

ARTICLES

MICHAEL J. FANIZZO JR.*

Unpacking Import Injury

I.	Background	3
II.	Analysis	7
	A. Is the Volume of Subject Imports Significant?	7
	B. Do Subject Imports Adversely Affect Price?	11
	C. Is There Adverse Impact?	16
	Conclusion.....	21

“I can’t afford to bring this case, but I can’t afford to do nothing.”¹ says Diana, a hypothetical owner of an American manufacturing business whose sales are diving. The recession, slow recovery, and foreign competition are squeezing Diana’s sales so much that she anticipates having to close the factory. She learns from a lawyer that there is a way to sue foreign importers, and if she wins, customs duties will be levied on the importers, eroding their price advantage. The suit would be for a trade violation, such as unfair pricing or illegal subsidies. Two federal agencies share jurisdiction to adjudicate import injury claims: the Department of Commerce (DOC) and the International Trade Commission (ITC).² Both agencies help domestic industries assess whether there is sufficient evidence to obtain a

* Michael J. Fanizzo Jr. is a contract specialist and an attorney. He received his J.D. from George Mason School of Law and his M.B.A. from The George Washington University. He would like to thank Mr. Daniel Pickard for his insight and support. The opinions expressed in this Article are solely those of the author.

¹ Daniel Pickard, International Trade Lecture at George Mason School of Law (Spring 2010).

² DANIEL C.K. CHOW & THOMAS J. SHOENBAUM, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, MATERIALS 641 (2008).

judgment against a subject importer.³ A subject importer is a foreign industry that has been named in a suit filed at the DOC and ITC. Conversely, a nonsubject importer is a foreign industry that is not named in a suit. This means that although they are foreign importers and competitors, they are not at risk of additional duties if the suit against the subject importers prevails.

The DOC and ITC answer different questions that are both necessary for Diana's claim: the DOC decides whether dumping or illegal subsidies exist and the ITC decides whether the unfair practice caused material injury to a domestic industry in the United States.⁴ To obtain a judgment against a subject importer, a plaintiff must show more than mere price competition; they must show that the subject importer is dumping or receiving an illegal subsidy.⁵ Dumping is when subject importers are pricing below the prices in their respective home markets or below the cost of production.⁶ The ITC then assesses whether dumping caused material injury to companies like Diana's. To recover under an import injury theory, a plaintiff must prove that the subject importer caused a sufficiently consequential injury.⁷ Although success in the DOC is not assured, some consider the DOC to be so favorable to domestic injuries that it is not part of the analysis.⁸ Specifically, the DOC offers procedural advantages to domestics such that a dumping determination is considered a given, leaving the ITC as the real decision-maker.⁹ Some attribute the split functions between the two as an effort to manifest independence for the ITC's analysis,¹⁰ a reasonable desire considering the United States has led World Trade Organization (WTO) member nations in the use of trade remedies.¹¹ Commentators vary widely in their take on the

³ *Id.* at 643.

⁴ *Id.* at 642.

⁵ *Id.*

⁶ *Id.*

⁷ UNITED STATES INT'L TRADE COMM'N PUBL'N 4056, ANTI-DUMPING AND COUNTERVAILING DUTY HANDBOOK II-28-29 (June 2015) [hereinafter USITC, Antidumping]; *see also* Certain Aluminum Extrusions from China, Inv. Nos. 701-TA-475 and 731-TA-1177, USITC Pub. 4229 (May 2011) (Final) at 15 [hereinafter USITC, Certain Aluminum] (citing 19 U.S.C. § 1677(7)(A)).

⁸ ROBERT M. DUNN JR. & JOHN H. MUTTI, INTERNATIONAL ECONOMICS 156 (6th ed. 2004).

⁹ *Id.*

¹⁰ CHOW & SHOENBAUM, *supra* note 2, at 641 (noting that the bifurcation of the two roles is unique to United States).

¹¹ BRINK LINDSEY & DANIEL J. IKENSON, ANTIDUMPING EXPOSED: THE DEVILISH DETAILS OF UNFAIR TRADE LAW 106-07 (2003) (noting that between 1995 and 2000, the

ITC's analysis, specifically whether it is unpredictable and unprincipled¹² or whether the ITC performs an objective analysis based on the law.¹³ In addition to the controversy as to whether the ITC does its job correctly, there is a peculiar feature in its jurisprudence, specifically, that the ITC's decisions are *sui generis*—*i.e.*, they have no precedential value for later decisions.¹⁴ To some, this is a weakness of the ITC. *Stare decisis*, the use of prior decisions in adjudications, is a strong a feature in American law that it seems unlikely that fair and transparent adjudication is possible without it.¹⁵

To give Diana insight into what she should expect, this Article will review injury determinations for antidumping and countervailing duty cases. The review will focus on how the ITC treats the facts and arguments of the parties, both subject importers, and domestic industries. This will provide Diana with insight into the winners and losers of ITC investigations, as well as describe how the ITC is not unpredictable and unprincipled but rather applies the law based on specific factual issues that are essential to proving injury. Additionally, this review shows that any perceived unpredictability in ITC decisions stems from the nature of causation analysis and the law-as-a-standard nature of import injury law. Before describing the facts and analyses of the ITC, it is useful to describe how the ITC fits within the larger world of international trade law.

I BACKGROUND

Since 1921, the United States has had some form of antidumping laws, but other nations have much older laws and remedy systems.¹⁶ Modern trade law began with the General Agreement on Tariffs and Trade (GATT), adopted in 1947, which established the rules for

United States was third in unilateral trade remedy actions and, as of 2008, posted the most antidumping measures).

¹² See BRINK LINDSEY & DANIEL J. IKENSON, *ANTIDUMPING EXPOSED: THE DEVILISH DETAILS OF UNFAIR TRADE LAW* 178 (2003) (stating that trade injury law lacks clear standards and analytical rigor, and that coincidence often serves as the basis for antidumping remedies).

¹³ James M. Devault, *Economics and the International Trade Commission*, 60 S. ECON. J. VOL. 463, 463–64 (1993).

¹⁴ *Comm. for Fair Beam Imps. v. United States*, 27 Ct. Int'l Trade 932, 944 (2003).

¹⁵ Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 854 (1999).

