

# THE ASSESSMENT OF INJURY BY THE CANADIAN INTERNATIONAL TRADE TRIBUNAL

Lawrence Herman\*

---

*The author examines several factors considered by the Canadian International Trade Tribunal when assessing whether the dumping of imports has caused injury to domestic production. The determination of causation has become more complex and there are significant areas of uncertainty.*

---

[French abstract]

---

The Canadian International Trade Tribunal determines whether material injury to Canadian production has been caused or is likely to be caused by dumped or subsidized imports. The jurisdiction of the tribunal is set out in the *Special Import Measures Act (SIMA)*,<sup>1</sup> which implements Canada's treaty obligations under the *WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)* and the *Subsidies and Countervailing Measures Agreement (SCM Agreement)*.<sup>2</sup> Tribunal inquiries follow preliminary determinations of dumping or subsidizing made by the Canada Border Services Agency.<sup>3</sup> A review of tribunal findings over the last decade indicates a much more demanding standard for establishing causation, a direct result of decisions of the panels and Appellate Body of the WTO.<sup>4</sup>

The *Anti-Dumping Agreement* (and the *SCM Agreement*) require

---

\* Cassels Brock & Blackwell LLP, Toronto.

<sup>1</sup> R.S.C. 1985, c. S-15, ss. 42, 43.

<sup>2</sup> These two agreements are part of the *Marrakesh Agreement Establishing the World Trade Organization [WTO Agreement]*, 15 April 1994, Uruguay Round of Multilateral Trade Negotiations.

<sup>3</sup> *SIMA*, s. 38(1). The division of jurisdiction between the CBSA and the Canadian International Trade Tribunal in anti-dumping and countervailing duty matters is set out in other provisions of *SIMA*. It corresponds to the scheme in the *WTO Agreement* and generally follows similar divisions between investigative and adjudicative agencies in other jurisdictions, such as the United States.

<sup>4</sup> The handling of various injury factors by the tribunal and its predecessors in earlier days has been discussed by the author in *Canadian Trade Remedy Law* (Toronto: Emond Montgomery, 1997) and in "Injury Findings by the Canadian Import Tribunal: The Decisive Elements" (1987) 1 *R. I. B. L.* 373.

domestic agencies to undertake an objective examination of (a) the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of those imports on domestic producers.<sup>5</sup> The causal connection between dumped goods and injury must be based on an examination of all relevant evidence and “[i]t must be demonstrated that the dumped imports are, through the effects of dumping...causing injury within the meaning of this Agreement.”<sup>6</sup> Authorities are also required to examine “any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.”<sup>7</sup> Neither the *Anti-Dumping Agreement* nor the *SCM Agreement* has the force of law in Canada. However, the *World Trade Organization Agreement Implementation Act (Implementation Act)* “approves” of the 1994 *WTO Agreement* and amends an array of Canadian statutes to give it effect.<sup>8</sup>

The *Special Import Measures Regulations*, issued under *SIMA*, were also changed in 1994 to conform to Canada’s WTO treaty obligations.<sup>9</sup> The factors in the *Anti-Dumping Agreement* and the *SCM Agreement* were listed or “prescribed” in section 37.1(1) of the regulations, “[f]or the purposes of determining whether the dumping or subsidizing of any goods has caused injury or retardation.” Operating in tandem with the regulations, the *Canadian International Trade Tribunal Rules*,<sup>10</sup> made under the authority of the *Canadian International Trade Tribunal Act*,<sup>11</sup> provide for the collection of evidence of injury and causation in an injury inquiry by the tribunal. Rule 60(1) allows the tribunal, at any time, to direct any party to an inquiry to file written submissions, documents or evidence related to injury and rule 61 gives the tribunal the authority to direct a party to an inquiry to produce information that relates to the prescribed factors.

In line with the two WTO agreements, the tribunal’s task under *SIMA* is to weigh and balance the various causation factors. The process involves significant subjectivity and is more art than science. The process was described by Justice Hugessen in the Federal Court of Appeal in *Sacilor Aciéries, Forges et Aciéries Dilling and Francosteel Canada Inc. v. Anti-Dumping Tribunal*:

---

<sup>5</sup> Art. 3.1.

<sup>6</sup> Art. 3.5.

<sup>7</sup> *Ibid.*

<sup>8</sup> S.C. 1994, c. 47.

<sup>9</sup> S.O.R./84-927, as amended.

<sup>10</sup> S.O.R./91-499, P.C. 1991-1446, 13 August 1991.

<sup>11</sup> R.S.C. 1985, c. 47 (4th Supp.).

If the presence of foreign goods in the domestic market at dumped prices results in domestic producers being obliged either to lose sales or to sell their own products at a loss, then it is open to the Tribunal to make a finding that the dumping has caused injury. Of course, there may be other factors which may have contributed to the injury. As a matter of common sense, it seems to me that there almost always will be. Such matters as efficiency, quality, cost control, marketing ability, accuracy in forecasting, good luck, and a host of others come to mind. It is the function of a specialized, expert tribunal such as this one to weigh and balance those factors and to decide the importance to be given to each.<sup>12</sup>

There is a considerable WTO jurisprudence on the nature of the task facing national trade agencies. Various rulings have emphasized that conclusions must be such that “an objective and unbiased investigating authority could have properly concluded that the dumped imports were having a negative effect” on the domestic industry.<sup>13</sup> While there is now a greater sophistication to the weighing and balancing process, the tribunal’s reasons are not always clear or consistent.<sup>14</sup> That produces uncertainty as to the relative importance of the applicable factors. An examination is made here of key tribunal findings on the causation issue, particularly since 1994, in an attempt to explain their significance in current Canadian trade remedy law.

---

<sup>12</sup> (1985) 60 N.R. 371 at 374 (F.C.A.) [*Sacilor*]. See also *McCulloch of Canada Limited v. Anti-Dumping Tribunal*, [1978] 1 F.C. 222 (F.C.A.); *Sarco Canada Limited v. Anti-Dumping Tribunal*, [1979] 1 F.C. 247 (F.C.A.).

<sup>13</sup> *Guatemala - Definitive Anti-dumping Measures on Grey Portland Cement from Mexico* [*Guatemala – Cement II*], (2000) WT/DS156/R at para. 8.276. See also *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, (2004) WT/DS277/R at para. 7.28 [*United States – Softwood Lumber*].

