the volume or price effect of the Canadian imports upon the domestic potatoes demonstrated there was no causal link between the LTFV imports and the materially injured domestic industry.[84]

The ITC in *Molded Pulp Egg Filler Flats from Canada*[85] focused on the causal nexus between the LTFV imports and the material injury and noted that LTFV imports increased contemporaneously with an increase of the Canadian share of U.S. consumption. This trend alone, the ITC noted, was some evidence of causation.[86] The Commission determined, however, that the differences in distribution techniques between the domestic industry and the LTFV imports impacted on causation. It was noted that end-users in the U.S. generally paid less for Canadian egg filler flats than U.S.-produced flats.[87] The record demonstrated that egg filler flats were sold to distributors or producers' cooperatives who in turn sold to end-users. The cooperatives were organized for the benefit of their egg producer/packer members and, similar to distributors, placed orders, invoiced buyers and sold flats to

83. *Id.* at 2526.

84. *Id.* In another recent case involving an affirmative injury determination, Red Raspberries from Canada, USITC Pub. No. 1707 (June 1985), the Commission noted that as to the volume of imports, LTFV red raspberries from Canada increased two-fold over the same period one year before, but at the same time that U.S. production slipped somewhat. The LTFV imports market share of U.S. consumption increased sharply in the first nine months of the 1984 crop year. As to the effect of such imports on domestic prices, the Commission stated that "the Canadian LTFV imports were not only a part of the general over-supply problem, but specifically and significantly contributed to the price declines experienced in crop year 1984." *Id.* at 9. The ITC noted the data failed to demonstrate "strong evidence of underselling by Canadian imports that would lead to this price depression," but stated that because there were no real quality differences between the imports and domestic products, "the addition of a greater supply through increased imports would normally tend to have a price depressing effect." *Id.* at 9–10. The Commission also noted two different Canadian LTFV suppliers had at different times been the price leader and concluded that "the aggressive pricing of the LTFV imports aggravated the price declines even beyond the effect of the import volumes alone." *Id.* at 10. As to the impact on the domestic industry, the ITC stated that although specific lost sales were generally difficult to document in that market, the evidence adduced did demonstrate some instances in which domestic producers lost sales to LTFV Canadian suppliers. *Id.* For these reasons, the ITC determined that the domestic industry was materially injured by reason of imports from Canada of red raspberries.

85. Molded Pulp Egg Filler Flats from Canada, USITC Pub. No. 1724 (1985).

86. *Id.* at 8.

87. *Id.* at 8–9.

non-members and members.[88] Unlike distributors, the cooperatives were organized for the benefit of their members, who were subject to dues. They did not offer as much delivery and warehousing services, nor did they stock as much packaging material.[89] The Commission determined that no significant underselling occurred at the distributor-cooperative level.[90] However, sales of Canadian egg flats at the end-user level by cooperatives occurred at sales at net prices well below sales of the domestic flats by distributors.[91] The evidence demonstrated that the cooperatives, who in many cases paid higher prices for imported flats than a distributor paid for domestic flats, charged end-users a lower price than a distributor, because of their policy to provide their members with low cost egg flats. The lower end-user prices were caused by the inherent practices of the cooperative versus a distributor, and not the LTFV imports.

The ITC also noted that the only documented lost sales occurred at the end-user level, and, thus, were not caused by the LTFV imports.[92] Furthermore, the imports seemed to have no harmful effect on U.S. prices because the U.S. prices had been increasing at the distributor-cooperative level. For these reasons, the Commission concluded that the egg filler flats from Canada were not a cause of material injury to the domestic industry.

C. Judicial Review of the ITC's Causation Findings

The courts in reviewing determinations made by the Commission will examine whether substantial evidence supports the ruling in question.[93] As one court has stated, judicial review of the findings of the Commission is limited to determining "whether the Commission has acted within its delegated authority, has correctly interpreted statutory language, and has correctly applied the law."[94] The reviewing courts may not weigh the evidence

