COURT DEFERENCE TO THE U.S. INTERNATIONAL TRADE COMMISSION ON ISSUES OF LAW AND QUESTIONS OF FACT: RECENT PRECEDENT AND PRACTICAL IMPLICATIONS *

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I. INTRODUCTION

This paper considers the extent to which certain key decisions of the courts, including the U.S. Court of International Trade ("CIT"), indicate that the courts are likely to defer to the U.S. International Trade Commission (the "Commission") in appeals of determinations in antidumping and countervailing duty cases, depending upon whether the appeal is based on issues of law or questions of fact. It concludes that the courts have been much more aggressive than they once were in questioning the Commission's position on matters of statutory interpretation. It concludes that certain recent court decisions suggest that challenges to the Commission based on factual issues -- *i.e.*, "substantial evidence" questions -- are likely to be more difficult to sustain.

The paper also considers the implications of these decisions for private party appellate litigation strategies. It deems the distinctions between legal challenges based on law and those based on fact as likely to make some difference in litigation strategies. It finds, however, that other considerations relating to institutional factors -- notably, the marked tendency of commissioners to adhere to their original determination in remand proceedings -- as something that has been, and is likely to continue to be, a far more important factor in shaping such strategies.

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[1] The views expressed herein are those of the author personally and should not be attributed to King & Spalding or its clients.

II. COURT DEFERENCE TO THE COMMISSION ON QUESTIONS OF STATUTORY INTERPRETATION

A. A Legacy Of Deference

Until recently, challenges to the Commission's interpretation of the statute were almost uniformly unsuccessful. This was the case even though certain of these challenges were based on the fact that different commissioners were advancing radically different interpretations of important aspects of the law. Because these different interpretations were so common, practitioners of international trade law began to accept them as posing no special problem.

In fact, outside the context of international trade law, it has been long been understood that federal statutes should be interpreted in a consistent fashion. This principle is embedded in the principles that the Supreme Court applies in determining whether it should review circuit court decisions. As one legal commentator has stated, "{t}he 'single most important' factor for granting certiorari petitions . . . is a split within the circuits that have considered the issue below."[2]

Two lines of court cases illustrate the court's tolerance of inconsistent interpretations by commissioners of basic elements of the law. The first relates to the use of the so-called "one-step" and "two-step" approaches in determining whether imports have caused injury to a domestic industry. The statute merely states that the Commission is to make an affirmative determination when the evidence shows that the industry has been injured "by reason of" the imports that have been found by the Department of Commerce to have been dumped or

[2] Sanford Levinson, Book Review: Strategy, Jurisprudence, and Certiorari. Deciding to Decide: Agenda Setting in the United States Supreme Court, 79 Va. L. Rev. 717, 726 (1993) (*quoting* H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court 251 (1991)).

subsidized.[3] This formulation of the causation test -- "by reason of" -- is vague. It suggests that the Commission must find that the subject imports are "causing" injury. But there are many types of legal causation. In the context of the law of torts, for example, depending upon the jurisdiction, the issue of causation involves a consideration of whether a particular action is a "proximate cause," a "but for cause," or a "contributing cause."

Beginning in the 1970s, some commissioners began interpreting the "by reason of" language to require a two-step approach in analyzing causation. In the first step, they asked whether the domestic industry was materially injured in the abstract, without regard to the effect of imports. If they concluded that the industry was "healthy," that was the end of the inquiry -- a negative determination automatically followed.[4] If they concluded that the industry was not "healthy," they then proceeded to consider whether the subject imports were "a cause" -- a more than *de minimis* cause -- of that injury. This interpretation of the law became the view of the majority of the Commission, and it was approved on numerous occasions by the CIT.[5]

A minority of commissioners strongly rejected that view. They contended that the statute requires that the subject imports, by themselves, be causing material injury. This approach has been called the "one-step" approach. These commissioners did not consider whether the industry was injured in the abstract. They said that any approach that denied relief simply because the industry was healthy in the abstract was contrary to law. They also argued that any interpretation

[3] 19 U.S.C. §§ 1671(a)(2), 1673(a)(2).

[4] *See, e.g., Tapered Roller Bearings and Certain Components from Japan*, Inv. No. AA921-143, TC Pub. 714 (Jan. 1975).

