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An Examination of ITC Determinations on Imports: the Basis for "Substantial Injury"

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Notes and Comments

AN EXAMINATION OF ITC DETERMINATIONS ON IMPORTS: THE BASIS FOR "SUBSTANTIAL INJURY"

INTRODUCTION

Any entity "representative of an industry"[1] within the meaning of Section 2251(a)(1) of the Trade Act of 1974,[2] may file a "petition for eligibility for import relief for the purpose of facilitating orderly adjustment to import competition."[3] Every such petition must be filed with and investigated by the International Trade Commission [hereinafter ITC]. The statute allows the Commission up to six months for an investigation of whether the imports are the substantial cause of serious injury to the domestic industry.[4] If it is determined that imports are the substantial cause of serious injury, the Commission must determine the amount of the increase in duty or quotas which would prevent or remedy the injury. A determination that adjustment assistance[5] could effectively remedy the injury is reported to the President of the United States. The President must then determine what action, if any, will be undertaken.[6]

This article is an examination of the ITC's determinations of whether imports are the substantial cause of serious injury to domestic industry. The analysis includes a case-by-case identification of the economic issues considered by the ITC in its investigations, particularly of the ITC's interpretation of the substantial cause requirement as shown in its reported decisions to date.[7] This author concludes that the decisions rendered by the ITC, in the cases discussed herein, indicate its protectionist nature.

ITC Determinations

It is the responsibility of the United States International Trade Commission to investigate charges that foreign goods are being imported into

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1. Trade Act of 1974, 19 U.S.C. § 2251(a)(1) (1974).
2. *Id.*
3. *Id.*
4. 19 U.S.C. § 2251(d)(2).
5. *Id.*
6. 19 U.S.C. § 2252(a).
7. After careful analysis, the author concludes that no pattern exists in ITC investigations with respect to Section 2251 "escape clause" proceedings.

the United States in such increased quantities as to be a substantial cause of serious injury (or the threat thereof) to the domestic industry producing an article like or directly competitive with the imported article. The Trade Act of 1974 [hereinafter Trade Act] requires that each of the following economic conditions be present before an affirmative determination of injury caused by imports may be made:

1. There are increased imports (either actual or relative to domestic production) of an article into the United States;[8]
2. A domestic industry producing an article like or directly competitive with the imported article is seriously injured, or threatened with serious injury;[9] and
3. Such increased imports of an article are a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.[10]

The requirement that increased imports be a "substantial cause" of actual or threatened serious injury represents a relaxation of the analogous "major cause" standard employed in Section 1901(b)(1) of the Trade Expansion Act of 1962 (TEA),[11] the predecessor provision to Section 2251(b)(1). The new "substantial cause" criterion of Section 2251(b)(1) requires a dual test to be met. The Trade Act, in Section 2251(b)(4), defines "substantial cause" to mean "a cause which is important and not less than any other."[12] Thus, imports must both constitute an important cause of the serious injury and be "not less than any other" cause.[13] The two phrases are not synonymous.

The legislative history of Section 2251 indicates that where increased imports are just one of many causes of equal weight, such imports would, most likely, not constitute an "important" cause; where imports are one of two factors of equal weight, such imports would be identified as an

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8. 19 U.S.C. § 2251(b)(1) (1974). In addition, the time period within which the existence of an increase in imports is to be measured must be selected by the Commission. This, of course, affects the determination of whether there was an increase in imports.

9. *Id.*

10. *Id.* at § 1901 (1962).

11. *Id.* at § 2251(b)(4) (1974).

12. *Id.*

13. House Comm. on Ways and Means, *Trade Reform Act of 1973,* H. REP. No. 93–571, 93d Cong., 1st Sess., 46–47 (1974); Senate Comm. *Trade Reform Act of 1974,* S. REP. No. 93–1298, 93d Cong., 2d Sess., 120 (1974).

"important cause."[14] In thus explaining the meaning of "substantial cause," the Congress did not intend to set rigid, impossible standards for the Commission to apply to determine whether increased imports were indeed a "substantial cause" of the requisite injury or threat thereof.[15] If there is evidence that the domestic industry is harmed by increased imports,[16] and employment, sales and other problems unique to the industry are found, there is a much higher probability the Commission will find "substantial cause" in a Section 2251 "escape clause" proceeding.[17] This result is misleading; the Commission might choose to lend greater credence to a different balancing of economic variables in any given investigation.[18] For example, there were increased imports in the case of *High Carbon Ferrochromium*;[19] however, the Commission clearly recognized that the nations of Rhodesia and South Africa held pricing and cost advantages with which the domestic industry could not compete.[20] And, in *Certain Fishing Tackle*,[21] imports were a major factor in the Commission considerations; however, the Commission determined imports were not the substantial cause because the imports were the result of the federal government's Generalized Systems of Preference (GSP) policy.[22]

A REVIEW OF PAST ITC INVESTIGATIONS

Bolts, Nuts, and Screws of Iron or Steel:[23] A unanimous Commission (5–1–0)[24] determined that wood, iron and steel bolts, nuts, and screws were not the substantial cause of serious injury to the domestic market. The

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14. S. REP. No. 93–1298, *supra* note 13, at 120–1.