88. *Id.* at A-4–A-5.
89. *Id.*
90. *Id.* at 9.
91. *Id.* at 9–10.
92. *Id.* at 10, A-30. It should be noted that besides the pricing practices of the cooperatives, the Staff investigation report also noted that although eighteen of twenty end users reduced their purchases of U.S. egg flats to Canadian users primarily because of price, the remaining two reduced their purchases of U.S.-produced flats almost entirely because of quality reasons. *Id.* at A-30. Five other producers listed quality as a secondary consideration in reducing sales of U.S.-produced flats in favor of Canadian flats. *Id.*
93. Armstrong Bros. Tool Co. v. United States, 626 F.2d 168, 169–70 (C.C.P.A. 1980) (*citing* City Lumber Co. v. United States, 457 F.2d 996 (C.C.P.A. 172)); SCM Corp. v. United States, 544 F. Supp. 194, 197 (Ct. Int'l Trade 1981).
94. City Lumber Co. v. United States, 457 F.2d 991, 994 (C.C.P.A. 1972); Armstrong Bros. Tool Co. v. United States, *supra* at 169.

underlying the factual findings of the Commission, nor may the court substitute its judgment for the Commission's.[95] Consequently, the courts will sustain the Commission's determinations if the Commission's "findings and conclusions have a rational connection to its determination, and are supported by substantial evidence."[96] The courts thus tend to give great deference to the causation determinations made by the Commission. For example, in *Sprague Electronic Co. v. United States*,[97] the United States Court of International Trade[98] considered an appeal from a Commission determination that no domestic industry was being or was likely to be injured, nor was an industry prevented from being established by reason of the importation of tantalum capacitors at less than fair value.[99] In upholding the Commission's decision, the court noted that not one ITC commissioner concluded that a domestic industry was injured by the LTFV imports.[100] The Commission had found that any injury suffered by the domestic injury was not by reason of the LTFV imports, but rather general forces of recession confronting the electronics industry and that penetration of the domestic market and the underselling of the domestic producers "'were not of significant magnitude to warrant a determination of injury by reason of LTFV sales.'"[101] In giving deference to the Commission's findings, the court sustained the ITC causation and injury determinations because they were based on substantial evidence.

The United States Customs Court, the predecessor to the Court of International Trade, examined the causal nexus requirement in *Pasco Terminals, Inc. v. United States*.[102] In this case, the court reviewed a Commission determination that LTFV sulphur from Mexico had caused injury to the domestic industry.[103] The Commission found that LTFV sales and offers to sell the Mexican sulphur in the United States "had contributed to the general depression of prices and to market disruption in Tampa and along the East Coast of the United States."[104] This price depression and market

95. Sprague Electric Co. v. United States, 529 F.Supp. 676, 682–83 (Ct. Int'l Trade 1981). *See also* Armstrong Bros. Tool Co. v. United States, 483 F.Supp. 312, 320–21, *aff'd*, 626 F.2d 168 (C.C.P.A. 1980); Pasco Terminals, Inc. v. United States, 634 F.2d 610 (C.C.P.A. 1980).

96. 529 F. Supp. at 682–83.

97. 529 F. Supp. at 676, 682.

98. Congress created the Court of International Trade through the Customs Courts Act of 1980, Pub. L. No. 96–417, 94 Stat. 1727 (1980), 28 U.S.C. § 251 (1982). Congress created the Court of International Trade to provide a "comprehensive system of judicial review of civil actions arising from import transactions." H.R. REP. No. 1235, 96th Cong., 2d Sess. 1, 20 *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3731.

99. 529 F. Supp. at 677.

100. *Id.* at 682–83.

101. *Id.* at 683.

102. 477 F. Supp. 201 (Cust. Ct. 1979), *aff'd*, 634 F.2d 601 (C.C.P.A. 1980).

103. *Id.* at 219.

104. *Id.* The court also noted the evidence before the Commission of lost sales to the Mexican sulphur producer. *Id.* at n. 17.

disruption undergone by the domestic industry was "directly tied to sales and offers of Mexican sulphur at less than fair value."[105] The court assessed that its role was to determine whether the Commission's decision had a rational basis in fact and was not contrary to law. If there was a rational basis in fact, it must be upheld by the court even if the "decision is not one the court would have reached had the question first arisen in judicial proceedings."[106] The court noted that as long as there was a causative link between the LTFV sales of and offers to sell the Mexican sulphur and the injury to the domestic industry, the Commission was correct in finding injury to the domestic industry by reason of the LTFV sales and offers. The Customs Court stated that "[t]o establish the necessary causation, LTFV sales do not have to be the sole cause, the major cause, or greater than any other single cause of injury."[107] Where the Commission finds a causative link between the LTFV sales and injury to the domestic industry, the ITC's task is completed and there is no further need to discuss other causes of injury.[108] The court concluded that because the Commission found that the sulphur from Mexico had contributed to the price depression and market disruption suffered by the domestic industry, and thus was "a" cause of injury, it had in effect concluded that the entrance of the new domestic producer was not the sole cause of injury.[109]