<sup>14</sup> Methodology is a matter for the agency itself. In *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, (2000) WT/DS122/R at para. 7.159 [*Thailand Angles*], the WTO panel stated that “it is for the investigating authorities in the first instance to determine the analytical methodologies that will be applied in the course of an investigation, as Article 3 [of the *Anti-Dumping Agreement*] contains no requirements concerning the methodology to be used.” On appeal (AB-2000-12), WT/DS122/AB/R, at para. 111, the Appellate Body agreed with the foregoing, but went on to hold, “the requirement in Article 3.1 that an injury determination be based on ‘positive’ evidence and involve an ‘objective’ examination of the required elements of injury does *not* imply that the determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation. Article 3.1, on the contrary, permits an investigating authority making an injury determination to base its determination on *all* relevant reasoning and facts before it.”

*The Causation Standard*

Twenty years ago, in *Wide Flange Steel Shapes from Spain*, the Canadian Import Tribunal (predecessor to the present tribunal) stated that while imports need not be the *only* cause of material injury, they must have contributed to that injury in an important or significant degree.<sup>15</sup> There had to be a more substantial causal connection than dumped or subsidized goods ranking equally with other injury factors. In *Cars Produced by or on Behalf of Hyundai Motor Company*, the same tribunal determined that the dumping activities of Hyundai may have had “some suppressive effect on prices” and may have otherwise contributed to Ford and GM’s injury in Canada.<sup>16</sup> It found, however, that the price suppression and other manifestations of injury that could be “solely” attributed to the dumping were not significant.<sup>17</sup> These decisions arguably were not consistent with Canada’s GATT obligations. A few years later, in *Machine Tufted Carpeting*, the tribunal corrected that view, stating that subject imports need only be “a cause” of injury and not necessarily an important or significant cause, provided that the linkage was established.<sup>18</sup> That finding was the subject of a binational panel review under the *Canada – United States Free Trade Agreement*.<sup>19</sup> The panel remanded the standard of causation to the tribunal with instructions that it determine whether dumping “in and of itself” caused material injury.<sup>20</sup> On remand, the tribunal affirmed its earlier statement that the dumping (and subsidization) must be a cause, but not the only or major cause, of material injury.<sup>21</sup> A later NAFTA<sup>22</sup> panel in *Flat Hot-*

---

<sup>15</sup> *Certain Wide Flange Steel Shapes Originating in or Exported from Spain*, (1985) CIT-1-85.

<sup>16</sup> (1988) CIT-13-87 [*Cars*].

<sup>17</sup> *Ibid.* at 28-29.

<sup>18</sup> (1992) NQ-91-006 at 21.

<sup>19</sup> *Machine Tufted Carpeting From The United States of America*, (1993) CDA-92-1904-02.

<sup>20</sup> *Ibid.* at 38. It can fairly be said that this panel decision is an unusual and perhaps aberrant one, given that the standard of review in Canadian courts has been restrictive and would not likely have resulted in a similar remand under section 28 of the *Federal Courts Act*. In his dissent, Member Richard was of the view that the tribunal correctly examined all the relevant evidence before it. In his view, the issue was an issue of fact, which the tribunal had the expertise to assess. The panel could only intervene where there was no evidence of causality sufficient to satisfy section 42(1)(a) of *SIMA*.

<sup>21</sup> (1993) NQ-91-006 Remand.

<sup>22</sup> The *North American Free Trade Agreement* replaced the bilateral free trade agreement between Canada and the United States but kept the same system of binational panel reviews.

*Rolled Carbon Steel Sheet Products from the United States of America* affirmed the applicable causation standard in the following terms:

SIMA itself does not specify the required degree of causal relationship between dumping and material injury or exactly what must be considered in a causal analysis. In past decisions, the Tribunal, or its predecessor, found that dumped imports constituted a ‘significant’ or ‘direct’ cause of injury or that a ‘significant proportion’ of material injury was attributable to the effects of dumping. More recently, in *Machine-Tufted Carpeting*, the Tribunal found that dumped imports must be ‘a cause’ of material injury. There is no single administrative standard against which to judge the Tribunal’s analysis of causality in this case. To a certain extent, this may be inevitable because the Tribunal’s analyses are driven largely by economics and market analyses of various products and industries, which may dictate that different weight must be given to different factors in different cases.<sup>23</sup>

In *Fresh, Whole, Delicious, Red Delicious and Golden Delicious Apples*, the tribunal noted that SIMA itself provided little guidance concerning the standard to be applied in determining whether a causal relationship exists between dumping and material injury or the factors to be considered in performing a causal analysis.<sup>24</sup> However, making reference to the *GATT Anti-Dumping Code*, it went on to state that:

In the Tribunal’s view [the Code] contemplates that dumping need only be a cause of material injury and that material injury caused by factors other than dumping should not be attributed to dumping. Moreover, the Tribunal observes that paragraph 4 of Article 3 [of the former version of SIMA] does not contemplate that the dumping be the ‘only’ cause, ‘principal’ cause or ‘major’ cause of material injury or that an investigating authority quantify the extent of injury caused by factors other than dumping or isolate the injury caused by these other factors from the injury caused by dumping.<sup>25</sup>

Tribunal findings since that date, and since the replacement of the *GATT Codes* by the WTO agreements in 1994, have followed this

---

<sup>23</sup> (1994) CDA-93-1904-07 at 31-32. This passage was cited with approval by a subsequent NAFTA panel in *Hot-Rolled Carbon Steel Plate from Mexico*, (1999) CDA-97-1904-02 at 32.

<sup>24</sup> (1995) NQ-94-001.

<sup>25</sup> *Ibid.* at 21. Compare the absence of a causation standard and material injury definition with the law in the United States where material injury is defined under the *Tariff Act of 1930* as “harm which is not inconsequential, immaterial, or unimportant.” See 19 U.S.C. §1677(7)(A). This fairly low material injury threshold has a direct bearing on the requirements for the determination of causality in the United States.

line of analysis, making it accepted orthodoxy under Canadian trade law that the offending imports need only be *one* of the causes of injury and not the only or even an important or primary cause of injury.<sup>26</sup> Interestingly, tribunal analyses over the last five years or so do not state this “one of the causes” standard explicitly, but simply repeat the formula that causation is to be determined on the basis of the factors prescribed in section 37.1 of the *Special Import Measures Regulations*.<sup>27</sup> From time to time, however, statements of the tribunal muddy the waters. In the recent decision in *Fasteners*, the tribunal declined to find that imports of dumped and subsidized steel nuts and bolts caused injury to domestic producers, saying that it did not find the prices of imports were “the cause” of declines in prices of domestic product.<sup>28</sup> Whether this single reference is a misstatement of the standard or a ratcheting up of the causation standard is not entirely clear.<sup>29</sup> Whatever the precise articulation of the standard, causation will inevitably be based on impression and “feel” by the tribunal, part of the art of the weighing and balancing referred to by the Federal Court of Appeal in *Sacilor*. That leads into an examination of how the tribunal has handled the elements of causation over the last number of years.

