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The Multi-Purpose Vehicle Reclassification and Minivan Dumping Disputes Between the United States and Japan and Their Consistency with United States Obligations Under the GATT

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THE MULTI-PURPOSE VEHICLE RECLASSIFICATION AND MINIVAN DUMPING DISPUTES BETWEEN THE UNITED STATES AND JAPAN AND THEIR CONSISTENCY WITH UNITED STATES OBLIGATIONS UNDER THE GATT

W. Peter Cladouhos*

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INTRODUCTION

One of the most hotly contested and divisive issues in recent international trade law centers on whether the reclassification of multi-purpose vehicles constitutes a violation of the General Agreement on Tariffs and Trade (GATT). The automobile industry is often a susceptible target in trade disputes between the major industrialized powers—particularly between the United States and Japan. There is, however, much to lose by bringing potentially divisive automobile dumping and reclassification issues to the domestic and international forefront. The United States auto industry's efforts to adopt protectionist trade measures such as the reclassification of multi-purpose vehicles and to support anti-dumping actions against minivans Japan exports to the United States puts additional pressure on a divided Clinton Administration to take some sort of

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1. See Letter from Robert C. Cassidy, Jr., Wilmer, Cutler & Pickering, to William E. Barreda, Deputy Assistant Secretary for Trade and Investment Policy, United States Department of the Treasury 7 (Feb. 14, 1992) [hereinafter Cassidy Letter] (on file with author) (asserting that while multi-purpose vehicle, sport utility vehicle, and minivan reclassification would not constitute a violation of any GATT article, tariff rule, or convention, the law in the United States remains unsettled regarding the proper method of classification).

2. See David R. Sands, U.S. Imported Car Dealers Fear Trade War Will Target Their Stock, WASH. TIMES, May 20, 1993, at C1 (stating that in 1992, nearly three quarters of the fifty billion dollar United States trade deficit with Japan resulted from automobile and automobile parts sales and that minivans "can be dragged into seemingly unrelated trade disputes"); see also Robert W. McGee, The Case to Repeal the Antidumping Laws, 13 NW. J. INT'L L. & BUS. 491, 520 (1993) (decrying that the United States automobile industry is an outstanding example of a special interest group's utilization of the government to secure needed protection from foreign automobile manufacturers).

3. See Van Dumping Charge Offers Big 3 a Huge Victory—or Disaster, AUTOMOTIVE NEWS, June 10, 1991, at 12 (asserting that an unsuccessful anti-dumping action by Chrysler, Ford, and General Motors could lead to a dramatic change in enforcement actions in United States trade policy or to a growing consumer perception that the United States automobile industry is raising frivolous claims because it cannot compete effectively against foreign automobile manufacturers).
action on this politically sensitive issue. The Treasury Department remains unreceptive to suggestions from the "Big Three" to reexamine and reverse its earlier 1989 classification decision. Recently, Congress introduced several resolutions regarding the reclassification of multi-purpose vehicles, minivans and sport utility vehicles that increase the likelihood that this unsettling issue may come to the political and international forefront.

4. See Max Gates, Clinton to Decide Minivan Tariffs, AUTOMOTIVE NEWS, May 3, 1993, at 8 (stating that the Clinton Administration remains sharply divided on the multi-purpose vehicle reclassification issue). Former Treasury Secretary Lloyd Bentsen was opposed to raising the tariff on multi-purpose vehicles from 2.5% to 25%, while Commerce Secretary Ron Brown and United States Trade Representative Mickey Kantor support raising the tariff rate. Id.; see also A Close Call For Suzuki, THE NAT'L J., Feb. 29, 1992, at 489 (reporting that a Treasury Department proposal to reclassify multi-purpose vehicles lost momentum due to "staunch opposition within the department, from other government agencies and from Washington lobbyists" representing the Japanese automobile industry); Mark Rechtin, Imports: 25% Tariff Killed 2-door Market, AUTOMOTIVE NEWS, Mar. 29, 1993, at 37 (reporting that President Clinton called the 1989 Treasury Department reclassification decision a "$300 million freebie" to the Japanese automobile industry and, if reversed, would dramatically increase United States tariff collection revenues); Sands, supra note 2, at Cl (same). But see Max Gates, Importers Bolster Defenses as Clinton Focuses on Tariffs, AUTOMOTIVE NEWS, Nov. 16, 1992, at 4 (reporting that the Japanese automobile industry challenges the claims that raising the tariff on multi-purpose vehicles from 2.5% to 25% would lead to hundreds of millions in additional revenues because the higher tariff would serve to reduce Japanese vehicle sales in the United States, and would therefore, significantly reduce United States tariff revenues); Max Gates, Tariff Hike Sought for Imported Minivans, Four-Door Sport Utilities, AUTOMOTIVE NEWS, Feb. 17, 1992, at 4 (stating that opponents of reclassification assert that a tariff increase from 2.5% to 25% "will very likely reduce [United States] tariff earnings to zero" due to a lack of imported vehicle competitiveness).

