SUGARS AND SIRUPS FROM CANADA

Redetermination of Material Injury in Investigation No. 731-TA-3 (Final) Under the Tariff Act of 1930

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UNITED STATES INTERNATIONAL TRADE COMMISSION

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Note.--Information which would disclose confidential operations of individual concerns may not be published and therefore have been deleted from this report. Deletions are indicated by asterisks.

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

731-TA-3 (Final)

SUGARS AND SIRUPS FROM CANADA

Determination

The Commission determines 1/ that as of March 6, 1980, the date of the Commission's earlier determination regarding sugars and sirups from Canada, an industry in the United States was materially injured by reason of the importation of sugars and sirups from Canada sold, or likely to be sold, at less than fair value. The determination in this matter is made pursuant to the order of the U.S. Court of International Trade entered July 8, 1981, in the case of Atlantic Sugar, Ltd., et al. v. United States.

Background

In March 1980 the Commission determined that an industry in the United States is being materially injured by reason of imports of sugars and sirups from Canada which the Department of the Treasury has determined are being, or are likely to be, sold in the United States at less than fair value. The Commission's determination was appealed to the United States Customs Court (now known as the U.S. Court of International Trade) on May 6, 1980. 2/

Subsequent to the Commission's determination and the appeal of that determination to the Court of International Trade, errors were discovered in the information considered by the Commission relating to (1) the regional

1/ Commissioner Stern dissenting; Commissioners Bedell, Eckes, and Frank not participating.
2/ Atlantic Sugar, Ltd., et al. v. United States (C.I.T. No. 80-5-00754).

demand supplied by domestic productive facilities located outside the Northeastern States region, and (2) the financial performance of one of the sugar producers located in the region in question.

In an order issued on July 8, 1981, the Court of International Trade directed that within 90 days the Commission --

> issue a new determination after considering the corrected data regarding the regional demand supplied from elsewhere and, if it is reached, the evidence regarding the profitability of the producers in the region 3/

The Court further ordered that the Commission's new determination state with particularity the standards applied and the reasoning utilized in arriving at its conclusions concerning the aforementioned issues.

In arriving at its new determination in this matter, the Commission has given due consideration to written submissions received from the nongovernmental parties to the Court of International Trade appeal, information obtained during the course of investigation No. 731-TA-3 (Final), as later corrected, and publicly available data from the General Services Administration concerning transportation costs for shipping refined sugar into the Northeastern States region as of January 1, 1980. With the exception of the corrected information from the earlier investigation and the General Services Administration data, the Commission has not considered any information obtained subsequent to the date of its earlier determination.

By order of the Commission.

Kenneth R. Mason
Secretary

Issued: October 5, 1981

3/ Atlantic Sugar, Ltd., et al. v. United States, Slip Op. 81-62, 15 Cust. Bull. & Decisions 69, 75-76 (Ct. Int'l. Trade 1981), July 8, 1981.

VIEWS OF CHAIRMAN BILL ALBERGER AND VICE CHAIRMAN MICHAEL J. CALHOUN

These views are submitted in reponse to the July 8, 1981, order of the United States Court of International Trade 4/ remanding investigation No. 731-TA-3 (Final) Sugars and Sirups From Canada. In that investigation, we had determined that "the refined sugar industry in the Northeastern states region is materially injured by reason of imported Canadian sugar sold at LTFV." 5/ We had found that for purposes of that investigation the Northeastern states region consisted of Connecticut, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and Vermont. 6/ Canadian exporters of refined sugar appealed our determination to the Court of International Trade.

During the appeal process, two computational errors were discovered in the data on which we had based our determination. Correcting the first error changed the percentage of demand in the Northeastern regional market supplied by U.S. producers located outside that region from 5.5 percent to approximately 12 percent. 7/ Correcting the second error changed the profitability of Revere Sugars Corp. (Revere), the second largest producer in this region, *** 8/

In remanding the case, Judge Watson ordered,

> That within 90 days the ITC shall issue a new determination after considering the corrected data regarding the regional demand supplied from elsewhere and, if it is reached, the evidence regarding the profitability of the producers in the region, and it is further

4/ Atlantic Sugar, Ltd., et al. v. United States, Slip Op. 81-62, 15 Cust. Bull. & Decisions 69 (Ct. Intl. Trade, July 8, 1981).

5/ Statement of Reasons of Vice Chairman Bill Alberger and Commissioner Michael J. Calhoun, Sugars and Sirups From Canada, Inv. No. 731-TA-3 (Final), USITC Pub. 1047, March 1980, p. 4.

6/ Id. at 3.

7/ Report at pp. 17-19.

8/ Id. at pp. 42-45.

> ORDERED, That the new determination shall state with particularity the standards applied and the reasoning utilized in arriving at a conclusion as to whether or not the demand in the region is satisfied to any substantial degree from elsewhere in the United States and, if it is reached, shall give a similar explanation for the conclusion as to whether it is the producers of all, or almost all, of the production in that market who are being materially injured, ... 9/

Thus, our task is to determine the extent to which the corrected data change our original determination. For the reasons stated below, after giving full consideration to the corrected data, we affirm our original determination.