15. 19 U.S.C. § 2251(b)(2)(c), requires the Commission to consider an increase in imports (if present) as a substantial cause but does not require a finding of substantial cause if there is an increase in imports.

16. *See* text *infra*, at 255–60.

17. 19 U.S.C. § 2251(b)(6) authorizes the Commission to investigate any factors which in its judgment may be contributing to increased imports of the article under investigation.

18. *Id.*

19. *See* text, *infra*, at 253.

20. *Id.*

21. *See* text, *infra* at 253.

22. *Id.* Under the GSP many developing nations were allowed to export to the United States in an effort to assist their economic development. In *Certain Fishing Tackle* it was determined that federal policy had caused the increase in imports and not foreign or domestic business decisions. *See* text, *infra*, at 253.

23. *Bolts, Nuts, and Screws of Iron or Steel*, No. TA–201–2, USITC Publication 747, November 1975.

24. Hereinafter, the Commission's vote will be in parenthesis, ordered for, abstain or absent and against, respectively.

following economic factors were considered: a sharp increase in import penetration; a declne in employment; a shutdown of plants and facilities; and increased inventories. The Commission concluded that the injury was attributable to cyclical fluctuations and to improved productivity rather than to imports.[25]

Wrapper Tobacco:[26] A unanimous Commission (4–0–0) determined that imports of wrapper tobacco were not the substantial cause of serious injury to the domestic market.[27] The following economic factors were considered: a marked decline in domestic production and consumption of large cigars; the Surgeon General's 1964 report on cigarette smoking, and a change in consumer demand and taste. The Commission concluded that the decline in domestic shipments was attributable to a change in consumer behavior.[28]

Asparagus:[29] The Commission split on whether imports of asparagus were the substantial cause of serious injury to the domestic industry.[30] The following economic factors were considered: a decrease in domestic production and increase in imports, the seasonal nature of the industry, and declining employment. The split in the Commission was attributable to differences over the problems of different links in the distribution of asparagus. Farmers and canners who dealt only in asparagus suffered injuries, while farmers and canners who were diversified suffered minor injuries.[31]

Stainless Steel and Alloy Tool Steel:[32] A majority of the Commission determined that imports of stainless steel and alloy steel were the substantial cause of serious injury to the domestic industry.[33] The following economic factors were considered: an increase in imports, a reduction in domestic shipments, the lower levels of capacity utilization, and the lower prices and profits. The Commission concluded that domestic industry only prospered when world demand increased and imports to the U.S. decreased.[34]

Footwear:[35] A unanimous Commission (6–0–0) determined that imports of footwear were the substantial cause of serious injury to the domestic

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25. *See supra* note 23.
26. *Wrapper Tobacco,* No. TA–201–3, USITC Publication 746, November 1975.
27. *Id.*
28. *Id.*
29. *Asparagus,* No. TA–201–4, USITC Publication 755, January 1976.
30. *Id.*
31. *Id.*
32. *Stainless Steel and Alloy Tool Steel,* No. TA–201–5 USITC Publication 756, January 1976.
33. *Id.*
34. *Id.*
35. *Footwear,* No. TA–201–7, USITC Publication 758, February 1976.

industry.[36] The following economic factors were considered: an increase in the percentage of the domestic market supplied by imports, a steady increase in imports, a decline in consumption, the reluctance of financial institutions to invest in the shoe industry, the poor returns on investments, the labor efficiency and the technological sophistication of the industry, the labor intensiveness of the domestic industry, the low costs of import producers, and the efforts of domestic producers to remedy the problem through vertical integration. The Commission concluded that the domestic industry could not be competitive with low priced imports despite any attempt at self-help.[37]

Stainless Steel Table Flatware:[38] The Commission determined that imports of stainless steel table flatware were the substantial cause of serious injury to the domestic industry.[39] The following economic factors were considered: the increases in imports relative to domestic production, the 1974–75 economic recession, the failure of domestic industry to adjust, the substitution of products, and the efforts of domestic industry to be more competitive. The Commission concluded that increased import penetration had prevented the domestic industry from being competitive.[40]

Certain Gloves:[41] A majority of the Commission (5–1–0) determined that imports of certain gloves were not the substantial cause of serious injury to the domestic market.[42] The following economic factors were considered: an increased level of import penetration, the lower wage costs in exporting countries, the labor intensiveness of the industry, and the profitability of the domestic industry. The Commission concluded that the domestic industry was still profitable and, thus, was not seriously injured within the meaning of the statute.[43]