The Court of International Trade in *Atlantic Sugar Ltd. v. United States*[110] also reviewed the causation issue. The case concerned an appeal from a decision by the ITC that refined sugar from Canada had caused material injury to the relevant domestic industry. The plaintiffs argued that the ITC failed to find that the declining per capita consumption of sugar and the increased use of high-fructose corn syrup were "more significant causes of injury to the industry than the importations."[111] The court rejected that claim, stating that "the ITC is not required to weigh the extent of injury from imports against the extent of injury from other causes, if they exist,"[112] but must instead determine "whether or not the imports are *a cause* of material

105. *Id.*

106. *Id.* at 220, *citing* Imbert Imports, Inc. v. United States, 475 F.2d 1189 (C.C.P.A. 1973); City Lumber Co. v. United States, 311 F. Supp. 340, *aff'd*, 457 F.2d 991 (C.C.P.A. 1972). The court further noted that because the Commission had been delegated discretionary authority, "it was not the function of the court to weigh the evidence considered by the Commission, determine the credibility of the witnesses appearing at the hearing and substitute its judgment for that of the Commission." 477 F. Supp. at 220.

107. 477 F. Supp. at 220.

108. *Id.* at 220–21.

109. *Id.* at 221. The court further stated that the Commission's causation determination was fully supported by record evidence and specifically referred to the seven dollar per ton price reduction in the Tampa sulphur market resulting from the presence of the Mexican sulphur.

110. 519 F. Supp. 916 (Ct. Int'l Trade 1981).

111. *Id.* at 922.

112. *Id.*

injury to the industry and to do so based on a reasonable analysis of the evidence before it."[113] The court held that as long as substantial evidence exists to support the finding of "sufficient causal connection between the imports and the injury, the existence of other contributing causes is immaterial."[114]

D. Synopsis of the "By Reason Of" Standard Application

1. *Three critical factors*

As shown above, the first critical factor examined by the Commission is whether the volume of imports was "significant." The ITC determines significance as an absolute amount and as a market share percentage. The Commission also analyzes the timing of the increase in volumes of LTFV imports in relation to domestic production, sales and consumption. The second criterion is whether LTFV imports depressed prices of like domestic products or prevented price increases that would have occurred but for the LTFV imports. Both in *Barium Chloride* and *Chloropicrin*, the Commission found significant price undercutting and a significant depression of prices of the domestic products by the LTFV imports, while no such depression of prices or suppression of price increases was found in *Bicycles*. In fact, in *Fall Harvested Round White Potatoes* domestic prices were at their highest during the investigation when LTFV imports had increased. One key element is the examination of the timing of the LTFV imports in the market and what the effects are on domestic prices.

Finally, the ITC determines the impact of the LTFV factors upon the domestic industry. The Commission examines such impact for material injury purposes, but also for analyzing impact for causation purposes. Once again, the Commission analyzes impact in relation to the timing of the imports. For causation purposes, the Commission has examined lost sales. While the petitioners in *Chloropicrin* and *Barium Chloride* buttressed their causation arguments with documented evidence of sales lost to the LTFV imports from China, failure to document allegations of lost sales was one

113. *Id.*, *citing* S. Rep. No. 249, 96th Cong., 1st Sess. 74–75.

114. *Id.* (emphasis supplied). The court also concluded that substantial evidence supported the Commission's findings that the LTFV volume of sales was "significant" even though the maximum volume of imports was 4.5 percent of the primary distribution of the product ("a volume measure of refiners' sales and a reasonable reflection of consumption") and that regional producers lost sales as a result of the LTFV imports. *Id. See also* City Lumber Co. v. United States, 290 F. Supp. 385, 392 (Cust. Ct. 1968) ("The intent of Congress in the court's opinion, was to protect domestic industry from sales of imported merchandise at less than fair value which either *caused or continued* an injury to competitive domestic producers of merchandise of a class or kind to that of foreign merchandise which 'is being, or is likely to be, sold in the United States or elsewhere at less than its fair value.'" (Emphasis in original.))

reason the Commission failed to find a causal nexus in *Cold Rolled Carbon Steel*.

