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Protecting Industry Under U.S. Trade Law: Key Issues in Recent ITC Opinions

I. INTRODUCTION

The purpose of this Comment is to examine recent opinions of the International Trade Commission (ITC) pursuant to sections 201-203 of the Trade Act of 1974 (the “Act”).¹ This legislation confers authority on the President to take certain measures, subject to ITC recommendation, to protect complaining industries from an increase in imports which are a substantial cause of actual or threatened serious injury.

The Comment is divided into two parts. In the first part, the procedural provisions of the Act are examined. The legislative history of the measure and case law are referenced, where possible, to clarify the meaning of the text.

The key substantive concepts of the Act are analyzed in the second part of the article. This analysis consists, first, of a textual examination with particular emphasis on the legislative history of the Act. These concepts are then discussed in the context of recent ITC determinations in the cases of *NonRubber Footwear*² and *Carbon Steel and Certain Alloy Steel Products (Carbon Steel)*,³ to the extent each of these cases advances an understanding of the key concepts.

The *NonRubber Footwear* and *Carbon Steel* cases have been selected for analysis because each represents recent affirmative relief recommendations by the ITC, and thus provide a relatively complete discussion of the issues. They also reveal the areas of agreement and disagreement among the ITC Commissioners concerning the key concepts in the Act.

1. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2011-2018 (codified as amended at 19 U.S.C. §§ 2251-2253) (1982 & Supp. II 1984)).

2. *NonRubber Footwear*, USITC Pub. 1717, Inv. No. TA-201-55 (July 1985) [hereinafter *NonRubber Footwear*].

3. *Carbon Steel and Certain Alloy Steel Products*, USITC Pub. 1553, Inv. No. TA-201-51 (July 1984) [hereinafter *Carbon Steel*].

II. PROCEDURAL PROVISIONS OF SECTIONS 201-203.

Under the Act, the purpose of import relief is to facilitate an orderly adjustment to import competition.⁴ An ITC investigation is required to determine if import relief is justified. An investigation may be triggered by any one of several parties. It may proceed from a petition by an entity including a trade association, firm, certified or recognized union, or group of workers representing an industry. An investigation must be initiated at the request of the United States Trade Representative, upon resolution of the House Ways and Means or Senate Finance Committees, or upon the self motion of the ITC.⁵

The ITC must then provide the President with a report of its investigation not later than six months after receiving a petition, request, or resolution, or after adopting a self motion to investigate.⁶

4. Trade Act of 1974 § 201(a)(1), 19 U.S.C. § 2251(a)(1) (1982). A petition for relief must include a statement of specific purposes for which relief from imports is sought. These specific purposes may include such objectives as facilitating the orderly transfer of resources to alternative uses and other means of adjustment to new conditions of competition. *Id.*

5. *Id.* at § 201(b)(1), 19 U.S.C. § 2251(b)(1).

6. *Id.* at § 201(d)(2), 19 U.S.C. § 2251(d)(2). However, except for good cause, no investigation may be made on the same subject unless one year has elapsed since the report of a prior investigation was submitted to the President. *Id.* at § 201(e), 19 U.S.C. § 2251(e). Additionally, no investigation is permitted concerning an article for which relief was granted unless a period of two years has elapsed since the last day of effective relief. *Id.* at § 203(j), 19 U.S.C. § 2253(j).

The issue of re-opening an investigation for good cause was the subject of litigation in *Sneaker Circus, Inc. v. Carter*, 457 F. Supp. 771 (E.D.N.Y. 1978), *aff'd*, 614 F.2d 1290 (2d Cir. 1979). In *Sneaker Circus*, importers of nonrubber footwear brought an action to set aside two orderly marketing agreements (OMAs) negotiated between the United States and Taiwan and between the United States and Korea. Plaintiffs made three broad allegations to support their plea. First, they claimed that the ITC good cause determination to re-investigate alleged injuries to domestic producers did not comply with § 201 (19 U.S.C. § 2251) of the Act. Second, they claimed that the President had failed in several ways to comply with §§ 202-203 (19 U.S.C. §§ 2252-2253) of the Act. Last, they claimed that the OMAs violated the Treaty of Friendship, Commerce, and Navigation between the United States and each country, respectively, as well as § 1 of the Sherman Act. Plaintiffs failed to establish any of these allegations.

On the issue of good cause, plaintiffs had four specific contentions: (1) that the ITC may only commence an investigation for good cause if the request to do so originates from the industry; (2) that formal public notice and a hearing are necessary when such a determination is being considered; (3) that the affirmative determination in this case was not supported by sufficient evidence; and (4) that notice of the public hearing following the ITC's affirmative determination was insufficient as to the basis of good cause, the evidence to support it, and the scope of the evidence considered.

As to its first good cause contention, plaintiffs alleged that the ITC could only commence a re-investigation if the industry presents substantial new evidence to justify another proceeding. Plaintiffs objected to a Senate Finance Committee resolution which directed the ITC to commence a new investigation less than one year after the commission had issued a negative determination on the same subject. This resolution stated "[i]t is the sense of the Committee

This report must also be made public, subject to confidentiality requirements.⁷

If the ITC makes an affirmative determination for import relief, it is required to (1) find the amount of the increase in, or imposition of, any import duty or other import restriction which is necessary to prevent or remedy the injury; or (2) recommend a provision for adjustment assistance if that will effectively remedy the injury.⁸

Where the ITC makes an affirmative determination, the President must decide within sixty days what relief, if any, he will provide,⁹

that changed circumstances, including increasing imports and rapidly deteriorating economic conditions in the domestic footwear industry, constitute good cause within the meaning of § 201(e) of the Act." *Sneaker Circus*, 457 F. Supp. at 783. The ITC subsequently made a determination that good cause existed to re-open the investigation and did so.

The court held that neither section 201(e) nor the legislative history supported plaintiffs' contention. To accept plaintiffs' position would have meant that Congress reserved to an industry the right to request a re-investigation while denying this right to all other persons entitled to request an initial investigation under section 201(b)(1). The court found no evidence that Congress intended this result. *Id.* at 783-84. Accordingly, the ITC may determine whether to commence a re-investigation at the direction of the Senate Finance Committee, and the ITC determination of whether good cause exists can only be challenged if the ITC did not comply with procedural requirements. *Id.* at 785. *See also, infra* note 12.

The court next found that section 201(e) plainly does not contain a public notice or hearing requirement prior to a good cause determination by the ITC to re-investigate. *Id.* at 785. The fact that public notice and a hearing are required in other contexts, *e.g.*, under section 201(c), indicated that "if Congress had intended for the ITC to give notice and hold hearings before a good cause determination under subsection (e) it would have done so." *Id.*

Plaintiffs' sufficiency of the evidence contention essentially asked the court to substitute its judgment for that of the Commission. The offer was declined since it was a matter left by Congress to the discretion of the ITC. *Id.* at 787. Accordingly, a review could only consider whether the ITC determination was arbitrary, capricious, or an abuse of discretion. Such a review would focus on whether the ITC had borne in mind the relevant factors it was statutorily bound to consider and whether there was clear error. *Id.* at 788. The *Sneaker Circus* court found that statistics considered by the ITC evidencing increased imports, an increase in the import/consumption ratio, a decrease in domestic production, and a decrease in employment, were sufficient to show ITC consideration of the relevant factors, and thus, no clear error was indicated. *Id.*

Finally, the court could find no language in the Trade Act requiring the ITC to provide any more information than it did in its notice of re-investigation. *Id.* As such, plaintiffs' allegation that notice of ITC's good cause determination was insufficient for lack of information was without merit. *Id.* at 789.

7. Trade Act of 1974 § 201(d)(2), 19 U.S.C. § 2251(d)(2) (1982).

8. *Id.* at § 201(d)(1), 19 U.S.C. § 2251(d)(1).

9. *Id.* at § 203(a), 19 U.S.C. § 2253(a). For purposes of import relief, the President may:

- (1) proclaim an increase in, or imposition of, any duty on the article causing or threatening to cause serious injury to industry;
- (2) proclaim a tariff-rate quota on such article;
- (3) proclaim a modification of, or imposition of, any quantitative restriction on the import into the United States of such article;

and report to Congress on the same day he makes his decision.¹⁰ In determining what relief, if any, he will provide, the President must consider nine specific factors,¹¹ as well as as the national economic

(4) negotiate, conclude, and carry out orderly marketing agreements with foreign countries limiting the export from foreign countries and the import into the United States of such articles; or

(5) take any combinations of such actions.

Id. Any of these actions, except the arrangements of orderly marketing agreements, may be recommended by the ITC. *Cf. id.* at § 201(d)(1), 19 U.S.C. § 2251(d)(1).

10. *Id.* at § 203(b)(1), 19 U.S.C. § 2253(b)(3). If, however, the President's action differs from that recommended by the ITC, the President's report to Congress must state the reason for the difference. *Id.* In any event, the President's action should provide relief that is "commensurate with the injury." S. REP. NO. 1298, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7270 [hereinafter S. REP.].