5. See Max Gates, Japanese Blunt Big 3 Offensive on Tariffs, AUTOMOTIVE NEWS, Mar. 1, 1993, at 1 (reporting that a meeting among representatives of the United States automobile industry, the United Auto Workers, and Treasury Secretary Bentsen failed to secure a Treasury Department reclassification pledge).

6. See H.R. Res. 228, 103d Cong., 1st Sess. (1993) (proposing to amend the Harmonized Tariff Schedule of the United States in order to classify certain trucks as motor vehicles for the transport of goods rather than as motor vehicles for the transport of persons under the tariff schedule and to increase their tariff rate from 2.5% to 25%); see also H.R. Res. 1369, 103d Cong., 1st Sess. (1993) (proposing the "Minivan Tariff Consumer Protection Act of 1993," drafted to reduce the tariff rate on imported minivans if they are reclassified at a higher duty rate and if imported minivan prices rise at a rate above the rate of inflation); S. Res. 385, 103d Cong., 1st Sess. (1993) (proposing to redesignate Harmonized Tariff Schedule of the United States notes two and three and to reclassify certain minivans, sport utility vehicles, multi-purpose vans,
The Clinton Administration faces the difficult task of balancing its concern for the welfare of the United States auto industry with implementing free and fair international trade policies. This Comment examines the use of protectionist trade measures, such as the reclassification of multi-purpose vehicles, sport utility vehicles, and minivans, and the United States auto industry's efforts to bring anti-dumping actions against Japanese minivans. This Comment also addresses whether such a reclassification is illegal under the GATT and examines the consequences of bringing an action before a GATT dispute settlement panel.

Part I of this Comment surveys the history of the minivan reclassification and dumping disputes. Part II examines the multi-purpose vehicle and minivan reclassification issue. Part III explores the International Trade Commission's (ITC) dumping investigation of Japanese minivans. Part IV examines whether multi-purpose vehicle or minivan reclassification is consistent with United States obligations under the GATT and considers the likely outcome if Japan invokes the dispute resolution mechanism under GATT Article XXIII. Part V draws conclusions and

and other vehicles less than five metric tons "designated primarily for purposes of transportation of property . . . equipped with special features enabling offstreet or off-highway operations and uses . . . suitable for cargo-carrying purposes or other non-passenger purposes" as motor vehicles for the transport of goods rather than persons under the HTSUS heading 8704); S. Res. 2145, 102d Cong., 2d Sess. (1992) (proposing to "assure mutually advantageous international trade in motor vehicles and motor vehicle parts," to advance the "interstate sale and export" of U.S. motor vehicles and parts, and to promote American jobs); S. Res. 3081, 102d Cong., 2d Sess. (1992) (proposing to reclassify under HTSUS heading 8704 "any passenger van, multipurpose van, [and] sport utility vehicle" less than five metric tons which is designed primarily for transporting property, "equipped with special features" allowing for off-road use, or "suitable for cargo-carrying purposes or other non-passenger-carrying purposes" by removing manufacturer's seats for the purpose of creating "a flat floor level surface" from the "forwardmost point of installation" to the end of the vehicle's rear interior); H.R. Res. 3250, 102d Cong., 1st Sess. (1991) (proposing to amend the notes of the Harmonized Tariff Schedules of the United States in order to reclassify light trucks or light duty trucks from HTSUS heading 8703 to 8704); S. Res. 1646, 102d Cong., 1st Sess. (1991) (proposing the same).

7. See President Clinton's Submission to Congress of Documents Concerning the Uruguay Round Agreement, Int'l Trade Rep. (BNA), Dec. 22, 1993, at 2154 [hereinafter President's Uruguay Round Submission] (stating that the President's principal negotiating objectives during the Uruguay Round were the promotion of "more open, equitable and reciprocal market access" and the reduction or elimination of all barriers to trade and other trade distorting practices while at the same time preserving the sovereign ability of the United States to enforce its laws against inequitable trade practices).
offers recommendations for President Clinton to consider before he proceeds down a precarious reclassification path. The underlying premise of this Comment is that the multi-purpose reclassification issue has been adequately addressed by the Court of International Trade\(^8\) and the United States Court of Appeals for the Federal Circuit\(^9\) and any further efforts to reclassify multi-purpose vehicles may be illegal under the GATT and actionable under the GATT's dispute resolution procedures. Furthermore, in light of the recent conclusion of the Uruguay Round negotiations, President Clinton's reclassification options will be limited further if Japan decides to invoke the GATT dispute resolution mechanism because the United States will soon lose its ability to utilize its single country veto power to prevent the adoption of GATT panel reports.\(^{10}\)

I. BACKGROUND: ORIGINS OF THE MINIVAN DISPUTE

A. THE "CHICKEN TAX" TARIFF

The ongoing dispute between the United States and Japan over the

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9. Marubeni Am. Corp. v. United States, 35 F.3d 530 (Fed. Cir. 1994) (holding that the Court of International Trade had "properly classified" the two-door Nissan Pathfinder "as vehicles principally designed for the transport of persons" under the Harmonized Tariff Schedules of the United States).