2. *Non-LTFV import injurious factors*

In order to gather information for its investigation, the ITC sends questionnaires to the named respondents to elicit data and detailed information on costs of production, sales, profit, net revenues, wholesale and retail prices and other data related to the article in question. In answering these questionnaires, respondents may attach information supporting allegations that other factors unrelated to the LTFV imports have caused the material injury suffered by the domestic industry. The questionnaires themselves may be issued as a subpoena.[115] The ITC also sends questionnaires to various purchasers of the LTFV imports not only to document allegations of lost sales, but also to determine whether other factors unrelated to the LTFV imports influenced the purchasers' decisions to buy the imported over the domestic product. Such other factors examined by the Commission include reduction in the demand for the product, change in the product's consumption patterns, developments in technology, restrictive practices, competition between foreign and domestic producers, and the export performance and productivity of the domestic industry,[116] quality differences between imported and domestic products, scarcity of the domestic supply of a natural resource, domestic transportation costs and distribution techniques, and availability of new substitute products that may explain why the domestic industry has suffered material injury.[117]

If such other injury causing factors exist, the Commission's task is made even more difficult. Although it must consider these other factors contributing to the domestic industry's plight, it may not weigh the effect of these factors against the effects of the LTFV imports. As the 1979 Senate Report noted, the ITC does not have to determine that the LTFV imports are a principal, substantial or significant cause of material injury, but only that

115. 19 C.F.R. § 207.8 (1985). In the event a party fails to answer adequately the questions posed in the questionnaire, is unable to produce pertinent information requested in a timely manner in the form required, or otherwise "significantly impedes an investigation," the Commission may seek judicial enforcement of the subpoena, use the best information otherwise available in making its determination, or seek other necessary and appropriate actions. *Id.*

116. Examination of whether a petitioner has kept pace with technology has a corollary in the law of torts. Where a domestic manufacturer fails to keep up with technology and the manufacturer's product is inferior in quality to the LTFV import, a respondent would in essence argue that the domestic manufacturer's contributory negligence broke the causal nexus. Contributory negligence has been defined as "conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." W. PROSSER & W. KEETON, THE LAW OF TORTS 451 (5th ed. 1984).

117. *See supra* notes 53–92 and accompanying text.

there is "a" causal link between them.[118] In fact, as the Report notes, such a requirement would make it more difficult to obtain relief for industries "that are facing difficulties from a variety of sources" which are "often the most vulnerable to less-than-fair-value imports." The Commission, moreover, is not required to make any "precise, mathematical calculations as to the harm associated with such factors, nor is the petitioner required to prove a negative, i.e., that it has not suffered material injury from other sources."[119] The difficulty is further exacerbated by the fact that the injury causing factors are so often intertwined. For instance, a domestic producer's failure to keep up with new technology may lessen the quality of the domestic product relative to the foreign comeptitor's product. If the domestic supplier lost sales to the foreign producer, the imports would be "a" cause of material injury but the domestic supplier's failure to implement new technology may have spurred the purchaser's resort to the imported product.

III. Applying Reason to the Causation Standard—Theory and Practice

A. Is There Room for "Reason"?

The Commission has done a good job overall in making its causation determinations and considering the existence of injury causing factors other than the LTFV imports, given its difficult task of considering but not weighing such other factors. It could be argued that the Commission's reliance on non-LTFV causative factors that were not explicitly mentioned in the legislative history to the Trade Agreements Act in recent cases has made it more difficult for petitioners to establish a causal nexus between the material injury suffered by the domestic industry and the LTFV imports. Especially with regard to scarcity of finite natural resources, a situation over which a domestic producer has little control, it becomes much more difficult for industries facing such a situation to establish a causal nexus.

A counter-argument could be made that the Commission has in recent years recognized other non-LTFV factors that have caused material injury to the domestic industry. The Commission's analysis takes into account all relevant factors that have an effect on the domestic industry, while placing greater emphasis on those LTFV factors that have a direct relationship to the material injury suffered. Under this view, it could further be argued that similar to other areas of law, the ITC has adopted an implicit "rule of

118. *See supra* notes 38–41 and accompanying text.