In *Sneaker Circus*, plaintiffs alleged that OMAs negotiated with only two countries of the many who also export nonrubber footwear indicated that the President's actions were not commensurate with the injury. Plaintiffs also challenged the President's determination that the 1974-1976 time period was the most representative period for assessing injury. The court held that the phrase "commensurate with the injury" while not in the Trade Act is provided in the legislative history as a general guide to the President concerning matters essentially turning on his judgment. *Sneaker Circus*, 457 F. Supp. at 791. The question of with whom to negotiate OMAs is a nonjusticiable political question. *Id.* at 793. Moreover, the relevant time period in which to assess injury for the purpose of negotiating OMAs is a discretionary matter for the President under Section 203(d)(2) and, as such, is also non-reviewable. Further, it is a non-justiciable political question since it goes to the substance of the OMAs. *Id.*

11. Trade Act of 1974 § 202(c), 19 U.S.C. § 2252(c) (1982). These are:

- (1) information and advice from the Secretary of Labor on the extent to which workers in the industry have applied for, are receiving, or are likely to receive adjustment assistance under part 2 . . . or benefits from other manpower programs;
- (2) information and advice from the Secretary of Commerce on the extent to which firms in the industry have applied for, are receiving, or are likely to receive adjustment assistance under parts 3 and 4 of this subchapter;
- (3) the probable effectiveness of import relief as a means to promote adjustment, the efforts being made or to be implemented by the industry concerned to adjust to import competition, and other considerations relative to the position of the industry in the Nation's economy;
- (4) the effect of import relief on consumers (including the price and availability of the imported article and the like or directly competitive article produced in the United States) and on competition in the domestic markets for such articles;
- (5) the effect of import relief on the international economic interests of the United States;
- (6) the impact on United States industries and firms as a consequence of any possible modification of duties or other import restrictions which may result from international obligations with respect to compensation;
- (7) the geographic concentration of imported products marketed in the United States;
- (8) the extent to which the United States market is the focal point for exports of such article by reason of restraints on exports of such article to, or on imports of such article into, third country markets; and
- (9) the economic and social costs which would be incurred by taxpayers, communities, and workers, if import relief were or were not provided.

Id.

While each of these factors will have relative weight in the President's determination, points 5 and 6 may be particularly important in deciding whether to provide import relief.

interests of the United States.¹²

Under Article 19.3 of GATT, if relief is granted, affected exporting countries may seek compensating tariff benefits from the United States on other products. If such benefits are not conferred, affected countries are permitted by GATT to retaliate against United States exports to their countries. J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 565-66 (1969). Thus, a decision to grant relief may directly affect other United States industries who are likely to lobby against relief if they believe they will be affected. It is, no doubt, partly because of the fact that retaliation is permitted under multilateral trade law that the standards for relief under the Trade Act are high. In consequence, only about 20% of the cases brought for relief have resulted in relief being granted. Sandler, *Primer on United States Trade Remedies*, 19 INT'L LAW. 761, 784 (1985).

12. Trade Act of 1974 § 202(a)(1)(A), 19 U.S.C. § 2252(a)(1)(A) (1982). On the day the President determines that import relief is not in the national economic interests of the United States, he must set forth his reasons in his report to Congress. Additionally, the President must state what other actions he is taking beyond adjustment assistance to help the industry in question overcome serious injury and to help its workers find productive employment. *Id.* at § 203(b)(2), 19 U.S.C. § 2253(b)(2).

In *Maple Leaf Fish Co. v. United States*, 596 F. Supp. 1076 (Ct. Int'l Trade 1984), *aff'd*, 762 F.2d 86 (Fed. Cir. 1985), an importer of frozen battered and breaded mushrooms challenged an assessment of supplemental import duties on that product on the grounds that frozen battered and breaded mushrooms were outside of the scope of the ITC's investigation, and that, therefore, Presidential action based on this investigation was *ultra vires*. The court held that mushrooms are included in item 144.20 of the Tariff Schedules of the United States, and all procedures taken pursuant to the ITC's and the President's actions were proper. *Id.* at 1082.

This case reviewed the procedural authority granted to the ITC and the President in taking protective actions. In undertaking this review, the court relied on two prior cases, *Florsheim Shoe Co. v. United States*, 744 F.2d 787 (Fed. Cir. 1984) and *Norwegian Nitrogen Products v. United States*, 288 U.S. 294 (1933).

In *Maple Leaf*, the court reviewed the validity of action by the ITC and the President under authority delegated by Congress. In dicta, the court found that section 202(b)(1) granted the President expansive discretion in import relief matters since he is permitted to deny import relief if it is "not in the national economic interest." *Maple Leaf*, 596 F. Supp. at 1079. Thus, the national economic interest, as determined by the President, may override any weight attributable to the nine factors the President is required to consider under section 202(c).

Similarly, under section 201(b), the ITC may consider all economic factors it deems relevant in making its import relief report, in addition to those factors prescribed by Congress. Accordingly, the factors cited by Congress in its delegations of essentially legislative authority to the ITC and the President are mandatory guidelines, but, the court said, quoting *Florsheim*, "these facts do not amount to a formula for the decision making process which can be judicially reviewed." *Id.* When the process of decision making is reviewed, that inquiry is limited to: "(1) whether proper statutory procedures . . . [are] followed; (2) whether the statutory language was properly construed; and (3) whether the action taken was within the scope of delegated authority." *Id.*

In *Florsheim*, plaintiff challenged the Custom Service's denial of plaintiff's petition against the classification of buffalo and goat leather as dutiable merchandise. The denials were made on the basis of certain Executive Orders under which the President withdrew free treatment. The court found that section 504(a) (19 U.S.C. § 2464) confers plenary authority on the President to withdraw duty free treatment based on his consideration of certain enumerated factors, which, if invoked, is sufficient to uphold denial of plaintiff's petition. Relying on *United States v. Bush & Co.*, 310 U.S. 371 (1940), the *Florsheim* court pointed out that in

However, a Presidential determination denying relief, or granting relief differing from that recommended by the ITC, is subject to Congressional override. An override requires a joint resolution of Congress made within ninety days of receipt of the President's report.¹³ If Congress overrides the executive recommendation, the President is required within thirty days to proclaim the imposition or increase of import duties, or other restrictions recommended by the ITC.¹⁴

matters where a public officer has been duly authorized to take specified action requiring his judgment as to the necessity of appropriateness of action, the judgment of that officer as to the facts calling for action is not subject to review. *Florsheim*, 744 F.2d at 795-96.

Notwithstanding this deference to the judgment of an officer to whom legislative responsibility has been delegated, however, the *Maple Leaf* court stated that substantive finds are subject to judicial review. *Maple Leaf*, 596 F.2d at 1081. The *Maple Leaf* court relied on the holding in *Norwegian Nitrogen Products* for its conclusion.

In *Norwegian Nitrogen Products*, plaintiffs refused to reveal production cost information regarding Tariff Commission hearings to increase duties on plaintiffs' product, but sought to have revealed domestic producer information given in confidence to the Commission. The Court determined that whenever a hearing is required by the Commission, the hearing must be fair. What is fair, however, may vary from case to case. In this case, the Commission's refusal to reveal domestic producer cost information was not arbitrary because it created neither hardship for domestic producers nor prejudice to foreign producers, the detailed information was not essential to the plaintiffs' case, and plaintiffs' refusal to provide production information amounted to an obstruction of the Commission's purposes. *Norwegian Nitrogen Products*, 288 U.S. at 321-24.

The *Maple Leaf* court found *Norwegian Nitrogen Products* analogous to its case. Thus, although ITC determinations are not themselves final, and therefore not subject to the Administrative Procedure Act, 5 U.S.C. § 557(c)(3)(A) (1982), general principles of judicial review and section 201(d) of the Act require that the ITC articulate the basis for its recommendation so a court may conduct a meaningful review to determine if substantial evidence supports the ITC recommendation. While such a review will not be based upon the substantial evidence test, the ITC's report must at least fairly apprise the President, interested parties, and the public of the reasons for its determinations. Such revelation is necessary to meet the implied standard of fairness required in every administrative hearing. *Maple Leaf*, 596 F. Supp. at 1081.

13. Trade Act of 1974 § 203(c)(1), 19 U.S.C. § 2253(c)(1) (1982), amended by Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 248(a)(1), 98 Stat. 2998. This amendment for override was made in response to the Supreme Court decision in *INS v. Chadha*, 462 U.S. 919 (1983). In *Chadha*, the plaintiff appealed the validity of a resolution by the House of Representatives purporting to invalidate an action of the Executive Branch which allowed an alien to remain in the United States. The Court held that a one-house resolution overriding an Executive action is unconstitutional. This decision is based on the principle that actions taken pursuant to the legislative function require passage by both Houses of Congress and presentment to the President. *Id.* at 954-55.

14. Trade Act of 1974 § 203(c)(2), 19 U.S.C. § 2253(c)(2) (Supp. II 1984). Section 203(d) provides that tariffs may be raised to a level not to exceed 50% ad valorem above the presently existing rate, e.g., if the present tariff rate is 5%, it may not exceed 55%. Additionally, any quantitative restraint proclaimed must allow importation of a quantity or value of an article which is not less than that entered during the most recent period representative of imports of the article.