10. See President's Uruguay Round Submission, supra note 7, at 2163 (asserting that the new dispute settlement process significantly improves the dispute resolution process because disputing states must now accept panel reports unless a consensus develops to reject the panel report). In addition, the Dispute Settlement Understanding requires strict time limits for countries to bring their existing laws into conformity with GATT panel recommendations or rulings. \textit{Id.} Disputing parties can complete the overall dispute settlement process within a sixteen month period. \textit{Id.} Under the new GATT agreement, a decision by the United States to ignore a GATT panel report will not only leave the United States in violation of its international obligations but could lead to retaliation by the moving party. \textit{Id.} at 2163-64; see also Richard H. Steinberg, \textit{The Uruguay Round: A Legal Analysis of the Final Act}, at 63-64 (1994) (discussing the implementation of stronger dispute settlement resolution procedures at the conclusion of the Uruguay Round including: integrated dispute settlement procedures, the potential for cross-retaliation as a result of a favorable panel determination, more timely review for hearing and resolving disputes, and automatic adoption procedures for GATT panel reports unless a consensus develops against their adoption).
reclassification of minivans and sport utility vehicles has its origins in one of the most unlikely products. In 1963, the Federal Republic of Germany announced that its domestic poultry industry needed protection from imported poultry, primarily from the United States, and tripled tariffs on imported poultry.

In the Fall of 1963, the Johnson Administration retaliated by raising the tariff on imported trucks, brandy, dextrine, and potato starch to 25%. The original purpose of this tariff was to retaliate against the German government for increasing the duty on frozen chickens by making it more costly to sell trucks in the United States, thereby reducing German truck exports to the United States. Although the United States government repealed the tariff on such items as brandy and potato starch, the 25% duty on trucks remains in force to this day.

Even though the United States achieved its objectives, the American consumer and the German truck industry have incurred an economic cost. This "chicken tax" led Volkswagen to discontinue sales of its pickup truck line in the United States, thereby eliminating a large segment of imported German trucks from the United States market.

11. Sands, supra note 2, at Cl.
12. Id.
13. Proclamation No. 3564, 3 C.F.R. 318 (1959-63). Paragraph (2) of this proclamation amended the Tariff Schedules of the United States by inserting the following:

<table>
<thead>
<tr>
<th>Item</th>
<th>Article</th>
<th>Rate of Duty</th>
</tr>
</thead>
<tbody>
<tr>
<td>945. 13</td>
<td>Potato starch (provided for in item 132.50)</td>
<td>2.5 cents per lb.</td>
</tr>
<tr>
<td>945. 16</td>
<td>Brandy, valued over $9.00 per gallon (provided for in items 168.20 and 168.22)</td>
<td>$5 per gal.</td>
</tr>
<tr>
<td>945. 49</td>
<td>Dextrine and soluble or chemically treated starches (provided for in item 493.30)</td>
<td>3 cents per lb.</td>
</tr>
<tr>
<td>945. 69</td>
<td>Automobile trucks valued at $1,000 or more (provided for in item 692.05)</td>
<td>25% ad val.</td>
</tr>
</tbody>
</table>

Id. at 319.

15. See Sands, supra note 2, at Cl (stating that the 25% "chicken tax" tariff on light trucks continues to remain in force and now applies to certain Japanese vehicles, such as minivans, imported into the United States).
17. Gwenell Bass, Multipurpose Vehicles—Are they Cars or Trucks?, CONGRES-
In 1980, the United States "applied" the "chicken tax" tariff to imported Japanese trucks and cab chassis, which then became subject to a 25% tariff rate. In 1984, the Japanese automobile industry challenged the United States classification of lightweight trucks and cab chassis as finished trucks because the new classification significantly increased the tariffs on Japanese imported lightweight trucks and cab chassis. The Court of International Trade upheld the cab chassis classification and the 25% tariff and the Court of Appeals for the Second Circuit affirmed the decision. Once again, the cost to consumers was dramatic: over the next three years, this tariff led to more than a 23% increase in imported truck prices while the price of American-made compact trucks increased by 29%. Ironically, the Japanese auto industry remains the principal target of this tariff despite the chicken tariff's rather limited purpose and even though Japan imports more United States poultry products than any other country.

**B. HISTORY OF MINIVAN RECLASSIFICATION**

In January of 1989, the United States Customs Service (Customs Service) reclassified imported minivans and sport utility vehicles from "passenger vehicles," which carry a 2.5% tariff, to "trucks," which carry a 25% tariff. The Customs Service based its decision to reclassify minivans and sport utility vehicles at the 25% rate on its belief that multi-purpose vehicles such as minivans and sport utility vehicles are designed principally as trucks and not as passenger vehicles. This de-
cision to reclassify multi-purpose vehicles from passenger vehicles to trucks removed what many observers in the domestic automobile industry believed to be an unfair advantage to the Japanese automobile industry. Automotive industry analysts have estimated that this ruling could provide hundreds of millions of dollars in additional tariff revenue to the United States Treasury.