119. *Id.* The Court of International Trade has also construed the statutory "by reason of" standard as requiring the Commission not to weigh different factors, but only to determine whether substantial evidence exists to demonstrate that the LTFV imports are "a" cause of the relevant industry's injury, notwithstanding the existence of other factors affecting the domestic industry.

reason" to consider additional injury factors other than the LTFV imports listed, as well as those that are not explicitly mentioned in the legislative history. Courts have adopted a "rule of reason" in construing a statute that requires examination of underlying legislative intent, even though there is no explicit provision for a "rule of reason" in the statute.[120]

In antitrust law, the Supreme Court enunciated a "rule of reason" in interpreting section 1 of the Sherman Act[121] in *Standard Oil Co. of New Jersey v. United States*.[122] The Court in *Standard Oil* adopted the rule of reason in examining the legality of concerted business arrangements. In construing section 1 of the Sherman Act, the Court stated that the Act rendered illegal "all contracts or acts which were unnecessarily restrictive of competitive conditions," and should proscribe "undue" restraints on competition. The Court then relied upon the standard of reason to determine "whether a particular practice restricts competition to a degree which could be called 'undue.'"[123] The analysis, however, does not confer upon the Court the right to approve of an arrangement that does "significantly restrict competition on the ground that in the particular instance the public is better off."[124]

This article does not argue that the ITC should adopt an antitrust style "rule of reason" for application to antidumping cases. Rather, if the Commission has implicitly adopted a type of "rule of reason' to enhance its flexibility in considering the complicated causation or issue, application of this or any rule in the antidumping area should take into account certain features inherent in antidumping law.

B. Starting with a Purpose

A "rule of reason" analysis in the antidumping area would first start with a

120. *See, e.g.*, in the environmental area, the D.C. Circuit recognized in Natural Resources Defense Council v. Morton, 458 F.2d (D.C. Cir. 1972), the implicit need to apply a rule of reason in construing the National Environmental Policy Act. The government had argued in this case that although NEPA required a detailed statement of alternatives, it did "'not require a discussion of the environmental consequences of the suggested alternative.'" *Id.* at 834. The court ruled that a "rule of reason is implicit in this area of law," given the underlying legislative history and the executive branch's construction of the statute, that would require a "presentation of the environmental risks incident to reasonable alternative courses of action." *Id.* at 834.

121. 15 U.S.C. § 1. Section 1 of the Sherman Act states in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

19 U.S.C. § 1 (1982).

122. 221 U.S. 1 (1911).

123. *Id.* at 58–60; *see* L. Sullivan, Antitrust Law 173–74 (1973) (hereinafter cited as Sullivan); *see also* Standard Oil Co. of New Jersey v. United States, 211 U.S. at 58–60 (1911)); 2 P. Areeda, Antitrust Law 47 (¶ 314) (1978) (hereinafter cited as Areeda).

124. Sullivan, *supra* note 123, at 175.

determination of what wrong or evil Congress intended the antidumping laws to correct.[125] In enacting the provisions for escape clause cases, those in which domestic industries can obtain relief from fair trade practices of foreign companies,[126] Congress readdressed the purpose of the antidumping laws. The Senate Report to the 1974 Trade Act notes that the antidumping statute was "designed to free U.S. imports from unfair price discrimination practices."[127] Moreover, this same Senate Report notes that the purpose of the antidumping law is not to force foreign suppliers to set the prices at the same level for both its home and U.S. markets.[128] Rather the legislative history notes:

> [T]he Act is primarily concerned with the situation in which the margin of dumping contributes to underselling the U.S. product in the domestic market, resulting in injury or likelihood of injury to a domestic industry . . . When clear indication of injury, or likelihood of injury, exists there would be reason for making an affirmative determination.[129]

Because dumping is defined as price discrimination, the question is what "unfair" price discrimination was the antidumping law designed to prevent. A view shared by one ITC Commissioner is that the unfair price discrimination practices Congress sought to remedy was "some type of predatory pricing."[130] As the Vice-Chairman noted, predatory pricing occurs when a firm prices its merchandise below its own marginal cost of productions. A firm would price its goods in this way "if the firm expects to be able to raise its prices in the future to a level at which it can more than recoup the losses it suffers in the present."[131] The Commissioner did not cite to any specific portion of legislative history to support equating "unfair price discrimination" with "predatory pricing" practices but did note that the Senate Report to the Trade Act of 1974 stated the antidumping laws would not "proscribe transactions which involve 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."[132]

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125. In antitrust law, the courts examine whether a plaintiff has been injured by reason of anything forbidden in the antitrust laws. Areeda, *supra* note 123, at 245 (¶ 346); *see* Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477 (1977).