Where the ITC recommends adjustment assistance as relief, the President is required to direct the Secretaries of Commerce and Labor to give expeditious consideration to the matter.¹⁵

Any relief provided is temporary and may not exceed a period of five years.¹⁶ Even when relief is granted, however, the guiding purpose of permitting time for beleaguered domestic producers to adjust remains operative. Accordingly, if relief is granted for more than three years, it must, if feasible, be accompanied by a phase-out of relief commencing not later than the last day of the third year after which relief is granted.¹⁷ Such relief may, however, be extended for one three-year period at the same level in effect immediately before the extension provided the continued relief is in the economic interests of the United States.¹⁸ In making this judgment, the President is required to consider the views of the ITC¹⁹ and those factors which otherwise govern his actions.²⁰

Finally, any implemented relief may be reduced or terminated early if the President determines that it is in the national interest of the United States.²¹ As a condition precedent to this action, the President must receive advice from the ITC and the Secretaries of Labor and Commerce.²²

III. SUBSTANTIVE CRITERIA FOR IMPORT RELIEF UNDER SECTIONS 201-203.

Under the Act, an ITC investigation is initiated to determine "whether an article is being imported into 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."²³ The terms "industry," "increased imports," "serious injury," "threat thereof," and "substantial cause" are the key elements of this determination. These expressions are examined seriatim, and in connection with the cases of *NonRubber Footwear* and *Carbon Steel*, as appropriate.

15. *Id.* at § 202(b)(2), 19 U.S.C. § 2252(b)(2).

16. *Id.* at § 203(h)(1), 19 U.S.C. § 2253(h)(1).

17. *Id.* at § 203(h)(2), 19 U.S.C. § 2253(h)(2).

18. *Id.* at § 203(h)(3), 19 U.S.C. § 2253(h)(3).

19. *Id.* at § 203(i)(2), 19 U.S.C. § 2253(i)(2).

20. *Id.* at § 202(c), 19 U.S.C. § 2252(c); see *supra* note 11.

21. Trade Act of 1974 § 203(h)(4), 19 U.S.C. § 2253(h)(4) (1982).

22. *Id.*

23. *Id.* at § 201(b)(1), 19 U.S.C. § 2251(b)(1), amended by Interest and Dividend Tax Compliance Act of 1983, Pub. L. No. 98-67, § 214(f), 97 Stat. 393.

A. The Definition of "Industry"

1. Statutory Framework

An "industry" is limited to producers located in the insular United States.²⁴ Beyond this general limitation, the definition of "industry" is flexible. Section 201(b)(1) provides that an "industry" is one which produces an article "like or directly competitive with" the allegedly harmful imports.

The terms "like" and "directly competitive with" are not synonymous. "Like" products are those which are substantially identical in inherent characteristics, having similar appearance, quality, and texture.²⁵ "Directly competitive" products are those which are functionally equivalent substitutes for commercial purposes.²⁶ The most appropriate article of reference for determining a like or directly competitive product is the finished product itself, and not its component parts.²⁷

Notwithstanding this general definition of "industry," the ITC has discretion in three cases to narrow its focus in identifying an industry.²⁸ First, where a domestic producer also imports a like or directly competitive product, the ITC may treat only its domestic production as part of the domestic industry.²⁹ Second, where a domestic producer makes more than one product, the ITC may treat only that portion or division of the producer which produces the like or directly competitive product as part of the industry.³⁰ These two distinctions are aimed at more precisely identifying injurious imports since consolidated income statements of multi-product or multinational producers may obscure losses as to their like or directly competitive product, and may distort the assessment of injury to smaller

24. *Id.*

25. S. REP., *supra* note 10, at 7265.

26. *Id.* at 7266.

27. In *United Shoe Workers of Am. v. Bedell*, 506 F.2d 174 (D.C. Cir. 1974), a union sought a declaratory judgment that adjustment assistance was available to union members as a result of their firm's product being injured by imports that contained their firm's product as a component. After the union succeeded in the district court, the court of appeals reversed. The appellate court reasoned that the provision of adjustment assistance was not intended to be available as a result of injuries due to imports where the imports are not a distinct article. Thus, imported shoes were not "like" domestically produced components of such shoes within the meaning of the statute. *Id.* at 186-87.

28. Trade Act of 1974 § 201(b)(3), 19 U.S.C. 2251(b)(3) (1982).

29. *Id.* at § 201(b)(3)(A), 19 U.S.C. § 2251(b)(3)(A).

30. *Id.* at § 201(b)(3)(B), 19 U.S.C. § 2251(b)(3)(B).

producers.³¹

Finally, where domestic producers are concentrated in a limited geographic area of the United States, the ITC may treat only that segment of production that originates in that area as part of the domestic industry producing a like or directly competitive product, subject to three qualifications.³² First, the production in the geographic area must amount to a substantial portion of the national industry. Second, such producers must primarily serve the market in the geographic area. Third, the imports must be concentrated in the geographic area.

2. The Case of *NonRubber Footwear*³³

The Commission unanimously agreed that athletic and non-athletic footwear together made up one nonrubber footwear industry for purposes of this investigation. Respondents, athletic footwear producers, argued that athletic and non-athletic footwear are not completely interchangeable because athletic footwear can be used for non-athletic purposes, but the converse was not usually true. Since these types of footwear were not consistently interchangeable, they urged, the two types of footwear were not directly competitive products.³⁴

Chairwoman Stern noted that these products are not "like"

31. S. REP., *supra* note 10, at 7266. Additionally, the ITC should, where possible, exclude profits from captive imports by operators of domestic industry. Such profits do not necessarily reflect the conditions of production operations in the United States. CONF. REP. NO. 1156, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5259 [hereinafter CONF. REP.].

32. Trade Act of 1974 § 201(b)(3)(C), 19 U.S.C. § 2251 (b)(3)(C) (1982). The legislative history of this provision is silent. Substantively, it appears to be a clarification that in identifying an industry, reference may be made to the special needs and activities of particular geographic areas, and that an industry need not be national in scope.

Such closer focus would prevent distortion stemming from the use of aggregate industry data on a national scale when determining if serious injury has occurred or is imminent. This is particularly important when a geographic region is especially reliant on a certain industry. In cases where other, extra-regional operators in the industry are competing successfully, that success could prevent relief for that portion of the industry in the especially vulnerable region.

33. *See supra* note 2. This investigation was initiated upon a resolution by the Senate Finance Committee. *See supra* note 6. This resolution was made in response to a prior ITC negative determination made one year earlier. In making an affirmative determination in this subsequent case, the ITC cited changed facts as the basic rationale for their reversal. *NonRubber Footwear, supra* note 2, at 1. In that case, Commissioners Eckes, Lodwick, and Rohr found that increased imports were the substantial cause of *actual* serious injury to the industry; Chairwoman Stern and Vice Chairman Liebler found that increased imports were the substantial cause of *threatened* serious injury to the industry. Both findings, however, justify the recommendation to grant import relief.

34. *NonRubber Footwear*, USITC Pub. 1717, Inv. No. TA-201-55, 8-9 (July 1985).

products, citing various criteria such as: the significant differences in the establishments used for the production of these two products; distinct research and development required; and different technology and worker skills employed.³⁵ However, athletic and non-athletic footwear were found to be directly competitive since there was "essential interchangeability" in terms of the uses to which the two types of footwear were put.³⁶ This was based on a finding that substantial portions of both types of footwear were purchased and used in contexts in which either would be suitable.³⁷ Therefore, athletic and non-athletic footwear were found to be substantially equivalent for commercial purposes, *i.e.* directly competitive under the Act.³⁸

Commissioner Eckes pointed out that to assume "directly competitive" means "two-way substitution," is to argue that athletic and non-athletic footwear are "like" products, since "like" products possess the same characteristics and, thus, are necessarily equivalent."³⁹ This would effectively make the statutory language of "directly competitive" wholly redundant. This plainly was not the intent of Congress.

Finally, Commissioner Lodwick contributed his criteria for determining if there was one industry in this case.⁴⁰ These criteria overlapped with those of Chairwoman Stern, but, in addition, Commissioner Lodwick distinguished establishments by firms and plants, and suggested that whether the products are distributed through the same retail outlets may be material.⁴¹

3. The Case of *Carbon Steel*⁴²

The threshold issue of defining "industry" in this investigation

35. *Id.*

36. *Id.* at 10; *cf. id.* at 27, 94 (findings of Commissioners Liebler and Rohr, respectively, which are in accord with the conclusions of Chairwoman Stern).

37. *Id.* at 10.

38. *Id.* at 9; *see also supra* text accompanying note 26.

39. NonRubber Footwear, *supra* note 2, at 58.

40. *Id.* at 80-81.

41. *Id.*

42. *See supra* note 3. This controversy arose from a petition by the United Steelworkers of America, the AFL/CIO/CLC, and Bethlehem Steel Corporation. The scope of the investigation concerned the effect of imports of nine carbon steel products produced by the domestic industry. By a 3-2 vote, relief was recommended for five products (ingots, blooms, billets, slabs, and semi-finished sheet bars; sheets and strip; wire and wire products; plates; and structural shapes and units). By a unanimous vote, no relief was recommended for three products (wire rods; railway type products; and bars). By a 3-2 vote, no relief was recommended for one product (pipes and tubes). Concerning semi-finished products,

focused upon the the production facilities and processes of domestic producers, as well as the markets for their products.⁴³ The range of articles included in this investigation consisted of ingots, blooms, billets, slabs, and semi-finished steel bars, sheets and strip, wire and wire products, plates, structural shapes and units, wire rods, railway type products, bars, and pipes and tubes.