During 1989, however, Treasury Department Secretary Nicholas Brady, under "enormous pressure" from the domestic and international automobile industry, reversed the Customs Service's reclassification decision. The Treasury Department based its determination primarily on the fact that all sport utility vehicles with four doors and rear seats should be classified as cars because they are designed to transport people rather than goods. Recently, President Clinton has criticized the

car manufacturers report sales of these vehicles as trucks" and not as passenger vehicles. Id. When reporting its volume of exports to the United States, the Japanese government counts multi-purpose vehicles as trucks and not as passenger vehicles. Id.

25. See Memorandum from the American Automobile Manufacturers Association on the Consistent Application of Regulations and Standards to Multi-Purpose Vehicles (June 1993) (on file with author) (arguing for the consistent and fair application of United States laws and regulations with strong consideration for the national interest). The United States automobile industry asserts that foreign lobbyists are manipulating United States tariff schedules to enable the importation of sport utility vehicles and minivans at one tenth the tariff rate. Id.; see also Kildee & Shuster, supra note 24, at 13A (asserting that the Customs Service's classification of multi-purpose vehicles as passenger vehicles at the 2.5% tariff rate rather than as trucks at the 25% has created an unfair loophole that has allowed Japanese manufacturers to avoid the payment of over one billion dollars in duties).

26. Bass, supra note 17, at 4; see Geoff Sundstrom, Vans, Utilities Socked With a 25% Tariff, AUTOMOTIVE NEWS, Jan. 9, 1989, at 1 (stating that industry statistics reveal that the Customs Service's reclassification ruling would cover approximately 250,000 vehicles annually, translating into hundreds of millions of dollars in tariff revenue).

27. Kildee & Shuster, supra note 24, at 13A; see Naftali Bendavid, Marubeni America Corp. v. United States, LEGAL TIMES, May 24, 1993, at 17 (reporting pressure by the domestic automobile industry on the United States Treasury Department to reverse the reclassification decision); see generally Paul Magnuson, Look Who's Lobbying for Japan Inc., BUSINESS WEEK, Oct. 8, 1990, at 14 (discussing the revolving door for former government officials who lobby on behalf of foreign businesses and Japan's great success at utilizing American lobbyists to achieve their objectives).

28. Warren Brown, Where There's a Wheel, There's a Way to Define; A Lot Rides on How Vehicles Are Classed, WASH. POST, May 19, 1993, at Fl. The Treasury Department did uphold, however, the Customs Service's ruling classifying the two door sport utility vehicles as trucks and therefore subject to a 25% tariff. Id. The Court of International Trade in Marubeni America Corp. v. United States, 821 F.
Treasury Department's 1989 reversal of the Customs Service reclassification decision, setting the stage for a possible showdown between the Clinton Administration, the United States automobile industry, and the Japanese automobile industry over the proper classification method for multi-purpose vehicles and sport utility vehicles.

C. HISTORY OF MINIVAN DUMPING

While dumping has existed in international trade for over four hundred years, governments have only recently restricted its practice. In the United States, a dumping investigation begins when the government receives a petition from a domestic industry alleging that imports are being sold at unfair prices in the United States.

In May 1991, General Motors Corporation, Ford Motor Company, and Chrysler Corporation filed an anti-dumping petition with the Department of Commerce and the ITC, alleging that imported Japanese minivans injured the United States automobile industry. This petition marked

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29. See Sands, supra note 2, at C1 (noting President Clinton's statement calling for the reclassification of multi-purpose vehicles in order to eliminate a $300 million a year windfall to the Japanese); see also Rechtin, supra note 4, at 37 (reporting President Clinton's statement that the 1989 Treasury Department reclassification decision was a "$300 million freebie" to the Japanese automobile industry); cf. Gates, supra note 5, at 1 (noting that the 1,000% tariff differential amounts to a $500 million a year gift to the Japanese).

30. Sands, supra note 2, at C1.

31. Joseph E. Pattison, Antidumping and Countervailing Duty Laws § 1.02[1] (1994). Dumping is a form of price discrimination and is defined as the practice of "selling a commodity from one country to a different country under similar conditions of sale for less than its price in its own country." Id. A commodity's "fair market value" is generally considered to be "the price of the commodity in the country in which it is produced." Id. at n.2.

32. J. Michael Finger & Tracy Murray, Antidumping and Countervailing Duty Enforcement in the United States 242 in Antidumping: How It Works and Who Gets Hurt (J. Michael Finger ed., 1993). The International Trade Commission and the Commerce Department both receive the petition and must determine within twenty days whether the allegation is reasonably supported by available information. Id. The International Trade Commission then has 45 days to determine whether there is sufficient evidence that a United States industry has been materially injured or threatened with material injury. Id. A negative determination made by the International Trade Commission will end the case. Id.