¹⁶ LINDSEY & IKENSON, *supra* note 11, at 103–04.

international trade,¹⁷ as well as created an organization also called the GATT for facilitating trade negotiations.¹⁸ This began rounds of negotiations where many nations agreed to rules for governing international trade, specifically the reduction of trade barriers.¹⁹ In 1995, the GATT organization became the WTO.²⁰ The principle behind the WTO is nondiscrimination: treating foreign and domestic products in the same manner. Exceptions to this principle exist. One such exception is the treatment to remedy an unfair trade practice, such as dumping or subsidies.²¹ The WTO includes a dispute settlement system called the Dispute Settlement Understanding, which is an international forum for litigation between member nations to enforce trade agreements.²² Although the DSU has authority over different types of claims between nations, specifically that one has failed to satisfy a WTO requirement, unilateral actions, such as those made by the ITC, remain the only remedy for dumping violations.²³ The remedy for unfair practices is the imposition of a duty on the foreign products equal to the difference between the dumped price and the market price.²⁴ Members are required to impose these duties in accordance with WTO requirements and failure to do so is subject to challenge at the DSU.²⁵

The WTO prohibits member states from promulgating protectionist policies. However, critics claim that antidumping measures allow WTO members to keep their protectionism under the cover of “fairness.”²⁶ The number of nations pursuing unilateral remedies like those the ITC have with antidumping remedies has significantly increased since the 1980s, and such remedies have been used by both developing and industrialized nations.²⁷ Indeed, some scholars argue that an import injury “arms race” mentality took hold, with each

¹⁷ CHOW & SHOENBAUM, *supra* note 2, at 6.

¹⁸ *Id.*

¹⁹ DUNN & MUTTI, *supra* note 8, at 186–93.

²⁰ *Id.*

²¹ *Id.* at 154.

²² CHOW & SHOENBAUM, *supra* note 2, at 52.

²³ DUNN & MUTTI, *supra* note 8, at 192.

²⁴ DUNN & MUTTI, *supra* note 8, at 155.

²⁵ CHOW & SHOENBAUM, *supra* note 2, at 639 (this is interesting as the WTO otherwise disapproves of unilateral action).

²⁶ LINDSEY & IKENSON, *supra* note 11, at 103–05.

²⁷ *Id.*

member state responding to the antidumping remedies imposed by others and even focusing on the same industries.²⁸

The WTO²⁹ became part of U.S. law with the Uruguay Round Agreements Act.³⁰ The Act directs the ITC to “administer laws in a manner consistent with international obligations.”³¹ Again, some consider the DOC’s processes as favoring Diana, our domestic factory owner, which raises the stakes for the injury determination made at the ITC.³²

Although “each injury or investigation is *sui generis*,” the ITC is bound by previous findings of a general nature.³³ The rationale for *sui generis* adjudication is that the use of precedent would require the ITC to consider all prior decisions.³⁴ However, even in a *sui generis* setting, the ITC must avoid arbitrary and inconsistent decisions. Any changes in analysis must be based on a discernible basis and be presented to reviewing courts.³⁵

Findings of a general nature are findings of fact about an economic condition.³⁶ For example, a finding that the European Union is considered by the ITC to be “export-oriented,” meaning that the European Union was a large exporter, for the purposes of assessing market conditions, would be considered a finding of a general nature.³⁷ If the ITC considered the EU as export-oriented in one case but not export-oriented in another, then the ITC must provide a reasoned explanation.³⁸ The reason is that export-orientation is not as susceptible to case-by-case fluctuation. For example, either the European Union is a large exporter or not. Factual determinations within the ITC’s injury analysis, however, such as whether a certain

²⁸ *Id.* (noting that metal and chemical products account for a majority of all antidumping actions).

²⁹ DUNN & MUTTI, *supra* note 8, at 192.

³⁰ *Usinor v. United States*, 26 Ct. Int’l Trade 767, 776 (2002) (citing *Hyundai Elecs. Co. Ltd. v. United States*, 23 Ct. Int’l Trade 302 (1999)).

³¹ *Id.*

³² DUNN & MUTTI, *supra* note 8, at 156.

³³ *Comm. for Fair Beam Imps.*, 27 Ct. Int’l Trade at 942 (citing *Usinor*, 26 Ct. Int’l Trade at 776).

³⁴ *Comm. for Fair Beam Imps.*, 27 Ct. Int’l Trade at 943.

³⁵ *Id.* at 944.

³⁶ *Id.* at 942 (2003) (citing *Usinor*, 26 Ct. Int’l Trade at 776).

³⁷ *Id.* at 947.

³⁸ *Id.*

level of subject import steel pipe volume increase was significant, are not considered binding.³⁹

So what does this mean for Diana, our factory owner who is losing business to foreign competitors? For Diana's purposes, this dichotomy means that the same information from previous cases can justify different findings depending on the market; it is the context of the market information that matters.⁴⁰

The three prongs of the ITC's injury analysis are (1) an increase in the volume of subject imports, (2) a decrease or suppression of prices of the domestic products, and (3) an adverse impact.⁴¹ Case law consistently identifies how these elements will make or break a material injury determination: First, the subject import increase must be significant.⁴² Second, there must be a price suppression or depression.⁴³ Third, there must be sinking performance indicators for domestic producers and rising subject imports.⁴⁴ The significance of the subject import volume and price effects, as well as their impact on the domestic industry, must be more than minimal and not merely temporal.⁴⁵ Consequently, affirmative answers to the volume, price effects, and impact questions are necessary for a determination of material injury; however, the correlation of all three is what carries the day.⁴⁶ Domestic industries, like Diana's, must show how all three

³⁹ *Id.*

⁴⁰ *Id.* at 947–48.

⁴¹ USITC, Antidumping, *supra* note 7, at II-28, 29; *see, e.g.*, Circular Welded Carbon-Quality Steel Pipe from India, Oman, the United Arab Emirates, and Vietnam, Inv. Nos. 701-TA-482-484, USITC Pub. 4362 (Dec. 2012) (Final) [hereinafter USITC, Circular Welded] (citing the Tariff Act of 1930, 19 U.S.C. § 1677(7)(B)–(C)) at I-2; Utility Scale Wind Towers from China and Vietnam, Inv. Nos. 701-TA-486 and 731-TA-1195-96, USITC Pub. 4372 (Feb. 2013) (Final) at I-2 [hereinafter USITC, Utility Scale]; Certain Large Residential Washers from Korea and Mexico, Inv. Nos. 701-TA-488 and 731-TA-1199, USITC Pub. 4378 (Feb. 2013) (Final) at I-2 [hereinafter USITC, Certain Large].

⁴² *See generally* Wire Decking from China, Inv. Nos. 701-TA-466 and 731-TA-1162, USITC Pub. 4172 (July 2010) (Final) at 14-16 [hereinafter USITC, Wire Decking]; Drill Pipe and Drill Pipe Collars from China and Vietnam, Inv. Nos. 701-TA-474 and 731-TA-1176, USITC Pub. 4213 (Feb. 2011) (Final) at 17, 21 [hereinafter USITC, Drill Pipe]; USITC, Utility Scale, *supra* note 41, at 11, 19–22.