Mushrooms:[44] A majority of the Commission determined (5–0–1) that imports of mushrooms were the substantial cause of serious injury to the domestic industry.[45] The following economic factors were considered: the botulism scare of 1973–74, the diversion of raw products from the canned to the fresh market, and an increase in imports relative to domestic production. The Commission determined that a change in consumer purchasing patterns

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36. *Id.*
37. *Id.*
38. *Stainless Steel Table Flatware,* No. TA–201–8 USITC Publication 759, March 1976.
39. *Id.*
40. *Id.*
41. *Certain Gloves,* No. TA–201–9, USITC Publication 760, March 1976.
42. *Id.*
43. *Id.*
44. *Mushrooms,* No. TA–201–10, USITC Publication 761, March 1976.
45. *Id.*

combined with the presence of low priced imports was the substantial cause of serious injury to the domestic industry. The Commission also noted that imports held an increased share of the domestic market before and after the botulism scare.[46]

Ferricyanide and Ferrocyanide Pigments:[47] A majority (5–0–1) determined that increased imports of ferricyanide and ferrocyanide were the substantial cause of serious injury to the domestic industry.[48] The following economic factors were considered: the inability of the domestic industry to raise prices to offset costs and to achieve a reasonable level of profitability. The Commission concluded that the pricing in the iron-blue pigment industry lagged behind prices of the rest of the chemical industry as a result of price oppression caused by increased imports.[49]

Shrimp:[50] The Commission determined (3–1–2) that shrimp were being imported in such quantities as to be the substantial cause of injury to the domestic industry.[51] The following economic factors were considered: all information regarding imports, the recession, the increased costs of production, a surplus of domestic shrimp craft, and a shortage of shrimp available to domestic shrimpers. The Commission concluded that, even though domestic consumption of shrimp was at an all time high, the small proportion of the domestic market supplied by domestic production was a direct result of low priced imports.[52]

Rounded Stainless Steel Wire:[53] The Commission (3–2–1) determined that rounded stainless steel wire was not being imported in such quantities as to be a substantial cause of serious injury.[54] All economic indicators of the health of the industry pointed to an absence of any serious injury within the meaning of the statute.[55] The manufactured products of the end product users of round wire were in less demand during times of recession. The Commission concluded that the recession was a more important cause of serious injury than imports.[56]

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46. *Id.*

47. *Ferricyanide and Ferrocyanide Pigments* (Iron Blue Pigments), No. TA–201–11, USITC Publication 767, April 1976.

48. *Id.*

49. *Id.*

50. *Shrimp,* No. TA–201–12, USITC Publication 773, May 1976.

51. *Id.*

52. *Id.*

53. *Rounded Stainless Steel Wire,* No. TA–201–13, USITC Publication 779, June 1976.

54. *Id.*These goods were durable goods.

55. *Id.*

56. *Id.*

Honey:[57] The Commission (3–1–2) determined that honey was being imported in such quantities as to be a substantial cause of serious injury.[58] The following factors were considered: a depressed domestic price caused by low-priced imports, the ratio of imports to domestic production, an increase in inventories of honey, and the increase in consumers' use of substitutes. The Commission concluded that declining production accompanied by declining prices was the result of low priced imports.[59]

Plant Hangers:[60] The Commission determined that imports of plant hangers was not the substantial cause of serious injury to the domestic industry.[61] The following economic factors were considered: an increase in imports, an increase in both total sales and profits for the industry during 1972–75, and a steady increase in the total number of workers employed from 1972–75. The Commission concluded that the major reason for the decline in domestic shipments in 1976 was a decline in domestic production because of a decrease in consumer demand.[62]

Sugar:[63] A unanimous Commission (6–0–0) determined that sugar was being imported in quantities sufficient to harm the domestic industry.[64] Economic factors included: an increase in sugar imports, both actual and relative to the amount supplied by domestic production; the fact that the United States is the largest unregulated sugar market in the world and an increase in sugar imports in 1977 would adversely affect sales, inventories, production, and profit in the domestic industry, and an increasing use of substitutes by consumers. The Commission concluded that the increased use of substitutes in the future would result in a smaller domestic market for the domestic industry.[65]

Mushrooms:[66] Only nine months after its first mushroom decision, the Commission again determined that mushrooms were being imported in sufficient quantities to injure the domestic market.[67] The following economic factors were considered: nine mushroom canners ceased canning operations since the 1960s, mushroom canneries were continually unable to achieve a