[5] *See, e.g., Encon Indus. Inc. v. United States*, 16 CIT 840, 841 (1992); *Gifford-Hill Cement Co.*, 615 F. Supp. 577, 585-586 (1985); *British Steel Corp. v. United States*, 593 F. Supp. 405, 413 (Ct. Int'l Trade 1984).

that led to an affirmative determinations simply because the subject imports were minimally contributing to overall "material injury" was contrary to law.[6]

These conflicting interpretations of what the law contemplated were the subject of a series of heated exchanges between the main advocates of the "one-step" and "two-step" approaches -- Vice Chairman Cass on behalf of the former approach and Commissioner Eckes on behalf of the latter approach.[7] Both commissioners were in no doubt that their difference of opinion was a difference over what the law means.

When this debate first reached the courts, however, that is not what the courts concluded. In appeals of certain negative Commission determinations brought by the domestic steel industry -- *United States Steel Group v. United States*[8] -- the courts found that this difference was merely a question of differing *methodologies* -- and that such differences are acceptable (as are most, if not all, methodologies employed by the Commission).

In its opinion, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") talked at length about the fact that "Congress has crafted an intricate statute," and "has populated the Commission with six independent commissioners, each confirmed to office by the United States Senate."[9] It stated that "commissioners are free to attach different weight to the various statutory tests which they are required to employ when evaluating the presence or threat of injury," and that "each commissioner is free to attach different weight to factual information bearing on . . .

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[6] *See Certain Telephone Systems and Subassemblies Thereof from Japan and Taiwan*, Inv. Nos. 731-TA-426 and 428 (Final), USITC Pub. 2237 (Nov. 1989)("*Telephone Systems*")(Dissenting Views of Vice Chairman Cass).

[7] *Id.* at Views of Commissioner Eckes and Dissenting Views of Vice Chairman Cass.

[8] *See United States Steel Group v. United States*, 96 F.3d 1352, 1360-1361 (Fed. Cir. 1996), *affirming* 873 F.Supp. 673, 694-695 (Ct. Int'l Trade 1994) .

[9] *Id.* at 1362.

the many statutory factors; and that commissioners may ultimately reach different factual conclusions on the same record."[10] This language is striking because it reveals a mind set inclined to give extraordinary deference to the Commission -- and because, even though all of the things that the court said are true, they do not show that Congress intended to allow commissioners to interpret the "by reason of" language to mean different things.

Although the courts said in *United States Steel Group* that what was at issue in that dispute was only a question of differences in methodology, the Federal Circuit issued a second decision two years later that effectively retreated from that position. In that case -- *Angus Chemical Company v. United States*[11] -- two commissioners made negative determinations using the two-step analysis because they found that the domestic industry was "healthy," without regard to the effects that the subject imports were having on the domestic industry. Petitioners challenged this, arguing, *inter alia*, that such an analysis was unlawful, pointing out, among other things, that the statute had been amended in 1988 to require that, in all cases, commissioners must determine whether the volume of subject imports is significant, whether the subject imports are having significant effects on prices of the domestic product, and whether the subject imports are having a significant adverse impact on the domestic industry.[12] They argued that this was inconsistent with the notion that commissioners may make a negative determination simply because they deem an industry to be healthy, without regard to the effects of the subject imports.

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[10] *Id.*

[11] *Angus Chemical Company v. United States*, 140 F.2d 1478 (Fed. Cir. 1998).

[12] 19 U.S.C. § 1677(7)(B).

In *Angus Chemical*, the court stated, as it had previously, that the statute does not "'compel the commissioners to employ either the one step or two-step approaches," and that both methods are consistent with the statute." The court went on to say, however, that a two-step approach that does not consider the volume, price effect, and impact of the subject imports is unlawful. As previously indicated, however, one of the essential elements of the two-step analysis is the notion that an industry is not entitled to relief if it is healthy, regardless of the significance of the volume of imports, their effect on prices, or their impact on the domestic industry. This is one of the main reasons why Vice Chairman Cass had argued that the two-step analysis was unlawful in the first place.[13] By ruling that this form of two-step test was unlawful, the court effectively ruled that the two-step test was itself unlawful. The court said as much, stating that the three statutory factors of volume, price, and impact must be considered in step one of the two-step test prior to reaching a conclusion -- thus collapsing the two parts of the test into a one-part test. The court said that this may "lessen that method's appeal, because it may eliminate a shortcut to a negative determination." That is an understatement. In fact, the court effectively gutted the two-step approach. But it but did so without stating that the issues presented were questions of legal interpretation for which inconsistent answers are not permissible. This is an indication that the court remained reluctant to question head-on the authority of commissioners generally to interpret the law as they see fit.

