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Trends in Antidumping Decisions: The ITC's Use of Certain Economic Indicators

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TRENDS IN ANTIDUMPING DECISIONS: THE ITC'S USE OF CERTAIN ECONOMIC INDICATORS

INTRODUCTION

Domestic industries have invoked the Antidumping Act of 1921[1] in increasing numbers recently[2] to protect themselves from the threat of lower-priced foreign merchandise. That protection is the levying by the Department of Treasury of an additional customs duty on certain imports that have been found to satisfy two requirements. First, the Treasury Department must determine that the imported merchandise in question[3]

1. Antidumping Act of 1920, §§ 201 et seq., 19 U.S.C. §§ 160-173 (1976).

2. The amount of dumping complaints in 1978 was triple that in 1977. Interview with Hal Sundstrom, Office of the Secretary, International Trade Commission (May 3, 1979).

3. The Treasury's determination begins when it receives information of LTFV sales of imports. 19 U.S.C. § 160(c)(1). That information can come from any district director of Customs, 19 C.F.R. § 153.25 (1978), or from a person outside the Customs Service. *Id.*, § 153.26. The LTFV determination can also begin automatically when certain designated steel imports are priced below a previously established "trigger price." Final Rule, 43 Fed. Reg. 6065 (1978). *See also* "Trigger Prices" for Imported Steel Mill Products, 43 Fed. Reg. 1464 (1978), and Notice of Proposed Rule Amendment, 42 Fed. Reg. 65214 (1977).

"is being, or is likely to be sold . . . at less than its fair value . . . " (LTFV).[4] Second, the International Trade Commission (ITC) must determine that a domestic industry "is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States."[5] The focus of this Note is this second required determination,[6] by the ITC, of whether there has been injury to a domestic industry.[7]

When the ITC receives notice from the Treasury that there have been LTFV sales, it has three months to resolve the injury issue.[8] It bases its decisions on information gathered from its own files, from other agencies of the government, from questionnaires and correspondence from field work by members of its staff and from testimony and other evidence at its hearings.[9] The requisite level of injury for an affirmative finding need only be "more than de minimis"[10] and its final decision is subject to very limited judicial review.[11] Therefore it is important to know how the ITC arrives at its determinations of injury.

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4. 19 U.S.C. § 160(a)(1976).

5. *Id.*

6. The first required determination, by the Treasury, of LTFV sales, is a complex "exercise in legal accounting . . . basically a comparison between the price in the United States market and the fair value of the merchandise sold." Note, *Treasury Runs the Maze; Less Than Fair Value Determinations Under the Antidumping Act of 1921*, 8 GA. J. INT'L & COMP. L. 919, 922 (1978). The guidelines for this comparison are set out in 19 C.F.R. §§ 153.1-153.18 (1978). For more on the LTFV determination *see* Victor, *United States Dumping Rules*, 10 ST. MARY'S L. J. 217, 222-229 (1978) and Myerson, *A Review of Current Antidumping Procedures: United States Law and the Case of Japan*, 15 COLUM. J. TRANSNAT'L L., 167, 175-181 (1976) [hereinafter cited as Myerson].

7. The ITC rarely finds that an industry has been prevented from being established, therefore, the scope of this Note is limited to injury determination.

8. 19 U.S.C. § 160(a)(1976).

9. 19 C.F.R. § 201.9 (1978).

10. For a discussion of this *see* Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis* 5 LAW & POL'Y INT'L BUS. 85, 104-106 (1973).

11. City Lumber Co. v. United States, 457 F.2d 991, 994, 59 C.C.P.A. 89 (1972).

> It is not the judicial function to review or to weigh the evidence before the Commission or to question the correctness of findings drawn therefrom. (Citations omitted) [It] does not extend beyond determining whether the Commission has acted within its delegated authority, has correctly interpreted statutory language, and has correctly applied the law . . . . " No question of law is raised when the exercise of . . . discretion is challenged."

Id. See also Imbert Imports, Inc. v. United States, 475 F.2d 1189, 1191, 60 C.C.P.A. 123 (1973).

The significance of certain key economic indicators will be examined with respect to five affirmative determinations of injury,[12] two affirmative determinations of likelihood of injury[13] and nine negative determinations of both injury or likelihood of injury, [14] made by the ITC during the period of March, 1978 to March, 1979. For convenience, the seven affirmative determinations will be referred to as "winners" and the nine negative determinations as "losers."