⁴³ USITC, Drill Pipe, *supra* note 42, at 17, 21; USITC, Utility Scale, *supra* note 41, at 11, 22–25.

⁴⁴ USITC, Circular Welded, *supra* note 41, at 16, 19; USITC, Utility Scale, *supra* note 41, at 11, 25–30; USITC, Wire Decking, *supra* note 42, at 1166.

⁴⁵ USITC, Antidumping, *supra* note 7, at II-28, 29; *see also* USITC, Certain Aluminum, *supra* note 7, at 15.

⁴⁶ USITC, Certain Aluminum, *supra* note 7, at 15 (citing *Angus Chemical v. United States*, 140 F.3d 1478, 1484–85 (Fed. Cir. 1998)) (explaining that the significance of the

factors are present in her case. One or two is not sufficient as there are too many reasons for price, volume, or adverse effects to change. One professor described the correlation issue as an “X”: a decreasing line for prices, sales, profits, etc., for the domestic industry that is related to an increase in sales for subject imports.⁴⁷

Several scholars studied how different forces influence ITC decisions and the results were mixed as to whether the ITC was unpredictable and unprincipled.⁴⁸ One criticism of the process is that any coincidence of rising imports and domestic industry suffering triggers a remedy.⁴⁹ Another criticism is that congressional pressure influences the ITC’s decision-making.⁵⁰ Others point to legitimate issues such as the domestic industry’s profit rate, market share, and production rates,⁵¹ or declining production, unemployment, and profitability as the real determinants for a finding of injury.⁵²

II ANALYSIS

A. Is the Volume of Subject Imports Significant?

As the first step in its analysis, the ITC considers whether the volume of goods or increase in the volume of imports is significant, either “in absolute terms or relative to production or consumption in the United States.”⁵³ Unfortunately for subject importers, that language provides several pitfalls in that the threshold can be met several different ways.⁵⁴ For instance, the volume or an increase in the volume can both contribute to an injury determination, and second, the comparison can be made in absolute or relative terms, and if relative, against U.S. production or consumption.⁵⁵ Changes to industries matter, such as changes to market participants or demand,

volume of price effects of subject imports and its impact on domestic industries must be more than minimal and more than temporal).

⁴⁷ Pickard, *supra* note 1.

⁴⁸ Devault, *supra* note 13, at 463–64.

⁴⁹ LINDSEY & IKENSON, *supra* note 11, at 178.

⁵⁰ Devault, *supra* note 13, at 473.

⁵¹ *Id.*

⁵² CHOW & SHOENBAUM, *supra* note 2, at 680.

⁵³ Ferrosilicone from Venezuela, Inv. No. 731-TA-1225, USITC Pub. 4490 (Sept. 2014) (Final) at 14 [hereinafter USITC, Ferrosilicone] (citing the Tariff Act of 1930, 19 U.S.C. § 771(7)(C)(i)).

⁵⁴ *Id.*

⁵⁵ *Id.*

because they could change the relative position of domestic industries and importers. For example, unchanging subject importer volume can become significant if other participants drop off, making relative volumes jump while absolute volumes remain the same.

Domestic industries, like that to which Diana belongs, are more likely to prevail if historical data indicates that the only increases in product volume during the period of review were from subject imports.⁵⁶ This means that volume increases were only due to importers, as opposed to domestic or nonsubject importers, which makes importer's volume responsible for injury. Additionally, if consumption was increasing, then importer volume increases that outpace demand supports finding a significant volume or increase from that importer.⁵⁷ Conversely, if the demand was falling, then increasing subject import volume and market share would support finding the volume or increase to be significant.⁵⁸

Of course, if subject import market share increases, as market share is inherently zero-sum, then domestic industries or nonsubject importers must be losing market share.⁵⁹ Nonsubject importer volume, importers that are not at issue in the case, as well as domestic industry's market shares, are assessed to determine who is being displaced.⁶⁰ If domestics are losing market share, then this demonstrates how the subject imports are displacing domestic industries even while consumption falls.⁶¹ Of course, if subject importers injure nonsubject importers by taking their market share,

⁵⁶ Coated Paper Suitable for High Quality Print Graphics, Inv. Nos. 701-TA-470, 471 and 731-TA-1169-70, USITC Pub. 4192 (Oct. 2010) (Final) at 35 [hereinafter USITC, Coated Paper].

⁵⁷ Drawn Stainless Steel Sinks from China, Inv. Nos. 701-TA-489 and 731-TA-1201, USITC Pub. 4390 (Apr. 2012) (Final) at 18 [hereinafter USITC, Drawn Stainless]; Crystalline Silicon Photovoltaic Cells and Modules from China, Inv. Nos. 701-TA-481 and 731-TA-1190, USITC Pub. 4360 (Nov. 2012) (Final) at 28 [hereinafter USITC, Crystalline Silicon].

⁵⁸ USITC, Coated Paper, *supra* note 56, at 35; USITC, Certain Aluminum, *supra* note 7, at 20–21; Diffusion Annealed Nickel Plated Flat Rolled Steel Products from Japan, Inv. Nos. 731-TA-1206, USITC Pub. 4466 (May 2014) (Final) at 13–16 [hereinafter USITC, Diffusion Annealed].

⁵⁹ Frozen Warmwater Shrimp from China, Ecuador, India, Malaysia, and Vietnam, Inv. Nos. 701-TA-491, 93, 95, 97, USITC Pub. 4429 (Oct. 2013) (Final) at 27 [hereinafter USITC, Frozen Warmwater].

⁶⁰ USITC, Circular Welded, *supra* note 41, at 14.

⁶¹ Frontseating Service Valves from China, Inv. No. 731-TA-1148, USITC Pub. 4073 (Apr. 2009) (Final) at 13 [hereinafter USITC, Frontseating Service].

then there is no finding of significant volume or increase thereof.⁶² Additionally, if market share for all industries remains constant, then there is no finding of significant volume, even if there are increases in subject importer absolute volumes.⁶³

In addition, subject importers can have increased volumes without achieving significant volumes or increases.⁶⁴ Viewed in isolation, comparing importer volumes from one year to the next, importers volumes can appear significant, however, when you compare them to increasing demand and increasing domestic market share, then they appear less so.⁶⁵ On the other hand, decreasing nonsubject importer's market share, while domestic and importer's increase, also prevents finding the volume or increase to be significant.⁶⁶ In the event that subject importer volume was significant, then increases in domestic volumes and market shares can suggest that the importer volume had no adverse effects on domestics.⁶⁷ This means that although the volume was significant, domestic industries did not lose market share and, consequently, there was no injury.⁶⁸ Additionally, importers could have a large but stable presence, without any increases in shipments, and could avoid a finding of significant volume or increases.⁶⁹

⁶² USITC, Frozen Warmwater, *supra* note 59, at 27.