In the late 1980s and continuing through the mid-1990, the courts also upheld the Commission on other issues involving another fundamental question where the statute was being interpreted differently by commissioners. At the time, there was a strong disagreement among commissioners as to whether the Commission should consider the size of dumping margins or

[13] *Id.* at 1485.

subsidy rates. Those who argued that they must be considered pointed out that there are several passages in the legislative history that seem to contemplate this.[14] Those opposed to the use of margins argued that margins were not identified in the statute as one of the factors that the Commission must consider, and that the statute says that the Commission is to consider whether the industry is injured by the "imports" found to be dumped or subsidized -- not by the effects of dumping or subsidization. This was not a trivial issue. As the advocates on both sides of the argument pointed out, the outcome of many cases would likely differ depending on whether the commissioner was looking at the effects of the volume of imports or the effects of the dumping margin.[15] For example, in a case where the import market share was very large (say, 50 percent) but the dumping margin was very small (say, two percent), commissioners who eschewed the use of margins would be inclined, all else being equal, to make an affirmative determination, while those who relied on margins might be inclined to reach the opposite conclusion.

Still, the CIT upheld both approaches. In *Hyundai Pipe Co., Ltd. v. United States*,[16] the CIT said that the Commission was not required to consider margins because they were not among the factors that the statute says that the Commission must consider, but could consider them as an "other factor" that it deems relevant or probative to its analysis.[17]

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[14] S. Rep. No. 248, 96h Cong., 1st Sess. 74 (1979)(noting with apparent approval the Commission's practice of considering "how the effects of the margin of dumping relate to the injury, if any, to the domestic industry"); *id.* at 88 ("{F}or one type of product, price may be the key factor in making a decision as to which product to purchase and a small price differential resulting from the amount of the subsidy or the margin of dumping can be decisive. . . ."); H.R. Rep. No. 317, 9th Cong., 1st Sess. 68 (1979)(noting that the statute gives the Commission 45 days after Commerce's final determination "in order to allow it to take into account any differences between . . . {Commerce's} preliminary and final determinations (e.g., in dumping margins)").

[15] *Telephone Systems* at Dissenting Views of Vice Chairman Cass at notes 26-27.

[16] 670 F. Supp. 357 (Ct. Int'l Trade 1987).

[17] More than 20 years later, it is not clear that this issue has gone away forever. Pursuant to a commitment made by the United States in the Uruguay Round Agreements that resulted in the

In the same steel case discussed above -- *United States Steel Group v. United States* -- the courts also brushed aside a challenge to the Commission's application of the negligibility exception to mandatory cumulation in investigations that was then provided for by the statute. This challenge was based on seemingly clear language in the statute. That exception gave the Commission the authority to exclude imports from a country if it deemed them "negligible" and also found that they had "no discernible adverse impact on the domestic industry."[18] The domestic industry argued that the word "no" meant just that, and that the Commission could not exclude imports if it found that they found that they had *any* adverse impact on the domestic industry. The Federal Circuit did not discuss that argument at length, but implicitly found that imports that had *some* impact could be excluded from cumulation. In a very brief discussion, it noted that the statute directed the Commission to consider as part of its negligibility analysis whether the imports at issue were "isolated and sporadic." [19] The court said that such imports "presumably" would have some adverse impact "on the particular domestic producers who would otherwise supply the demand they fill."[20] This presumption seems to be a slender reed on which to rest the conclusion that the statute meant something other than what its plain language stated, and that imports could be deemed negligible even tough they were having an impact on the domestic industry.