The Antidumping Act does not set forth any standards by which the ITC is to be guided in making its determinations.

> As a result, the Commission has traditionally exercised considerable discretion in making its determinations based upon the facts in each case. However . . . Section 201 of the Act requires the Commission find that two conditions have been satisfied. First, the Commission must determine that an industry is being or is likely to be *injured.* This determination is based upon certain economic indicators — consumption, production, capacity changes and utilization, shipments, inventory levels and profits. Second, the Commission must determine that the injury is "*by reason of*" the less than fair value imports. This second determination is based upon an analysis of such factors as market penetration by less than fair value imports, documented lost sales of domestic manufacturers to less than fair value imports, and a price depression or suppression of the impacted products. If the Commission finds that either condition has not been

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12. *Bicycle Tires and Tubes from the Republic of Korea*, No. AA1921-193, Pub. No. 958 (U.S.I.T.C. March, 1979); *Rayon Staple Fiber from France and from Finland*, Nos. AA1921-190 and AA1921-191, Pub. No. 938 (U.S.I.T.C. February, 1979); *Steel Wire Strand for Prestressed Concrete from Japan*, No. AA1921-188, Pub. No. 928 (U.S.I.T.C. November, 1978); *Rayon Staple Fiber from Belgium*, No. AA1921-186, Pub. No. 914 (U.S.I.T.C. September, 1978); *Carbon Steel Plate from Japan*, No. AA1921-179, Pub. No. 882 (U.S.I.T.C. April, 1978).

13. *Polyvinyl Chloride Sheet and Film from the Republic of China*, No. AA1921-178, Pub. No. 879 (U.S.I.T.C. April, 1978); *Impression Fabric of Manmade Fiber from Japan*, No. AA1921-176, Pub. No. 872 (U.S.I.T.C. March, 1978).

14. *Silicon Metal from Canada*, No. AA1921-192, Pub. No. 954 (U.S.I.T.C. March, 1979); *Certain Steel Wire Nails from Canada*, No. AA1921-189, Pub. No. 937 (U.S.I.T.C. February, 1979); *Motorcycles from Japan*, No. AA1921-187, Pub. No. 923 (U.S.I.T.C. November, 1978); *Certain Nylon Yarn and Grouped Nylon Filaments from France*, No. AA1921-185, Pub. No. 922 (U.S.I.T.C. October, 1978); *Portland Hydraulic Cement from Canada*, No. AA1921-184, Pub. No. 918 (U.S.I.T.C. September, 1978); *Sorbates from Japan*, No. AA1921-183 (U.S.I.T.C. September, 1978); *Steel Wire Strand for Prestressed Concrete from India*, No. AA1921-182, Pub. No. 906 (U.S.I.T.C. August, 1978); *Welded Stainless Steel Pipe and Tube from Japan*, No. AA1921-180, Pub. No. 899 (U.S.I.T.C. July, 1978); *Ice Hockey Sticks from Finland*, No. AA1921-177, Pub. No. 871 (U.S.I.T.C. March, 1978).

> met, its determination must be negative, and it need not consider the factors relevant to determining the other conditions.[15] (emphasis added)

Commissioner Stern was not speaking for the entire Commission in the above quotation.[16] This is understandable because often the ITC does not clearly distinguish between injury and causation,[17] its majority opinion does not consider all the indicators she cites,[18] and it sometimes considers other economic indicators.[19] However, Stern's analysis that the elements of injury and causation should be treated separately seems the proper one,[20] and her division of certain economic indicators between these elements seems logical.

Although the majority opinions of the ITC are not as analytically precise as Stern would imply, they usually at least refer to most of the economic indicators she mentions.[21] But there is no indication of what relative weight the ITC attaches to these indicators. What follows, therefore, is a breakdown of the subject winners and losers to these indicators to determine the meaning and significance of each.

INJURY FACTORS

Consumption

If the domestic market is consuming less of a given product, there can be little dispute that a producer of that product is being injured. Therefore the winners should show a decline in consumption and the losers steady or rising consumption.

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15. *Rayon Staple Fiber from France and Finland, supra* note 12, at 9–10 (determination by Commissioner Stern). *See also Certain Steel Wire Nails from Canada, supra* note 14, at 10–11 (determination by Commissioner Stern).

16. In *Rayon Staple Fiber from France and Finland*, she was concurring with the majority's opinion in part and dissenting in part. In *Certain Steel Wire Nails from Canada*, she was concurring with the majority.