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57. *Honey*, No. TA–201–14, USITC Publication 781, June 1976.
58. *Id.*
59. *Id.*
60. *Plant Hangers*, No. TA–201–15, USITC Publication 797, March 1977.
61. *Id.*
62. *Id.*
63. *Sugar*, No. TA–201–16, USITC Publication 807, March 1977.
64. *Id.*
65. *Id.*
66. *Mushrooms*, No. TA–201–17, USITC Publication 798, January 1977.
67. *Id.*

reasonable level of profitability,[68] employment declined in the mushroom canning industry; recalls were made because of botulism. The Commission concluded that increased imports of mushrooms and evidence that other countries planned to increase their exports justified granting remedial relief to the domestic industry.[69]

Footwear:[70] A unanimous Commission (6–0–0) determined that imports of footwear were the substantial cause of serious injury to the domestic industry.[71] The following economic factors were considered: the increase in imports both actually and relative to domestic production, the recent recession, the inability of domestic producers to keep pace with technological and style changes, and a decreased U.S. production. The Commission found that although the domestic industry was composed of a wide variety of firms with great diversity in size and efficiency and was labor intensive, lower priced imports generally undersold domestic products.[72]

Television Receivers:[73] A unanimous Commission (6–0–0) determined that imports of television receivers were the substantial cause of serious injury to the domestic industry.[73] The following economic factors were considered: the dominant position of the two largest U.S. producers (Zenith and RCA) in the domestic market and the 1974–75 recession. The Commission concluded that the failure of the industry to recover after the recession was due to the phenomenal import penetration of the lower-priced imports. The presence of low priced imports prevented the domestic industry from regaining its former position after the 1974–75 recession.[74]

Low Carbon Ferrochromium:[75] A majority of the Commission (4–1–1) determined that imports of low carbon ferrochromium were not the substantial cause of serious injury to the domestic industry. The Commission concluded that the decline in domestic shipments was attributable to the development of a new stainless steel refining process being installed by many consumers of low carbon ferrochromium, and not to increased imports.[76]

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68. Additionally, there was a significant idling of production facilities.

69. *See supra* note 66.

70. *Footwear*, No. TA–201–18, USITC Publication 799, February 1977.

71. *Id.*

72. *Id.*

73. *Television Receivers, Color and Monochrome, Assembled or not Assembled, Finished or Not Finished, and Subassemblies Thereof*, No. TA–201–19, USITC Publication 808, March 1977.

74. *Id.*

75. *Low Carbon Ferrochromium*, No. TA–201–20, USITC Publication 825, July 1977.

76. *Id.*

Cast-Iron Cooking Ware:[77] A majority (4–1–1) of the Commission determined that imports of cast iron cooking ware were the substantial cause of serious injury to the domestic industry.[78] Although there was evidence of price depression, many firms had increased their profits, and therefore no serious injury within the meaning of the statute was found. Thus, in the absence of a finding of serious injury, the Commission did not reach the issue of substantial cause.[79]

Fresh Cut Flowers:[80] A unanimous Commission (4–0–0) determined that imports of fresh cut flowers was not the substantial cause of serious injury to the domestic industry.[81] During the period investigated, there was an increase in profit margins and no significant unemployment or underemployment. The Commission concluded that imports were not causing injury to the domestic industry of the magnitude necessary for an affirmative determination.[82]

Certain Headware:[83] A unanimous Commission (4–1–0) determined that imports of certain headwear were not the substantial cause of serious injury to the domestic industry.[84] During the period investigated, the sales and domestic production of casual and sport headwear increased, the industry's profits increased, and the number of persons employed increased. The Commission determined the domestic industry was not being seriously injured within the meaning of the statute.[85]

Cast-Iron Stoves:[86] In its decision on cast-iron stoves, the Commission split on the issue of whether imports did or did not threaten substantial injury.[87] Economic factors considered included: the tenfold increase of imports of cast iron stoves from 1972-76 and the increase of the total U.S. shipment of imported and U.S. produced cast-iron stoves from 50 percent of the U.S. market in 1972 to 60 percent of that market in 1975. The Commission determined the point of contention was whether, in the future, imports would injure the domestic market.[88]

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77. *Cast-Iron Cooking Ware,* No. TA–201–21, USITC Publication 817, May 1977.
78. *Id.*
79. *Id.*
80. *Fresh-Cut Flowers,* No. TA–201–22, USITC Publication 826, July 1977.
81. *Id.*
82. *Id.*
83. *Certain Headwear,* No. TA–201–23, USITC Publication 829, August 1977.
84. *Id.*
85. *Id.*
86. *Cast-Iron Stoves,* No. TA–201–24, USITC Publication 826, July 1977.
87. *Id.*
88. *Id.*

Live Cattle and Certain Edible Meat Products:[89] A unanimous Commission determined that imports of cattle and edible meats were not the substantial cause of serious injury to the domestic market.[90] An investigation disclosed that the cattle industry had encountered other serious problems before imports began to increase. Therefore, the Commission determined that the impact of increased imports was minimal.[91]