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establishment of the World Trade Organization, the statute now requires the Commission to consider dumping margins. 19 U.S.C. § 1677(C)(iii)(V) The Commission's consistent practice is to consider the margins by listing them in a footnote to its opinion. *See, e.g.*, *Coated Free Sheet Paper from China, Indonesia, and Korea*, Inv. Nos. 701-TA-444-446 and 731-TA-1107-1109 (Final), USITC Pub. 3965 at 17 n.111 (Dec. 2007).

[18] 96 F.3d at 1358.

[19] *Id.* at 1359.

[20] *Id.*

B. A Retreat From Deference

In recent years, however, the courts have been much less deferential to the Commission's interpretations of the statute. A leading example of this can be found in a series of decisions by the CIT regarding the interpretation of the provisions of the statute pertaining to five-year reviews, which require the Commission to determine whether certain events are "likely" if antidumping or countervailing duty orders are revoked.[21] In *Usinor Industeel, S.A.. v. United States*,[22] the Commission argued that this term should be interpreted as something other than "probable," pointing to the following language from the Statement of Administrative Action ("SAA") that accompanied the Uruguay Round Agreements Act of 1994 ("URAA"), which added the five-year review provisions to the statute, and stated:

> The determination called for in these types of reviews in inherently predictive and speculative. There may be more than one likely outcome following revocation or termination.[23]

The Commission argued that the reference to the possibility of more than one likely outcome was inconsistent with the notion that "likely" meant probable.

Judge Restani rejected that argument, finding that the world "likely" has a plain meaning -- *i.e.*, "probable." She found, *inter alia*, that the SAA cannot change that plain meaning.

The Commission pressed that argument again in a motion for the court to certify the court's order for interlocutory appeal.[24] In that proceeding, the Commission argued aggressively

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[21] 19 U.S.C. § 1675a(a)(1) (likelihood of injury upon revocation); 19 U.S.C.§ 1675a(a)(2)(likely volume of imports upon revocation); 19 U.S.C. § 1675a(a)(3) (likely price effects of imports upon revocation); 19 U.S.C. § 1675a(a)(4) (likely impact of imports upon revocation); 19 U.S.C. § 1675a(a)(7)(for purposes of cumulation, likely existence of competition among products and likely discernible impact of imports upon revocation).

[22] Slip op. 02-39 (Ct. Int'l Trade, April 29, 2002).

[23] Statement of Administrative Action at 883.

[24] *Usinor Industeel, S.A. v. United States*, 215 F. Supp. 1356 (2002).

that the statute provides that the SAA is the authoritative expression of the URAA.[25] The Court rejected that argument, stating that, because the meaning of the term "likely" was clear, there was no need to consult the SAA to determine what it meant.

The Commission stated once again in the subsequent remand proceeding that it continued to disagree with the view expressed by the court on this subject.[26] In that proceeding, two commissioners had agreed with the court that "likely" means "probable." The court rejected the position of the Commission majority again, stating that, if the Commission majority was still confused as to the court's understanding of the term "likely," they should consult the opinions of these two other commissioners.

On another issue, the courts have also recently stepped in to require the Commission to apply the statute in a manner that the Commission has deemed contrary to the language and intent of the statute. In *Bratsk Aluminum Smelter v. United States*,[27] the Federal Circuit required the Commission to undertake an analysis of the role of non-subject imports of the kind never previously undertaken by the Commission. This decision warrants, and has received, extensive comments elsewhere,[28] and has raised issues that cannot be addressed comprehensively in the limited space available here. But the broad implications of that decision are important to this discussion. In *Bratsk*, the court stated, *inter alia*, that when commodity products are at issue and non-subject imports are a significant factor in the market, "the Commission is required to make a specific causation determination and in that connection to directly address whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic

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[25] 19 U.S.C. § 3512(d).

[26] *Usinor Industeel, S.A. v. United* States, skip op. 2002-152 (Ct. Int'l Trade, Dec. 20, 2002).

[27] 444 F.3d 1369 (C.A.F.C. 2006).

[28] *Id.* at 1475.

producers." The court also suggested, more than once, that the domestic industry should not receive relief if the evidence shows that the domestic industry would not benefit from an order because non-subject imports would replace subject imports if an order was imposed.