126. Congress enacted the "escape clause" provisions through the Trade Act of 1974, Pub. L. No. 93–618, 88 Stat. 2072 (1974), 19 U.S.C. §§ 2101–2487.

127. S. REP. No. 1298, 93rd Cong., 2d Sess. 179, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7316 (1974).

128. *Id.*

129. *Id.*

130. Certain Red Raspberries from Canada, USITC Pub. No. 1707 at 14 (1985).

131. *Id.*

132. S. REP. No. 1298, *supra* note 127, at 7316; *see Comment, Soviet Bloc Dumping, the Revenue Act of 1916, and Economic Policy*, 27 U.C.L.A. L. REV. 1365, 1374 ("Historically, the

The greater weight of the legislative history from the 1974 Trade Act and the 1979 Trade Agreements Act, however, supports the view that unfair price discrimination was not only limited to predatory pricing situations. The situation cited by the Commissioner referenced above was in the section of the 1974 Trade Act Senate Report labelled "technical dumping."[133] Technical dumping exists when the import sold in the U.S. at less than its fair low market value, but the price equals the prevailing U.S. market price, often occurring in a "short supply situation or inflationary period."[134] Congress noted that when imports are priced in such a way in those situations, "it is likely to be a case of technical dumping in which there is not likely to be injury to a domestic industry."[135] Technical dumping then occurs when imports are sold LTFV but do not cause material injury to the domestic industry.[136] The Senate Report states that such "'technical dumping' is not anti-competitive, but is procompetitive in effect"[137] and thus not unfair. The necessary implication is that the pricing practices of the import are not "unfair" or "anti-competitive" because the imports have not undersold the prices of the domestic industry's product and thus have not caused injury. Because one of the necessary statutory elements—i.e., a finding of material injury—is obviously not satisfied, no antidumping duty order would be issued. The antidumping laws, thus, are not confined only to eradicating predatory pricing, but are meant to remedy situations in which LTFV imports cause material injury or a threat thereof to the domestic industry.[138] The Senate Report to the 1979 Trade Agreements Act also does not limit the reach of the antidumping laws to predatory pricing situations. The Report, in fact, did not define dumping as "unfair" price discrimination but rather as "selling in another country's market at prices less than 'fair value.'"[139] The Report gives an example of "unfair competition" as being one in which "less-than-fair value imports" cause or threaten the domestic industry with material injury.[140] Hence, Congress, through the antidumping

prevention of predatory dumping has served as one of the most powerful rationales behind antidumping legislation"); *see also* W. WARES, THE THEORY OF DUMPING AND AMERICAN COMMERCIAL POLICY 84 (1977).

133. S. REP. NO. 1298, *supra* note 127, at 7316; Victor, *Injury Determinations by the United States International Trade Commission in Antidumping and Countervailing Duty Proceedings*, 16 N.Y.U. J. INT'L L. 749, 769 (1984).

134. S. REP. NO. 1298, *supra* note 127, at 7316.

135. *Id.*

136. *See supra* note 133, at 769.

137. S. REP. NO. 1298, *supra* note 127, at 7316.

138. As one court has held, the purpose of the dumping statute was to "protect a domestic industry from sales of imported merchandise at less than fair value which either 'caused or continued' an injury to competitive domestic producers." City Lumber Co. v. United States, 290 F. Supp. 385, 392 (Cust. Ct. 1968).

139. S. REP. NO. 1298, *supra* note 127, at 423.

140. *Id.* at 461.

laws, intended to remedy situations in which imports are sold at LTFV and cause or threaten the domestic industry with material injury.

C. Limitations on "Reason"

This "rule of reason" analysis thus when applied to the antidumping duty area has a *per se* element. Because the purpose of the antidumping laws is to remedy situations in which LTFV imports have caused or threatened to cause material injury to a domestic industry, price discrimination which has caused material injury or the threat thereof is per se "unfair" and must be proscribed. The statute itself does not distinguish between fair and unfair LTFV imports. In antitrust law, however, conduct that causes material injury is not automatically considered to be an undue restraint on trade. As one commentator has noted, "the soft word in all of this is 'undue.' The function of 'reason' in the rule is to discriminate between restraints which have that offensive quality and those which do not."[141] The rule of reason does not allow the courts to approve a practice that does significantly restrict competition because the public as a whole would benefit. Similarly, the ITC is not statutorily authorized to reach a negative injury determination when the evidence demonstrates the domestic industry has been materially injured "by reason of" LTFV imports, on the ground that the benefit to the public as a whole of being able to purchase the LTFV imports outweighs the harm suffered by the domestic industry. In escape clause cases, however, Congress gave the President explicit authority not to implement a Commission recommendation that import relief be granted.[142] The President may decide not to impose such relief after examining the effect of granting import relief on consumers, competition in the domestic markets for such articles, the international economic interests of the United States, as well as the "economic and social costs which would be incurred by taxpayers, communities and workers, if import relief were or were not provided."[143] Congress has conferred no such authority upon the Commission through the antidumping laws.[144]