Regional industry

In most investigations under Title VII of the Tariff Act of 1930 (Act), we analyze and assess the impact of imports on a national industry, as defined in section 771(4)(A) of the Act (19 U.S.C. 1677(4)(A)). In appropriate circumstances, however, there is a statutory basis for analyzing and assessing the impact of imports on a regional industry (19 U.S.C. 1677(4)(C)). This section of the Act is a legislative recognition that the economic impact of imports on an isolated market may be such as to warrant the imposition of countervailing or antidumping duties on a nationwide basis. This derogation from the general industry definition is stated in section 771(4)(C) of the Act as follows:

> In appropriate circumstances, the United States, for a particular product market, may be divided into 2 or more markets and the producers within each market may be treated as if they were a separate industry if--
>
> (i) the producers within such market sell all or almost all of their production of the like product in question in that market, and

9/ Atlantic Sugar, ibid., at 75-76.

> (ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States.
>
> In such appropriate circumstances, material injury, the threat of material injury, or material retardation of the establishment of an industry may be found to exist with respect to an industry even if the domestic industry as a whole, or those producers whose collective output of a like product constitutes a major proportion of the total domestic production of that product, is not injured, if there is a concentration of subsidized or dumped imports into such an isolated market and if the producers of all, or almost all, of the production within that market are being materially injured or threatened by material injury, or if the establishment of an industry is being materially retarded, by reason of the subsidized or dumped imports.

Subsections 771(4)(C)(i) and (ii) set forth the criteria for determining whether there is such an isolated market. Under these provisions, we attempt to determine whether production and consumption patterns reflect a market which is distinct from a national market and whether these activities are greatly localized. In this regard, we understand subsection (i) to require that the producers in the region rely almost completely on sales to consumers in that market. We view subsection (ii) as requiring that the demand in the region for domestically produced goods not be satisfied substantially by domestic goods produced outside that region.

In our original investigation, we found that an average of over 96 percent of the sales by producers located in the Northeastern states region were to customers in that region during the period 1975-79. 10/ That finding is not before us on this remand. Rather, the first issue presented by the remand order pertains to section 771(4)(C)(ii) of the Act and, generally, concerns our view of the meaning of the word "substantial" in the context of

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10/ Statement of Reasons of Vice Chairman Bill Alberger and Commissioner Michael J. Calhoun, Sugars and Sirups From Canada, Inv. No. 731-TA-3 (Final), p. 4.

the extent to which demand in the market relies on domestic producers from outside the market. Clearly, there is no absolute percentage of demand which represents a "substantial" degree of outside supply, one which can be automatically and uniformly applied in all investigations for the purposes of the statutory test in question here. Indeed, it seems certain that by the use of "substantial" the Congress recognized that some portion of demand might be supplied by producers from outside the region. That is, a region may satisfy the statutory criteria for an isolated market even though it is not completely isolated from the remainder of the national market. Thus, our analysis must be made in the context of the facts in each investigation. Such an analysis seems to require, at the minimum, two evaluations. One is whether the percentage in question is, in an empirical sense, at such a level as to suggest its substantiality. The other is whether the particular character of the region in question supports such a conclusion.

In connection with the first evaluation, the corrected figures show that the percentage of demand within the region for domestic sugar which was supplied by producers located outside the region ranged from 11.6 to 12.6 percent. 11/ We do not believe that common parlance, itself, suggests that this range is substantial. "Substantial" is relevantly defined in Webster's Third New International Dictionary as "considerable in amount, value or

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11/ We disagree with the figures used by the Canadian exporters as to the percentage of demand within the region supplied from elsewhere in the United States. The exporters allege that this percentage ranged from 12 to 16 percent. They argue that 16 percent is the most accurate figure for cross-regional penetration in 1975. ******* Furthermore, when the exporters' estimates of outside supply are examined, it appears that two manufacturers within the region were omitted in the calculations: Revere's New York and Boston plants and Refined Sugar & Syrups Co. in New York. For these reasons, we feel that the exporters' percentages are overstated.

worth." On its face, 12.6 percent does not raise a question as to whether there is a "considerable" quantity or amount of nonregionally produced products being consumed in the region. In fact, if 12.6 percent of demand for domestic goods is supplied from elsewhere in the United States, then 87.4 percent of that demand is supplied by regional producers. Such a high level of isolated supply and demand, alone, suggests a rather high degree of isolation in production and consumption.

Regarding the second evaluation, in view of the significant transportation cost disadvantages to producers outside the region, the current and historical patterns of distribution, and the fact that the bulk of the outside supply of sugar goes into the perimeter of the region, the facts of this case also compel a finding that the criteria under subsection (ii) have been met.

Current and historical distribution patterns for sugar sold into the region by domestic producers illustrate that sugar is sold only into Michigan and Ohio, the perimeter of the region. Approximately one half of the outside supply comes from sugar refineries as far away as California, Louisiana, and Minnesota. When the transportation cost data is examined, producers shipping from refineries distant from the region have a significant transportation cost disadvantage when they ship to the large cities on the East Coast, such as Philadelphia, New York, and Boston, which are in the heart of the region. *** If Amstar were to ship north from Baltimore into the region, it would directly compete with its other plants in Philadelphia, New York, and Boston. Obviously sound marketing practices dictate that they avoid such intracompany competition.