33. See General Motors Corp. v. United States, 827 F. Supp. 774, 778 (Ct. Int'l Trade 1993) (asserting that the American minivan market has been injured or will
the first anti-dumping action brought by the United States automobile makers against the Japanese automobile industry. On July 15, 1991, the ITC notified the Department of Commerce that sufficient evidence existed to warrant a further investigation into the allegation of material injury to the United States minivan industry. On January 2, 1992, the Department of Commerce issued a preliminary determination, finding that Japanese minivans manufactured by Toyota Motor Corporation and Mazda Motor Corporation were sold in the United States at less than fair value. On May 26, 1992, the Department of Commerce issued its final determination that Toyota and Mazda sold minivans in the United States at less than fair value.

As a result of the Department of Commerce's affirmative determination, the ITC began its final investigation. On June 24, 1992, the ITC

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face injury if Japanese minivans are sold below their actual cost of production or fair market value).

34. Stuart Auerbach & Warren Brown, Japan 'Dumping' Minivans, U.S. Rules, WASH. POST, May 20, 1992, at A1. American companies have filed a number of dumping complaints against foreign manufacturers in other highly competitive areas such as semiconductors, steel, chemicals and cement. Id.; see Big Three U.S. Automakers File Petition Against Japanese Manufacturers of Minivans, Int'l Trade Rep. (BNA), June 5, 1991, at xxx (noting the "unprecedented move" by the Big Three in filing this dumping petition).

35. New Minivans From Japan, 57 Fed. Reg. 43 (Dep't Comm. 1992) (prelim. LTFV determination) [hereinafter Preliminary Determination].

36. Id.; see 19 C.F.R. § 353.42 (1994) (discussing the relationship between "fair value" and "foreign market value"); see also 19 C.F.R. § 353.46(a)(1) (1994) (defining "foreign market value" as "the price at which such or similar merchandise is sold or offered for sale in the principal markets of the home market country, in the usual commercial quantities and in the ordinary course of trade for home consumption"). Put simply, when the United States price for the merchandise is less than the importer's foreign market value, there is a sale at less than fair value. This underpricing tactic can also be used by a company to gain a greater share of a foreign market while using its domestic market or even a third market to make up the difference in lost revenues.

37. New Minivans From Japan, 57 Fed. Reg. 21,937 (Dep't Comm. 1992) (final LTFV determination) [hereinafter Final Determination]. Of particular importance in reaching its affirmative dumping decision, the Department of Commerce took the uncommon practice of examining the "keiretsu system" or the close relationship between the automaker and its suppliers. Id. at 21,949. Accordingly, the Department of Commerce investigators found a "systematic pattern of lower prices for parts going into export models compared to the prices charged for parts in vehicles which are to be sold in Japan." Auerbach & Brown, supra note 34, at A1. This practice enabled the Japanese automobile manufacturers to sell their minivans at "below their fair value in the United States." Id.
reached a negative determination pursuant to section 735(b) of the Tariff Act of 1930\textsuperscript{38} and found that the United States automobile industry was not materially injured by imports of Japanese minivans.\textsuperscript{39} On July 12, 1993, General Motors, Ford, and Chrysler unsuccessfully appealed the ITC’s negative determination to the United States Court of International Trade.\textsuperscript{40} Part III of this Comment addresses the determinations of the Commerce Department and the ITC in greater detail.

II. THE MULTI-PURPOSE VEHICLE, SPORT UTILITY VEHICLE, AND MINIVAN RECLASSIFICATION ISSUE

A. THE CUSTOMS SERVICE’S DETERMINATION

On November 21, 1988, Suzuki Motor Corporation requested a Customs Service determination whether certain Suzuki vehicles, principally the Suzuki Samurai, are considered “motor vehicles for the transport of goods” within the meaning of heading 8704 of the Harmonized Tariff Schedule of the United States (HTSUS) or “motor vehicles principally designed for the transport of persons” under HTSUS heading 8703.\textsuperscript{41} There are two relevant HTSUS headings for motor vehicles: HTSUS heading 8703, which primarily addresses vehicles for the transport of persons, and HTSUS heading 8704, which covers non-passenger or goods carrying vehicles.\textsuperscript{42} The classification of these vehicles was important because if multi-purpose vehicles, such as the Suzuki Samurai,

\textsuperscript{38} 19 U.S.C. § 1673d(b) (1988).

\textsuperscript{39} Minivans From Japan, USITC Pub. 2529, Inv. No. 731-TA-522 (final determination) (July 1992), at 1.

\textsuperscript{40} General Motors, 827 F. Supp. at 774, 788 (affirming the ITC’s negative determination of material injury primarily because the elements of material injury were not compelling enough to warrant a finding of material injury and were insufficient to overturn the rather considerable evidence on which the ITC relied).