Shortly thereafter, the Federal Circuit overturned an affirmative determination by the Commission in a case involving imports of steel wire rod from Trinidad and Tobago on the basis of *Bratsk*.[29] The court stated that the Commission was required, but failed, to make a specific determination as to whether non-subject imports would have replaced imports from Trinidad and Tobago without any beneficial effect on domestic producers. On remand, the Commission then made a negative determination for Trinidad and Tobago, as two commissioners in the Commission majority -- Commissioners Hillman and Aranoff -- stated, in essence, that the Federal Circuit had forced them to do so against their will, by requiring them to presume, among other things, that the product at issue was a commodity product.[30]

In several other opinions, the Commission bitterly criticized *Bratsk*. Among other things, the Commission stated that:

- The Commission has a "well established approach to addressing causation," which did not include an analysis of the kind contemplated by *Bratsk*;
- The existence of injury caused by other factors does not compel an affirmative determination if other factors are contributing to material injury to an industry;
- The legislative history of the statute does not require that the harm caused by subject imports be weighed against other factors causing material injury; and
- There is nothing in the statute or its legislative history that requires that a domestic industry show that it would benefit from an order in order to receive relief.[31]

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[29] *Caribbean Ispat Limited v. United States*, 450 F.3d 1136 (C.A.F.C. 2006).

[30] *Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, Inv. No. 731-TA-961 (Remand), USITC Pub. 3902 (Jan. 2007).

[31] *Certain Activated Carbon from China*, Inv. No. 731-TA-1103 (Final), USITC Pub. 3913 (Apr. 2007).

The Commission recently received some measure of satisfaction in this ongoing battle with the Federal Circuit as a result of the court's recent decision in *Mittal Steel Point Limited v. United States*.[32] In that case, the court stated, *inter alia*, that *Bratsk* was not intended to require an industry to prove that remedial relief would be effective, and that *Bratsk* did not require any presumptions of the kind that the two commissioners had made in reaching their negative determinations. It reiterated, however, that the Commission must determine whether non-subject imports would have been present in greater quantities in the market if subject imports had not been in the market, so that the domestic industry might not have been better off "but for" the subject imports. In short, the Federal Circuit limited the scope of *Bratsk* somewhat. Even so, it continues to stand as an indication of the unwillingness of the courts to defer completely to the Commission on questions of statutory interpretation.

III. COURT DEFERENCE TO THE COMMISSION ON SUBSTANTIAL EVIDENCE QUESTIONS

In recent years, for the most part, challenges to the Commission's analysis of the facts have ultimately fared less well than challenges based on the argument that the Commission has erroneously interpreted the law. This is, in one sense, surprising because the CIT's decision in *Altx* v. *United States*[33] in 2001 provides a veritable road map for parties seeking to overturn the Commission on factual grounds.

That case involved an appeal of the Commission negative determination in *Certain Seamless Stainless Steel Hollow Products from Japan* by a 4-2 vote.[34] The court remanded that determination after criticizing the Commission's analysis of the facts on many grounds. The

[32] 2008 U.S. App. Lexis 19774 (Sept. 18, 2008).

[33] 167 F.Supp.2d 1353 (Ct. Int'l Trade 2001).

[34] *See* Inv. No. 731-TA-859 (Final), USITC Pub. 3344 (Aug. 2000).

Court found that the Commission improperly failed to consider the results of an economic simulation model generated by Commission staff that appeared to show that the subject imports caused a significant reduction in the domestic industry's sales.[35] The court said that the Commission's finding with respect to the significance of non-subject imports -- *i.e.* that non-subject imports were a major cause of any harm suffered by the domestic industry -- was inadequate because the Commission ignored circumstantial evidence that non-subject imports were displacing both subject imports and the domestic product.[36] The court also rejected the Commission's conclusions on a number of issues relating to the price effects of the subject imports, finding, *inter alia*, that they were in some respects contradictory and that the Commission had improperly ignored certain arguments raised by petitioners.[37] The court also directed the Commission to reconsider its finding that there was a lack of correlation between increases in the subject imports and harm suffered by the domestic industry.[38] The court upheld the Commission's finding that competition between the subject imports and the domestic like product was attenuated, however.[39]

In the private bar, *Altx* is generally considered recent good authority -- and is frequently cited -- for at least two propositions. First, there may be grounds for a substantial evidence challenge to a Commission determination when the Commission fails to address an important argument raised by the parties if it is supported by some evidence in the record. Second, there may be grounds for a substantial evidence challenge when the Commission has made a finding

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[35] *Id.* at 1358-1359.