With regard to transportation costs, 12/ a comparison of truck freight rates 13/ for shipments of sugar from various refineries to Northeastern cities, shows that a refinery in *** has its lowest cost disadvantage *** when it ships to Cleveland as compared to one of the plants more favorably located within the region at *** and an even higher cost disadvantage if it ships to cities on the East Coast. *** has transportation cost disadvantages of *** to Philadelphia, New York and Boston, when compared to other sugar refineries in Philadelphia, New York, and Boston, respectively. This disadvantage represents about 30 percent of the price of sugar, a penalty which effectively prohibits shipments to the core of the region. Thus, when sugar is shipped from distant refineries, such as *** it is almost invariably shipped only to the western perimeter of the Northeastern states region to minimize the transportation cost disadvantage. This establishes transportation cost as a rather significant economic barrier to sugar coming into the region from refineries outside the region.

With regard to the patterns of distribution in the region, we take note of the role of Amstar's Baltimore plant, ***. Amstar informed the Commission at the hearing that it had set up distinct marketing territories and, therefore, Amstar's Baltimore plant did not send sugar north into the region where it would compete with its plants in Boston, New York, and Philadelphia. The Baltimore plant's principal marketing territory is largely to the south and the west of the region. The plant does send sugar into the region, but

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12/ In order to quantify the comparative disadvantage suffered by the producers located outside the region, the Commission obtained General Services Administration data collected from publicly available rate schedules on the costs of shipping sugar by truck from sugar refineries within and without the region to major cities within the region as of Jan. 1, 1980.

13/ Although some sugar is shipped by other methods, truck transport is an important method of transport for sugar shipped to end users.

only to areas in the western perimeter (parts of Michigan and Ohio) where there are no nearby sugar refineries or where the other refineries cannot provide enough sugar to satisfy demand.

Amstar's Baltimore plant also has a transportation cost disadvantage in shipping to most of the cities in the Northeast. In the case of Philadelphia the disadvantage is small. In the case of Boston, it is substantial. Furthermore, for Amstar, this transportation cost disadvantage would be magnified because shipments to the core of the region would adversely affect sales and utilization of the Amstar plants in Philadelphia, New York, and Boston that are located near their primary customers. These Amstar plants are in place. We have no indication that they will be relocated or closed. Therefore shipments from the Baltimore plant into their traditional marketing areas simply do not make economic sense unless Amstar expands its share of the Northeastern market beyond the capacity of its present plants to meet the demand. Amstar did not expand its share during the period of the Commission investigation. In the case of Amstar's Baltimore plant, therefore, it just makes good competitive business sense not to send sugar north into the core of the region.

The rigid nature of the established marketing pattern for sugar in the Northeastern states region is evidenced by the 1975-79 period during which Amstar's share of annual sales in the Northeastern states region supplied by its plants outside of the region only fluctuated within the narrow range ***. This rigidity is further underscored by the fact that, although shipments into the Northeastern states region from all plants located outside of the region fluctuated somewhat on an individual company basis, in the aggregate they moved within an equally narrow range of a high of 12.6 percent in 1979 to a low of 11.6 percent in 1976. It, therefore, is evident that producers within the region have traditionally supplied the great bulk of the sugar consumed within the Northeastern region and that plants outside the region have supplied a small and virtually constant share of the overall demand.

These historical distribution patterns must be taken into account. Section 771(4)(C)(ii) states, "the demand in that market is not supplied, to any substantial degree, by producers . . . . located elsewhere." The statute is written in the present tense. This is done presumably to direct our inquiry to matters as they exist in fact, and not as they could exist or, in some perfect world, ought to exist. Therefore, the Commission must take into account the present commercial realities of the marketplace in order to determine whether a regional industry exists. We cannot replace these realities with speculation or conjecture as to future events that have no support in the facts on the record.

In summary, we conclude that the evaluations discussed above compel us to affirm our finding that demand in the region is not supplied to any substantial degree by producers located elsewhere in the United States. From an empirical point of view, 12 percent of regional demand is a low number, and does not automatically appear as substantial. Furthermore, the percentage of demand supplied by outside producers remains stable. It is also apparent that because of transportation costs and historical distribution patterns, sugar from outside the region either does not penetrate the core of the region or, if it does, penetration incurs a significant cost disadvantage, sharply limiting the degree of penetration which can be obtained.