Malleable Cast Iron Pipe and Tube Fittings:[92] A unanimous Commission determined that imports of malleable cast iron pipe and tube fittings were not so voluminous as to be a substantial cause of serious injury.[93] Economic factors considered included: an increase in sales, profits and production, a five year low in inventories, and the supply by the domestic industry of 85 percent of domestic consumption. The Commission determined that increasing imports were not injurious to the domestic industry.[94]

Bolts, Nuts, and Large Screws of Iron or Steel:[95] A majority of the Commission (3–2–1) determined that imports of bolts, nuts and large screws of iron or steel were the substantial cause of serious injury to the domestic industry.[96] The following economic factors were considered: an increase in imports both actually and relative to that of domestic production, an increase in the proportion of the domestic market supplied by imports, the 1974–75 recession, labor strikes, severe weather, production inefficiency, and an emphasis of the domestic industry on the original equipment manufacture market rather than the distributor market. The Commission concluded that since the ratio of imports to domestic production had increased every year since 1969, the substantial cause requirement was met.[97]

Citizens' Band (CB) *Radio Transceivers*:[98] A majority of the Commission (5–0–1) determined that imports of citizens' band (CB) transceivers were the substantial cause of serious injury to the domestic market.[99] The following economic factors were considered: a decline in profit levels, employment, production and consumer demand, an increase in inventory, and the impact

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89. *Live Cattle and Certain Edible Meat Products of Cattle,* No. TA–201–25, USITC Publication 834, September 1977.

90. *Id.*

91. *Id.*

92. *Malleable Cast Iron Pipe and Tube Fittings,* No. TA–201–26, USITC Publication 835, September 1977.

93. *Id.*

94. *Id.*

95. *Bolts, Nuts, and Large Screws of Iron or Steel,* No. TA–201–27, USITC Publication 847, December 1977.

96. *Id.*

97. *Id.*

98. *Citizens' Band* (CB) *Radio Transceivers,* No. TA–201–29, USITC Publication 852, February 1978.

99. *Id.*

of an FCC rule. The Commission concluded that restriction on the use of CB radios in Japan and other countries and the extensive production facilities of foreign producers contributed substantially to the increase of imports into American markets.[100]

Unalloyed, Unwrought Zinc:[101] A majority of the Commission determined that the domestic industry was not being seriously injured by imports of unalloyed unwrought zinc.[102] Economic factors considered by the Commission included: an increase in imports, a decline in consumption, labor, and power equipment, supply problems in the industry, and the impact of environmental regulations. The Commission concluded that the decline in the domestic industry was attributable to a decline in consumption, traceable to depressed economic conditions and to a loss in market share due to replacement by substitution.[103]

Unalloyed, Unwrought Copper:[104] A majority of the Commission (4–1–1) determined that the domestic industry was being seriously injured by increased imports of unalloyed unwroght cooper.[105] The following economic factors were considered: the ratio of imports to domestic production, the failure of U.S. producers of achieving a satisfactory profit margin, the cyclical trends of copper sales, the substitution of other products for copper, and the costs of environmental and safety protections. The Commission determined that increased imports were adversely affecting the industry because the price of those products did not include the added cost resulting from environmental and safety regulations followed by the domestic industry.[106]

Bicycle Tires and Tubes:[107] A majority of the Commission (4–1–1) determined that the domestic industry was seriously injured by an increase in imports of bicycle tires.[108] The following economic factors were considered: the increase in imports relative to that of domestic production, and the allegations that the domestic industry's sole producer depended heavily on a single buyer, failed to solicit new accounts, provided inadequate service to old

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100. *Id.*

101. *Unalloyed, Unwrought Zinc,* No. TA–201–31, USITC Publication 894, June 1978.

102. *Id.*

103. *Id.*

104. *Unalloyed Unwrought Copper,* No. TA–201–32, USITC Publication 905, August 1978.

105. *Id.*

106. *Id.*

107. *Bicycle Tires and Tubes,* No. TA–201–33, USITC Publication 910, September 1978.

108. *Id.*

accounts, overexpanded capacity and was not price competitive. The Commission concluded that the rapid increase in import penetration over a short period of time frustrated the domestic industry's ability to respond to increased competition.[109]

Certain Fishing Tackle:[110] A unanimous Commission (5–1–0) determined that the domestic industry was not being seriously injured by increased imports of certain types of fishing tackle.[111] It was noted that imports of artificial baits and flies increased dramatically with the advent of the Generalized System of Preferences (GSP).[112] Imports had been in a state of decline before the GSP. The Commission concluded that imports were the substantial cause of serious injury, but not such injury as is defined within the meaning of the statute.[113]