[36] *Id.* at 1362.

[37] *Id.* at 1367-1369.

[38] *Id.* at 1371.

[39] *Id.* at 1363-1364.

that the Court regards as simply mistaken, if that finding played a role of some kind in the ultimate disposition of the case by the Commission.

Following this decision, on remand, the Commission made an affirmative determination by a 3-3 vote. The Commission's original negative determination was reversed because, pursuant to a recess appointment, a new commissioner, Commissioner Devaney, had replaced Commissioner Askey, who was one of the four negative votes in the Commission's initial determination. Commissioner Devaney voted in the affirmative, joining then-Chairman Koplan and then-Vice Chairman Okun, who had voted in the affirmative initially. Commissioners Hillman, Bragg, and Miller all voted in the negative, as they had initially.

The CIT reversed and remanded this decision.[40] Among other things, the court found that the new Commission majority had failed to determine whether the volume of imports was significant in light of the evidence showing that competition between the subject imports and the domestic like product was attenuated -- which was, to repeat, a finding made by the commissioners who voted in the negative in the original investigation that had been upheld by the court in the first appeal.[41] The court also found that the Commission's finding that there was significant underselling was not supported by substantial evidence, but it sustained the Commission's finding that there was a correlation between the subject imports and the harm suffered by the domestic industry and that changes in input costs were not the predominant cause of the industry's injury.[42]

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[40] *Altx, Inc. v. United States*, 26 CIT 709 (2002).

[41] *Id.* at 712-716.

[42] *Id.* at 722-730.

In its second remand decision, the Commission made a negative determination by a 3-2 vote. This decision was upheld by the CIT.[43] As before, Commissioners Hillman, Bragg, and Miller voted in the negative. By this time, however, Commissioner Devaney's recess appointment had expired. Thus, his absence accounts for the change in the Commission's vote.

Hence, petitioners' initial victory in the courts proved to be pyrrhic. Petitioners originally won the case in a court-ordered remand due to a change in commissioners, only to ultimately to lose the case, again due to a change in commissioners. Thus, even though the court engaged in a probing review of the Commission's factual findings in the various proceedings, the outcome of the case appears to have been dictated by other considerations. This has occurred more than once, a phenomenon that has important practical implications that are discussed below.

Another court decision has cast even greater doubt on the prospects for overturning the Commission's decision on the basis of alleged factual errors. In protracted litigation over an antidumping order against imported tin mill products from Japan, *Nippon Steel Corporation v. United States*, the CIT twice reversed affirmative determinations by the Commission on the basis of such asserted errors.

In its initial decision,[44] the court overturned a 4-2 Commission affirmative determination on a host of grounds. While the court upheld the Commission's finding that the volume of the subject imports was significant, it rejected the Commission's finding with respect to the price effects and impact of the subject imports.

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[43] *Altx, Inc. v. United States*, 26 CIT 1425 (2002).

[44] 182 F.Supp.2d 1330 (Ct. Int'l Trade 2001).

After a second 4-2 affirmative determination by the Commission, the court once again reversed and remanded the case, finding that the Commission's analysis of price effects and causation issues was still flawed in numerous ways.[45] This time, however, the court declined to remand the case, and directed the Commission to issue a negative injury determination, stating that the Commission had "demonstrated an unwillingness or inability to address the substantial claims made by respondents or the concerns expressed by the court in Nippon I."[46]

The Commission appealed this decision to the Federal Circuit, which held that the court below had engaged in a re-finding of facts (*e.g.*, by determining witness credibility) or interposing its own factual findings.[47] The Federal Circuit ordered a remand to the Commission for additional data gathering and analysis.