The issue of a regional market for sugar has also been addressed by other agencies of the U.S. Government and they have consistently concluded that there is a Northeastern regional market. Although the boundaries of the region have varied from one study to another, both the Department of Agriculture and the Federal Trade Commission (FTC) have identified Northeastern regions. A 1975 FTC staff study entitled The U.S. Sugar Industry defined a 14 state area contiguous with, but somewhat larger than, the 11-state Northeastern region considered by the Commission. In that study the FTC confirmed the Commission's analysis in the current investigation, i.e., that the producers within such market sell all or almost all of their production in that market (only 2.3 percent of 1970 production in the Northeastern region was shipped out of the region) and that demand in that market is not supplied, to any substantial degree, by producers located elsewhere in the United States (only 10.2 percent of 1970 consumption in the region was supplied by shipments from outside of the region). 14/

In addition, the boundaries of a regional industry are generally state boundaries which often do not offer a perfect basis for defining marketing territories. It would be difficult for producers to supply the Commission with sales information broken down on anything smaller than a statewide basis and, therefore, the Commission generally would not be able to draw the boundaries of a regional industry along county lines in order to define the region to include just key portions of states. In this case, therefore, we were unable to exclude from the region Southern Ohio and parts of Michigan which were not penetrated by imports and which consume a large proportion of the outside supplies.

14/ The data on shipments to and from the Northeastern region originally appeared in a Department of Agriculture report. See Harry A. Sullivan, Refined Sugar Movement Within and Among Marketing Territories, Sugar Reports No. 240, May, 1972.

For all of the above reasons, we believe the present eleven state region is a regional industry within the meaning of section 771(4)(C).

Material injury

The second issue the court ordered the Commission to address was whether Revere's changed financial performance alters the Commission's original determination under section 771(4)(C) that producers of all or almost all of the production within the region are materially injured. In our original determination in this case, we based our decision, in part, on the declining profits of the producers within the region. *** When the corrected data for Revere were averaged with the data for the other producers within the region, the ratio of net profit to sales for 1979 changed from 0.34 percent to 1.05 percent and the aggregate profits changed from $4 million to $13.5 million in 1979. 15/ The corrected aggregate data show that all seven firms in the Northeastern states region have declining profits, with the ratio of net profit to sales dropping from 5.55 percent in 1976 to 1.05 percent in 1979. Aggregate profit for these seven firms declined from $54 million in 1976 to $13.5 million in 1979. Three of the firms within the region had net losses in both 1978 and 1979 and two other firms had declining profits. 16/ Therefore, even with the corrected data, overall profits have declined but the decline was simply not as steep. We conclude that the corrected data still support our finding that producers of all or almost all of the production are materially injured. As a further matter, an industry does not necessarily have to be suffering a loss as a prerequisite to a finding of material injury. As Judge Watson stated in his opinion: " . . . in 19 U.S.C.

15/ Report at pp. 42-43.
16/ ******

§ 1677(7)(C)(ii) the statute mentions actual decline in profits as one of the factors which the ITC must evaluate in examining the impact of imports and arriving at a conclusion regarding material injury." 17/

Moreover, Judge Watson also noted that "no single factor is given decisive effect in determining material injury. In fact, at 19 U.S.C. § 1677(7)(E)(ii) the law specifically disclaims the controlling effect of the presence or absence of any of the evaluative factors." 18/ In our original determination, we cited a number of other factors which also contributed to our finding of material injury, such as price suppression, price depression, declining employment, and lost sales. 19/

The Canadian exporters argued that the aggregate data of the domestic industry cannot be examined. Instead, they maintain that we should examine the data for each specific producer within the region in order to determine whether "producers of all, or almost all, of the production" within the regional market are materially injured.

The language of section 771(4)(C) however, cannot be read out of context. The statute is concerned with determining whether a regional industry is being materially injured, not whether particular producers are injured. It does not refer to all or almost all of the producers but refers to "the producers of all, or almost all, of the <u>production</u> . . ." 20/ It should be noted that section 771(4)(A), the general rule for defining an industry, specifically refers to the domestic producers as a whole and not to individual producers.

17/ Atlantic Sugar, *ibid.*, at 73.
18/ *Id.* at 75.
19/ *See* Views of Vice Chairman Alberger and Commissioner Calhoun, Sugars and Sirups from Canada, *ibid.*, at 5-10.
20/ Section 771(4)(C). [Emphasis added.]

When we are construing section 771(4)(C), it is also logical to focus on the regional industry in the aggregate and not to individual firms within it, even though the wording of the two sections is not identical. Congressional concern that the Commission examine the industry as a whole is manifested throughout the legislative history of section 771(4). The Senate Report states:

> Under section 771(4) of the Tariff Act of 1930, . . . the term industry generally would mean the domestic producers as a whole of the like product, i.e., a product like the imported article, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of the like product. 21/

The House Report states:

> As under current practice, the "industry" can also be producers who comprise something less than the entire group of producers of like products if the total output of this group of producers constitutes a major proportion of the total domestic production of that product. 22/

Further, the Senate Report states regarding regional industry:

> However, domestic producers in a geographic region in the United States would be considered an industry when they sell all or almost all of their production of the like product in the market in that region . . . 23/

The Senate, therefore, was focusing on production and not the individual producers in a regional industry. Finally, in the Statements of Administrative Action on the Trade Agreements Act of 1979, it is even clearer that the Commission is to focus on production and not individual producers in determining material injury:

21/ S. Rep. No. 96-249, 96th Cong., 1st Sess., at 82. [Emphasis added.]
22/ H. Rep. No. 96-317, 96th Cong., 1st Sess., at 73. [Emphasis added.]
23/ S. Rep. No. 96-249, ibid. [Emphasis added.]