Given the parameters of such a "rule of reason," the ITC then may exercise flexibility in examining injury causing factors other than the LTFV imports, but it may not use the flexibility to read into the law authority to balance benefit to the public against harm to the domestic industry.[145] The

141. Sullivan, *supra* note 123, at 173.
142. 19 U.S.C. § 2252(b) (1982).
143. 19 U.S.C. §§ 2252(c)(1–9) (1982).
144. Relatedly, unlike the requirement for a section 337 trade action (19 U.S.C. § 1337(g) (1982)), the domestic industry in an antidumping case is not statutorily required to demonstrate that it operates in an efficient manner.
145. Another issue concerns whether the Commission must find a causal link between the

"rule of reason" that the ITC has seemed to accept implicitly gives the ITC flexibility by allowing it to consider factors causing injury to the domestic industry other than the LTFV imports even if the factors were not explicitly referred to in the legislative history of the Trade Agreements Act of 1979. Neither the legislative history nor the implementing regulations limit the Commission's consideration of other injury causing factors not explicitly contained therein. By the same token, the "rule of reason" gives the Commission the ability to discount other factors proposed by parties that seem inconsistent with the types of injury causing factors Congress intended the Commission to consider.

Conclusion

Before antidumping duties can be imposed upon imports, it must be shown that a domestic industry has experienced material injury, or the threat thereof, by reason of imports sold at less than fair value. Although Congress has defined in the statute the "material injury" and "less than fair value" elements of the offense, it has not given explicit guidance in the statute, as one Commissioner has acknowledged, as to how the "by reason of" causation standard should be applied. In analyzing causation, the ITC has examined the causation related aspects of the volume of imports, the effects of the imports on domestic prices and the impact of the imports upon domestic producers of like products.

The Commission's task is made difficult because it must examine factors other than the LTFV imports as to why the domestic industry has suffered material injury. The problem is that so often such other reasons are closely intertwined with aspects of the imports. By accepting implicitly a "rule of reason" analysis in applying the "by reason of" causation standard, the Commission obtains greater flexibility in considering other factors that may have caused material injury, but recognizes that such factors are often

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actual margin of dumping and the material injury alleged or just between the LTFV imports and the material injury. In other words, if an LTFV import has a thirty percent margin, the issue is whether the Commission must find a causal link between the margin itself and the material injury alleged. *See* Victor, *supra* note 133, at 766–67. The Senate Report to the 1979 Trade Agreements Act states that the Commission "considers, among other factors, the quantity, nature, and rate of importation of the imports subject to the investigation, and how the *effects of the margin of dumping* relate to the injury, if any, to the domestic industry." (Emphasis added.) S. REP. No. 249, 96th Cong., 1st Sess. 74 *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 460. *See generally* Victor, *supra* note 133, at 765–68; *see* Certain Carbon Steel Products from Spain, 48 Fed. Reg. 525 (1983) (*compare* majority opinion at 534 with the dissent by Commissioner—now Chairwoman—Stern at 534). *See also* Palmeter, *Countervailing Subsidized Imports, the International Trade Commission Goes Astray*, 2 U.C.L.A. PAC. BASIN L.J. 1 (1983); Easton & Perry, *The Causation of Material Injury: Changes in the Antidumping and Countervailing Duty Investigations of the International Trade Commission*, 2 U.C.L.A. PAC. BASIN L.J. 35 (1983).

intertwined with aspects of the LTFV imports. However, for a petitioner to establish that material injury to the domestic industry resulted "by reason of" LTFV imports, a petitioner must place emphasis on the LTFV factors which will be critical to any Commission determination and be prepared to rebut arguments that factors unrelated to the LTFV imports were the cause of the material injury.