Petitioners, unions and domestic producers, maintained that there was a single industry comprised of all basic steel mill products and certain "first tier" products. To support this claim, they argued that the products in question shared the following common characteristics: (1) a common technological and metallurgical basis; (2) production facilities shared in whole or in part; (3) common melt facilities; (4) ease of varying product mix; (5) unitary economies of production; and (6) a high degree of vertical integration among some producers. In addition, petitioners observed that two-thirds of the cost of production of finished products consisted of raw steel production. Finally, they argued that the existence of a continuum of products lacking clear differentiating characteristics makes a single industry approach realistic.⁴⁴ Thus, the "industry" definition offered would encompass all basic steel producers, as well as a number of finished product producers who use basic steel as raw material.

Respondents, importers and some domestic manufacturers, countered by referring to the legislative history of section 201(b)(1) of the Act which requires that the products and imports must share inherent characteristics or be of like appearance.⁴⁵ They also argued that production and marketing practices showed there were multiple industries.⁴⁶ Further, respondents maintained that some of these products were manufactured abroad by United States firms and that there can be no finding of injury for such products.⁴⁷ Finally, respondents observed that section 201 is derived from Article 19 of the General Agreement on Tariffs and Trade (GATT), under which escape from import competition is only permitted for "an article" and not a

Commissioners Lodwick and Rohr found that domestic industry faced a threat of serious injury, and Commissioner Eckes found it had suffered actual serious injury. Concerning the remaining products for which relief was recommended, these three Commissioners agreed on a finding of actual serious injury.

43. Carbon Steel, *supra* note 3, at 12-13.

44. *Id.* at 13-14.

45. *Id.*

46. *Id.*

47. *Id.*

“class of articles.”⁴⁸

In its analysis, the Commission considered not only differences in products, but also differences in the types of firms producing these products. Since product diversity was self-evident, differences in the types of firms manufacturing the products assumed greater importance.

The largest fully integrated firms were characterized by the whole array of steel-making technology.⁴⁹ The firms which are concentrated in the Great Lakes region also tended to own and operate mines providing raw materials.⁵⁰ Significantly, a number of the large integrated producers had diversified away from their traditional steel-making business into wholly unrelated areas.⁵¹

Non-integrated producers, in contrast, operated on a smaller, regional scale. Their steel-making technological base was decidedly more limited than the integrated producers' capital plant. Typically, these firms had very limited raw steel production capability, and relied on independent providers of raw materials to produce their more limited range of products.⁵²

Additionally, there were a number of non-steel-making firms affected by this case. These firms shared few similarities with the smaller steel producers, having different capital plant and producing different products.⁵³

Finally, although there was a class of products insofar as each product was primarily made of steel, the Commission found that the semi-finished and finished products were not so closely related as to justify finding a single class category.⁵⁴ This conclusion followed from the varied production facilities and processes used to produce each product, as well as the different markets into which the products were placed.⁵⁵ Given the diversity of products and the various types of firms producing these products, the Commission found nine industries were present, one for each article under consideration.⁵⁶

48. *Id.*

49. *Id.* at 15-16.

50. *Id.* at 16.

51. *Id.*

52. *Id.* at 17.

53. *Id.*

54. *Id.* at 18.

55. *Id.*

56. The Commission's determination on this issue was unanimous. *See id.* at 133 (finding by Commissioner Liebeler).

A comparison of these two cases reveals that the ITC will use, within statutory bounds, whatever criteria seems most appropriate for defining the industry in question. Where there are similar, though not identical, products, the definition of the industry will turn on the degree of interchangeability between the two products. Where a large number of products are under investigation, closer examination will be made of the organization of the industry to determine if the nature of the products and their manufacture require a unified organizational structure. If so, the various products may be treated as a class of articles for purposes of comparison to allegedly harmful imports. If a unified organizational structure is not a necessity, the products and the firms producing them will be treated as several industries for the purpose of comparison.

These approaches are reasonable. Since comparison is essential to determine whether there is an injury, discrete industries must be identified before the comparison can be made to discrete foreign industries. This identity may be found either in the uses to which the products are put, or in the economic requirements of efficient organization. Depending on the specific items under investigation, either measure would satisfactorily identify an industry.

B. *The Requirement of "Increased Imports"*

1. Statutory Framework

The text of section 201 refers to "increased imports" in two places. This fact has given rise to disagreement among ITC Commissioners as to which provision governs their determinations. A comparison of the two provisions reveals the source of the controversy.

Section 201(b)(1) of the Act provides, in pertinent part, that the Commission shall determine "whether an article is being imported into the United States in such *increased quantities* as to be a substantial cause of serious injury or a threat thereof"⁵⁷ Section 201(b)(2)(C) provides that in making its determination the Commission shall consider "with respect to substantial cause, an *increase in imports (either actual or relative to domestic production)* and a decline in the proportion of the domestic market supplied by domestic producers."⁵⁸

The difference between these two provisions is material. If sec-

57. Trade Act of 1974 § 201(b)(1), 19 U.S.C. § 2251(b)(1) (1982) (emphasis added).

58. *Id.* at § 201(b)(2)(c), 19 U.S.C. § 2251(b)(2)(c) (Supp. II 1984) (emphasis added).

tion 201(b)(1) controls, no relief may be granted unless imports have increased in absolute terms. If imports have not increased, there is no need to make a causation determination by examining changes in market share since no relief is possible. If section 201(b)(2)(C) controls, whenever there is an increase in market share of foreign suppliers, relief may be granted, assuming all other criteria for relief are met. This will be true even when demand falls, if foreign supply falls more slowly than domestic supply. The provision of two clauses in section 201 might facially suggest a two-part test is being suggested. In fact, there is only one test, a reduction in market share and domestic producers. This is revealed by considering the logical possibilities present.

The case of an actual increase in imports is clear. When imports grow faster than domestic supply, there is an *actual* increase in market share of foreign producers. This is true whether demand increases or remains steady. When demand falls, if foreign supply remains steady, there is a *relative* increase in market share of foreign producers. Similarly, when demand and supply fall, and domestic supply declines faster than foreign supply, there is also *relative* increase in the market share of foreign producers. Thus, in all cases, the key referent is the prior existing market share of domestic producers. Consequently, whenever the domestic producer market share falls, imports may be found to be the substantial cause of serious injury or the threat thereof.

The issue of which provision should control ITC determinations is not easily resolved. Those who maintain that there can be no relief unless imports have increased absolutely in number rely on the plain language of section 201(b)(1),⁵⁹ and its legislative history.⁶⁰ Those who hold that any loss of market share by domestic producers may suffice for relief rely on the plain language of section 201, taken as a whole.⁶¹ These parties also rely on both the legislative history of section 201,⁶² and the history of United States escape clause legislation.⁶³ Thus, until Congress speaks or there is an established, uniform view among ITC Commissioners, whether an absolute or relative increase in imports may justify import relief remains an open question.

59. See *infra* text accompanying note 76.

60. See *infra* text accompanying note 77.

61. See *infra* text accompanying note 66.

62. See *infra* text accompanying note 69.

63. See *infra* text accompanying note 71.

2. The Case of *Carbon Steel*

This case has significant precedential value concerning the issue of increased imports. By a 4-1 vote,⁶⁴ the ITC for the first time recommended import relief when imports had not increased in absolute terms.⁶⁵ Several arguments were used to support the majority view that a relative increase in imports may justify relief.

The first argument was based on statutory construction. The majority noted the language of section 201(b)(2)(C) which includes in the definition of "increased imports" the parenthetical phrase "either actual or relative to domestic production."⁶⁶ Section 201(b)(1) was deemed to provide merely the basic test for import relief. That section must be read by reference to the more specific factors provided by Congress for determining if the test is met, *i.e.*, those contained in section 201(b)(2)(C).⁶⁷ Thus, the majority found it logical that Congress would define the term "increased imports" in the same subsection in which it enumerated the factors to be considered when determining causation.⁶⁸

Second, the majority found nothing in the legislative history of the Act which evinces a Congressional intent to employ a two-step test, *viz.*, first determine if imports have actually increased, and, if so, then determine if the increase is actual or relative to domestic production.⁶⁹ Although the legislative history is clear that the Senate preferred an absolute increase to justify relief, the Senate also accepted the House version of section 201(b)(2)(C) which provides the actual or relative test.⁷⁰ Thus, the majority found no clear basis in the legislative history that an absolute increase in imports is necessary for relief.

Third, the majority also relied on the history of United States escape clause legislation which is traceable to Article 19 of GATT. From the earliest days of GATT, it was clear that relief action could

64. Vice Chairman Liebelier dissented.

65. Carbon Steel, *supra* note 3, at 133; the five categories of products of which imports actually decreased were: plates, structural shapes and units, pipes and tubes, railway type products, and bars. *cf. supra* note 42.

66. Carbon Steel, *supra* note 3, at 25.

67. *Id.* at 25-26.

68. *Id.* at 26.