> In a case in which the output of producers within a region constitutes a major proportion of total domestic production, material injury to the domestic industry may be found without regard to the specific criteria for injury to a regional industry. 24/

Terms such as "collective output," "major proportion," and "total output" all suggest that the focus of the statute is on material injury to the domestic industry, rather than to individual producers. Thus, the Commission must consider aggregate data on the regional industry in order to assess the impact of imports.

Conclusion

There exists a distinct regional industry, as defined by section 771(4)(C) of the Tariff Act of 1930 (19 U.S.C. 1677), comprised of the producers of refined sugar in Connecticut, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island and Vermont (Northeastern states region).

The Northeastern states region, as defined above, is materially injured by reason of imports of sugar and sirups from Canada which the Department of the Treasury has found are being, or are likely to be, sold in the United States at less than fair value.

24/ Trade Agreements Act of 1979; Statements of Administrative Action, House Doc. No. 96-153, 96th Cong., 1st Sess., at 432.

Additional Views of Chairman Alberger

I feel compelled to note that Commissioner Stern's dissenting opinion relies on a statement from our joint views in Carbon Steel Plate from Taiwan 25/ which is not applicable on the facts of this case. The dissenting opinion concludes that regional distribution is based solely on historical marketing patterns and that our earlier opinion discourages regional analysis under such circumstances. As was noted in the original report in this case, however, "transportation costs for refined sugar are relatively high in relation to its value; therefore, refined sugar is normally shipped to markets within 250-300 miles of refineries . . . ." 26/ All Commissioners apparently accepted this. Furthermore, our staff stated in the public briefing that this industry follows a transportation model. Therefore, the dissent's reliance on a phrase (from a pre-Trade Agreements Act opinion) relating to regional distribution ". . . based solely on historical marketing practices" is misplaced. It is correct to note that the majority is relying in part on historical marketing patterns in this opinion, but only with respect to Amstar's Baltimore plant, which occupies a unique position on the border of the region and which provides less than half of the outside supply. Furthermore, the situation involving Amstar is structural in nature, and is not based on mere marketing whim. Amstar located plants in numerous cities throughout the Atlantic coastal area, obviously because it recognized the importance of transportation advantages, especially where the customers were large industrial users who would want their source of supply very nearby.

25/ Inv. AA1921-197, USITC Pub. 970 (May, 1979).
26/ See original Staff Report at p. A-16.

This is a major distinction from a situation where a regional producer had merely failed to explore markets outside the region for historical reasons, which is the type of situation I was alluding to in Carbon Steel Plate. In this case, Amstar could not alter its marketing practices without incurring substantial costs and undergoing significant structural changes. It would be difficult to find large commercial customers outside the region, and in any event significant transportation costs would be incurred. Therefore, I believe it is highly unlikely that regional injury could be avoided in this case solely by management decisions within the affected firms. The type of management decisions called for would themselves be injurious.

Because this case comes before us on a remand order relating only to specific issues, I have attempted to limit my consideration of commercial factors to the discrete question of whether the new figure for outside shipments is "substantial," and have accepted the Commission's original findings that transportation costs were a significant factor. In essence, historical patterns relating to the Amstar plant in Baltimore suggest that the 12.6 percent figure is deceptively high, and this is the only purpose for which I made such an analysis. The appropriate time to consider whether there is any logic underlying the regional segmentation of the sugar industry would have been in the original determination. At that time, as now, I believed there was a clear basis for doing so.

VIEWS OF COMMISSIONER STERN

This view is submitted in reponse to the July 8, 1981, order of the United States Court of International Trade remanding Sugars and Sirups From Canada (March 1980), 27/ to the Commission for a new determination in light of the corrected data regarding the demand in the Northeastern area supplied from elsewhere in the United States and the profitability of domestic producers.

A careful reexamination of the regional industry issue in light of the corrected data has been primarily responsible for my negative determination in the remanded case. Because U.S. producers in the Northeastern states area are not sufficiently separate or isolated to constitute a regional industry, the relevant domestic industry should encompass the entire nation and not the region found by the Commission in the original case or the majority in the present one. As a result of this change in my views, my analysis of injury and causation are now based on national data, including the revised profitability statistics.

The domestic industry

Industry is defined in section 771(4)(A) of the Tariff Act of 1930 to mean the domestic producers of a product which is like that being imported. "Like product," in turn, is defined in section 771(10) as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation . . . ." The products in this case are refined sugar and liquid sugar and other sugar sirups. Thus, the domestic industry is defined as the producers of refined sugar or sugar sirups.

27/ See Sugars and Sirups from Canada, Inv. No. 731-TA-3 (Final), USITC Pub. 1047, March 1980.