⁶³ Xantham Gum from Austria and China, Inv. Nos. 731-TA-1202-03, USITC Pub. 4411 (July 2013) (Final) at 20 [hereinafter USITC, Xantham Gum].

⁶⁴ Galvanized Steel Wire from China and Mexico, Inv. Nos. 701-TA-479 and 731-TA-1184, USITC Pub. 4323 (May 2012) (Final), at 20 [hereinafter USITC, Galvanized Steel].

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Steel Threaded Rod from India, Inv. Nos. 701-TA-498 and 731-TA-1213,14, USITC Pub. 4487 (Aug. 2014) (Final) at 20 [hereinafter USITC, Steel Threaded]; Certain Steel Wheels from China, Inv. Nos. 701-TA-478 and 731-TA-1180, USITC Pub. 4319 (May 2012) (Final) at 16 [hereinafter USITC, Certain Steel] (the next move for domestic industries would be to claim that though domestic sales and shipments increased, the increase was less than the increase in U.S. consumption); High Pressure Steel Cylinders from China, Inv. Nos. 701-TA-480 and 731-TA-1188, USITC Pub. 4328 (June 2012) (Final) at 14 [hereinafter USITC, High Pressure]; USITC, Ferrosilicone, *supra* note 53, at 15; Grain-Oriented Electrical Steel from Germany, Japan, and Poland, Inv. Nos. 731-TA-1233, 1234, and 1236, USITC Pub. 4491 (Sept. 2014) (Final) at 22–23 [hereinafter USITC, Grain-Oriented]; USITC, Frozen Warmwater, *supra* note 59.

⁶⁸ USITC, Ferrosilicone, *supra* note 53, at 15; USITC, Grain-Oriented, *supra* note 67, at 22–23; USITC, Frozen Warmwater, *supra* note 59.

⁶⁹ Silica Bricks and Shapes from China, Inv. Nos. 731-TA-1205, USITC Pub. 4443 (Jan. 2014) (Final) at 17 [hereinafter USITC, Silica Bricks].

The argument that increased imports stem from the domestic industry's inability to satisfy demand was not successful.⁷⁰ The ITC will look to see whether the domestic industry had excess capacity that could have met some of the increasing demand.⁷¹ If so, the ITC may determine that the subject imports precluded the domestic industry from increasing shipments to meet consumption.⁷²

Another issue is whether there was a decline in subject importer volume during the investigation.⁷³ If decline in volume is found to be due to the pending investigation, the decreased year is reduced in weight of the analysis.⁷⁴ This can also be a defense for subject importers because if there is no decrease in volume pending the investigation, then subject importers can claim that there is no injury.⁷⁵ The idea is that if there was an injury, then the temporary sanctions would have affected sales.⁷⁶

Summing up, Diana must show that subject import volumes increased significantly, either as a percentage or in real terms, with the best-case scenario being that the only volume increases during the period under review being made by subject imports. Even if Diana's volume is increasing along with increases in subject imports, the subject imports volume analysis remains unchanged, whereas diving volume of subject imports can weaken Diana's claim. This is particularly true if Diana's increases outpace subject importer's increases. In all of these scenarios, demand is used as context for any volume changes.

⁷⁰ USITC, Utility Scale, *supra* note 41, at 20.

⁷¹ *Id.* at 20–21; USITC, Crystalline Silicon, *supra* note 57, at 29.

⁷² USITC, Utility Scale, *supra* note 41, at 21; USITC, Crystalline Silicon, *supra* note 57, at 29.

⁷³ USITC, Steel Threaded, *supra* note 67, at 20; Welded Stainless Steel Pressure Pipe from Malaysia, Thailand, and Vietnam, Inv. Nos. 731-TA-1210, 1212, USITC Pub. 4477 (July 2014) (Final) at 16 [hereinafter USITC, Welded Stainless].

⁷⁴ Steel Wire Garment Hangers from Vietnam, Inv. Nos. 701-TA-487 and 731-TA-1198, USITC Pub. 4371 (Jan. 2013) (Final), at 13 [hereinafter USITC, Steel Wire]; USITC, Welded Stainless, *supra* note 73, at 16.

⁷⁵ USITC, Certain Large, *supra* note 41, at 30.

⁷⁶ *Id.*; domestic industries have also tried claiming that improvements in performance indicators pending the investigations are proof; the ITC was not persuaded; USITC, Ferrosilicone, *supra* note 53, at 28.

B. Do Subject Imports Adversely Affect Price?⁷⁷

Like in the volume analysis, the price effects analysis has its own fact questions of varying importance.⁷⁸ These questions include:

1. Whether the subject importers and domestics are substitutes;
2. Whether price is an important factor for purchasers;
3. Whether there is underselling;
4. Whether there is price depression;
5. Whether there is price suppression; and
6. Whether there are lost sales.⁷⁹

In evaluating price effects, the ITC considers questions one and two above as preliminary questions, whereas the last four determine whether there are price effects. This makes sense as importers and domestics must be substitutes for them to pose some competitive threat to each other, and price should be important to customers of the product. The next questions are whether there is significant underselling and whether the subject imports depress prices or prevent domestic industries from increasing prices (also called suppression).⁸⁰ In assessing underselling, the ITC compares prices between importers and domestics to determine how often there is underselling as well as at how much of a margin the underselling occurs.⁸¹ The combination of these two elements determines whether the underselling is “pervasive” which is an ITC adjective for “significant.” Underselling is an important, but not determining factor in the price effects analysis.⁸² It is possible for importers to undersell domestics and not have price effects, or suffer an injury attributed to subject imports.⁸³

In evaluating price depression, the ITC compares the prices between the importers and domestics with a specific eye for any

⁷⁷ USITC, Certain Aluminum, *supra* note 7, at 22.

⁷⁸ USITC, Coated Paper, *supra* note 56, at 39–41.

⁷⁹ *Id.*

⁸⁰ USITC, Drawn Stainless, *supra* note 57, at 20; USITC, Certain Steel, *supra* note 67, at 20.

⁸¹ USITC, Drawn Stainless, *supra* note 57, at 21; USITC, Certain Steel, *supra* note 67, at 21.