69. *Id.*

70. Compare S.REP. *supra* note 10, at 7266 with CONF.REP. No. 1644, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7379.

be premised on a relative increase in imports.⁷¹ This notion was incorporated into United States law in section 7 of the Trade Expansion Act of 1951.⁷² This provision was later strengthened in the Trade Expansion Act of 1962⁷³ which provided that only an absolute increase in imports would justify relief. However, when the Trade Act of 1974 was drafted, Congress found this standard too rigorous and sought a relaxation. This relaxation was accomplished by using language from the Trade Agreements Extension Act of 1951 which provided for relief if the increase in imports is "actual or relative to domestic production."⁷⁴ Thus, the history of the escape clause confirmed the majority belief that Congress intended that a relative increase in imports may justify relief.

Finally, the majority argued that the provision of two separate tests for increased imports and causation would create an inconsistency with the basic purpose of the statute, which is to prevent or remedy injury while facilitating an orderly adjustment to new conditions of competition.⁷⁵ Since an industry may be in need of relief even when imports are declining, as when there are severely depressed market conditions, the requirement of an absolute increase in imports would defeat this purpose.

The lone dissenter on this point, Vice Chairman Liebeler, maintained that increased imports, pursuant to section 201(b)(1), is a threshold requirement in every ITC determination. If imports have not increased in absolute terms, under this view, section 201(b)(2)(C) need not be considered as the ITC must make a negative determination.⁷⁶

This view was supported by a construction of the statute. Not only is section 201(b)(1) clear on its face, but when Congress wished the ITC to consider relative increases in imports, it used the precise language to so indicate.⁷⁷ Such precision was used by Congress in identifying the causation requirement for relief from imports in section 201(b)(2)(C), but such language was not used in establishing the

71. General Agreement on Tariffs and Trade, 2 BISD, 44-45 (1952); J. JACKSON, *supra* note 11, at 558.

72. Pub. L. No. 50, 65 Stat. 74.

73. Pub. L. No. 87-794, 76 Stat. 876.

74. Carbon Steel, *supra* note 3, at 26. *But see infra* note 122.

75. Carbon Steel, *supra* note 3, at 26; *see also supra* note 4.

76. Carbon Steel, *supra* note 3, at 133-34.

77. *Id.* at 134.

initial increased imports requirement in section 201(b)(1).⁷⁸ The fair inference to be drawn is that Congress intended that there must be an absolute increase in imports to satisfy the increased import requirement of section 201(b)(1).

Finally, this view was supported by the argument that the requirement of increased imports reflected Congress' intent to balance domestic and foreign policy considerations.⁷⁹ Accordingly, if the ITC were to find grounds for import relief based upon a relative increase in imports, it would effectively be substituting its judgment for that of Congress in this delicate area.

These discrepant interpretations of the standards upon which import relief may be conferred create troubling uncertainty for those seeking relief. Since the statute and the intent of Congress on this issue are not clear, perhaps the most appropriate touchstone for determining the better view is the express purpose of the Act.

The design of the Act is to permit the orderly adjustment by an industry to new conditions of competition. Thus, it is not "protectionist" in the sense of seeking to arrest or reverse change. Rather, the Act implicitly endorses change wrought by competition and aims only to moderate its pace in certain conditions. In practical terms, the Act appears to be founded on the recognition that modern means of mass production can create large volumes of goods very quickly.⁸⁰ When placed in the market, the disruptive effects can abruptly swell unemployment and its collateral problems. The Act was crafted to mitigate or avoid such results temporarily.

Undesirable effects can occur even while an industry is undergoing consolidation. The fact that industry consolidation may be due to competitive imports is, standing alone, not sufficient to justify import relief. However, if imports continue to make it impossible for the domestic industry in question to make an orderly adjustment despite a decline in the absolute numbers of foreign products in the U.S., the Act, by reference to its purpose, should be temporarily utilized to moderate the pace of change until order is restored.

The notion that the Act represents a Congressional balance of

78. *Id.* at n.9.

79. *Id.* at 133-34. Unfortunately, no direct authority is cited for this argument. In contrast, it can be argued that since the ITC may consider any factors it deems relevant in making its determination, and since political considerations are not expressly precluded by the statute, the ITC may consider foreign policy factors. See *infra* text following note 80.

80. See GATT Doc. SR. 15/17, at 153 (1959) (cited in J. JACKSON, *supra* note 11, at 570).

foreign and domestic policy seems unpersuasive. Under Article 19 of GATT, the United States recognizes the principle of import relief founded upon a relative increase in imports. Thus, it would be surprising for the Congress to provide a remedy that was not essentially parallel to that under the rules of international trade. Further, even when relief is recommended on the basis of a relative increase in imports, the President may prevent embarrassment or difficulties for the United States by denying the recommended relief. The President's act may, of course, be overridden by Congress, which retains the power to reset the balance of foreign and domestic policy as it sees fit. Thus, it would not appear that the ITC can practically substitute its judgment for that of Congress.

C. The Requirement of "Serious Injury"

1. Statutory Framework

United States trade legislation does not define this critical term. Rather, Congress has provided a list of indicia which may evidence injury.⁸¹ However, the presence or absence of any of these factors is not dispositive that serious injury has occurred.⁸² Additionally, the ITC is authorized to consider any other factors it deems relevant.⁸³

81. Trade Act of 1974 § 201(b)(2)(A), 19 U.S.C. § 2251(b)(2)(A) (1982). These factors include the significant idling of productive facilities in the industry; the inability of a significant number of firms to operate on a reasonable level of profit; and significant unemployment or under-employment within the industry.

Additionally, the ITC is now also required to consider the closing of plants and underutilization of production facilities in determining if there has been a significant idling of productive facilities in an industry. Trade and Tariff Act of 1984, Pub. L. No. 98-573, Title II, § 249, 98 Stat. 2998.

This latest clarification reflects Congressional dissatisfaction with the negative injury determination made by the ITC in the 1984 NonRubber Footwear case. *See supra* note 33. In that case, the ITC had, in the view of Congress, read section 201 of the Act too restrictively. Accordingly, Congress has now said that an industry's profit data is not dispositive for finding serious injury. Rather, the ITC must look deeper and consider plant closings and employment trends in assessing the conditions of an industry. This requirement has been imposed because it is possible that a surviving industry may be profitable, even though a large number of firms have closed. CONF. REP., *supra* note 31, at 5258-59.

82. Trade and Tariff Act of 1984, Pub. L. No. 98-573, Title II, § 249(1), 98 Stat. 2998.

83. Trade Act of 1974 § 201(b)(2), 19 U.S.C. § 2251(b)(2) (Supp. II 1984). Where inefficient producers are cutting back on production, as indicated by their individual statistical profile relative to the aggregate statistical profile of the industry, such cutbacks may be indicative of industry consolidation. Usually, consolidation is considered positive since the market system is geared to disfavor inefficient producers. But where cutbacks show clear negative deviations from historical patterns, there is actual or encroaching industry depression. These conditions would present a stronger case for finding serious injury since it may indicate unduly voluminous, competitive imports. In such cases, the increase of imports is likely harmful since

Hence, the ITC has considerable room for judgment to determine if serious injury occurred, especially since each indicator is qualified by the requirement that it be of "significant" importance.

Nonetheless, the indicia which the ITC are required to consider readily lend themselves to quantification, thus providing a clear basis for judgment. Utilization and profitability ratios are standard components of financial analysis for assessing the health of a business or industry. Similarly, plant closings and unemployment statistics are readily obtainable data which may show the actual or projected health of an industry depending on which producers are cutting back operations.

To be sure, this reliance on qualified data will not remove the element of judgment concerning what is a reasonable profit level, what is significant under-employment, or what is an appropriate plant utilization rate. But it does provide a factual basis for any ITC judgment concerning injury, and would appear necessary to withstand judicial review.⁸⁴

2. The Case of *NonRubber Footwear*

Substantively, the key issue is the degree of injury necessary to be deemed "serious." On this point, there is general agreement among ITC Commissioners that the availability of a remedy requires that the injury be serious indeed. Metaphorically borrowing from the fields of medicine and biology, the ITC suggests "serious" means a "crippling or mortal injury" that may become a "terminal injury" if import

it would appear to undermine the domestic industry's ability to make orderly adjustment. *See supra* note 4.

One way to determine whether there is on-going consolidation or encroaching industry depression is to examine industry production data and financial market attitudes toward the industry in question. If period to period the data shows a gradual reduction of production, it would appear to be a case of orderly consolidation. In this case, orderly adjustment is apparently being made. If, however, production cutbacks are sharp, and show little or no upward variation, the inference to be drawn is that imports are increasing too rapidly to permit adjustment. In this case, domestic producer market share is being lost before any effective effort can be made to become more efficient.

To confirm whatever finding is made, reference may be made to the ability of the industry in question to attract capital. Investors and lenders do their own financial analyses prior to committing capital. Since these parties are afforded no protection under the *Act*, their self-interested, independent views give probative weight to their professional estimates of the ability of the domestic industry to compete effectively.

84. *See supra* note 12.

trends continue or "extinction, or something close to it."⁸⁵

Beyond these generalizations, there were two views on how to assess serious injury. Each view considered the statutory criteria, but divided on the judgment of whether there was serious injury, and the related question of how best to assess industry profit data.

Concerning profit data, there are three possible groups of material from which an assessment can be made: (1) use only aggregate industry data, or (2) use aggregate industry data according to the production size of the firm, or (3) use aggregate industry data and disaggregated data according to individual firms. Depending on which measure is used, judgment may vary accordingly.