17. *See e.g., Carbon Steel Plate from Japan, supra* note 12.

18. *See e.g., Bicycle Tires and Tubes from the Republic of Korea, supra* note 12.

19. *See e.g., Rayon Staple Fiber from France and from Finland* (use of ratio of profit to sales), *supra* note 12, at 5.

20. Commissioner Alberger has also always emphasized this distinction; *see* his affirmative determination in *Polyvinyl Chloride Sheet and Film from the Republic of China, supra* note 13 and his dissent in *Rayon Staple Fiber from Belgium, supra* note 12.

The ITC measures "apparent consumption" which equals producers shipments minus exports.[22] One difficulty with this indicator is that it does not account for change in inventories of distributors and end users.[23] If such inventories fluctuate for reasons other than consumption the apparent consumption figure will be distorted. When the ITC is aware of such fluctuations it adjusts its consumption figures accordingly.[24]

An examination of the winners reveals that it does not consider consumption to be a significant indicator. In three[25] of the five affirmative determinations of injury, consumption was rising in the period immediately prior to the investigation, which should indicate the opposite of injury. The ITC distinguished these adverse apparent consumption figures in one of these cases by comparing it to a very high level of consumption reached in 1974.[26] The second set of affirmative findings were not of injury but only the *likelihood* thereof, which may have mitigated the effect of the adverse data, even though in one of these the consumption had risen by thirty-eight percent.[27]

More consistent, however, were the losers, where consumption was usually flat or rising. The two exceptions to this were attributed by the respective staff reports as due to other causes.[28]

Production

Production decreases might also signal injury. Yet in three of the winners,[29] production had risen in 1977. And in each of these cases the

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21. The information is always attached to the opinion in the staff report to the Commission as a "Summary." Often, however, the exact figures for these indicators are confidential.

22. *Rayon Staple Fiber from France and from Finland, supra* note 12, at A-9.

23. *Carbon Steel Plate from Japan, supra* note 12, at A-11.

24. *Id.* at A-12.

25. *Carbon Steel Plate from Japan, supra* note 12 (6.8 million short tons in 1976 to 7.4 million short tons in 1977), at A-11; *Polyvinyl Chloride Sheet and Film from the Republic of China, supra* note 13 (38% increase from 1975 to 1977), at 6; *Impression Fabric of Manmade Fiber from Japan, supra* note 13 (rising "irregularly" from 1974 to 1977), at A-20.

26. *Carbon Steel Plate from Japan, supra* note 12, at 7, A-11.

27. *Polyvinyl Chloride Sheet and Film from the Republic of China, supra* note 13, at 6.

28. *Motorcycles from Japan, supra* note 14 (decrease in consumption due to recission pressures), at A-15 and *Ice Hockey Sticks from Finland, supra* note 14 (decrease due to "higher energy costs in 1973 that have resulted in higher operating expense for artificial ice skating rinks, the closure of some of those rinks, and higher fees required of users of those rinks"), at A-10.

29. *Steel Wire Strand for Prestressed Concrete from Japan, supra* note 12 (78 million tons in 1976; 92 million in 1977), at A-11; *Polyvinyl Chloride Sheet and*

majority opinion ignored the adverse data. However, two of these were only findings, again, of likelihood of injury,[30] and in the third a concurring opinion distinguished the adverse data by showing the eighteen percent increase in production in 1977 only brought production to a level that was twenty-three percent less than the production level in 1974.[31]

The losers all reflected flat or rising levels of production.

Capacity

Closely related to production is an industry's capacity to produce. The ITC does not rely on capacity *per se* as an economic indicator. Instead it compares actual production to hypothetical maximum capacity in a ratio that yields the "capacity utilization rate" (c.u.r.). A low c.u.r. for one given year might indicate injury to an industry in that its productive resources have been idled. On the other hand it might just reflect an expanded capacity because of increased demand — a healthy sign. Thus the c.u.r. is a more accurate indicator when compared to the preceding year; winners, therefore, should be expected to show a declining c.u.r. and losers a flat or rising c.u.r.

The ITC, however, looks to further than just the preceding year. Five[32] of the seven winners showed an *increase* in the c.u.r. from 1977; another winner[33] also showed an increased c.u.r. over 1977, but a decline in the first half of 1978. In three[34] of these cases the majority opinion

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Film from the Republic of China, supra note 13 (690 million tons in 1976; 716 million tons in 1977), at A-14; and *Impression Fabric of Manmade Fiber from Japan, supra* note 13 (33 million square yards of woven fabric in 1976; 40 million square yards in 1977; 36 million square yards of slit fabric in 1976; 43 million square yards in 1977), at A-16.