#### *Which Market?*

The question arises whether the examination of injury and causation is confined to the domestic market or whether *all* production, whether for domestic or export sales, must be evaluated. If export sales are involved as well as the local market, the domestic industry will face a more difficult task of showing both injury and causation. Several earlier tribunal decisions made it clear that the injury factors expressed in the WTO agreements and set out in section 37.1 of the *SIMA* regulations are confined to the Canadian market.<sup>30</sup> The issue was also addressed in a NAFTA panel decision in *Contrast Media*, the panel stating that “there is nothing in the language of the statute and regulations that precludes the

---

<sup>26</sup> This is in line with article 3.5 of the *Anti-Dumping Agreement* and article 15.5 of the *SCM Agreement*, which require that it be demonstrated that the offending imports, through their “effects,” are causing injury to a domestic industry. See *Guatemala – Cement II*, *supra* note 13; *Thailand Angles*, *supra* note 14.

<sup>27</sup> These words have been used virtually without variation as part of a template for the tribunal’s reasons. See *Steel Fuel Tanks*, (2004) NQ-2004-002 at 10; *Stainless Steel Wire*, (2004) NQ-2004-001 at 11; *Carbon Steel Pipe Nipples, Threaded Couplings and Adaptor Fittings*, (2003) NQ-2002-004 at 12 [*Carbon Steel Pipe Nipples*].

<sup>28</sup> (2005) NQ-2004-005 at 28.

<sup>29</sup> The decision is under review in the Federal Court of Appeal.

<sup>30</sup> E.g. *Cars*, *supra* note 16.

Tribunal from considering the impact of dumping...with respect to conditions in the domestic market.”<sup>31</sup>

Another market-related issue has been the extent to which injury must be focused on the external or “merchant” market as well as on product used for internal processing. In other words, does a complainant have to show that not only was injury caused to its external sales, but that the same goods used as feedstocks and internally-processed have also been injured by the offending imports? Nothing in *SIMA* (or the regulations) specifically confines the injury and causation analysis to merchant market sales. Some confusion had crept into the analysis in *Flat Hot-Rolled Carbon Steel Sheet Products* in 1993, where the tribunal took the broad view.<sup>32</sup> Some eight years later, however, in *Flat Hot-Rolled Carbon and Alloy Steel Sheet and Strip*, the tribunal made it clear that its injury inquiry would focus on merchant market sales, where the effect of imports is felt.<sup>33</sup> The tribunal did go on to say that, in certain cases, diversion of production from external sales to use as feedstocks by the domestic industry could be a factor that contributes to lower merchant market sales.<sup>34</sup>

### *Correlation*

The tribunal typically commences consideration of causation with a review of the key market indicators, mainly the price and volume performance of dumped or subsidized imports in relation to domestically-made goods in the same market over the same period of time.<sup>35</sup> *Stainless Steel Welded Pipe*, a pre-Uruguay Round case, is typical

---

<sup>31</sup> *Iodinated Contrast Media from the United States of America*, (2003) CDA-USA-2000-1904-02 at 14. See also the tribunal decision in the same case, *Iodinated Contrast Media*, (2000) NQ-99-003 at 20, citing with approval the approach in *Cars*, *supra* note 16, and stating that the focus of a section 42 inquiry is injury to domestic production for domestic consumption.

<sup>32</sup> (1993) NQ-92-008 at 18 (“The tribunal had to determine whether it makes a difference if like goods are transferred internally rather than sold in the merchant market. There is no statutory basis for excluding internally transferred goods from the production in Canada of like goods for purposes of determining injury thereto. The domestic industry is defined in the Code in terms of production of like goods and does not include consideration of the market or distribution channels for the goods. Thus, the tribunal concluded that both internally transferred like goods and those sold in the merchant market must be considered part of the production in Canada subject to the injury inquiry.”)

<sup>33</sup> (2001) NQ-2001-001.

<sup>34</sup> *Ibid.* at 12.

<sup>35</sup> One of the most important documents in tribunal inquiries, the pre-hearing staff report, normally sets out a great deal of information on the market

of the tribunal's correlation analysis: "[O]ther things being equal, the situation of simultaneously declining domestic production and large and increasing volumes of imports, a high proportion of which have been dumped at significant margins of dumping, provides *prima facie* evidence of causality."<sup>36</sup> The correlation between the declining market position of the domestic producers and simultaneously increased penetration of dumped goods was cited as an overriding factor in *Beer*.<sup>37</sup> Dumped imports had substantially increased market share while Canadian beer showed a corresponding decline in the same period, important evidence of a causal connection between dumping and material injury.<sup>38</sup> In *Machine Tufted Carpeting*, declining domestic market share in the face of increasing share of dumped imports was held to be a prime indicator of causation: "The Tribunal notes that in the face of a soft home market, and despite poor market conditions in Canada, U.S. exports to Canada continued to climb. The Tribunal is satisfied that, except for the dumping, U.S. imports of the subject goods would not have penetrated the Canadian market as deeply or as rapidly as they did."<sup>39</sup>

The same analytical structure appears in more recent findings. In *Structural Tubing*, the tribunal concluded that the gain in market share by the dumped imports came at the expense of the domestic industry, with those gains virtually matching the loss in share experienced by the domestic industry over the same period.<sup>40</sup> It went on to refer to the "clear correlation" between the peak period of import arrivals and the market collapse that subsequently occurred.<sup>41</sup> Thus, evidence of a direct or even indirect correlation between the volume of dumped (or subsidized) goods and their increased market share, on the one hand, and the declining market share of the domestic industry, on the other, can be taken as

---

by means of market tables and other data reporting on the aggregate performance of imports and domestic production over time. It is the main source of the macro-economic evidence before the tribunal.

<sup>36</sup> *Stainless Steel Welded Pipe*, (1991) NQ-91-001 at 8. See also *Solder Joint Pressure Pipe Fittings and Solder Joint Drainage, Waste and Vent Pipe Fittings*, (1993) NQ-93-001 at 19.

<sup>37</sup> (1991) NQ-91-002.

<sup>38</sup> *Ibid.* at 18-19.

<sup>39</sup> *Supra* note 18 at 24. See also *Preformed Fibreglass Pipe Insulation With a Vapour Barrier*, (1993) NQ-93-002 at 18-19, where the loss of market share in a "flat" market was deemed particularly relevant. Evidence that several key bids were lost by the Canadian producers to imports was also an important causation factor.

<sup>40</sup> (2004) NQ-2003-001 at 14-15.

<sup>41</sup> *Ibid.* at 20. See also *Stainless Steel Round Bar*, (1998) NQ-98-001 at

*prima facie* evidence of a causal link for purposes of the tribunal's analysis.<sup>42</sup>

What is not clear from the case law is the weight given to the macro level correlation evidence. Earlier decisions such as *Stainless Steel Welded Pipe* suggested that the correlation test would be given considerable weight. Other decisions have indicated otherwise.<sup>43</sup> The question at the end of the day is this: How important is the macro correlation and can it be countered by more specific micro evidence showing that the *prima facie* causal connection does not, in fact, exist?