\textsuperscript{41} Durant Letter, supra note 23. Counsel for Suzuki requested that the Samurai be classified as a “motor vehicle for the transport of goods” under HTSUS heading 8704 if it was imported without rear seats or other accessories in its rear area. \textit{Id.} at 3. If, however, the Samurai was imported with rear seats and other options in the rear seat area that impede the loading, transport or unloading of goods, it should be classified under HTSUS heading 8703 as a “motor vehicle principally designed for the transport of persons.” \textit{Id.} at 4.

\textsuperscript{42} \textit{Id.} at 4. The General Rules of Interpretation control HTSUS tariff classification. \textit{Id.} HTSUS heading 8703 was designed to address “[m]otor cars and other motor vehicles principally designed for the transport of persons . . . “ while HTSUS heading 8704 was constructed to address “[m]otor vehicles for the transport of goods . . . .” \textit{Id.}
were classified as trucks under HTSUS heading 8704, then they would not be considered part of the import quotas under the terms of the United States - Japanese Voluntary Restraint Agreements (VRA), negotiated during the 1980s. Consequently, Japanese automobile manufacturers are free to remove these vehicles from their import passenger car quotas and increase their overall number of vehicle exports to the United States without altering their established ratios for automobiles under the VRA. According to the Customs Service's interpretation of the rules, a vehicle that is designed both for the transport of persons and goods is not subject to classification under heading 8703 because it fails the "principally designed for the transport of persons" requirement under HTSUS heading 8703.

43. Customs classifies import utility vehicles as trucks; Resists pressure from D.C., AUTOWEEK, Apr. 11, 1988, at 9.
44. Car-truck border dispute; Customs reclassifies multi-purpose vehicles, AUTOWEEK, Jan. 16, 1989, at 5.
45. Durant Letter, supra note 23, at 4. The Customs Service determined that Suzuki 4 by 4 vehicles are designed on a truck chassis, capable of off-road use, and have a body style designed for the transport of goods. Id. at 4-5. To support this position, the Customs Service offered several important factors such as: a body style that allows for "easy loading, transportation and unloading of goods," a swinging rear door, a flat floor, a rear loading deck, and a high roof. Id. at 5. The primary rationale for the Customs Service's ruling was the Samurai's "readily accessible and usable cargo space" and "chassis and suspension that permits a cargo payload which is approximately 20% of the gross vehicle weight rating." Id. The usual percentage of payload for small pickup trucks is 15% to 25% of gross vehicle weight. Id. Consequently, the Customs Service found that the Suzuki Samurai should be classified as a "truck" under heading 8704. Id.

The Customs Service also stated that the vehicle's design and accessories "create a presumption that the vehicle has been principally designed for an intended purpose"—the transport of goods under HTSUS heading 8704. Id. at 5. Secondary design features, however, which allow for other vehicle uses should be used only as evidence that the vehicle is a multi-purpose vehicle. Id. As long as the change or design feature does not "significantly alter" the vehicle's basic design, a vehicle such as the Suzuki Samurai or such similar vehicle remains equally designed for the transport of goods and persons. Id. If the vehicle fails the "principally designed for the transport of persons" test under HTSUS heading 8703, it must remain classified as a truck subject to a 25% duty. Id. at 6. While the Customs Service recognized that a significant alteration in the body style could require a different ruling, it explicitly stated that including such items as carpeting, removable or folding rear seats, and interior trim packages, does not appreciably affect the vehicle's primary design as a vehicle which transports goods and not people. Id. at 5. According to the Customs Service, an example of a "material change" in body style is one that limits cargo loading and unloading. Id.
Furthermore, according to the Customs Service, a multi-purpose or dual-purpose vehicle should not be considered a passenger vehicle simply because it has both front and rear seating. Based upon this analysis, the Customs Service concluded that the Samurai will be classified under HTSUS heading 8704 as a non-passenger vehicle and therefore "dutiable at twenty five percent ad valorem."

B. THE TREASURY DEPARTMENT'S DETERMINATION

On March 1, 1989, the Treasury Department issued a clarification of the Customs Service's January 4, 1989 ruling. While it affirmed the Customs Service's conclusion, the Treasury Department stated that the ruling and the criteria issued to Customs Service officers were inconsistent with the interpretation of the applicable HTSUS headings. The Treasury Department clarified the Customs Service's criteria given to its field offices and then analyzed the interpretation of the phrase "including station wagons" under HTSUS heading 8703.

46. Durant Letter, supra note 23, at 5 (discussing that station wagons are not dual purpose vehicles because they were designed primarily for transporting persons and secondarily for transporting goods).

47. Id. at 6. The principal factors for this classification under HTSUS heading 8704 included the chassis and suspension, body style, payload capacity, a 26 1/2 inch seating reference point, and the degree to which rear seating affects cargo capacity. Id. Of particular importance to Customs was the Samurai's basic design which was suitable both to the transport of persons and goods, and that the design for the transport of goods appeared "at least equal to" the design for the transport of passengers. Id. As a result, the Customs Service could classify the Samurai under HTSUS heading 8703 because it fails to satisfy the "'principally designed' for the transport of persons" requirement. Id. at 4.