⁸² USITC, Galvanized Steel, *supra* note 64, at 22–23; USITC, Certain Aluminum, *supra* note 7, at 22; USITC, Circular Welded, *supra* note 41, at 23; USITC, Frontseating Service, *supra* note 61, at 14.

⁸³ USITC, Galvanized Steel, *supra* note 64, at 23; USITC, Circular Welded, *supra* note 41, at 23.

trends between the two.⁸⁴ For domestics, the concern is only with prices, specifically, whether they rose or fell. However, with importers, the review compares changes in volume, prices, and underselling.⁸⁵ The idea is that if importer volume spikes coincide with domestic price dives, then there is price depression because importer volume is pushing down domestic prices.⁸⁶ Conversely, the absence of any correlation prevents a finding of price depression.⁸⁷

In assessing price depression, importer underselling and domestic price changes are not necessarily linked. It is possible for pervasive underselling to occur without depressing domestic prices.⁸⁸ Additionally, it is possible that the absence of any importer volume spikes prevents a trend from developing between importer changes and domestic prices.⁸⁹ The price depression determination also depends on comparing prices to demand: if prices fall with demand, then there is no price depression as it is demand that is affecting prices and not importer volume.⁹⁰

Whereas price depression is based on comparing importer and domestic prices with demand and volume, the price suppression determination is based on a comparison of domestic indicators only, specifically cost of goods sold and net sales.⁹¹ If materials cost decrease, which then leads to a price decrease, there is no price suppression.⁹² Conversely, if the cost of goods sold falls, but prices do not, then this suggests that prices were not squeezed by costs, but by something else.⁹³ This also works the other way, if the cost of goods sold increase more than prices, then there is a cost squeeze.⁹⁴ Again, the ITC is trying to parse the influence of market issues, such as the price of materials, from the effects of importers. A cost squeeze, where materials costs are rising, which should cause an increase in

⁸⁴ USITC, Drawn Stainless, *supra* note 57, at 21; USITC, Certain Steel, *supra* note 67, at 21.

⁸⁵ USITC, Drawn Stainless, *supra* note 57, at 21; USITC, Certain Steel, *supra* note 67, at 21.

⁸⁶ USITC, Certain Steel, *supra* note 67, at 21.

⁸⁷ *Id.*

⁸⁸ USITC, Galvanized Steel, *supra* note 64, at 20–23.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ USITC, Diffusion Annealed, *supra* note 58, at 18–19.

⁹² *Id.*

⁹³ USITC, Certain Aluminum, *supra* note 7, at 22.

⁹⁴ USITC, Frontseating Service, *supra* note 61, at 14.

prices, but prices do not rise, indicates that something other than materials costs is influencing prices.⁹⁵

For Diana, another important question in assessing price effects is whether there are any confirmed lost sales or revenues.⁹⁶ The magnitude of lost sales can vary in quantity and value,⁹⁷ benefitting either importers or domestics. For domestic industries, the best cases involve either several incidents of lost sales or large value lost sales, but either is sufficient.⁹⁸ One example of sufficient lost sales was \$26 million of confirmed lost sales where customers switched to buying subject imports and the domestic industry alleged \$198 million in lost sales.⁹⁹ The weakest proof of lost sales capable of carrying a price effects determination was that “some instances” of lost sales received confirmations.¹⁰⁰ For domestic industries like Diana’s, the worst-case scenario is when her alleged lost sales receive no confirmations. This does happen often.¹⁰¹ Additionally, lost sales that are of “minor magnitude” fail to support a price effects determination.¹⁰²

The importance of quality to the market or how importer products are different from domestics could also impact the analysis.¹⁰³ This provides context to the underselling analysis such that it is possible for importers to undersell, but if there is a quality consideration, this

⁹⁵ USITC, Galvanized Steel, *supra* note 64, at 23.

⁹⁶ USITC, High Pressure, *supra* note 67, at 17; USITC, Galvanized Steel, *supra* note 64, at 24; USITC, Certain Aluminum, *supra* note 7, at 22; USITC, Circular Welded, *supra* note 41, at 23; USITC, Silica Bricks, *supra* note 69, at 19; Prestressed Concrete Steel Rail Tie Wire from China and Mexico, Inv. Nos. 731-TA-1207-1208, USITC Pub. 4473 (June 2014) (Final) at 21 [hereinafter USITC, Prestressed Concrete]; Certain Kitchen Appliance Shelving and Racks from China, Inv. Nos. 701-TA-458 and 731-TA-1154, USITC Pub. 4098 (Aug. 2009) (Final) at 18 [hereinafter USITC, Certain Kitchen]; Large Power Transformers from Korea, Inv. Nos. 731-TA-1189, USITC Pub. 4346 (Aug. 2012) (Final) at 20 [hereinafter USITC, Large Power]; USITC, Certain Large, *supra* note 41, at 39; USITC, Certain Steel, *supra* note 67, at 18; USITC, Grain-Oriented, *supra* note 67, at 4; USITC, Frozen Warmwater, *supra* note 59, at 27.

⁹⁷ USITC, Certain Large, *supra* note 41, at 39.

⁹⁸ USITC, Certain Aluminum, *supra* note 7, at 22; USITC, Prestressed Concrete, *supra* note 96, at 21.

⁹⁹ USITC, Large Power, *supra* note 96, at 20.

¹⁰⁰ USITC, High Pressure, *supra* note 67, at 17.

¹⁰¹ USITC, Galvanized Steel, *supra* note 64, at 24; USITC, Circular Welded, *supra* note 41, at 23, 29; USITC, Silica Bricks, *supra* note 69, at 19.

¹⁰² USITC, Grain-Oriented, *supra* note 67, at 27.

¹⁰³ Hardwood Plywood from China, Inv. Nos. 701-TA-490 and 731-TA-1204, USITC Pub. 4434 (Nov. 2013) (Final) at 21 [hereinafter USITC, Hardwood Plywood].

could attenuate the causation.¹⁰⁴ This makes sense as any consumer could choose to buy a superior foreign product sold cheaper than a more expensive domestic product, or conversely, could buy a domestic. However, if price and quality are both important, then price will be seen as the reason for lost sales and falling market share.¹⁰⁵

The ITC will also look as to whether any other forces impact the analysis.¹⁰⁶ Price effects require that price competition is a significant force in the industry. Non-price factors attenuate this causation, perhaps not enough to break a causal chain based on some price competition, but it must be evaluated. Non-price factors include changes in demand, contract arrangements, or business operations.¹⁰⁷ For example, if demand is flat, and COGS fall, then it is reasonable that prices fall.¹⁰⁸ These other factors could rebut lost sales allegations, specifically that non-price factors caused the lost sales.¹⁰⁹ In bidding procedures, where several cost and non-cost factors are evaluated, any significance assigned to cost keeps the causal chain intact.¹¹⁰ Base prices, as compared to total ownership costs, also complicates the analysis, but when there is underselling on the base price, there is found to be price effects.¹¹¹ On the other hand, the existence of spot sales has been found to exacerbate price effects when combined with underselling.¹¹²

Other fact combinations can also prevent finding adverse price effects.¹¹³ Assume increasing domestic industry prices, with stable or improving costs of goods sold, and with little or no allegations of sales lost.¹¹⁴ These facts were found to preclude a finding of price effects.¹¹⁵ It is also possible that importers oversold domestics, or sold

¹⁰⁴ USITC, Prestressed Concrete, *supra* note 96, at 19–20; USITC, Silica Bricks, *supra* note 69, at 18.