#### *Production Declines and Lost Sales*

Market share is a percentage comparison showing the relative performance of imports and domestic production. Factors relating to production and sales volumes, on the other hand, tend to be based on absolute numbers. In *Machine Tufted Carpeting*, the sales volume taken from Canadian producers by imports was sufficient to demonstrate causation, even in the absence of perfect, account-by-account correlation of the lost sales.<sup>44</sup> Echoing its 1991 finding in *Stainless Steel Welded Pipe*, the tribunal found that "in the face of a soft home market, and despite poor market conditions in Canada, U.S. exports to Canada continued to climb. The Tribunal is satisfied that, except for the dumping, U.S. imports of the subject goods would not have penetrated the Canadian market as deeply or as rapidly as they did."<sup>45</sup> With respect to evidence of lost sales at particular accounts, the tribunal concluded that, even if the precise source could not always be pinpointed, it was clear that U.S. origin goods were the cause of the losses: "The Tribunal recognizes that the industry has had difficulty identifying the correct source of dumping in respect to many of its lost accounts. The Tribunal

---

<sup>42</sup> In *Automotive Replacement Windshields*, (2002) NQ-2002-001, on the other hand, the correlation was absent from the macro-economic picture. The tribunal (at 13) found that, "the aggregate pattern does not show that the price undercutting had an effect on [the Canadian producer's] prices in terms of price depression or price suppression."

<sup>43</sup> Contrast *Stainless Steel Welded Pipe*, *supra* note 36, with the recent decision in *Fasteners*, *supra* note 28, where the tribunal rejected the domestic industry's injury case. Notwithstanding that dumped and subsidized imports from subject countries grew by nearly 40% in 2004, increasing to 60% of the total Canadian market, and notwithstanding the fact that import prices substantially undercut domestic prices during that same period, the tribunal declined to find any *prima facie* linkage and went on to reject the argument that imports were even one of the causes of material injury.

<sup>44</sup> *Supra* note 18 at 18-20.

<sup>45</sup> *Ibid.* at 24.

is satisfied that this is explained, in part, by the complex channels of distribution which exist in this industry....<sup>46</sup> The indication was that, once the *prima facie* correlation was established, it was not necessary to pinpoint injury at specific accounts.

That approach was discounted, however, in *Flat Hot-Rolled Carbon Steel Sheet Products* in 1993.<sup>47</sup> In that case, there was significant market penetration of dumped goods, establishing the necessary correlation ingredient, but insufficient case-by-case evidence supplied by the domestic industry to link imports with lost or reduced sales at particular accounts. A no injury finding was issued, the tribunal in effect saying that, even where a *prima facie* injury case is made out, account-specific injury evidence is required to establish causation.<sup>48</sup>

A somewhat different approach was employed in *Stainless Steel Wire*.<sup>49</sup> Although the subject goods did not appear to contribute significantly to the loss of volume or market share in aggregated terms, and therefore did not show correlation at the macro level, imports were nonetheless found to be a cause of price suppression. In the tribunal's view, even if market share was maintained by the domestic industry, imports led directly to erosion in financial performance, particularly in terms of gross margins. The tribunal was also persuaded that the deterioration in financial performance caused by the dumping and subsidizing also played a significant part in the reduction in investment and ability to raise capital.<sup>50</sup>

#### *Price Erosion and Price Suppression*

While market share issues are important in establishing the macro correlation described above, the price impact of subject imports is normally the prime factor demonstrating the causal connection between dumped or subsidized goods and declining fortunes of domestic producers.<sup>51</sup> A review of the case law over the past decade indicates that

---

<sup>46</sup> *Ibid.* at 25-26.

<sup>47</sup> *Supra* note 32.

<sup>48</sup> In *Refrigerators, Dishwashers and Dryers*, (2000) NQ-2000-001 at 17 [*Refrigerators*], aggregated market share data was singled out in the tribunal's general assessment of the causal connection. The most important evidence of causation, however, appeared to be the direct, account specific evidence of import displacement at various retail price points.

<sup>49</sup> (2004) NQ-2004-001.

<sup>50</sup> *Ibid.* at 20.

<sup>51</sup> Tribunal findings indicate that while factors other than sales and price are important, they are largely viewed by the tribunal as secondary criteria.

price stagnation or, even better, absolute declines in domestic selling prices, are among the most significant elements in a causation analysis.<sup>52</sup> The question is whether account-by-account evidence of price erosion or suppression is needed to establish the necessary linkage. Recent tribunal findings leave the answer unclear.

*Flat Hot-Rolled Carbon Steel Sheet Products* indicated that account-specific evidence was essential to establish the connection and that without it, even with compelling evidence at the macro level, the industry's case would fail.<sup>53</sup> Prior to that case, the tribunal had appeared to find persuasive evidence of causality in the correlation between increased imports of dumped goods and declining domestic financial performance and had not expressly called for account-specific evidence of price reductions or suppressed prices in the face of imports.<sup>54</sup> In *Flat Hot-Rolled Carbon Steel Sheet Products*, despite compelling macro factors as well as documentary evidence of numerous low price offerings, the tribunal was not satisfied that the necessary causal nexus was established: "The industry made a number of claims of low price offers for imported steel and could show that steel prices were declining during the period of investigation. However, many of the industry's claims were incomplete in that they often failed to identify the source involved or details as to prices and volumes...."<sup>55</sup> Even though it appreciated the difficulty the industry experienced in producing specific commercial intelligence on an individual account basis, that was the kind of evidence necessary to form the crucial link between dumped imports and injury to the domestic industry. The finding was reviewed by a binational panel, the majority upholding the determination.<sup>56</sup> One dissenting panel member, however, concluded that the tribunal had unreasonably changed the causality requirements in the case and "seemed to be requiring the domestic producers to show a smoking gun and to demonstrate if a sale was lost or a price reduced at a particular

---

Thus, declines in capacity utilization, losses in employment or inability to obtain investment capital, normally enter the picture after the major causation factors have been assessed. Few findings in the last number of years have raised these to the same level of significance as the effect of imports on price.

<sup>52</sup> Both article 3.2 of the *Anti-Dumping Agreement* and article 15.5 of the *SCM Agreement* single out the "effect" of dumped and subsidized imports on prices of domestic goods. While all other relevant factors bearing on the domestic industry must also be looked at, the special reference to price in these provisions indicates that it is of special significance.

<sup>53</sup> *Supra* note 32.

<sup>54</sup> *Stainless Steel Welded Pipe*, *supra* note 36.