49. Id. at 1.

50. Id. at 2-3. This process was important because, in theory, any of these dual-purpose vehicles—including multi-purpose vehicles and sport utility vehicles could be classified as falling within the meaning of the term "including station wagons." Id. at 2. The Customs Service offered a number of interpretations: 1) reading the phrase "including station wagons" to mean an exception to the "principally designed" rule—including vehicles in the same class as station wagons even if they are not chiefly designed to carry people; 2) interpreting the phrase to mean that station wagons are not precluded from an 8703 classification simply because they are capable of carrying cargo; 3) reading the language to establish that dual purpose vehicles are "deemed to
explanatory notes as well as the purpose of the Act, the Treasury Department concluded that the correct reading of the "including station wagons" language should not be rigidly applied as an exception to, or an expansion of, the requirement that all products are classifiable under HTSUS heading 8703 if they are primarily designed for the transport of people. In other words, multi-purpose vehicles and sport utility vehicles are not precluded from classification under HTSUS heading 8703 as "motor vehicles principally designed for the transport of persons" simply because their overall design allows them to carry both cargo and transport people.

The Treasury Department then analyzed the criteria for the classification of sport utility vehicles and focused on the distinction between two types of design features: structural design features and auxiliary design features. The Treasury Department cautioned that neither structural design features nor auxiliary design features should be used exclusively to ascertain the vehicle's primarily design purpose. The Treasury Department did identify, however, one important characteristic: rear side doors with windows, as convincing evidence that passenger transport, rather than cargo transport, was a primary design criterion for certain classes of multi-purpose vehicles. Consequently, the Treasury Department concluded that four-door sport utility vehicles with rear side doors and rear windows should be classified as motor vehicles "principally designed for the transport of persons" under HTSUS heading 8703.

The Treasury Department did not extend the same treatment to two-door sport utility vehicles, finding that because two-door sport utility vehicles do not come with the a rear door and window design and be members of the class of vehicles that are principally designed for the transport of persons; 4) interpreting the word "including" when followed by specific examples to restrict its application only to those examples actually listed. Id. at 2-3.

51. Id. at 6.
52. Id. at 7.
53. Id. at 7. Structural design features include "body, chassis, and suspension design" and are considered important because they have an impact on rear seating access. Id. Auxiliary design features include seating as well as other vehicle options. Id.
54. Id. at 8. While this analysis also applies to vehicles with integral design characteristics designed for the transport of cargo, neither of these characteristics should be exclusively relied upon to make a classification under either HTSUS heading 8703 or 8704. Id.
55. Id. at 8. This type of body design is also seen commonly in many four-door sedans and station wagons. Id.
56. Id. at 9.
cause they are primarily built from truck designs, two-door sport utility vehicles do not have the same structural design features as four-door sport utility vehicles.\textsuperscript{57} Essentially, the Treasury Department made a distinction between two- and four-door vehicles primarily on the basis of the vehicle's number of doors and the permanence of its rear seating capability.\textsuperscript{58}

In addressing minivans, the Treasury Department stated the importance of both integral and auxiliary design features in determining whether a minivan is principally designed to carry cargo or persons.\textsuperscript{59} Since the minivan's integral design features can be used for both cargo and passenger-carrying, auxiliary design features are critical in determining a minivan's tariff classification.\textsuperscript{60} In conclusion, the Treasury Department cited three auxiliary design features which are determinative in the tariff

\textsuperscript{57} Id. at 9. While two-door sport utility vehicles have passenger compatible auxiliary design features such as a rear seat seating area, the Treasury Department concluded that foldable or removable rear seating is not a structural feature that significantly "alters the purpose for which the vehicle [was] principally designed." Id. In fact, either removable or foldable seats coupled with a flat rear space enables one to use the vehicle's interior for cargo carrying purposes. Id. Without a major cargo carrying alteration to the vehicle, the Treasury Department declined to find that removable or folding rear seats and other "rear-area passenger amenities" demonstrated conclusively that the vehicle was principally designed to transport persons; therefore, two-door sport utility vehicles with these features should be classified under HTSUS heading 8704 as vehicles "principally designed for the transport of goods" and thus subject to a much larger 25\% tariff rate. Id.\textsuperscript{58}

\textsuperscript{58} Id. at 9; see infra notes 64-74 and accompanying text (reviewing the appeal of the Treasury Department's conclusion regarding two-door sport utility vehicles in the Court of International Trade's \textit{Marubeni Am. Corp. v. United States} decision); see also supra note 45 (discussing the differences between two-door and four-door multi-purpose vehicles for tariff classification purposes).\textsuperscript{59}