On the second remand, the Commission again made an affirmative determination, and the CIT overturned that decision, and remanded the case to the Commission with instructions to enter a negative determination.[48] The Commission subsequently entered a negative determination but stated that it would not have made such a finding in the absence of the Court's instructions and expressed concerns that the CIT had exceeded its authority. Defendant-Intervenor International Steel Group appealed that decision to the Federal Circuit, which reversed it, and found that there was substantial evidence to support the Commission's prior affirmative determination.[49] The Federal Circuit remanded the case to the CIT and instructed it to reinstate the Commission's affirmative determination. In so doing, the Federal Circuit

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[45] 223 F.Supp.2d 1349 (Ct. Int'l Trade 2002),

[46] *Id.* at 1371-1372.

[47] 345 F.3d 1379, 1381 (C.A.F.C. 2003).

[48] 350 F.Supp.2d 1186 (Ct. Int'l Trade 2004).

[49] 458 F.3d 1345 (C.A.F.C. 2006).

suggested that the CIT had impermissibly weighed the evidence and questioned the Commission's evaluation of the credibility of witnesses.[50] The Federal Circuit also said that it would be appropriate only in the rare case where a remand would plainly be "futile" for the court to order an outright reversal without a remand.[51]

While the merits of the various Commission and court decisions in this litigation can be debated, one of the likely consequences of the ultimate resolution of the litigation is that it will be perceived as imposing limits on the authority of the CIT to force the Commission to render a different determination when the CIT perceives that the Commission made factual errors that led it to reach erroneous conclusions. To that extent, the deference that the Commission enjoys under the substantial evidence standard will be seen, rightly or wrongly, as significantly enhanced.

IV. READING THE TEA LEAVES: IMPLICATIONS OF COURT DECISIONS AND INSTITITIONAL FACTORS FOR PRIVATE PARTY APPLELLATE LITIGATION STRATEGY

The two strands of court decisions discussed above suggest that, while the courts may be increasingly willing to take a hard look at whether the Commission is faithfully applying the law, challenges to the Commission's analysis of the facts under the "substantial evidence" standard may face impediments that are difficult ultimately to overcome. In theory -- and perhaps in reality -- this may lead to more appeals by private party litigants that are based on the law and fewer appeals based on the facts. But any bias in that direction is likely to result only in minor changes in the litigation strategy of parties seeking to overturn a Commission decision. Such

[50] *Id.* at 1358.

[51] *Id.* at 1359.

strategies have been, and will continue to be, driven heavily by other considerations having little to do with whether the legal category into which the alleged cause of action happens to fall.

These considerations relate strictly to the prospect that a successful appeal may actually result in a different outcome if the case is remanded to the Commission. This may appear to be a statement of the obvious. But, in the context of Commission decisions, assessing the prospects for success on remand requires an evaluation of an institutional question with an answer that may not be obvious, at least to those unfamiliar with Commission precedent -- *i.e.*, "How likely is it that individual commissioners will change their mind in light of the court's ruling?" The short answer to that question is "Not very."

An examination of Commission precedent over the past decade reveals that there have been some cases -- not many, to be sure -- in which a Commission decision has been reversed after a court appeal and court-ordered remand. But, with virtually no exceptions, this has been because the composition of the Commission has changed -- not because a ruling by the courts caused an individual commissioner to reconsider his or her original determination. The degree to which commissioners have tended to reach the same conclusion as they did previously, irrespective of what the courts may have said about the particular views that the commissioners initially expressed, would be likely to strike anyone not familiar with Commission practice as remarkable.

This pattern is shown clearly in *Altx v. United States*, which is discussed above. It is also show in the protracted litigation conducted in connection with the five-year review of antidumping and countervailing duty orders against grain-oriented silicon electrical steel from

Japan and Italy that was first completed by the Commission in 2001.[52] That review ended in an affirmative determination by an evenly-divided Commission, in which Commissioners Koplan, Miller, and Devaney comprised the majority, and Commissioners Okun, Bragg, and Hillman comprised the minority. Judge Eaton reversed and remanded that decision so that the Commission could apply the correct "likely standard" and due to the failure of the Commission, in the Court's view, to address certain statutory factors.[53] The judge stated that it was premature to reach the substantial evidence questions raised by respondents.