High Carbon Ferrochromium:[114] A unanimous Commission (4–2–0) determined that the domestic industry was being injured by imports of high carbon ferrochromium.[115] The following economic factors were considered: the imports had risen at an annual rate of more than 11 percent from 1973–77 and importers had increased their share of the U.S. market from 46 percent to 58 percent in the same period, there was a substantial decline in domestic producers, the rising prices between 1975 and 1978 were accompanied by rising costs, pricing and cost advantages enjoyed by the import producer, and the primary end users of high carbon ferrochromium were profit makers. The Commission concluded that the pricing and cost advantages enjoyed by imports were the substantial cause of serious injury to the domestic industry.[116]

Clothespins:[117] A unanimous Commission (4–2–0) determined that increased imports of clothespins were the substantial cause of serious injury to the domestic industry.[118] The following economic factors were considered: the increase in imports both actual and relative to that in domestic production, the increased proportion of the domestic market supplied by imports as the shipments of domestic products declined, and the costs of domestic producers

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109. *Id.*

110. *Certain Fishing Tackle,* No. TA–201–34, USITC Publication 917, September 1978.

111. *Id.*

112. *See supra* notes 21–22 and accompanying text.

113. *See supra* note 110.

114. *High Carbon Ferrochromium,* No. TA–201–35, USITC Publication 911, September 1978.

115. *Id.*

116. *Id. See supra* notes 19–20 and accompanying text.

117. *Clothespins,* No. TA–201–36, USITC Publication 933, December 1978.

118. *Id.*

increased. The Commission concluded that the domestic industry could not compete with low priced imports and the import producers' hold on one-half of the American market without remedial action.[119]

Bolts, Nuts and Large Screws of Iron or Steel:[120] A majority of the Commission determined tht the domestic industry was being seriously injured by increased imports of bolts, nuts and large screws made of iron.[121] The following economic factors were considered: the increase in imports relative to domestic production and the proportion of the domestic market supplied by imports, the 1974–75 recession, inefficiencies in certain production methods and the domestic producers' emphasis on the original equipment manufacturer market rather than the distribution market. The Commission concluded that imports were gaining a larger share of the market in both good and bad economic times.[122]

Certain Machine Needles:[123] A unanimous Commission (5–0–0) determined that the domestic industry was not being seriously injured by increased imports of certain types of machine needles.[124] The following economic factors were considered: the decline of U.S. consumption of machine needles, the transfer of production by machine needle producers to foreign facilities, the changes in machine needle technology, and the evidence that domestic producers had not kept up with such changes. The Commission concluded that a changing technology and a decline in consumption of end products were the causes of the serious injury.[125]

Nonelectric Cooking Ware:[126] A unanimous Commission (5–0–0) determined that the domestic industry was being seriously injured by increased imports of nonelectric cooking ware.[127] The following economic conditions were considered: the increase of the total apparent domestic consumption of 19 percent in four years, 1974–78; the availability of substitutes; and the decline of the domestic industry share of the domestic market. The Commission concluded that the largest decline in domestic shipments

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119. *Id.*

120. *Bolts, Nuts and Large Screws of Iron or Steel,* No. TA–201–37, USITC Publication 924, November 1978.

121. *Id.*

122. *Id. See also supra* notes 23–25, 95–97 and accompanying text.

123. *Certain Machine Needles,* No. TA–201–38, USITC Publication 936, February 1979.

124. *Id.*

125. *Id.*

126. *Nonelectric Cooking Ware,* No. TA–201–39, USITC Publication 1008, November 1979.

127. *Id.*

occurred whenever the rate of imports was high; the impact of imports on domestic producers was highlighted by the largest decline in profits for the domestic industry's largest producer (General Hardware), occurring from 1977–78 when the increase in imports was the largest.[128]

Fresh-Cut Roses:[129] A unanimous Commission (5–0–0) determined, for a second time,[130] that the domestic industry was not being seriously injured by imports of fresh-cut roses.[131] The following economic conditions were considered: an increase in employment and wages, the stability of production levels during the period investigated, and increase in sales and profitability, and an increased return on investment. The Commission concluded that this industry was not seriously injured or threatened with serious injury.[132]

CONCLUSION

The results of the thirty-six investigations just reviewed indicate the factors considered important to the International Trade Commission's interpretation of substantial cause. In 20 instances, the Commission determined that imports were the substantial cause of serious injury to the domestic industry. In 14 instances, imports were not the substantial cause of serious injury. In two instances, the Commission was evenly divided. In the past the Commission has found substantial cause when the following economic information was discovered regarding the viability of American business, labor or communities: an increase in imports relative to that in domestic production, the presence of cost and price advantages of import producers over domestic industry, a decline in profits suffered by the domestic industry, a change in consumer behavior/preference, in employment, in productivity, in cyclical fluctuations, in recession, in consumption, in sales, in the availability of substitutes, in inventories, in the return on investment, in efforts at self-help, in the wages of domestic workers, in problems unique to the industry, in government regulation, in any evidence of a worsening market, in the inability of the domestic industry to adapt and in the proportion of the domestic market supplied by import producers.