<sup>55</sup> *Supra* note 32 at 28-29.

<sup>56</sup> *Flat Hot-rolled Carbon Steel Sheet Products From the United States of America*, *supra* note 23.

account, thus requiring a domestic producer to bring forward evidence to show that there was a competing U.S. product sourced by that account.”<sup>57</sup> The requirement for account-by-account evidence of price suppression and erosion was again followed in *Corrosion-Resistant Steel Sheet Products*.<sup>58</sup> While the macro evidence was persuasive in establishing a correlation between dumped import prices and domestic price declines, it was insufficient to establish causality in the absence of account-specific evidence of price.<sup>59</sup>

The tribunal’s inconsistent approach to causation related to price was revealed in *Caps, Lids and Jars*.<sup>60</sup> The macro-economic picture showed that dumped imports surged in a short time period, evidencing “a clear causal relationship between the dumping and the sharp increase in imports of the subject goods” and demonstrating that “the gains made by the U.S. exporters resulted from lower price offerings which were assisted by dumping.”<sup>61</sup> Instead of requiring account-by-account pricing information, average aggregate prices were used to confirm the correlation revealed at the macro-economic level.<sup>62</sup> In *Concrete Reinforcing Bar*, the evidence demonstrated the correlation between declining domestic selling prices and the increased volume of dumped imports from the subject countries.<sup>63</sup> The large volumes entering Canada at low prices had established imports from the subject countries as the undisputed price leaders in the market, taking sales away from the domestic industry or forcing the industry to reduce prices to retail sales volume. This macro level evidence of price undercutting suggested a direct causal connection between dumping and injury.<sup>64</sup>

Price erosion and suppression may not always show up in the aggregate macro-economic data. Composition or “product mix” within a class of goods often differs between individual shipments and that affects

---

<sup>57</sup> *Ibid.* at 99.

<sup>58</sup> (1994) NQ-93-007.

<sup>59</sup> *Ibid.* at 25-27.

<sup>60</sup> (1995) NQ-95-001.

<sup>61</sup> *Ibid.* at 15.

<sup>62</sup> *Ibid.* at 16.

<sup>63</sup> (2000) NQ-99-002.

<sup>64</sup> An opposite conclusion was reached in *Corrosion-Resistant Steel Sheet*, (2001) NQ-2000-008 at 14, where the tribunal found that the higher selling prices of imports over the review period could not explain the decreases in domestic prices and that, as a result, “the necessary causal connection between the price erosion suffered by the industry and the dumped and subsidized imports cannot be made.” See also *Automotive Replacement Windshields*, *supra* note 42.

the average price of that class. However, as noted in *Fasteners*, over time product mix issues will sort themselves out. In that case, even where there were differences in the composition of shipments over the period being examined, the data nevertheless demonstrated a decidedly downward trend in average domestic prices in the face of substantial increases in dumped or subsidized imports.<sup>65</sup>

In *Grain Corn*, the tribunal found that the price of imports of dumped and subsidized grain from the United States had a “depressing influence” on prices and that the requisite causal connection was established.<sup>66</sup> The tribunal nevertheless considered it necessary to go beyond average data and conduct a more specific analysis. Drilling down to the agricultural sub-sectors, it found that a large percentage of growers were not affected by imports and indeed had performed profitably in the period of inquiry (such as on-farm users). It concluded that, in spite of the macro-economic data establishing *prima facie* causation, “this volume of non-injured production is, by itself, significant enough to preclude a conclusion that there is injury to producers of all or almost all of the production in the regional market.”<sup>67</sup>

In *Refrigerators, Dishwashers and Dryers*, the tribunal recognized the “weaknesses inherent in using average prices,” when dumping did not necessarily result in suppressed prices but rather allowed importers to offer more heavily featured products within given price points.<sup>68</sup> In that case, while average pricing data in itself did not show a direct correlation, price decreases at specific accounts for specific models were sufficient to establish the necessary linkage.<sup>69</sup> More recently, in *Stainless Steel Wire*, the tribunal relied largely on macro-economic data and found, notwithstanding differences in product mix and some inconsistencies in the pricing relationship, that the prices of the subject imports were lower than domestic goods and resulted in significant price erosion and suppression.<sup>70</sup> Account-specific pricing information was used to corroborate the macro economic picture but was not required in and of itself as the necessary ingredient to establish causation.

---

<sup>65</sup> *Fasteners*, *supra* note 28 at 20.

<sup>66</sup> (2001) NQ-2000-005 at 25. This case was one of the rare “regional market” cases, where the complaint alleged injury due to dumped and subsidized imports from the United States west of the Manitoba-Ontario border. As a regional market case, special considerations respecting injury applied.

<sup>67</sup> *Ibid.* at 29.

<sup>68</sup> *Supra* note 48 at 26.

<sup>69</sup> *Ibid.* at 26.

<sup>70</sup> *Supra* note 27 at 17-18.

In short, tribunal thinking on this issue is less than clear. Some of the cases such as *Stainless Steel Welded Pipe* support the view that the correlation at the macro level is *prima facie* evidence of causality. Others, such as the rolled steel cases, indicate that while macro-economic patterns may set the stage for the inquiry, direct evidence of declines in pricing at individual accounts is required to establish the causal connection. Other more recent cases, such as *Caps, Lids and Jars* and *Stainless Steel Wire*, indicate that individual account information is not essential but, if provided, will be used to corroborate causation already established by the macro data.

The inconsistent approach in the case law is reflected in the tribunal's evidence gathering efforts. In its standard domestic producer's questionnaire, the tribunal states that "domestic producers are under no obligation to provide specific injury allegations, as these are not essential to the conduct of an injury inquiry or a review."<sup>71</sup> It goes on to state that where a party decides to submit customer-specific injury allegations, the tribunal "is interested in quality rather than quantity."<sup>72</sup> At the same time, "[a]ny customer-specific injury allegations that are not submitted in response to this question will not be accepted at a later date, whether by way of written submissions or witness statements or during the hearing, unless the Tribunal is persuaded that there are compelling reasons for doing so."<sup>73</sup> That contradictory approach to account-specific injury information was continued in the recent finding in *Fasteners*. Notwithstanding the clear evidence of extensive import volumes and increases in market share, combined with substantial price-undercutting, the tribunal found insufficient evidence of price undercutting at individual accounts to establish causation.<sup>74</sup>

#### *Matching Domestic Prices*

The tribunal stated in several earlier cases that an importer may not dump on the pretext of meeting domestic prices. The classic statement found in *Soda Ash*<sup>75</sup> was re-affirmed in *Flat Hot-Rolled Carbon and Alloy Steel Sheet Products* in 1999: "As the Tribunal and its predecessors have noted before, even where imports are simply meeting or tracking falling domestic prices, they are not entitled to 'cross the line' into injurious

---

<sup>71</sup> Tribunal questionnaires are found at [www.citt-tcce.gc.ca](http://www.citt-tcce.gc.ca).