In order for a regional industry to be found, section 771(4)(C)(ii) requires that the demand in the geographically defined market not be supplied to any substantial degree by producers located elsewhere in the United States. In this case, the shipments into the Northeastern area from elsewhere in the United States equal 12 percent of the area's demand, instead of the 5.5 percent figure the Commission worked with in the earlier case. 28/ In this case, the penetration figures and the appropriateness of special regional consideration merit particularly careful scrutiny because the corrections in them were significant enough to form a basis for the Court's decision to remand. The new percentage--when examined in the appropriate context--represents a substantial degree of the area's supply. The context of such penetration figures is important because bare numbers themselves are rarely conclusive evidence absent further analysis.

I have found that no natural or commercial reasons outside the control of the sugar producers themselves severely limit the quantities of sugar that can flow between geographical areas. Rather, the pattern of supply seems to reflect the historical distribution practice which in and of itself is not a sufficient basis to find that the market is isolated or separate as required by law. 29/

28/ See revised Report at 22.

29/ One may ask why a change in the numerical level of outside supply entering an area has prompted examination of the reasons underlying that percentage. The initial figure for outside penetration was 5.5 percent. It seems highly improbable that such a low level could have resulted for merely historical reasons. In the absence of external barriers, the profit motive usually will result in a more even development of commerce which tends to erase regional boundaries. On remand, the penetration figure more than doubled and demanded further analysis. The Commission in its regionality consideration should, as a matter of practice, take a hard look at the reasons underlying any observed geographical distribution pattern.

The concept of regionality has partly evolved from the legislative history of both the Trade Act of 1974 and the Trade Agreements Act of 1979. The legislative history of the Trade Act of 1974 states:

> A hybrid question relating to injury and industry arises when domestic producers of an article are located regionally and serve regional markets predominately or exclusively and the less-than-fair-value imports are concentrated in a regional market with resultant injury to the regional domestic producers. [Emphasis added.] 30/

Relying on the above statement, Chairman Alberger and I stressed the importance of the separate or isolated nature of a regional industry in Carbon Steel Plate From Taiwan, a case decided in May 1979 under the Antidumping Act, 1921:

> The regional segment of the industry must be sufficiently isolated from the rest of the industry to justify a deviation from the Antidumping Act's normal requirement of national injury. Commission decisions have discussed this problem. The Senate Finance Committee has noted that it is relevant to consider whether ". . . domestic producers . . . are located regionally and serve regional markets predominately or exclusively . . ." This suggests that it would be inappropriate to apply geographic segmentation principles if producers ship substantial portions of their production outside the region, since such a practice indicates an ability to market goods on a multiregional or national basis. [Emphasis added.] In other words, the region itself would not be separate and identifiable from other regions.
>
> We believe the degree of isolation is an important factor to assess in deciding whether to apply a regional industry definition. It is very difficult to rely on regional data if it does not reflect conditions within a discrete and self-contained portion of the industry. Moreover, if a region is fully integrated with the national industry or other regions, we would have to examine conditions outside the region to determine the true impact of LTFV sales.

30/ S. Rep. No. 93-1298, 93d Cong., 2d Sess., at 180 and 181.

> In order to determine whether a region is separate and identifiable, it is useful to weigh certain considerations. As pointed out in the Senate Report, it must be shown that the producers in question are located in and serve the region predominantly or exclusively. In addition, the region must not be served to any substantial degree by domestic producers outside the region. Finally, it may be relevant to ask what factors led to geographic segmentation. For example, we would want to know if constraints on transhipment [sic] exist by virtue of transportation costs or product characteristics, or if regional distribution is based solely on historical marketing practices. [Emphasis added.] 31/

Section 771(4)(C) of the Trade Agreements Act, which was being drafted when Carbon Plate Steel was decided, also stipulated the separate and isolated nature of a regional industry. It states " . . . the producers within each market may be treated as if they were a separate industry . . . if there is a concentration of subsidized or dumped imports into such an isolated market . . . ." [Emphasis added.] 32/ Accordingly, a determination as to whether the level of the sales in the region from producers outside the region is substantial or insubstantial must be made in the context of whether the market is an isolated or separate market. Likewise, this is remphasized in Judge Watson's opinion: "The sales from elsewhere are being examined to determine the isolation of a market, which is a more general question of condition, not cause and effect." 33/

To determine whether the percentage of outside supply is substantial, the Commission must examine the reasons for the apparently isolated or separate

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31/ Carbon Steel Plate From Taiwan, inv. No. AA1921-197, USITC Pub. 970, at 20 and 21 (footnotes omitted).

32/ Section 771(4)(C) of the Trade Agreements Act was modelled after Article 4 of the Antidumping Code which also includes the concept of an isolated or separate market.

33/ Atlantic Sugar, Ltd., and Redpath Sugars, Ltd. v. United States and Amstar Corp., Slip Op. 81-62, 15 Cust. Bull. and Decisions, 69, 72 (Ct. Intl. Trade 1981).

nature of the regional market. In Carbon Steel Plate From Taiwan, as noted above, Chairman Alberger and I stated:

> Finally, it may be relevant to ask what factors led to geographic segmentation. For example, we would want to know if constraints on transhipment [sic] exist by virtue of transportation costs or product characteristics, or if regional distribution is based solely on historical marketing practices.

