

Commissioners found to be a cause of such serious injury as was being suffered by the United States industry which was greater than the increase in imports — a decline in demand — was itself the result of a series of separate, and therefore smaller causes (e.g. higher gasoline costs, higher interest charges, the decline in income of the unemployed).

This ITC determination precipitated a considerable discussion as to whether the current U.S. escape clause legislation is more onerous than GATT Article XIX. For example, in the material prepared for a conference in 1981 on trade law, the notes prepared for the panel on the escape clause assert that "the statutory standard of causation, linking increased imports with the serious injury to the domestic industry, is considerably higher than that required by Article XIX of the GATT."²² This assertion is based on the assumption that Article XIX can be read as requiring only that an overall condition of "serious injury" to an industry need be shown and that imports (meeting the other criteria of para. 1 of XIX) can be shown to be one of the causes of that overall condition of injury. In the same discussion, Bill Alberger, then Chairman of the ITC, examined the broad issue of whether the approach of the U.S. escape clause was too legalistic and considered various alternative approaches to determining injury.²³ Peter Ehrenhaft observed that the U.S. legislation "includes requirements that increased imports be a cause of injury no less than any other cause — no such quantification is required by the GATT"; in his view Certain Motor Vehicles raised a number of key issues. First, "how to deal with problems of cyclical industry during (a) downturn". In Certain Motor Vehicles the ITC decided that the decline in demand was a greater cause of the (overall) serious injury than were imports. A concept of injury as "separable" would have enabled the Commission to treat as a separate matter the injury caused by the cyclical downturn, and as another matter the injury caused by imports: was that injury by itself "serious"?

Criticism of the Commission's findings in Certain Motor Vehicles (and perhaps (most importantly) the fact that the administration reacted by negotiating a "voluntary" limit by Japan on exports to the U.S. apparently had some impact on ITC thinking. Precise comparisons in escape clause cases are not often possible, because each case is unique. However, in the case involving Heavy-duty Motorcycles (usually referred to as Harley Davidson)²⁴ and in the Speciality Steel case²⁵ the ITC found threat of injury caused by imports, despite the decline of the industry's position due to reduced demand. The Chairman (Mr. Eckes) in the Harley Davidson case said: "There is no basis in concluding that the current recession is the principal cause of injury. Industry under import assault or threatened by such an assault should not be denied relief simply because the assault happens to coincide with an economic slowdown". This is, in a practical sense, repealing the position of the ITC in the Motor Vehicles case.²⁶

It should be clear from this exposition that the "separable" concept of injury, if applied with a rigorous causality test, such as it could seem is called for by the GATT articles, might lead, in some cases, to positive injury determinations where, under an "overall" concept, there might be negative determinations. As for anti-dumping and countervail, if current U.S. law is read as being addressed to "overall" injury, and with its current causality language, then there are bound to be positive determinations which will be inconsistent with a "separable" reading of Article VI and the two Tokyo Round agreements.