¹⁰⁵ USITC, Prestressed Concrete, *supra* note 96, at 19–20.

¹⁰⁶ USITC, Grain-Oriented, *supra* note 67, at 26.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Bottom Mount Combination Refrigerator-Freezers from Korea, Inv. Nos. 701-TA-477 and 731-TA-1180-118, USITC Pub. 4318 (May 2012) (Final), at 37 [hereinafter USITC, Bottom Mount].

¹¹⁰ USITC, Large Power, *supra* note 96, at 18.

¹¹¹ *Id.*

¹¹² USITC, High Pressure, *supra* note 67, at 17.

¹¹³ USITC, Circular Welded, *supra* note 41, at 23.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

at higher prices, which would count against a price effects determination.¹¹⁶

A potential curveball for Diana is whether the industry is even susceptible to analysis, and to what degree.¹¹⁷ The ITC may acknowledge that the dynamics of the market are too complex and too many other factors influence the analysis.¹¹⁸ The ITC is communicating that a *res ipsa loquiter* analysis, i.e., prices are falling so it must be the importers, is insufficient to prove price effects.¹¹⁹ Facts limiting the amount of price data include whether an industry contracts for the long term, as then changes in material prices may be less important.¹²⁰ There could also be little head-to-head competition,¹²¹ or few domestic or importer-producers.¹²²

In the price analysis, there is also some reiteration of the volume analysis. Specifically, whether market share was displaced.¹²³ This may seem peculiar, as this is not directly relevant to the price analysis, but it helps maintain the focus on causation from one element to another. Specifically, that large volumes of unfairly traded goods took sales from a domestic industry and significant injury followed.

In conclusion, a price effects determination requires underselling and lost sales, with price depression and suppression playing minor roles in the determination. Like with volume, Diana's answers to these questions can lead in different directions, some supporting a price effects finding and others not, and like volume, there is no rule or equation as to how these questions support the determination.¹²⁴ This means that it is possible that there could still be a finding of adverse effects on prices when there is a mixed picture (high substitutability between subject importers and domestic industries, but

¹¹⁶ USITC, Steel Threaded, *supra* note 67, at 21–22.

¹¹⁷ USITC, Diffusion Annealed, *supra* note 58, at 21 (providing that the long terms contracts limit the impact of material prices on the analysis).

¹¹⁸ USITC, Certain Steel, *supra* note 67, at 37.

¹¹⁹ *Id.* (specifically stating that the analysis is limited to why domestics could not increase prices, not why they were down, and that falling prices are not evidence of importer's price effects).

¹²⁰ USITC, Diffusion Annealed, *supra* note 58, at 21 (providing that the long terms contracts limit the impact of material prices on the analysis).

¹²¹ USITC, Silica Bricks, *supra* note 69, at 17.

¹²² USITC, Certain Aluminum, *supra* note 7, at 25.

¹²³ USITC, Steel Threaded, *supra* note 67, at 23.

¹²⁴ USITC, Coated Paper, *supra* note 56, at 39–41; USITC, Certain Aluminum, *supra* note 7, at 21–22.

non-price factors and price both matter, with significant underselling, no finding of price suppression, and falling costs of goods sold).¹²⁵ If the evidence for price effects is mixed, it is likely that underselling, falling market share, and lost sales will tip the balance for domestic claimants.¹²⁶

From the cases, it appears that price depression and suppression are not determinative in the price effects analysis.¹²⁷ The phrase “nevertheless” or “none the less” often follows a negative depression or suppression finding, because the ITC will use underselling and lost market share to carry the analysis.¹²⁸ The importance of lost sales is particularly visible in findings of no material injury where, in the absence of depression or suppression and despite underselling, the lack of lost sales prevents a price effects determination and corresponding injury determination.¹²⁹ Additionally, importer’s failure to capture market share, even with “rampant” underselling, often prevents a finding of price effects.¹³⁰

*C. Is There Adverse Impact?*¹³¹

The adverse effects analysis is based on the performance indicators of the domestic industry.¹³² The performance indicators often cited includes output, employment, shipments, operating losses, and margins.¹³³ The ITC looks to assess whether these indicators have

¹²⁵ USITC, Coated Paper, *supra* note 56, at 39–41; USITC, Certain Aluminum, *supra* note 7, at 22.

¹²⁶ USITC, Certain Aluminum, *supra* note 7, at 22. This analysis also shows how questions from different elements lean on each other; here, the market share question from Volume and the lost sales question from Domestic Industry effects both contribute to the Price effects analysis. *See also* USITC, Circular Welded, *supra* note 41, at 23.

¹²⁷ USITC, Diffusion Annealed, *supra* note 58, at 18 (stating that there is no price depression but importers gained at the expense of domestics); USITC, Galvanized Steel, *supra* note 64, at 22–23.

¹²⁸ USITC, Diffusion Annealed, *supra* note 58, at 18 (stating that there is no price depression but importers gained at the expense of domestics).

¹²⁹ USITC, Bottom Mount, *supra* note 109, at 37; USITC, Diffusion Annealed, *supra* note 58, at 18.

¹³⁰ USITC, Certain Steel, *supra* note 67, at 22; USITC, Xanthan Gum, *supra* note 63, at 25–26.

¹³¹ USITC, Drawn Stainless, *supra* note 57, at 23.

¹³² USITC, Prestressed Concrete, *supra* note 96, at 22.