In Vice Chairman Liebeler's view, a 6.2% decline in capacity from 1980 to 1984 was not considered a "significant idling of production facilities."⁸⁶ In the same period, there was also a 25% decline in the number of plants, utilization rates fell by 7.9%, and the constant dollar value of shipments fell from 4.62 billion dollars to 3.42 billion dollars.⁸⁷ These facts, while significant to this Commissioner, were nonetheless deemed insufficient to constitute "serious injury."⁸⁸ Similarly, a 16% decline in production and related worker employment in this period were held not indicative of "serious injury."⁸⁹

Concerning profitability analysis, Vice Chairman Liebeler focused on aggregate industry data and data based on production size of firms. This information showed that only the smallest firms, accounting for less than 2% of domestic production, operated at a loss amounting to an average of 3% of net sales.⁹⁰ However, firms producing 4 million or more pairs of shoes annually, representing 59% of domestic production, showed good operating profits, albeit declining from 11.4% in 1983 to 7.4% in 1984. The relative stability of key industry financial ratios was also noted by this Commissioner.⁹¹

Thus, traditional financial indicators did not show "serious injury." Rather, financial analysis revealed that economies of scale are an important factor in the nonrubber footwear industry, with firms producing 1 million pairs of shoes or more annually being most able

85. NonRubber Footwear, USITC Pub. 1717, Inv. No. TA-201-55, 69 (July 1985); see also *id.* at 32.

86. *Id.* at 35.

87. *Id.* at 35-36.

88. *Id.* at 38; see also *supra* text accompanying note 84.

89. NonRubber Footwear, USITC Pub. 1717, Inv. No. TA-201-55, 35-38 (July 1985).

90. *Id.* at 36.

91. *Id.* at 37-38.

to compete.⁹² Accordingly, the “shake-out” of smaller producers is to be expected when industry consolidation is on-going and is, itself, insufficient to justify relief from imports.⁹³

The essence and strength of this financial analysis is its primary, but not exclusive, concentration of analysis on segments of the industry according to producer size rather than individual firms. It thus takes into account the established principle of economies of scale which identifies the most appropriate size for a production plant, and leads to the most efficient allocation of resources.⁹⁴

This approach also impliedly recognizes that the statistical measures of small, non-competitive firms may unduly influence aggregate data, and may, in turn, inappropriately influence judgment. If, therefore, relief were afforded either on the basis of aggregate data, or aggregate data and individual firm statistics, larger, more efficient firms would reap the benefit of unneeded relief. Consequently, the end result would be the maintenance of uneconomic firms and possibly the undermining of the competitive vitality of larger firms.

In the judgment of three Commissioners, the nonrubber footwear industry had suffered serious injury. Unemployment figures, considered by gross numbers as well as by year-to-year variation, showed a steady increase since 1981, with an accelerating jump in the 1983-1984 period.⁹⁵ The idling of production facilities also showed a steady rise over the 1983-1984 period, with the increase accelerating in the 1980-1984 period.⁹⁶ Similarly, accelerated declines were evident in production capacity and utilization rates, and the number of plant closures increased over the period covered by the investigation. These facts indicated that industry consolidation, previously orderly, was becoming a “rout.”⁹⁷

Profitability figures were considered on an aggregate and individual firm basis,⁹⁸ and then compared to the U.S. manufacturing industries profitability average.⁹⁹ This analysis displayed an accelerated increase in the number of firms reporting losses, and the number of

92. *Id.* at 37.

93. *Id.* at 37-38.

94. R. LIPSEY & P. STEINER, *ECONOMICS* 285-86, 390 (2d ed. 1969).

95. NonRubber Footwear, USITC Pub. 1717, Inv. No. TA-201-55, 64-67 (July 1985).

96. *Id.* at 65-67.

97. *Id.* at 66.

98. *Id.* at 68-69.

99. *Id.*

firms showing lower profits.¹⁰⁰ Financial ratio analysis evidenced fluctuating conditions, but a sharp decrease in the industry operating income ratio, from 8.7% to 5.8% for the 1983-1984 period.¹⁰¹

When these figures were compared to the U.S. manufacturing industries average, the result was unfavorable. The operating income ratio for the nonrubber footwear industry was a full 1% below the U.S. average.¹⁰² These facts were considered sufficient to show that a significant number of firms had failed to achieve a reasonable level of profit.¹⁰³

The strength of this financial analysis consists in the consideration given to rates of change in industry performance. The transition between an orderly and disorderly adjustment can occur very quickly. Thus, even one-year statistical movements of significant magnitude may evidence serious injury or the threat thereof, and should not necessarily be considered aberrations until a trend emerges. Given this, Commissioner Eckes' point as to the historical nature of data used for ITC determinations, which carry the risk of lagged perceptions, must be borne in mind.¹⁰⁴ Since there is no way to avoid the problem of lagged perceptions, any sharp negative statistical movement in one or more key indicators should, therefore, be considered a *prima facie* indication that an industry transition is becoming disorderly, and that there is a threat of serious injury.

Some of the deficiencies of using aggregate and individual firm data have been noted.¹⁰⁵ In addition, the appropriateness of comparison to the U.S. manufacturing industries average is open to question. This measure, since it is an average, necessarily implies that a significant number of U.S. industries have financial results that are below the average. Some of these industries may or may not face stiff import competition, suggesting that the most relevant comparison is not being made, *i.e.*, to industries which also face a meaningful degree of import competition. Moreover, just because an industry's financial results are below average, it does not necessarily follow that they are achieving "unreasonably" low levels of profit. Although the owners would prefer greater profits, this does mean that their profit level is unreasonable because, in most cases, their capital is available for alter-

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 67.

105. *See supra* text following note 93.

native use. Thus, it should be recognized that the comparison of the financial data of any complaining industry to the U.S. manufacturing industries average is, to a degree, arbitrary.

D. The Requirement of a "Threat" of Serious Injury

1. Statutory Framework

There is a threat of serious injury when serious injury is clearly imminent if import trends continue unabated.¹⁰⁶ As with serious injury, the indicia signaling a threat of serious injury lend themselves to quantification.¹⁰⁷ However, the existence of these factors does not necessarily flow from an increase in imports. Rather, they may arise from a variety of other factors, *e.g.*, changing consumer tastes, product substitution, or inept management.¹⁰⁸ Accordingly, when relevant, the ITC must consider such possibilities in its investigation, and its report to the President must contain information on efforts made by firms and workers to compete more effectively.¹⁰⁹

The difficult question is determining when a threat of serious injury is imminent. The thrust of section 201 and the legislative history of the Act clearly suggest that the threat must be real, not speculative, and highly probable, not merely possible. A threat, moreover, must derive from a source exogenous to the domestic industry, increased imports.

Accordingly, the determination of whether there is a threat of serious injury should require a comparative analysis of the conditions governing the domestic industry and the foreign industry. This type of analysis will reveal the comparative advantages of foreign producers. Depending on the nature and degree of the advantage, this analysis will provide the basis for finding a threat of serious injury.

The results of this examination should condition the type of relief afforded. If, on the one hand, the advantages revealed, such as lower wage rates, can be expected to persist, adjustment assistance may be more appropriate than the imposition of quotas or duties. On the other hand, if the advantage revealed, access to cheaper raw materi-

106. S. REP., *supra* note 10, at 7265.

107. Trade Act of 1974 § 201(b)(2)(C), 19 U.S.C. § 2251(b)(2)(C) (Supp.II 1984); *see also supra* text accompanying note 81. These factors include a decline in sales, a higher and growing inventory (whether maintained by domestic producers, importers, wholesalers, or retailers), and a downward trend in production, profits, wages, or employment (or increasing underemployment) in the domestic industry concerned.

108. S. REP., *supra* note 10, at 7265.

109. Trade Act of 1974 § 201(b)(5), 19 U.S.C. § 2251(b)(5) (1982).

als, can be expected to dissipate over a reasonable time period, the imposition of quotas or duties may be more appropriate relief than adjustment assistance. In either case, however, the existence of foreign producer comparative advantage must make it highly probable that the benefits of any advantage will in fact be realized.

2. The Case of *NonRubber Footwear*

Of the two Commissioners who found a threat of serious injury confronting the nonrubber footwear industry,¹¹⁰ only Vice Chairman Liebler offered a detailed explanation for this conclusion. Both Commissioners based their views on the declining statistical trends in production, capacity, utilization rates, financial performance, and the rising number of plant closures and resulting unemployment.¹¹¹ Basically, however, this data was symptomatic of the underlying cause, the comparative labor cost advantage of foreign producers relative to domestic producers. This advantage was revealed by an analysis of the terms of foreign production.¹¹²

Vice Chairman Liebler examined footwear production factors in Taiwan, and to a lesser extent, Korea. In 1984, these two countries accounted for 59% of all footwear imports by volume, and 46% of all footwear imports by value. With 52.3% of total domestic footwear consumption by value given to imports in 1984, these two countries represented 24% of the value of footwear sold in the United States, a very substantial proportion of market share.¹¹³

Concerning Taiwan, several salient facts evidenced a threat to the domestic nonrubber footwear industry. Taiwan is in the midst of implementing a plan to develop high value added, leather, footwear sales.¹¹⁴ Over the period of 1980-1983, Taiwanese production of leather footwear increased at a 46% annual rate. Taiwan's footwear industry has developed sophisticated techniques for manufacturing artificial leather. A large Italian leather firm announced plans to establish a processing plant in Taiwan, which is expected to boost the quality of shoes made in Taiwan.¹¹⁵ Furthermore, not only had Taiwan's production capacity and utilization rates grown materially

110. See *supra* note 33.

111. NonRubber Footwear, USITC Pub. 1717, Inv. No. TA-201-55, 35-38 (July 1985); see also *id.* at 16-20.

112. See *supra* text following note 109.

113. NonRubber Footwear, USITC Pub. 1717, Inv. No. TA-201-55, 40 (July 1985).

114. *Id.* at 42.