My reasoning in that case was that, if the geographical distribution of supply is based solely on historical marketing practices, a regional industry does not exist. Otherwise it would be difficult to understand how an examination of the factors underlying geographical segmentation has any relevance. If there are no other reasons, such as transportation costs or state licensing requirements, then historical marketing patterns cannot solely justify the existence of an isolated regional industry. In contrast to imposed economic or legal constraints beyond the control of the firms, marketing practices can change and a so-called regional industry could by its own action disappear overnight.

What is at issue here is not just a legal technicality. The Constitution does not allow dumping duties to be levied at different levels for different states. Thus, the commerce of the entire nation bears the burden of any remedy even when the injury motivating it may be localized. Congress, in the Trade Agreements Act of 1979, provided standards for carving out regional industries which essentially enacted past Commission practice. Fortunately, neither the statutory standard nor the Commission's past practice supports imposing a remedy on the entire nation when local injury may be averted by management decisions within the perogatives of the affected firms. 34/

34/ The conclusion here is in accord with the approach adopted by Chairman (Footnote continued)

In this case, there are a number of reasons why the Northeastern states area is too porous to constitute a region. First, questionnaires demonstrate that the outside supply comes from as far away as California. Even though transportation data 35/ demonstrate that there is a cost disadvantage if the sugar is shipped to cities on the East Coast, producers in distant parts of the United States still find it economic to do so. Thus, transportation costs are not an absolute barrier.

Second, *** of the total sugar shipped into the region is from Amstar's Baltimore plant, ***. Transportation data indicate that the sugar from Baltimore can be shipped anywhere in the region without a significant cost disadvantage. Therefore the Baltimore plant could increase its shipments into the region at any time. The majority argues that a region is present because even though the Baltimore plant could ship its sugar into the center of the region, historical marketing pratices prevent it from doing so. However, I believe that there must be some exogenous forces isolating the market. If

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(Footnote continued)
Alberger, Vice-Chairman Calhoun, and myself in Asphalt Roofing Shingles from Canada, (Inv. No. 731-Ta-29, USITC Pub. 1100, October 1980). There we allowed the domestic industry its best case, including a regional approach, but still found in the negative. We cautioned: "It seems highly questionable that the 26 state northern region as defined by petitioner is in fact an isolated geographic market, since there appears to be no natural or commercial reason for the boundary drawn by petitioner between northern states and southern states."

35/ In order to quantify the effect of transportation costs on the shipment of sugar, the Commission obtained General Services Administration data collected from publicly available rate schedules on the costs of shipping sugar by truck from sugar refineries within and without the region to major cities within the region as of Jan. 1, 1980. These data support any conclusions based on the record estabished in this investigation. See Meeting Transcript at 4-11 where answers to my questions confirmed that sugar could be competitively shipped into and out of the Northeastern states geographical area.

there had been such a showing in the present case, I would be able to agree with my colleagues that a regional industry is present.

The amount of sugar entering the Northeast from other parts of the United States has received much attention. The important point is the unmistakable porosity of the area. The majority has concentrated on explaining why not even more sugar (for instance, from Baltimore) was shipped into the area. An equally important question is the opposite: why wasn't sugar from Baltimore and the Northeast diverted to other areas in face of the Canadian competition? No licensing requirements or natural barriers were noted. Transportation costs are not insurmountable, even when long distances are involved. The only answers to this question seem to lie with traditional practices and the poorer conditions of the national market. But these market conditions were not shown to possess the durable and palpable qualities of regional barriers comprehended by the statute.

In the preliminary investigation, Maryland with its Baltimore plant was included in the region. One of the reasons given by the staff for excluding Baltimore from the region in the final investigation was that the Boston, New York, and Philadelphia Amstar plants were injured because of lost sales, but the Baltimore plant was not. 36/ This smacks of the problem Judge Watson noted in his opinion--the "arbitrary or freehanded sculpting of regional markets." 37/ No alternative regional segmentation would be any less arbitrary

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36/ Report at 17.
37/ Atlantic Sugar, ibid., at 72.

than the one adopted by my colleagues. Only a national approach now seems justified.

For the above reasons, I find that the Northeastern states area is too porous to justify the regional industry approach provided for in section 771(C). Therefore, the industry in this case is composed of all the producers of sugar in the United States.

Material injury

The domestic industry is experiencing difficulties, but no links have been established between any material injury it has suffered and dumped Canadian imports.

Before 1975, U.S. imports of sugar were controlled by quotas under the Sugar Act of 1948, and there was no quota for imports of sugar from Canada. The Sugar Act expired at the end of 1974. U.S. sugar imports from Canada amounted to 40,000 short tons in 1975, rose to 138,000 short tons in 1977, and then fell to 98,000 short tons in 1978 and 81,000 short tons in January-September 1979. 38/ The volume of imports from Canada was never higher than 2.2 percent of total U.S. sugar imports during this period. Hence, in absolute terms, such imports could not be considered substantial in relation to total U.S. sugar imports during the period of investigation.