30. *See supra* note 13.

31. *Steel Wire Strand for Prestressed Concrete from Japan, supra* note 12, at 8.

32. *Rayon Staple Fiber from France and from Finalnd, supra* note 12 (seventy-one percent in 1976; seventy-eight percent in 1978), at A-12; *Rayon Staple Fiber from Belgium, supra* note 12 (same), at A-12; *Steel Wire Strand for Prestressed Concrete from Japan, supra* note 12 (forty-four percent in 1976; fifty-one percent in 1977), at A-11; *Carbon Steel Plate from Japan, supra* note 12 (forty-five percent in 1976; fifty percent in 1977), at A-14; and *Impression Fabric of Manmade Fiber from Japan, supra* note 13 (woven fabric thirty-one percent in 1976; thirty-eight percent in 1977; slit fabric forty-one percent in 1976, forty-six percent in 1977), at A-16.

33. *Bicycle Tires and Tubes from the Republic of Korea, supra* note 12 ("increased somewhat in 1977 but declined in 1978 . . . "), at A-17.

nonetheless reported a declining c.u.r. by comparing the present figures to higher c.u.r. figures obtained in the more prosperous years of 1973 and 1974. The other two did not mention the adverse data.

Most of the losers, as should be expected, evidenced flat or rising capacity utilization rates. One complainant,[35] however, had a steadily declining c.u.r. from ninety-five percent in 1974 to fifty-four percent in 1978. The majority opinion dismissed this as "a result of the growth in capacity, the decline in production and the working-off of high inventories."[36] Two other losers[37] also had anomalous c.u.r. figures in that they were much lower now than in earlier more prosperous years.[38] The majority opinion in those cases conceded injury, but nonetheless found insufficient causation, thus skirting the c.u.r. question.

Shipments

Shipments include both domestic shipments and exports. Winners should be expected to have declining shipments, as a sign of their injury, and losers should have flat or rising shipments.

But five[39] of the seven winners had rising shipments in 1977. In two of these cases[40] no mention of this adverse data appears, perhaps because these were the two likelihood of injury cases. Of the remaining three, only one majority admitted the adverse data.[41] Another ignored the usual *total* shipments figure, which was adverse to an injury determination, and instead mentioned that *domestic* shipments (only a portion of the total

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34. *Steel Wire Strand for Prestressed Concrete from Japan, supra* note 12, at 4; *Carbon Steel Plate from Japan, supra* note 12, at 6; *Rayon Staple Fiber from France and from Finland, supra* note 12, at 5.

35. *Silicon Metal from Canada, supra* note 14, at A-14.

36. *Id.* at 3.

37. *Steel Wire Strand for Prestressed Concrete from India, supra* note 14 (ninety percent in 1974; fifty-one percent in 1977), at A-8; *Welded Stainless Steel Pipe and Tube from Japan, supra* note 14 (ninety-one percent in 1974; fifty-five percent in 1977), at A-8.

38. *Cf.* c.u.r. figures of cases, *supra* note 34.

39. *Rayon Staple Fiber from France and from Finland, supra* note 12 (468 million tons in 1976; 483 million tons in 1977), at A-10; *Rayon Staple Fiber from Belgium, supra* note 12 (same), at A-10; *Steel Wire Strand for Prestressed Concrete from Japan, supra* note 12 (81 million pounds in 1976; ninety-one million pounds in 1977), at A-12; *Polyvinyl Chloride Sheet and Film from the Republic of China, supra* note 13 (374 million pounds in 1976; 411 million pounds in 1977), at A-15; *Impression Fabric of Manmade Fiber from Japan, supra* note 13 (woven fabric: 33 million square yards in 1976, 41 million square yards in 1977; slit fabric: 41 million square yards in 1976, 45 million square yards in 1977), at A-17.

40. *See supra* note 13.

41. *Rayon Staple Fiber from France and from Finland, supra* note 12, at 5.

shipments figure) had declined.[42] The last compared the shipments of 1977 to the peak year of 1974 and thus found a decline.[43]

The losers all showed rising or flat shipments data. One of them,[44] did have lower shipments in 1977 than in the earlier peak year of 1974, as in one of the winners case,[45] but in that case the majority found that even though there was injury, there was no causation.