One may conclude from a reading of all the cases presented before the Commission under Section 2251 that the following factors in combination overwhelmingly favor a finding of serious injury substantially caused by imports: an increase in imports either actual or in relation to that in domestic production, a decline in the proportion of the domestic market

128. *Id.*
129. *Fresh-Cut Roses*, No. TA–201–42, USITC Publication 1059, April 1980.
130. *See supra* notes 80–82 and accompanying text.
131. *See supra* note 129.
132. *Id.*

supplied by domestic producers, and absent a change in circumstances, the inability of the domestic industry to adapt to those circumstances. The importance of these factors to the ITC support the argument that the Commission was established to protect American industry from injurious competition by imports.[133] Its entire approach is protectionist, and is not oriented toward the consumer.

The Commission has looked unfavorably on any indication that imports hold any decisive competitive advantage in the American market place. In its investigation of imports of CB transceivers[134] and sugar[135] as substantial causes of serious injury to the domestic industries, the Commission noted that the restrictions upon American markets were fewer than those upon foreign markets. Thus, doing business was easier for manufacturers of imports in the United States.[136]

On two occasions,[137] the ITC considered evidence that United States government regulation had been an important contributing factor to serious injury to the domestic market. However, even where the Commission made that determination, the Commission still found that imports were the "substantial cause" for statutory purposes.[138] The following discussion indicates this result.

In 1976, the FCC changed the technical specifications for the sale of CB radio transceivers, and directed a shift in production from the 23 to the 40 channel model to take effect in July, 1977.[139] The FCC decision created a two set competitive market from 1976 to July, 1977. As of July 1977, the 23 channel model effectively became obsolete. Sales suffered because of increased imports and because of perception of a better product soon to come.

The second situation in which governmental regulation contributed to serious injury to the domestic industry was one involving fishing tackle. Certain fishing tackle were designated as being eligible articles for duty-free treatment under the generalized system of preferences (GSP).[140] The GSP was established to assist developing nations in gaining access to American markets. From 1973 to 1975, imports of certain fishing tackle had been in a

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133. 19 U.S.C. § 1202(4).

134. *See Citizens Band* (CB) *Radio Transceivers, supra* note 98.

135. *Sugar, supra* note 63.

136. *See supra* notes 63–65 and 98–100 and accompanying text.

137. *Citizens Band (CB) Radio Transceivers, supra* notes 98–100 and *Certain Fishing Tackle, supra* notes 110–113.

138. *See id.*

139. *See* supra note 98.

140. *See supra* notes 21–22 and 110–113 and accompanying text.

state of decline, but in 1976, after the establishment of the GSP, imports increased 57 percent over the previous year and increased at an even greater rate in 1977.[141]

The Commission has not found substantial cause in cases where there has been a showing of a change in consumer behavior and in manufacturers' demand. The Commission discussed consumer behavior in its investigation of imported wrapper tobacco.[142] A resulting increase in U.S. imports of wrapper tobacco from 1971 to 1975, and a resulting decline in U.S. farm production was attributed to a strong demand for cigars and the U.S. Surgeon General's Report on Smoking and Health issued in 1964.[143] The Commission concluded that a change in consumer behavior was a more important cause of injury.

In both *Unalloyed, Unwrought Zinc*[144] and *Low Carbon Ferrochromium*,[145] the Commission concluded that a change in manufacturing methods was the important cause of serious injury to the domestic industry. In both instances, it was established that industrial demand for the commodities had been substantially reduced by a change in industrial requirements for producing the end products.[146]

Even though the Commission has recognized a change in consumer behavior as sufficient grounds for not finding substantial cause,[147] the agency has repeatedly held that a decrease in consumer demand alone is insufficient.[148] There was evidence in an investigation of citizens' band radios of a decrease in consumer demand for CB transceivers following a four year surge.[149] The Commission established a rule that where there is a shrinking market because of declining consumer demand, the presence of lower priced imports qualifies as the substantial cause of serious injury.[150] The Commission appears to decide the issues presented to it on a case by case basis: it considers whether there has been a significant idling of domestic facilities, decline of employment and availability of substitutes.

Although changes in consumer preferences, i.e., styles and/or tastes, have often been counter-indicia to substantial cause, changes in consumer

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141. *See supra* notes 110–113.

142. *Wrapper Tobacco, supra* notes 26–28.

143. *Id.*

144. *See supra* notes 101–103 (new mileage standards for automobiles).

145. *See supra* notes 75–76 and accompanying text (new process using high carbon ferrochromium).

146. *See supra* notes 144– 145.

147. *See Citizens Band* (CB) *Radio Transceivers, supra* notes 98–100.