¹³³ *Id.*

increased or decreased over the period of investigation.¹³⁴ After assessing whether the indicators rose or fell, the ITC looks to why they were what they were, specifically looking for a correlation between the indicators and demand, importer volume, importer underselling, etc.¹³⁵ The best that Diana can hope for is that her data indicators fell while demand, importer volume, or importer underselling rose.¹³⁶ Specifically, Diana could prove that importers displaced her market share and sales, and injury followed.¹³⁷

The ITC will also consider whether the market was in a recession or recovery. If domestic industry performance indicators continued to fall during a recovery, this indicates that something extraordinary was affecting the condition of the domestic industries.¹³⁸ Again, the question is whether demand conditions explain the performance indicators, and how it relates to consumption.¹³⁹ Conversely, performance indicator improvement could greatly exceed the increase in demand,¹⁴⁰ such as where domestic industry shipments increased but market share fell.¹⁴¹ Additional evidence could also be that domestic industry participants stopped selling the product, closed, wrote off assets, closed facilities, or faced bankruptcy.¹⁴²

Domestic industries often allege conditions and issues that disintegrate upon closer analysis. These include claims that importer competition forced domestic industries to lower prices,¹⁴³ that importers prevented critical development efforts, but no evidence was provided,¹⁴⁴ or where domestic industries claimed to compete with importers in a certain market but had actually not sold the product at

¹³⁴ USITC, Galvanized Steel, *supra* note 64, at 490; USITC, Circular Welded, *supra* note 41, at 25; USITC, Crystalline Silicon, *supra* note 57, at 35; and USITC, Steel Threaded, *supra* note 67, at 24–25.

¹³⁵ USITC, Circular Welded, *supra* note 41, at 25; USITC, Steel Threaded, *supra* note 67, at 24–25; USITC, Silica Bricks, *supra* note 69, at 20; USITC, Certain Aluminum, *supra* note 7, at 26.

¹³⁶ USITC, Drawn Stainless, *supra* note 57, at 23–24.

¹³⁷ Certain Stilbenic Optical Brightening Agents from China and Taiwan, Inv. Nos. 731-TA-1186-1187, USITC Pub. 4322 (May 2012) (Final) at 20 [hereinafter USITC, Certain Stilbenic].

¹³⁸ USITC, High Pressure, *supra* note 67, at 18.

¹³⁹ USITC, Certain Stilbenic, *supra* note 137, at 21.

¹⁴⁰ USITC, Crystalline Silicon, *supra* note 57, at 35.

¹⁴¹ *Id.*

¹⁴² USITC, Steel Wire, *supra* note 74, at 18; USITC, Crystalline Silicon, *supra* note 57, at 35–37.

¹⁴³ USITC, Hardwood Plywood, *supra* note 103, at 21.

¹⁴⁴ USITC, Silica Bricks, *supra* note 69, at 22.

issue for ten years.¹⁴⁵ Obviously, if Diana does not sell the product, then they are not in competition with subject importers.¹⁴⁶ In others, domestic industries remained profitable and even increased market share, and any dips in performance indicators coincide with an economic downturn more than importer competition.¹⁴⁷

Whether a severe economic downturn, with consumption dropping significantly, caused weak performance for domestics is another important question.¹⁴⁸ Economic downturn does not sever the causal link but the ITC will not attribute adverse demand conditions to subject imports.¹⁴⁹ The ITC will look to whether the magnitude of deterioration in performance indicators matches the severity of the downturn.¹⁵⁰ One example would be if U.S. consumption fell, but performance indicators fell much greater than the loss of demand.¹⁵¹ This would suggest that something other than demand caused the dive in domestic performance, such as unfairly traded imports. In terms of whether this mixed bag, part downturn, part import injury, is sufficient, the ITC has found that the effects of dumping or subsidies need not be linear or proportionate.¹⁵²

Conversely, the best that importers can hope for is that the indicators did not fall during the period of investigation, meaning that the domestics did not suffer any injury.¹⁵³ Alternatively, the importers can also prevail by indicating that the indicators fell as a result of influences separate from importer activity, such as the effects from non-commercial activity.¹⁵⁴ Often, domestic injuries or fluctuations in financials stem from a variety of influences, rather than importers.¹⁵⁵ In one example, rather than importer competition affecting performance indicators, the ITC identified that settlement payments from litigation affected operating gains and losses more than business

¹⁴⁵ *Id.*

¹⁴⁶ Why this was not discovered during the preliminary phase, as opposed to the final phase, is a good question.

¹⁴⁷ USITC, Coated Paper, *supra* note 56, at 45.

¹⁴⁸ USITC, Certain Aluminum, *supra* note 7, at 24.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ USITC, Galvanized Steel, *supra* note 64, at 25; USITC, Circular Welded, *supra* note 41, at 25; USITC, Xanthan Gum, *supra* note 63, at 29; and USITC, Steel Threaded, *supra* note 67, at 25.

¹⁵⁴ USITC, Frozen Warmwater, *supra* note 59, at 33.

¹⁵⁵ *Id.* at 33–34.

conditions.¹⁵⁶ Importers had unsuccessfully attempted to identify domestic competition as the cause of sinking domestic performance indicators, which the ITC considered, but the defense lacked factual support.¹⁵⁷

Importers can also hope to prove that, although domestic performance indicators fell, importers did not take market share or depress prices so there is no impact.¹⁵⁸ If importers did not displace domestic industries for any performance indicator, then the causal link between Diana's injury and any action from importers is severed.¹⁵⁹ Additionally, importers can take revenue from domestics provided that the lost sales were of minor magnitude.¹⁶⁰ Other importer gains are permissible provided that importers gained at the expense of nonsubject imports.¹⁶¹

Another nuance in the analysis involves assessing the correlation between importer volume and domestic performance indicators to assess.¹⁶² Specifically, the ITC is looking for an inverse correlation; importer data rose while domestic data fell, as opposed to when both rose and fell which would suggest that demand or market conditions affected figures more than trade violations.¹⁶³ The best that the domestics can hope for is that indicators fell while demand, importer volume, or importer underselling rose.¹⁶⁴ Conversely, it is possible that performance indicators fell but the record fails to show a meaningful correlation between importer volume or prices, and domestic performance indicators.¹⁶⁵ Examples of this include domestic allegations of injury, but domestic performance indicators were at highest levels when importer volume was at its highest.¹⁶⁶ This is the opposite correlation than what Diana would need to prove injury.

¹⁵⁶ *Id.*

¹⁵⁷ USITC, Certain Large, *supra* 41, at 45.

¹⁵⁸ USITC, Grain-Oriented, *supra* note 67, at 28; USITC, Frozen Warmwater, *supra* note 59, at 28.

¹⁵⁹ USITC, Ferrosilicone, *supra* note 53, at 20–21.

¹⁶⁰ USITC, Grain-Oriented, *supra* note 67, at 27.

¹⁶¹ USITC, Hardwood Plywood, *supra* note 103, at 20–23; USITC, Frozen Warmwater, *supra* note 59, at 27.