Inventory

Inventory levels are one of the more insignificant indicators studied by the ITC. Although its staff report regularly mentions inventory levels, the majority opinions rarely take that information into account. Perhaps this is because such data, standing alone, is of dubious significance in determining injury. High inventory levels might mean stagnation, or it might indicate rising sales or an expectation thereof in which case large inventories could be seen as healthy. Inventories often fluctuate seasonally[46] and sometimes industries do not keep any inventory.[47] The staff reports occasionally include an inventory/sales ration,[48] which might be a more precise indicator of injury as reflected by inventory levels. Nevertheless, it appears that the ITC regards rising inventories as a sign of injury.

The winners, as expected, all show rising inventories, but only two majority opinions mentioned it.[49] The losers all showed flat and fluctuating inventory levels and the data was not mentioned in any of the majority opinions.

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42. *Rayon Staple Fiber from Belgium, supra* note 12, at 5.

43. *Steel Wire Strand for Prestressed Concrete from Japan, supra* note 12, at 5.

44. *Welded Stainless Steel Pipe and Tube from Japan, supra* note 14 (162 million pounds in 1974; 123 million pounds 1977), at A-30. *Cf.* U.S. Department of Commerce figures at A-10.

45. *See supra* note 43.

46. *See e.g., Motorcycles from Japan, supra* note 14, at A-24.

47. *See e.g., Welded Stainless Steel Pipe and Tube from Japan, supra* note 14, at A-10.

48. *See e.g., Rayon Staple Fiber from France and from Finland, supra* note 12, at A-14; *Steel Wire Strand for Prestressed Concrete from Japan, supra* note 12, at A-16; and *Sorbates from Japan, supra* note 14, at A-12.

49. *Bicycle Tires and Tubes from the Republic of Korea, supra* note 12, at 4; *Steel Wire Strand for Prestressed Concrete from Japan, supra* note 12, at 4; *but see* "[T]he ratio of producers inventories to shipments indicates improvement in the domestic industry . . . ", at A-16.

Employment

Falling employment levels indicate injury. This information is determined by measuring the annual average number of employees and the total man-hours worked. These data usually followed the same pattern in the subject group of cases. One problem with this is that worker productivity can increase and thus offset the effect of falling employment levels.[50]

The ITC reports invariably mention employment levels yet three[51] of the winners showed rising employment. For two[52] of these three, the rise was modest after a precipitous drop from an earlier peak year, 1974, and in those two cases the majority opinion did not mention employment levels. But the other one showed a strong gain in employment, a fourteen percent increase for the first half of 1978,[53] and the majority opinion noted a "drop in employment,"[54] comparing the 1977 level of employment to the 1974 level.

The losers all showed rising or steady employment levels with one exception,[55] which was attributed to worker productivity.[56]

Profits

Profits may be the most important, and obvious, measure of injury to an industry. The ITC measures net sales and net profits before tax. Losses or declining profitability carry great weight in an injury determination. All but one[57] of the winners showed declining profits or outright losses in the last year reported, and that exception showed profits "well below levels in 1974 and 1975,"[58] and was, again, only a likelihood of injury determination.

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50. *See Silicon Metal from Canada, supra* note 14, at A-19.

51. *Rayon Staple Fiber from France and from Finland, supra* note 12 (2.5 thousand workers and 5.1 million man-hours in 1976; 2.7 thousand workers and 5.7 million man-hours in 1977), at A-13; *Rayon Staple Fiber from Belgium, supra* note 12 (same), at A-12; *Steel Wire Strand for Prestressed Concrete from Japan,* (270 workers and 581 thousand man-hours in 1977; 278 workers and 584 thousand man-hours in 1977), at A-16.

52. *Rayon Staple Fiber from France and from Finland, supra* note 12; *Rayon Staple Fiber from Belgium,* supra note 12.

53. *Steel Wire Strand for Prestressed Concrete from Japan, supra* note 12, at A-16.

54. *Id.* at 4.

55. *Silicon Metal from Canada, supra* note 14 (971 employees and 1.7 million man-hours in 1977, and 755 employees and 1.5 million man-hours in 1978), at A-14.

56. *Id.* at 4 and A-15.