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Fasteners*, *supra* note 28 at 29.

<sup>75</sup> (1983), 5 C.E.R. 467.

dumping.”<sup>76</sup> The doctrine was applied in *Iodinated Contrast Media*, where the tribunal found that dumped goods were causing injury even if they were only matching domestic prices to compete in a price war among the various players in the market.<sup>77</sup> There are numerous other pronouncements by the tribunal to the same effect, that is, that matching, and in some cases exceeding, domestic prices with dumped product is no defence.<sup>78</sup>

#### *Lost Business and Rejected Project Bids*

Under section 2(1) of SIMA, the term “sale” is defined as including leasing and renting as well as “an agreement to sell” and “an irrevocable tender.” Thus, in determining whether goods are dumped, there is no requirement that imports actually arrive for sale in Canada to cause injury. Lost orders resulting from a mere agreement by a foreign producer to sell at a dumped price are sufficient under Canadian trade law to establish injury and causation. That was confirmed in *Ansaldo, S.p.A. v. Deputy Minister of MNR*, which went to the Federal Court of Appeal and involved project bids for large equipment where the goods had not yet been made or shipped.<sup>79</sup> The court held that the term “sale” in the legislation at the time was broad enough to cover the price at which a party binds itself to enter into an agreement to sell, such as by way of irrevocable tender. In *Preformed Fibreglass Pipe Insulation With a Vapour Barrier*, low-priced import bidding resulted in lost contracts by the domestic industry, plus a downward impact on prices, sufficient to establish a causal linkage.<sup>80</sup> In *Xanthates*, low bidding by means of dumped prices by Chinese suppliers had the effect of significantly eroding prices in the market elsewhere to the detriment of the Canadian producer and causation was established.<sup>81</sup>

#### *Commodity or Standard Specification Product*

In commodity markets, price is normally the deciding factor in purchasers’ decisions. Thus, evidence of import prices either undercutting or matching domestic prices in commodity products cases can be compelling evidence of the requisite causal connection. In *Polyisocyanurate Thermal Insulated Board*, the tribunal made the fairly

---

<sup>76</sup> (1999) NQ-98-004 at 29.

<sup>77</sup> *Supra* note 31 at 16.

<sup>78</sup> E.g. *Stainless Steel Round Bar*, *supra* note 41 at 21.

<sup>79</sup> [1987] 11 C.E.R. 289.

<sup>80</sup> (1999) NQ-93-002 at 18-19.

<sup>81</sup> (2003) NQ-2002-003 at 14. See also *Iodinated Contrast Media*, *supra* note 31 at 14-16.

obvious statement that: “In a commodity market, competitors have to match prices or be faced with potentially substantial loses [*sic*] in sales and market share.”<sup>82</sup> That echoed an earlier finding in *Carbon Steel Welded Pipe*: “The Tribunal considers that the high level of import penetration is directly attributable to low prices of imports from the subject countries. Revenue Canada found that dumping margins were, on average, high.... Testimony at the hearing was unanimous that carbon steel welded pipe is a basic and highly price sensitive commodity....”<sup>83</sup> In most of the rolled steel cases over the last decade the tribunal has acknowledged that the goods were commodity products and physically interchangeable, making price the paramount factor in purchasing decisions.<sup>84</sup> Other recent findings confirm the magnified significance of price in cases of commodity products, where quality and other factors are less important than for value-added goods.<sup>85</sup>

Price sensitivity is not confined to commodity products. Consumer products can be equally price sensitive. In *Refrigerators, Dishwashers and Dryers*, the tribunal found that “the market for certain refrigerators, dishwashers and dryers is very price sensitive.... Data collected by the Tribunal, through its market characteristics questionnaire, also support[s] this testimony that the decision to purchase these products, instead of competing products or brands, is highly price-sensitive. The responses...suggested that the average purchaser would switch its sourcing toward the imported product if the price for the imported product fell by about 5 percent.”<sup>86</sup>

#### *Threat of Material Injury*

Under the WTO agreements, there are special considerations to be applied when dealing with the issue of threat of injury. Articles 3.7 and 3.8 of the *Anti-Dumping Agreement* and articles 15.7 and 15.8 of the *SCM Agreement* require such determination to be based on facts and not merely on “allegation, conjecture or remote possibility” and to be considered and decided “with special care.”<sup>87</sup> The pre-1995 version of

---

<sup>82</sup> (1997) NQ-96-003 at 21.

<sup>83</sup> (1991) NQ-90-005 at 11.

<sup>84</sup> See, for example, *Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Steel Plate*, (2004) NQ-2003-002 at 16.

<sup>85</sup> *Carbon Steel Pipe Nipples*, *supra* note 27 at 16; *Polyisocyanurate Thermal Insulated Board*, *supra* note 82 at 20.

<sup>86</sup> *Supra* note 48 at 25.

<sup>87</sup> See *United States – Softwood Lumber*, *supra* note 13 at para. 7.96 where the panel found that “in light of the totality of the factors considered and the reasoning in the USITC’s determination, we cannot conclude that finding of

SIMA required the tribunal to inquire whether the dumping “has caused, is causing or is likely to cause” material injury to Canadian production. In a subtle but significant amendment in 1995, following conclusion of the WTO agreements, section 42(1)(a) was changed to require the tribunal to inquire as to whether the dumping, “has caused injury...or is threatening to cause injury.”<sup>88</sup> In *Caps, Lids and Jars*, the tribunal held that the difference in the amended version between injury, on the one hand, and threat of injury, on the other, meant that the tribunal was no longer required to consider “past, present and future” injury as a package.<sup>89</sup> Rather, it must now decide whether the domestic industry either has suffered material injury *or* is threatened with material injury. If the tribunal finds past injury, the matter ends there and there is no need to determine if a likelihood of future injury exists. That is now the standard approach in injury cases.

In *Bicycles and Frames*, the enormous production capacity for bicycles in China was determinative of a threat of future injury.<sup>90</sup> In addition to these capacity factors, trade remedies applied in other jurisdictions against Chinese goods was a “further indication of the market disruption that can be created by that country’s growing exports.”<sup>91</sup> Similar considerations were significant in a number of other cases.<sup>92</sup> In *Plate I*, large dumping margins, in combination with excess global capacity and the commodity nature of the product, reinforced the likelihood of continuing injury in the future unless anti-dumping duties were applied.<sup>93</sup> The same point was reinforced in even stronger terms in *Plate II*: “There was considerable evidence adduced at the hearing that the capacity of the mills in the subject countries is several times that of the domestic producers and that excess capacity in these mills is extensive. This situation is reinforced by the continued excess capacity in the steel industry throughout the world.”<sup>94</sup> Similar considerations were applied in *Refined Sugar*, where abundant supply and the fact that the American and European markets were essentially closed to imports were

---

a likely imminent substantial increase in imports is one which could have been reached by an objective and unbiased investigating authority.”