115. *Id.*

since 1980, but more significantly, its productivity grew at a 7.5% annual rate during the 1982-1984 period.¹¹⁶ Finally, Taiwanese labor costs are less than 25% of domestic labor costs. Insofar as labor in the United States accounts for one-third of the cost of leather shoe manufacture, these labor costs are an especially significant portion of total production costs.¹¹⁷

Similar labor cost factors characterized shoe production in Korea.¹¹⁸ Beyond these two countries, footwear manufacturing technology is rapidly becoming available throughout the world.¹¹⁹ Most importantly, it is becoming available in those countries where labor costs have historically been much lower than in the United States.

Thus, the comparative advantage of Taiwan and other countries is not likely to diminish soon since it appears to be principally driven by labor cost differentials. Given the high probability of a continuing significant production cost advantage, therefore, the import of nonrubber footwear constituted a threat of serious injury according to Commissioners Liebler and Stern.¹²⁰

E. The Requirement of "Substantial Cause"

1. Statutory Framework

The Act defines "substantial cause" as "a cause which is important and not less than any other cause."¹²¹ A strict reading of this definition would suggest that increased imports, which are but one of a multitude of equal causes, would alone suffice as a substantial cause

116. *Id.* at 43.

117. *Id.* at 42 & n.54.

118. *Id.* at 43-44.

119. *Id.* at 44.

120. *Id.* at 15, 41 (conclusions of Commissioners Stern and Liebler).

121. Trade Act of 1974 § 201(b)(4), 19 U.S.C. § 2251(b)(4) (1982). The use of the term "substantial cause" reflects Congressional dissatisfaction with the prior requirement that imports be the "major factor" in causing injury. See *supra* text accompanying note 73. The major factor test was, in turn, linked to the most recently enacted trade agreement concessions granted by the United States.

This linkage considerably narrowed the number of cases in which increased imports could be found to cause serious injury. Of additional concern to Congress was the interpretation of the term "major factor" (or "major cause") as "a cause greater than all others combined." Such a standard proved unreasonably difficult to meet. Accordingly, use of the term "substantial cause" indicates a relaxation of conditions for finding serious injury. This relaxation was effected by severing the link between injury and imports arising from trade agreement concessions. And use of this term indicates Congressional rejection of the notion that the cause of injury must be "greater than all other causes combined." S. REP., *supra* note 10, at 7264, 7266.

of injury. However, this reading has been expressly rejected by Congress, and further explicit meaning has not been provided.¹²²

Although Congress did not intend that a mathematical formula would determine "substantial cause,"¹²³ the language of the statute mandates a balancing process.¹²⁴ The requirement that increased imports must be "not less than any other cause" to justify relief necessitates consideration of all causes. Thus, a critical initial investigatory problem is ensuring that all causes have been taken into account.

The ITC has taken basically two approaches in identifying all causes. One approach is simply to catalogue them as specifically as possible.¹²⁵ While this may yield correct results, there are three potential problems with this approach. First, all causes may not, in fact, have been identified. Second, the causes which are identified may be compared at different levels of generality.¹²⁶ On the one hand, this may result in double counting since some causes may overlap, and thus could lead to an inappropriate affirmative injury determination. On the other hand, comparison of causes at different levels of generality may also lead to an inappropriate affirmative injury determination. This may occur because disaggregated causes arising from domestic sources will often tend to be overshadowed by the aggregate cause of increased imports. Third, this approach relies, perhaps unnecessarily, on subjective judgment in assessing the relative weight of causes.

The second approach of the ITC to ensure that all causes have been considered, and one which avoids these problems, is to assess causes under a generalized analysis of demand and supply. However, two different macroeconomic models have been used for this purpose. The effective difference between these models is material.

Under the so-called "shift-share" model, which is apparently losing favor with some Commissioners,¹²⁷ only domestic demand and foreign supply are analyzed.¹²⁸ This analysis attributes decreased domestic production to increased imports. The shortcoming of this analysis is that it wholly ignores domestic supply factors when analyzing causation, and thus may lead to an unwarranted affirmative injury determination.

122. S. REP., *supra* note 10, at 7264.

123. *Id.*

124. *See supra* text accompanying notes 57-58.

125. *See, e.g.,* Carbon Steel, *supra*, note 3, at 90.

126. NonRubber Footwear, USITC Pub. 1717, Inv. No. TA-201-55, 45 n.62 (July 1985).

127. *Id.* at 71-72.

128. *Id.* at 49-50.

The alternative macroeconomic model includes analysis of domestic supply factors, in addition to domestic demand and foreign supply.¹²⁹ This model, then, effectively captures all possible causes of injury, and reveals, through graphic curve movements, whether imports are the cause of injury.

Inclusion of domestic supply factors appears consistent with the legislative intent. The legislative history cites several demand type factors such as changes in consumer taste and technology, and substitution, which, if found, would not justify import relief.¹³⁰ Similarly, it also cites a number of domestic supply type factors, plant obsolescence and poor management, which if found, would also not justify import relief.¹³¹ Thus, Congress apparently intended that domestic supply factors should be considered in determining if foreign supply is a substantial cause of serious injury or the threat thereof.

Plainly, the determination of whether increased imports are a substantial cause of injury remains a matter of judgment. Judgment may vary depending on the method of analysis used, the factors included for analysis, and the weight accorded the various factors considered. But this does not in any way reduce the ITC's burden of demonstrating that increased imports are the substantial cause of actual or threatened serious injury when recommending import relief. Accordingly, the ITC is urged to assure itself, and to document as well as possible, that increased imports are in fact the substantial cause of actual or threatened injury.¹³²

2. The Case of *NonRubber Footwear*

The unanimous ITC finding that increased imports of nonrubber footwear were a substantial cause of serious injury or a threat thereof was reached in two ways: on the basis of the declining market share of domestic producers, and on the basis of a broader economic analysis that included domestic supply factors.

As noted earlier, a decline in producer market share is one Congressionally proffered indication of substantial cause.¹³³ This was the

129. *Id.* at 45-47. Vice Chairman Liebeler cites a number of reasons why this approach is to be preferred, including: that it allows for the measurements of causes; it is quantitative and does not rely on subjective judgment; it is transparent and easy to follow; it allows for prediction; and it accords with intuitive notions of causation. *Id.* at 48-49.

130. S. REP., *supra* note 10, at 7265.

131. *Id.*

132. *Id.*

133. *See supra* text accompanying note 58.

determining factor to three Commissioners. It was noted that from 1980-1984 imports had virtually doubled to 726 million pairs. This entailed an increase in foreign producer market share from 49% in 1980, to 71% in 1984.¹³⁴ By the measure of the value of goods sold, imports in 1984 accounted for 54% of domestic consumption, up from 34% in 1980.¹³⁵ Thus, despite a large and rapid increase in domestic demand from 1980-1984, domestic producers were unable to share in any of the growth,¹³⁶ even though the number of domestic firms producing 500,000 pairs annually had decreased markedly since 1980.¹³⁷ Consequently, irrespective of other factors which may have contributed to the problems of the domestic industry, *i.e.*, changes in fashions, the high value of the dollar, and domestic marketing decisions, the "phenomenal" growth in imports in absolute terms over the period covered by the investigation far outweighed any other cause in the minds of three Commissioners.¹³⁸

This result was corroborated by a shift-share analysis,¹³⁹ made at the request of Commissioner Eckes. He did not rely on this analysis, however, because Congress had warned against the mathematical weighing of causes, and the problems of inaccuracy regarding partial year data.¹⁴⁰ Nonetheless, the shift-share analysis showed that for the periods of 1980-1984 and 1983-1984 "all of the decline in overall domestic production for the domestic market, during both time periods, [was] attributable to the increase in market share of imports (apparent U.S. consumption rose while domestic production declined)."¹⁴¹

Vice Chairman Liebeler, in contrast, adhered to a macroeconomic analysis as opposed to a statistical trend analysis.¹⁴² In this Commissioner's view, import relief can be recommended only when foreign producers achieve either decreased costs or increased productivity or both.¹⁴³ Here the evidence amply supported the finding that foreign producer costs decreased and foreign producer productivity increased.¹⁴⁴ The data did not suggest any pronounced

134. NonRubber Footwear, USITC Pub. 1717, Inv. No. TA-201-55, 72 (July 1985).

135. *Id.*

136. *Id.* at 89.

137. *Id.* at 111.

138. *Id.* at 89.

139. See *supra* text accompanying note 128.

140. NonRubber Footwear, USITC Pub. 1717, Inv. No. TA-201-55, 72 (July 1985).

141. *Id.* at 71, 72 & n.16.