In its first remand determination, an evenly-divided Commission again made an affirmative determination, this time by a 2-2 vote.[54] By this time, Commissioners Bragg and Devaney had departed from the Commission, Commissioners Miller and Koplan once again comprised the Commission majority, and Commissioners Okun and Hillman once again comprised the Commission minority. Judge Eaton reversed and remanded this decision on substantial evidence grounds and because the Commission's explanation of its analysis of certain issues was still deemed inadequate by the Court.[55]

In the second remand decision, the Commission again made an affirmative determination, this time by a 3-3 vote.[56] By then, Commissioners Lane and Pearson had been appointed to the Commission. Commissioner Lane joined Commissioners Miller and Koplan, who once again voted in the affirmative, and Commissioner Pearson joined Commissioners Okun and Hillman,

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[52] *Grain-Oriented Silicon Electrical Steel from Italy and Japan*, Inv. No. 701-TA-355 and 731-TA-659-660 (Review), USITC Pub. 3396 (Feb. 2001).

[53] *Nippon Steel Corp. et al. v. United States*, slip op, 02-153 (Ct. Int'l Trade, Dec. 24, 2002).

[54] *Grain-Oriented Silicon Electrical Steel from Italy and Japan*, Inv. No. 701-TA-355 and 731-TA-659-660 (Review)(Remand), USITC Pub. 3585 (Mar. 2003).

[55] *Nippon Steel Corp. et al. v. United States.*, 301 F.Supp. 1355 (Ct. Int'l Trade 2003).

[56] *Grain-Oriented Silicon Electrical Steel from Italy and Japan*, Inv. No. 701-TA-355 and 731-TA-659-660 (Review)(Second Remand), USITC Pub. 3680 (Mar. 2004).

who once again voted in the negative. Judge Eaton affirmed this decision in part and remanded it in part.[57]

In a third remand decision, the Commission made a negative determination by a 3-2 vote.[58] Commissioners Okun, Hillman, and Lane voted in the negative, as they had previously. By this time, Commissioner Miller had departed the Commission. Commissioners Koplan and Lane once again voted in the affirmative. This decision was affirmed by Judge Eaton.[59] Thus, the outcome of this case changed as a result of the litigation, but not a single commissioner was moved by any of the CIT's opinions to change their vote.

Private party litigants are generally well aware of the proclivity of individual commissioners to adhere to their original decision. Accordingly, in evaluating whether to appeal an adverse Commission decision, most litigants ask themselves two questions at the very outset as part of a screening process. First, how close was the Commission vote? Second, will the composition of the Commission change by the time that the case is remanded to the Commission? If the Commission's original vote was close -- *e.g.*, 3-3 or 4-2 -- the substitution of a new commissioner for other commissioners who voted in a manner adverse to the party considering an appeal could "flip" the Commission's vote. If the vote was not close -- *e.g.*, 5-1 or 6-0 -- then a change in the composition of the Commission is obviously much less likely to make a difference.

Thus, even if the party believes that it has a strong basis for appeal -- whether based on the facts or on the law -- if the vote was not close, it may decide that an appeal is simply not

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[57] *Nippon Steel Corp. et al. v. United States.*, slip op, 05-72 (Ct. Int'l Trade, June 15, 2005).

[58] *Grain-Oriented Silicon Electrical Steel from Italy and Japan*, Inv. No. 701-TA-355 and 731-TA-659-660 (Review)(Third Remand), USITC Pub. 3798 (Sept. 2005).

[59] *Nippon Steel Corp. et al. v. United States.*, 433 F.Supp.2d 1336 (Ct. Int'l Trade 2006).

worth the time and expense. Conversely, if the vote was close and the composition of the Commission is about to change, there is a strong incentive to review the Commission's decision very closely to identify possible errors, either legal or factual.

Accordingly, the cases that come before the courts on appeal generally reflect practical decisions by litigants based on institutional factors at least as much as they reflect strictly legal considerations. Plainly, the extent to which the courts defer to the Commission has some effect on a litigant's thought processes. If the courts are less inclined to the defer to the Commission, there will be more appeals, all else being equal. But, to the extent that that have been changes in the degree of deference that the courts have given to the Commission in recent years -- arguably less difference on legal questions and perhaps more deference on substantial deference questions -- they have been changes at the margin. In the grand scheme of things, they are not likely to result in a substantial change in the manner in which litigants evaluate whether to appeal a Commission decision, a process that will continue to be dominated by an assessment of other, institutional factors.

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