57. *Impression Fabric of Manmade Fiber from Japan, supra* note 12 ($2.5 million in 1976; $3.1 million in 1977), at A-23. *Cf.* note 58 *infra.*

58. *Id.* at 5. *See also* at A-23 ($4.4 million in 1974).

This consistency carried through to the losers, which uniformly registered rising or steady profits.

CAUSATION FACTORS

Lost Sales

Once an injury has been established the ITC must determine that that injury was caused by the LTFV imports. A key factor is evidence of lost sales, that is, proof that certain customers of the aggrieved domestic industry stopped buying from that industry and turned to the LTFV imports because of their lower prices. The ITC acquires this information by asking ex-customers of the complainant industry why they have stopped purchasing from that source. If the ex-customer admits that it was strictly because of the lower price of the LTFV imports, it is considered a documented lost sale. Often there are other reasons for the switch, such as higher quality of the LTFV imports, speedier delivery, former price quotations and better availability.[59]

In all but one[60] of the winners there was documented evidence of lost sales. The majority opinion of that exception claimed that the "entry" of the subject product "caused the domestic industry to lose sales."[61] This assertion hedges the issue which should be whether the price of the LTFV import actually caused the lost sale, not a mere deduction that its entry caused it. In that case, the staff report showed there were other reasons for the lost sales.[62]

Two losers, however, also showed lost sales,[63] but these lost sales were deemed minimal by the relevant majority opinions.[64]

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59. *See e.g., Steel Wire Strand for Prestressed Concrete from Japan, supra* note 12, at A-23; and *Rayon Staple Fiber from Belgium, supra* note 12, at A-19. In *Ice Hockey Sticks from Finland, supra* note 14, the effect of loss sales was mitigated, according to the staff report by evidence that the LTFV hockey sticks were not of comparable quality to the domestic sticks:

> The Swedish Federal Bureau for Consumer Interests tested 100 ice hockey sticks of each of nine models. Each hockey stick was subjected to slap shots on the ice by members of the Swedish First Division National Ice Hockey Team until his stick broke. On the average it took 5.3 slap shots to break a [LTFV] stick and it took 26.5 slapshots to break a [domestic] stick.

Id. at A-26.

60. *Rayon Staple Fiber from Belgium, supra* note 12, at A-19.

61. *Id.* at 5.

62. *Id.* at A-19.

63. *Silicon Metal from Canada, supra* note 14 (3 documented lost sales), at A-23; *Certain Steel Wire Nails from Canada, supra* note 14 (1 documented lost sale), at A-37.

64. *Silicon Metal From Canada, supra* note 14, at 5; *Certain Steel Wire Nails from Canada, supra* note 14, at 6.

Market Penetration

The ratio of total LTFV imports to total consumption yields market penetration, or market share, of the LTFV imports. High or rising LTFV market penetration in an injured industry seems a strong indicator of causation.

However, five[65] of the winners did not show high or rising market penetration. The majority opinions in three of these cases discounted this adverse data by relying on lost sales figures and price suppression data to show causation.[66] In the other two, which were the likelihood[67] of injury cases, the majority opinions asserted beliefs that the market penetration would increase. Furthermore, in one of the likelihood cases,[68] the majority opinion also stated that "the market penetration is artificially low because of the pending dumping proceeding"[69] because one major importer refused all orders for the subject product for two months in 1977.

None of the losers showed high or rising market penetration.

Price Suppression

Price suppression or price depression seems as though it should be an injury indicator, not a causal one, and even then it is a doubtful sign of injury.[70] Nevertheless, it is a ubiquitous indicator, although it wears many hats.

The ITC found some form of price suppression in all of the winners. In two cases[71] the ITC compared the domestic selling prices of the subject

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65. *Rayon Staple Fiber from France and from Finland, supra* note 12 (French Fiber: 0.1 percent in 1976, 0.8 percent in 1977; Finnish fiber: 0.2 percent in 1976, 0.4 percent in 1977), at A-17; *Rayon Staple Fiber from Belgium* (0 percent in 1976; 1.8 percent in 1977), at A-16; *Carbon Steel Plate from Japan, supra* note 12 (10 percent in 1976; 5 *percent* in 1977), at A-49; *Polyvinyl Chloride Sheet and Film from the Republic of China, supra* note 13 (3 percent in 1975; 4 percent in 1977), at 9; *Impression Fabric of Manmade Fiber from Japan, supra* note 13 ("less than 3% in 1977"), at 9.