<sup>88</sup> *Supra* note 8, s. 170.

<sup>89</sup> *Supra* note 60 at 10.

<sup>90</sup> (1992) NQ-92-002 at 19.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate, Heat-Treated or Not*, (1993) NQ-92-007 [*Plate I*]; *Cold-Rolled Steel Sheet*, (1993) NQ-92-009; *Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate, Heat-Treated or Not*, (1994) NQ-93-004 [*Plate II*].

<sup>93</sup> *Ibid.* at 24.

<sup>94</sup> *Supra* note 92 at 21.

major reasons for the decision.<sup>95</sup> In *12-Gauge Shotshells*, there was likelihood of future injury mainly because of the large production capacities and export orientation of the Czech and Hungarian manufacturers and their ability to flood the Canadian market.<sup>96</sup> Export capacity, combined with the fact that the domestic market was virtually non-existent, was a major factor weighing in favour of a future injury finding in *Black Granite Memorials from India*.<sup>97</sup> In *Leather Footwear*, the tribunal declined to find past injury due to dumped imports but went on to find a threat of future injury, largely based on the extensive Chinese production volume and capacity and their extensive supply infrastructure.<sup>98</sup> Chinese product had continued to improve in terms of quality, thus indicating an ability to move up-market to the more profitable bread-and-butter segment in competition with Canadian producers.

In the case of sunset reviews, where threat of prospective material injury is the major issue, foreign production and export capacity take on correspondingly greater significance. These were each critical factors in *Photo Albums with Pocket, Slip-in or Flip-up Style Sheets*: “Given the existence of excess production capacity for photo albums in general, the export orientation of much of that production capacity and the price pressures already being exerted in the Canadian market for pocket photo albums, the Tribunal considers it likely that imports of pocket photo albums from the subject countries will be dumped.”<sup>99</sup> In a later review, the tribunal made specific reference to the fact that “production capacity in the subject countries exceeds by far the combined production capacity of the two domestic producers.”<sup>100</sup> The large size of the export capacity of the offshore producers relative to the size of the Canadian market also was a paramount factor in the tribunal’s sunset review in *Waterproof Rubber Footwear*.<sup>101</sup> In the 1997 *Bicycles and Frames* review, a related factor was the evidence of “export orientation” on the part of the industries in China and Taiwan.<sup>102</sup>

---

<sup>95</sup> (1995) NQ-95-002 at 37.

<sup>96</sup> (1994) NQ-93-005 at 10.

<sup>97</sup> (1994) NQ-93-006 at 28. Another consideration was the export policies of the Indian government, all of which added to the “tremendous incentive to continue exporting large volumes of finished memorials.”

<sup>98</sup> (2002) NQ-2001-003 at 18.

<sup>99</sup> (1993) RR-92-003 at 9.

<sup>100</sup> *Photo Albums with Self-Adhesive Leaves*, (1995) RR-94-006 at 11.

<sup>101</sup> (1992) RR-92-001 at 8.

<sup>102</sup> (1997) RR-97-003 at 14. On the other hand, there was evidence of excess foreign capacity in *Horizontal Venetian Blinds*, (1997) RR-96-002, but because of the exporter’s participation in the North American market at non-

Closer to home, production capacity and available volumes for export were important in the U.S. International Trade Commission determination of threat of injury from Canadian imports in *Softwood Lumber from Canada*.<sup>103</sup> Following a challenge by Canada, however, the WTO panel determined that the data in the record on Canadian capacity and projected capacity increases did not support that conclusion. It found that a likely imminent and substantial increase in imports, and hence a threat to the U.S. industry, was not a conclusion that could have been reached by an objective and unbiased investigating authority.<sup>104</sup> The panel decision reinforces the need for special attention in assessing the effect of capacity and capacity increases in terms of the threat factor.

#### *Non-Dumping Factors*

It is important to examine cases where the tribunal found that factors other than dumped or subsidized imports were the cause of the domestic industry's injury. Consideration of non-dumping and non-subsidization factors is mandated by article 3.5 of the *Anti-Dumping Agreement*, which requires that "authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports."<sup>105</sup> Obviously, to the extent the injury suffered by the domestic industry is caused by factors other than dumping; these must be eliminated from the causal analysis. There are several recent cases where the tribunal has declined to make a positive finding, concluding that non-dumping and non-subsidizing factors caused the plight of the domestic industry. The cases indicate a shift in

---

dumped prices over the previous five years, no threat of material injury was found. In a very recent sunset review in *Women's Boots*, (2005) RR-2004-002 at 11, the tribunal said that, even if dumping were to resume at large volumes, there would likely be no injury because Chinese made goods could absorb the duties and still be competitive and would not, in any case, compete in that segment of the market where Canadian producers concentrated their production.

<sup>103</sup> Investigation Nos. 701-TA-414 and 731-TA-928 (2002).

<sup>104</sup> *Supra* note 13 at paras. 7.91-7.96.

<sup>105</sup> Article 15.5 of the *SCM Agreement* contains identical language. While WTO decisions have stated that investigating authorities are not required to seek out all possible extraneous factors on their own initiative, they must consider all such factors raised by the parties during the course of their causation analysis. See *Thailand Angles*, *supra* note 14 at para. 7.273. In *United States - Softwood Lumber*, *supra* note 13 at paras. 7.135, 7.136, the panel found that the United States International Trade Commission failed to fully consider these other factors and made a "glaring omission" in not considering the likely future effects of domestic oversupply on the U.S. industry.

the tribunal's weighing of the various non-dumping factors, likely to take on more significance in the WTO era.