142. See *supra* text accompanying note 129.

143. NonRubber Footwear, USITC Pub. 1717, Inv. No. TA-201-55, 46-48 (July 1985).

144. *Id.* at 51-53.

contraction of domestic demand or domestic supply.¹⁴⁵ Accordingly, the increase in imports had to be attributable to the foreign supply factors and were, therefore, the substantial cause of threatened serious injury.¹⁴⁶

3. The Case of *Carbon Steel*

A majority of three Commissioners found that five industries suffered actual or threatened serious injury.¹⁴⁷ A fourth Commissioner, Chairwoman Stern, used essentially the same criteria, but concluded that imports of all product categories under investigation were not a more important cause of injury than any other cause, and thus were not the substantial cause of injury.¹⁴⁸ Vice Chairman Liebler reached this same conclusion using a different analysis.¹⁴⁹

The majority identified the following potential causes of injury: cyclical changes in consumption; long-term changes in consumption patterns; independent variables affecting industry conditions including government regulations, intra-industry competition, management decisions regarding raw material sourcing, labor contract provisions, and investment decisions, and, finally, imports.¹⁵⁰

The majority focused closely on three factors regarding those industries determined to have been injured. The first concerned trends in import volumes. In each of the industries for which relief was recommended, imports had increased either in absolute terms¹⁵¹ or in

145. *Id.* at 52-53.

146. *Id.* at 53.

147. *See supra* note 42. Commissioners Lodwick and Rohr found that semi-finished steel products faced a threat of serious injury, and the remaining four products had suffered actual injury. Carbon Steel, *supra* note 3, at 56. However, they provided no analysis of the threat of serious injury. Rather, they reasoned that the uncertainty created by changes in the historical patterns in the market for this product indicated that a threat existed.

148. Carbon Steel, *supra* note 3, at 90-91.

149. *Id.* at 155; *see also supra* text accompanying note 129.

150. Carbon Steel, *supra* note 3, at 47-50.

151. These were semi-finished products, sheets and strip, and wire and wire products. *Id.* at 55, 59, 61-62.

Concerning sheets and strip steel in particular, the majority rejected the argument made by respondents that the long-term decline in demand was a more important cause of injury than imports. Respondent's argument was based on the facts that auto imports had increased; less steel was being used in domestically produced autos; average auto life was being extended as a matter of consumer preference; and aluminum was being substituted for steel in the manufacture of cans. *Id.* at 60-61.

The majority rejected this argument based on its unwillingness to treat these facts as a single cause, noting that an increase in auto imports does not have the same effect as using less steel in the domestic manufacture of autos. Rather, it held that increased imports of autos are

relative terms.¹⁵² The second factor was the pricing practices for the products concerned. Here it was found that the imported products in all categories carried substantially lower prices than the same products domestically produced.¹⁵³ The third factor considered was the relationship between the volume of imports and pricing practices as affecting the financial performance of domestic producers. Here the majority found a clear correlation between the volume and prices of imports and the declining financial performance of the domestic industry.¹⁵⁴

Thus, it was clear in the majority's view that increased imports, actual or relative to domestic production, were a more determinative cause of injury than any other factor. The driving force behind this paramount cause was lower prices.

Chairwoman Stern, though agreeing with the majority on the issue of injury, departs on the issue of substantial cause. In so doing, she identified six possible causes of injury.¹⁵⁵ Chairwoman Stern observed that semi-finished products can only be used to produce additional goods. Thus, imports of cheaper semi-finished goods contribute to the cost efficiency of domestic users who produce finished goods.¹⁵⁶ This efficiency will allow the domestic industry to invest in more advanced technology which will eventually enable it to overcome the current advantage held by foreign producers.

Moreover, Chairwoman Stern also observed that the increase in steel imports in 1981 was the result of a Canadian steel strike in that

a matter of changing consumer tastes which can vary quickly, whereas the amount of steel used in autos is a long-term production cost consideration. Additionally, respondents had failed to quantify the effect of a smaller volume of auto imports which are being priced substantially below domestically produced autos. *Id.* at 61.

While the majority's position on this point is, perhaps, supportable, there would seem to be a relationship between auto imports and the amount of steel used in domestically produced autos. In general, imported autos, particularly those from Japan, tend to be lighter and, therefore, more fuel efficient. Consequently, the decision of how much steel to use in domestically produced autos is not merely a long-term cost consideration, but is also a management marketing decision concerning expected consumer preferences which auto management should take into account. *See supra* text accompanying notes 130-31.

152. These were plates, structural shapes and units, and pipes and tubes. Carbon Steel, *supra* note 3, at 56, 58, 61-64.

153. *Id.* at 56-64.

154. *Id.*

155. Chairwoman Stern cited to the following explanations for the steel industry's poor performance since 1979: (1) long-term decline in demand; (2) unique short-term problems; (3) intra-industry competition from cost efficient mini-mills; (4) an increasingly non-competitive cost structure; (5) government regulation; and (6) the increase in imports. *Id.* at 90.

156. *Id.* at 105.

year. Canadian firms exported semi-finished steel to the United States for further processing and subsequently reimported the milled steel products into Canada.¹⁵⁷ The 1982-83 level of imports also remained relatively high. A material portion of the increase in imports was accounted for by two domestic producers who elected to terminate domestic production and to import to meet their needs.¹⁵⁸

As to steel plate, Chairwoman Stern found the major cause of injury to be deeply depressed general market conditions, even though a long-term decline in the demand for plate was evident.¹⁵⁹ Concerning other product categories, there was also found to be a long-term decline in demand which itself, or when coupled with other causes such as intra-industry competition or the unusually deep cyclical downturn in demand for the various products, was held to be the most important cause of injury.¹⁶⁰

Vice Chairman Liebler, in contrast to the other Commissioners, applied a broad macroeconomic analysis to each product industry under investigation.¹⁶¹ In no category of products did this analysis show that imports were a more important cause of injury than domestic demand or supply factors.¹⁶² Although Vice Chairman Liebler found that seven product industries had suffered serious injury, in six of these categories decreased domestic demand was found to be a more important cause of injury than imports.¹⁶³ In the seventh category of semi-finished products, the very small portion of the domestic market supplied by foreign producers suggested that imports could not be the most important cause of injury.¹⁶⁴ Thus, Commissioner Liebler could not recommend import relief for any product industry.

As to the preferred method of analysis in this case, the question is essentially one of logic. Is it proper to compare the single factor of foreign supply to domestic demand on an aggregate basis? Or is it

157. *Id.* at 103-104.

158. *Id.* at 104.

159. *Id.* at 105-106.

160. *Id.* at 107-117.

161. *Id.* at 143; *see also supra* text accompanying note 129.

162. Carbon Steel, *supra* note 3, at 155.

163. These were plates, *id.* at 146; sheet and strip, *id.* at 147; wire and wire products, *id.* at 149-50; railway-type products, *id.* at 151; structural shapes and units, *id.* at 153-54; and pipes and tubes, *id.* at 154-55.

Additionally, in four of these categories (plates, structural shapes and units, railway-type products, and pipes and tubes) imports had not increased in absolute terms. *See supra* text accompanying note 76.

164. Carbon Steel, *supra* note 3, at 144-45.

more proper to compare the single factor of foreign supply to each specific factor affecting domestic demand? An affirmative answer to the former question would yield fewer recommendations of relief, while an affirmative answer to the latter question would result in more recommendations of relief because the aggregate cause of foreign supply will tend to overshadow the specific factors affecting domestic demand.

A comparison of aggregate foreign supply to aggregate domestic demand would appear to be the better view. This is because foreign supply represents a collection of specific factors, *i.e.*, labor, material, energy, transportation costs, the cost of capital, *etc.* In any rational comparison, likes must be compared to likes, aggregates to aggregates. To compare the aggregate cause of foreign supply to the specific factors affecting domestic demand, therefore, violates a basic principle of rational inquiry and may lead to inappropriate recommendations for relief from imports.

CONCLUSION

This analysis of the key provisions of sections 201-203 of the Trade Act of 1974, as amended, and recent opinions of the International Trade Commission reveals that a high, but not insuperable, standard for obtaining relief from imports has been established. This standard can be met by establishing a substantial link between an actual or imminently threatened injury and a proportionate growth in market share by foreign producers. The recommendations by the ITC in *NonRubber Footwear* and *Carbon Steel* indicate that this causal connection can be established when foreign producers have the comparative advantage of lower production costs, which generally translates into lower product prices. It is these lower product prices which enable foreign producers to gain market share relative to domestic producers producing a like or directly competitive product. If, as a result of lower prices for foreign-produced goods, the domestic industry cannot make an orderly adjustment to the new conditions of competition, relief from these imports may be recommended by the ITC.

The thrust of the analysis also reveals that the ITC has come to certain settled approaches to the substantive issues presented by the Trade Act of 1974. However, other substantive issues are left unresolved by imprecise statutory language and its legislative history. It is clear that much of the substance of this legislation is left to the discretionary judgment of the ITC.

The drawback of this imprecision and reliance on the judgment of the ITC is that it creates uncertainty for those parties for whose benefit the legislation was enacted, making the availability of a remedy difficult to predict. The value of this deference to the ITC, however, is that it permits flexibility in response to the varying and shifting conditions of the marketplace. Thus, it gives both the ITC and petitioners the opportunity to tailor, within reasonable limits, their interpretations of this legislation to the facts of individual cases.

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