¹⁶² USITC, Steel Threaded, *supra* note 67, at 25.

¹⁶³ USITC, Circular Welded, *supra* note 41, at 30.

¹⁶⁴ USITC, Drawn Stainless, *supra* note 57, at 23–24.

¹⁶⁵ USITC, Steel Threaded, *supra* note 67, at 25.

¹⁶⁶ *Id.*; USITC, Silica Bricks, *supra* note 69, at 22.

Another obstacle for domestics is when there is no correlation between trends in importer volume and price and domestic performance indicators.¹⁶⁷ The ITC will look to track domestic performance trends and changes in market share and underselling for importers.¹⁶⁸ No correlation between performance indicators and subject import volume, market share, and underselling means that an injury determination is unlikely.¹⁶⁹ Specific examples include if performance indicators fell more when importers were absent from the market than when importers had a large presence,¹⁷⁰ or conversely when importers stepped out of the market, domestics did not improve.¹⁷¹

The ITC will also seek to ascertain if nonsubject imports caused the injury to the domestic industry by reviewing the correlation in a similar fashion to importers.¹⁷² Like with importers, the timing of nonsubject importer action and domestic injury must suggest causation.¹⁷³ This gets nuanced, as it is possible that performance indicators improved with increases in nonsubject importers but were inversely related to importers.¹⁷⁴ In this example, it is clear that the nonsubject importers did not cause any injury, as the performance indicator changes were not related to the corresponding injury. Additionally, it is possible that nonsubject importers oversold subject importers, which provides additional support for claims against importers, specifically, that imports are priced unfairly as compared to other foreign competitors.¹⁷⁵

From this review, it appears that the adverse impact analysis involves a reiteration of the preceding elements of volume and price.¹⁷⁶ Like with the repeated volume analysis in the price section,

¹⁶⁷ USITC, *Certain Aluminum*, *supra* note 7, at 26.

¹⁶⁸ USITC, *Circular Welded*, *supra* note 41, at 28.

¹⁶⁹ *Id.* at 31; USITC, *Silica Bricks*, *supra* note 69, at 20.

¹⁷⁰ USITC, *Ferrosilicone*, *supra* note 53, at 21.

¹⁷¹ USITC, *Coated Paper*, *supra* note 56, at 45.

¹⁷² USITC, *Prestressed Concrete*, *supra* note 96, at 23.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ USITC, *Steel Wire*, *supra* note 74, at 16 (describing Volume and Price in the analysis of performance indicators); USITC, *Certain Large*, *supra* note 41, at 33 (discussing how increased volume led to the closure of one domestic producer); USITC, *Crystalline Silicon*, *supra* note 57, at 29 (describing how subject import volume led to closure or bankruptcy of domestic firms; USITC, *Crystalline Silicon*, *supra* note 57, at 30 (citing manufacturing closures).

this reiteration helps hold together the causation even as different elements are discussed. This also highlights how important each element is to the other: volume increases must be significant, but these increases are immaterial if there is no unfair pricing, and neither the volume nor pricing matters if domestic performance indicators remain unchanged or improve.

CONCLUSION

So what does this mean for Diana? It means that although Diana must satisfy the elements of volume, price, and adverse impacts, the way to determine trade injury is by pinning down recurring factual issues.¹⁷⁷ These include:

1. What is the history of demand?
2. Whether price or non-price considerations drive customer's purchases;
3. Whether there are confirmed lost sales;
4. Whether there is underselling;
5. Demand conditions do, or do not, explain the domestic industry's performance indicators;
6. Whether nonsubject imports or non-business activity affected the domestic industry's performance indicators.

Additionally, Diana should look to avoid the mistakes of some domestic industries filing at the ITC. These include alleging damages and lost sales that did not occur or exaggerating losses that did, confusing revenue volatility from extraordinary events, such as natural disasters, to losses from unfair competition, and claiming to compete with importers when the firm does not actually sell a competing product. These may sound obvious, but, after reviewing some of the claims made by domestic industries, apparently they are not.

Injury analysis is difficult for two reasons. First, it is about causation, which is by its nature tricky. Second, the law for identifying causation is a law-as-a-standard, or a list of factors, such as volume, price, and impact, and not a law-as-a-rule, which is law as a factual trigger-legal result analysis. Causation requires an application of empirical truths, things we understand, which allow us

¹⁷⁷ One example is the inappropriately named "rule of reason" from antitrust law, which includes a dozen fact issues that are likely to surface in a monopoly situation.

to identify whether subject importer competition is pricing unfairly and taking market share or is simply competing. Similarly, our understanding of how markets and economies operate drives our evaluation as to whether domestic industry losses are due to subject importer's unfair prices or if domestic participants are simply not competitive, or if there is an economic downturn.

The nuanced nature of these analyses is probably why the ITC goes out of its way to state that timing alone is not enough to prove causation.¹⁷⁸ The alternative would be a reliable and transparent analysis, and would provide predictable results, but they could be wrong. If importer volume increased and domestic performance indicators fell, then there would be injury. Certainly, this is a necessary requirement, but based on our understanding of how varying and volatile markets are, it would not necessarily prove that importers caused injury to domestic injuries.

That the ITC must apply a set of factors to an unknown outcome also complicates the analysis, specifically, there is no formula or threshold for the amount of volume, price effects, and adverse impact that results in injury. Surely, domestics have a stronger claim if importer volume is high, prices were unfair, and importers suffered injury, but how much of each is required to prove injury? What if injury was significant but the volume increase was modest and the prices were fair? The law-as-a-standard framework can accommodate varying fact patterns because it is flexible, however, this flexibility can also make the injury analysis look unpredictable, and consequently, unprincipled, as critics claim.

The cases indicate a duality in the ITC's analysis in that each decision is *sui generis*, independent of precedent, but each decision contains the same message; that significant volume increases of unfairly traded goods that significantly injure domestic industries merit recovery. This may sound like a repetition of the elements; however, parties often lose their way from this idea. Diana must identify unfair competition as the issue by focusing on the recurring questions above such as history of demand, whether quality matters, etc., and distance her case from impermissible considerations. Fortunately, this idea of context, combining the elements of volume, price, and adverse effects, as applied by the ITC, allows her to make her case, specifically to demonstrate why her facts merit an injury

¹⁷⁸ USITC, Antidumping, *supra* note 7, II-28, 29; *see also* USITC, Certain Aluminum, *supra* note 7, at 15 (citing 19 U.S.C. § 1677(7)(A)).

determination. In this way, the determination for her injury claim will be unique as to the facts but not as to the law.