In *Waterproof Footwear*, intra-industry competition, not dumped imports, was the major reason for declines in price and financial performance: “The evidence was strong that the competition among manufacturers is intense, that domestic manufacturers compete on price and that retailers encourage this price competition.”<sup>106</sup> Interestingly, the tribunal's conclusions appeared to have been influenced by the rationalization and efficiency improvements made by the Canadian industry in meeting import competition, thereby insulating itself from the effects of dumping.<sup>107</sup>

An inability to supply the market may be a factor. In *Tomato Paste*, the domestic producers of tomato paste did not supply the goods in the size of containers normally used by domestic processors.<sup>108</sup> In addition, the two domestic producers of tomato paste had not been prepared to offer the product to certain large importers, forcing them to go outside Canada for their supplies. In *Automotive Replacement Windshields*, the Canadian producer could not adequately meet market demand and customer expectations, in part because of a shifting product mix between its parent company and the Canadian operation.<sup>109</sup>

A related issue is the question of market segmentation and market niches supplied by imports where the domestic producer is not active. In *Waterproof Footwear and Bottoms*, imports were not a cause of past injury because they supplied a particular market niche for light, fashion-oriented footwear and did not compete directly with domestic goods.<sup>110</sup> In *Leather Footwear*, the domestic industry had failed to work closely with retailers and to offer an assortment of product offerings and was weak in offering brand name products with national recognition.<sup>111</sup>

Although not a frequent factor in negative determinations, quality problems have been cited as the cause of injury, causing customers to switch to imports. In *Tomato Paste*, one of the Canadian producers acknowledged the quality problems associated with installation of new equipment and buyers reported that quality problems

---

<sup>106</sup> (1993) NQ-92-005 at 11.

<sup>107</sup> *Ibid.* at 12.

<sup>108</sup> (1993) NQ-92-006 at 14.

<sup>109</sup> *Supra* note 42 at 14.

<sup>110</sup> (2000) NQ-2000-004 at 13-14.

<sup>111</sup> *Supra* note 98 at 15-16.

with Canadian made product caused them to shift to imports.<sup>112</sup> In *Black Granite Memorials from India*, on the other hand, there was no difference in quality and there were no advantages for imported versus domestic goods.<sup>113</sup> Interestingly, in *Waterproof Footwear and Bottoms*, the tribunal appeared to find that it was the *high* quality and efficient production of Canadian manufacturers that gave them an advantage over imports and ensured that they were not injured by the dumping.<sup>114</sup> Quality factors were alleged as the reason why customers chose imports over domestic goods in *Bicycles and Frames*.<sup>115</sup> However, when subjected to closer scrutiny, the claim was not borne out: “[T]he Tribunal is of the view that non-price factors have not played a major role in sourcing decisions for the majority of customers. This view is strongly reinforced by the rapid return to the domestic fold by many of the customers that expressed such grievances as soon as the price gap between domestic and imported products was narrowed or eliminated as a result of the imposition of anti-dumping duties.”<sup>116</sup>

In *Steel Fuel Tanks*, lost sales were caused by, among other factors, the producer’s poor business practices: “SPI’s market behaviour prompted these former customers of SPI to source replacement fuel tanks elsewhere. It is thus the Tribunal’s view that, had SPI not engaged in this type of market disruptive behaviour, a significant portion of the companies that imported during the period of inquiry would not have done so.”<sup>117</sup> That factor was also present in *Leather Footwear*, referred to earlier, where the domestic producers were faulted for not understanding the needs of major retailers in offering a full range of product offerings.<sup>118</sup>

A range of market issues external to dumping were raised as defences in *Iodinated Contrast Media*, including the alleged inability of the domestic producer to offer a full range of product, a poorer incentive program as compared to that offered by importers, inferior distribution and marketing practices and a series of other non-dumping issues, including the effect of Canada’s price regulated regime for patented medicines.<sup>119</sup> Considering all these extraneous factors, the tribunal

---

<sup>112</sup> *Supra* note 108 at 14.

<sup>113</sup> *Supra* note 97 at 26.

<sup>114</sup> *Supra* note 110 at 7.

<sup>115</sup> *Supra* note 90.

<sup>116</sup> *Ibid.* at 17-18.

<sup>117</sup> (2004) NQ-2004-002 at 17.

<sup>118</sup> *Supra* note 98 at 16. See also *Automotive Replacement Windshields*, *supra* note 42.

<sup>119</sup> *Supra* note 31 at 14-16.

concluded that, while they played a role, the price erosion experienced by the complainant was directly attributable to the substantial margins of dumping.<sup>120</sup>

In *Tapered Roller Bearings*, injury to Canadian production was attributable to the fact that sales of bearings to the big three automotive manufacturers were reduced as a result of economic recession.<sup>121</sup> In *Flat Hot-Rolled Carbon Steel Sheet Products*, the tribunal said that “[i]n a time of deepening recession, excess domestic production capacity and drastic declines in end-user demand, it was entirely reasonable, in the Tribunal's view, that prices would have fallen from their historically high levels of 1989. There was no indication that price declines in Canada were any worse than those experienced worldwide over the period of inquiry....”<sup>122</sup> These kinds of global and regional market conditions are even more pertinent in sunset reviews where the issues are focused on whether dumped or subsidized goods will cause future injury to domestic production. In the review of *Carbon Steel Plate and Alloy Steel Plate* in 1998, the impact of the Asian crisis was seen as too remote to warrant a continuation of the finding.<sup>123</sup> Subsequently, in the series of sunset reviews of rolled steel findings in 2004, buoyant conditions in global steel markets and the strong demand in China in particular were central to the tribunal's decisions to find there was no likelihood of renewed injury to Canadian producers.

Poor financial performance based on reviews of financial statements, even where they might uncover unexplained cost factors, rarely counter the injurious effect of imports where the necessary correlation has been established. Thus, in *Carbon Steel Pipe Nipples*, evidence of variations in standard costs, some of which appeared to be significant, were not in themselves unusual and could well be beyond management's control in any case.<sup>124</sup> In *Fasteners*, on the other hand, one of the large domestic producers was undergoing re-structuring as a result of high costs and poor revenues.<sup>125</sup> The monitor's report referred to high scrap, pension and energy costs. No mention was made of the impact of low-priced subject imports on the company. The tribunal declined to attribute any injury to the dumped and subsidized goods, concluding that injury resulted entirely from these internally-driven cost

---

<sup>120</sup> *Ibid.* at 16.

<sup>121</sup> (1992) NQ-91-007 at 8-9.

<sup>122</sup> *Supra* note 32 at 29.

<sup>123</sup> (1998) RR-97-006.

<sup>124</sup> *Supra* note 27 at 21. See also *Iodinated Contrast Media*, *supra* note 31.

<sup>125</sup> *Supra* note 28 at 29-30.

factors.

### *Conclusions*

The cases indicate that the Canadian International Trade Tribunal is taking a more rigorous approach to the causation issue. In the pre-WTO era, the correlation between increased market penetration of dumped goods and the negative financial performance of the domestic industry was seen as *prima facie* evidence of causality. There now appears to be a diminishing reliance on macro-economic indicators and, judging from some of these recent findings, more emphasis on “smoking gun” evidence, requiring demonstration of injury at individual accounts and by specific items and customer pricing data. The cases also illustrate that, while dumping or subsidization need not be the “only” cause of material injury, non-dumping factors cannot be discounted. Given these decisions, injury inquiries in Canada will become more detailed and scientific, creating new challenges for those proposing to dispute causation.