148. *Id.*

149. *Id.*

150. *Id. See also* Bolts, Nuts, and Screws of Iron or Steel, *supra* notes 23–25; *Mushrooms, supra* notes 44–46, *Mushrooms, supra* notes 66–69.

preferences coupled with the inability of the domestic industry to adjust appear to be deemed further evidence of the presence of imports as the substantial cause of serious injury. The Commission has reasoned that if imports are not increasing their share of the American market, there should be sufficient revenues for the domestic industry to adapt to changes in consumer preferences.[151]

With the exception of the Generalized System of Preferences (GSP)[152] and trade negotiations, the Commission has not discussed conflicts between a declining domestic industry and a national public policy. In its investigation of *Certain Fishing Tackle* the Commission determined that imports only became competitive after the adoption of the GSP, which afforded favorable tariff treatment to imports from developing nations into the United States.[153]

The Commission has considered the implications of limiting imports where there are American antitrust violations. However, the agency also considers American competition as an important cause of serious injury in its determinations of whether imports were the "substantial cause." The Commission's *Television Receivers* decision illustrates this point.[154] Many imported television sets were manufactured in Japan. There was a significant idling of domestic production facilities, a lack of reasonable profits made by many domestic firms and a significant employment problem in the industry. The Commission held that market domination by two domestic producers was an important cause of injury. This finding was outweighed, however, by the finding that, during the period in which the domestic industry experienced its most serious injury, the combined market share of the two U.S. producers had declined.[155]

A second case illustrates the degree of injury which can be inflicted upon a highly competitive American industry by lower priced imports. In *Footwear,*[156] the Commission determined that the domestic industry was made up of a wide variety of firms with a great diversity in size and efficiency. While many U.S. shoe producing firms were highly efficient, imports generally undersold domestic footwear and continued to capture an increasing share of the U.S. market. The profit and loss statements of domestic producers varied widely; a number of the larger firms operate at a higher profit level. The profit level for the industry as a whole was low. Many

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151. *Certain Fishing Tackle, supra* notes 110–113.
152. *Id.*
153. *Id.*
154. *See supra* notes 73–74.
155. *Id.*
156. *See supra* notes 35–37.

firms were forced out of business as a result of the increased imports of lower priced footwear.[157]

A third case discussed the inability of a significant number of firms to operate at a reasonable level of profit. In the case of *Bicycle Tires and Tubes,*[158] the Commission noted that two domestic producers had ceased production of bicycle tires and tubes: the Universal Tire Company in 1970 and the Goodyear Tire & Rubber Company (Goodyear) in 1976. Carlisle Tire & Rubber Company (Carlisle) was the sole remaining U.S. producer. Information on profit and loss experience was obtained from Goodyear and Carlisle. Goodyear showed losses in both 1975 and 1976, the last year of its bicycle tire and tube production. Carlisle, the sole remaining firm, showed reduced earnings in 1976, 1977 and 1978. On the basis of the evidence, the Commission determined that a significant number of domestic firms were unable to operate at a reasonable level of profit.[159]

Recessions are seen as an important cause of serious injury *only* where it is evident that the industry is, or will be, injured in times of prosperity as well. For example, in times of recession, consumers' disposable personal income declines, thereby making lower priced imports more marketable. The domestic industry is unable to compete with the imports and, as a result, loses revenues. Thus, the domestic industry suffers serious injury substantially caused by imports. However, at the end of a recession when disposable personal income increases, there is a greater demand for both domestic and imported goods. If, in times of economic recovery, there is evidence that the domestic industry is recovering, the Commission will not find the element of substantial cause to have been satisfied. The difficulties of the domestic industry are thus deemed cyclical. However, if, in the economic recovery period, the domestic industry continues to suffer, imports will be determined to be the substantial cause of serious injury.[160]

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157. *Id.*

158. *Bicycle Tires and Tubes, supra* notes 107–109.

159. *Id. See generally Stainless Steel and Alloy Tool Steel; Television Receivers; High Carbon Ferrochromium; Bolts, Nuts and Large Screws of Iron or Steel, supra.*

160. Since this writing, the ICC in a 3–2 vote has held that automobile imports were not the substantial cause of injury to the domestic automobile industry. *See* ITC Investigation No. TA–201–44, November, 1980. "After two great oil crises of the last seven years and the perceived quality deficiencies of domestic autos, the U.S. market changed significantly and these imports were in a position to benefit" said Commissioner Paula Stern. "We should not, however, blame the messenger for the bad tidings." (Newsweek, November 24, 1980, p. 98.)

In conclusion, the U.S. International Trade Commission does not operate on principles of *stare decisis*; it instead considers the relevant economic data before it on a case by case basis. The ITC is protectionist in its approach to petitions on imports as being a substantial cause of serious injury to the domestic industry.

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