Further, U.S. imports of sugar from Canada were only 0.4 percent of U.S. consumption of sugar in 1975 and 1976, 1.2 percent in 1977, 0.9 percent in 1978, and 1.0 percent January-September 1979. They were equivalent to no more than 2.5 percent of U.S. production from 1975 to 1979. These ratios are so small that U.S. imports of sugar from Canada sold at less than fair value

38/ Report at 49.

could not have had any particular impact on the U.S. market for sugar. Nor is it clear that imports of sugar from Canada were increasing so as to threaten the U.S. market with any material injury. Such imports, although sold at less than fair value, appear to have penetrated the U.S. market for sugar only along the Canadian border where Canadian refineries would have a natural advantage over more distant U.S. refineries.

While there may have been lost sales and an impact on prices by imports of sugar from Canada in the areas where it was sold at less than fair value, the margin of underselling was not significant. 39/ Such imports never exceeded 1.2 percent of apparent U.S. consumption and, therefore, could not have had any impact on national sugar prices. U.S. sugar prices are primarily determined by the prices of raw sugar imports. 40/ Imports from Canada were never more than 2.2 percent of total U.S. sugar imports and, hence, could not have had a national impact on U.S. prices and quantities sold of domestic sugar.

The impact of U.S. imports of sugar from Canada sold at less than fair value appears to have been confined to the areas along the Canadian U.S. border. During the period of examination the entire U.S. sugar industry suffered injury. Because the injury was more severe on a national basis than in the Northeastern States region, factors other than imports from Canada must have been responsible. The small level of Canadian imports did not materially worsen this situation.

Data for 18 domestic-refined sugar producers showed that capacity utilization for these firms declined from 90 percent in 1976 to 85 percent in

39/ *Id.* at 63.
40/ *Id.* at 57.

1978, and then rose to 88 percent in 1979. 41/ Yearend inventories of 17 domestic producers peaked at 2,873 million pounds in 1976, fell to 2,835 million pounds in 1977, and then fell again to 2,113 million pounds in 1979. 42/ Employment in the 15 domestic sugar refineries fell from 16,328 workers in 1976 to 14,680 in 1979. Man-hours worked declined from 31.1 million hours to 26.9 million hours in the same period. During that period, productivity of U.S. workers was rising from 524 pounds per man-hour in 1976 to 589 pounds per man-hour in 1979, but productivity on a national basis was well below that in the Northeastern States which was 780 pounds per man-hour. 43/ During the period, wages paid per man-hour were rising, but wages paid in the Northeastern States were higher--$9.23 in 1979 compared with $7.98 nationally. 44/

The ratio of net profit or loss to net sales for the 15 domestic refined sugar producers declined from a profit of 8.75 percent in 1976 to loss of 0.33 percent in 1979. 45/ In 1979, firms in the Northeastern States had a ratio of net profit to net sales of 1.05 percent. The ratio of net profit or loss to net assets declined from a profit of 35.83 percent in 1976 to a loss of 1.26 percent in 1979, while the ratio of net profit to net assets for producers in Northeastern States was 7.79 percent in 1979. 46/ Hence, it is easy to see that injury to the sugar industry as a whole was much worse than for those producers in the region along the Canadian border where imports of sugar entered.

41/ *Id.* at 36.
42/ *Id.* at 37.
43/ *Id.* at 40.
44/ *Id.* at 41.
45/ *Id.* at 43.
46/ *Id.* at 45.

One cause of injury to the U.S. sugar industry was the rapid growth in sales of the alternative sweetener product, high fructose sirup. U.S. corn sweetener sales of 1.03 billion pounds in 1975 more than doubled to 2.54 billion pounds in 1979, and the unit value of these sales declined from 22.49 cents per pound in 1975 to 10.70 cents per pound in 1979. 47/ Imports of sugar from Canada, which never reached much more than 270 million pounds, could not have contributed in any material fashion to the problems of the U.S. industry on a national scale. 48/

Since the data gathered by the Commission show that the U.S. sugar industry was suffering injury, and such injury was worse for the sugar industry as a whole than for the industry in the Northeastern States, I cannot reasonably conclude that U.S. imports of sugar from Canada sold at less than fair value, which constituted less than 2.2 percent of U.S. imports and 1.2 percent of U.S. consumption, were a cause of any material injury.

Threat of material injury

As was already noted, there was no increasing trend in U.S. imports of sugar from Canada sold at less than fair value. Canadian sugar production and capacity have declined, particularly with the closing of a refinery in late 1979. 49/ Hence, there is no basis to conclude that U.S. imports of sugar from Canada were likely to become a threat of material injury to domestic sugar producers.

In sum, I have not been able to trace any material injury experienced by domestic refined sugar producers to Canadian sugar imported at less than fair value.

By order of the Commission:

Kenneth R. Mason
Secretary

47/ Id. at 26.
48/ Id. at 47.
49/ Id. at 32-34.

Issued: October 13, 1981

A report (USITC Publication 1047) containing the information developed in investigation No. 731-TA-3, Sugar and Sirups from Canada, was released in March 1980. Copies of this report are available from the Office of the Secretary, U.S. International Trade Commission, 701 E Street, NW., Washington, D.C. 20436.