66. *Rayon Staple Fiber from France and from Finland, supra* note 12, at 5-6; *Rayon Staple Fiber from Belgium, supra* note 12, at 5. (Note that this opinion's reliance on lost sales is misplaced; *see* text *supra* at note 61); *Carbon Steel Plate from Japan, supra* note 12 (no mention of market penetration at all).

67. *See supra* note 13.

68 *Impression Fabric of Manmade Fiber from Japan, supra* note 13.

69. *Id.* at 6.

70. "[D]eclining price structure is not necessarily an indicator of injury because lower prices may be merely indicative of greater competition. Where prices are forced down, sales may increase on the whole, causing an increase in profits." Myerson, *supra* note 6, at 194.

71. *Carbon Steel Plate from Japan, supra* note 12; and *Impression Fabric of Manmade Fiber from Japan, supra* note 13.

good to the wholesale price index for the relevant category of goods; in one[72] the index had risen twelve percent while the selling prices had remained constant; in the other the selling prices had increased "more slowly"[73] than the index. Three other cases found that underselling by the importers constituted price suppression.[74] And the last two[75] found evidence of a small price rollback — $0.006/lb. — as also indicative of price suppression.

The ITC found no price suppression in any of the losers.

CONCLUSION

The ITC has been criticized in the past for inconsistency and protectionism.[76] Its recent general tendency to confine itself to certain economic indicators as criteria of injury and causation is a step away from those charges towards principled and predictable decision making. However, the ITC should avoid the temptation of playing fast and loose with those indicators. It could set out for itself a few general, flexible guidelines regarding its use of these indicators.

For instance, the preceding analysis shows that the Commissioners regard some indicators as more reliable signs of injury and causation than others. It should announce the relative weight it attaches to these indicators and decide accordingly. This would reduce the appearance of, if not the tendency towards, using the indicators as padding to support a preconceived result rather than arriving at a decision on the basis of the indicators.

There should be a standardized base year for every indicator against which the present data should be compared. This would avoid the anomalous results of, for example, finding a drop in employment in an industry where that industry has experienced a significant expansion in employment for several years, merely because employment is not as high as it was five years ago.[77] Also there could be a standardized margin for

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72. *Impression Fabric of Manmade Fiber from Japan, supra* note 13, at 5, A-32.

73. *Carbon Steel Plate from Japan, supra* note 12, at 8, A-20.

74. *Bicycle Tires and Tubes from the Republic of Korea, supra* note 12, at 5, A-20-23; *Steel Wire Strand for Prestressed Concrete from Japan, supra* note 12, at 6, A-24; *Polyvinyl Chloride Sheet and Film from the Republic of China, supra* note 13, at 5, A-29-36.

75. *Rayon Staple Fiber from France and from Finland, supra* note 12, at 6, A-10-20; *Rayon Staple Fiber from Belgium, supra* note 12, at 6, A-17-19.

76. *See* Note, *Innovation and Confusion in Recent Determinations of the Tariff Commission under the Antidumping Act,* 4 N.Y.U. J. INT'L L. & POL. 212, 238 (1971); and Note, *The Antidumping Act of 1921: Primary Lead Metal and the Injury Standard,* 10 TEX. INT'L L. J. 357, 368 (1975).

77. *See* text, *supra,* at note 54.

each indicator, beyond which a negative fluctuation would be considered injury, but within which it would not be so regarded. This would recognize that it is perfectly normal for businesses to have their ups and downs.

Since the ITC is unlikely to hamstring itself by complying with these suggestions — and indeed total compliance might render it too mechanical and rote of a process — it is left to observers to deduce certain propositions regarding the ITC's use of the indicators.

Based upon the subject cases, it is clear that the ITC regards falling profits as the most important indicator of injury, followed by capacity utilization, consumption, production and shipment figures, in that order. Relatively insignificant are inventory and employment data — perhaps because of their higher susceptibility to negative fluctuations not caused by injury. Of the causation factors, lost sales is the most important indicator; the ITC has not made up its mind how to determine price suppression; and in the subject cases little market penetration was found at all.

The ITC will usually look back as far as six years in its analyses, although there is nothing to preclude it from going any further and nothing that requires it to go that far. Virtually any decline in the indicators is sufficient for that indicator to be used as evidence of injury or causation.

Thus, a domestic industry with profits lower than five years ago and evidence of sales loss to cheaper imports stands a very good chance before the ITC if Treasury finds that the imports are LTFV.

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