\textsuperscript{59} McPherson & Martoche Memorandum, supra note 48, at 10-12. The Treasury Department dismissed the seating reference point as immaterial for tariff classification purposes. Id. at 10-11. The seating reference point is the measurement or relationship between the seat's placement and the comparative difficulty or ease with which the passenger accesses it. Id. at 11. The Treasury Department also stated that while the presence of a sliding door on a van with back seats could be construed to indicate a non-passenger based design, this feature not only aids in the unloading of cargo, it also allows rear passengers to enter and exit the vehicle more easily. Id. at 11. In fact, the Treasury Department found the placement of windows on the vehicle's side panels and rear side door "consistent with the intention to design a passenger vehicle" is insufficient alone to warrant a classification under heading 8703 of the HTSUS. Id. at 11-12. Failure to place windows in these areas is, however, a significant indicator that the vehicle is not primarily designed to transport persons. Id. at 12.\textsuperscript{60}

\textsuperscript{60} Id.
classification of a minivan.\textsuperscript{61}

C. THE CUSTOMS SERVICE'S NEW CLASSIFICATION INSTRUCTIONS

Pursuant to the May 4, 1989 Treasury Department guidelines, the Customs Service revoked its January 4, 1989 decision and issued a new set of instructions for the classification of multi-purpose vehicles.\textsuperscript{62} Most significantly, the Customs Service abandoned its articulation of a presumption that a vehicle is principally designed for an intended purpose once its basic design and features are established.\textsuperscript{63} The Customs Service also removed from its instructions the position that a design equally suited for the transport of goods and persons precludes a vehicle's classification under HTSUS heading 8703. The new ruling eliminated the language that a multi-purpose or dual purpose vehicle is not "principally designed for the transport of persons" solely because of its front and rear seating capacity.\textsuperscript{65} Instead, the new ruling focused almost exclusively on the vehicle's structural design features rather than on its auxiliary design features or options.\textsuperscript{66} In reaching this decision,

\textsuperscript{61} Id. The Treasury Department offered the following conclusion with regard to the meaningful role auxiliary design features play in the minivan's tariff classification:

When a rear side passenger-access door, windows on the rear side passenger access door and on the side panels of both sides of the vehicle, and rear seating for two or more persons [3] are all provided, the vehicle is principally designed for the transport of persons, even though it also has the capability of carrying a significant volume of cargo. The appropriate classification is therefore under heading 8703, HTSUS.

\textsuperscript{62} Id.

\textsuperscript{63} Letter from John Durant, Director, United States Customs Service Commercial Rulings Division, to John B. Rehm, Dorsey & Whitney (May 4, 1989) (on file with the United States Customs Service Office of Regulations and Rulings).

\textsuperscript{64} See supra note 45 and accompanying text (discussing the Customs Service's conclusion that a vehicle's basic design and features "create a presumption that the vehicle has been principally designed for an intended purpose"—the transport of goods under HTSUS heading 8704).

\textsuperscript{65} See supra notes 45-47 and accompanying text (stating that the Samurai's basic design is suitable both for the transport of persons and goods and that its overall design for transporting goods appears at least equal to the design for transporting passengers).

\textsuperscript{66} See McPherson & Martoche Memorandum, supra note 48, at 9 (stating that front and rear seating on a multi-purpose or dual-purpose vehicle are not sufficient by themselves for a vehicle to be considered "principally designed for the transport of persons").

\textsuperscript{66} Id. at 5. In fact, in its revised determination, the Customs Service now stated that auxiliary features such as seating and trim packages "are not a significant alter-
the Customs Service apparently decided that basing its analysis on structural design rather than auxiliary features was a more sound and convincing legal proposition.

In a subsequent May 4, 1989 memorandum to its Regional Commissioners, District Directors, Area Directors, and Port Directors, the Commissioner of Customs issued instructions regarding the classification of multi-purpose vehicles and small vans. While the conclusion is the same as the January 4, 1989 ruling, the rationale is somewhat different. Of particular importance is the greater attention paid to the differentiation between two-door and four-door sport utility vehicles. While reaffirming the distinction between a body structure that facilitates the transportation of cargo over persons, the instructions promulgated explicitly drew a distinction between two-door and four-door models.

67. Memorandum from William Von Raab, Commissioner of Customs, United States Customs Service, to all Regional Commissioners, District Directors, Area Directors, and Port Directors, United States Customs Service (May 4, 1989) [hereinafter Von Raab Memorandum] (on file with the United States Customs Service Office of Regulations and Rulings).

68. Id. at 1-2.

69. Id. The Commissioner of Customs issued the following instructions:

(i) Sport-Utility Vehicles are designed to perform multiple functions. They typically have a body and chassis design stronger than that of ordinary passenger cars. They also have a boxy body structure... which facilitate the loading and unloading of cargo. These features suit the vehicles for the transportation of goods.

(ii) However, some sport utility vehicles have structural modifications that are evidence of a design in which transportation of persons is to be a primary purpose. For this reason a distinction is made for classification purposes between two-door and four-door models. On four-door models the rear doors are typically hinged and do not fully open... which is a strong indication that passenger transport, rather than cargo transport, was a principal design criterion for the vehicle.

(iii) Therefore, four-door sport-utility vehicles having the features described above generally will be classified [under]... heading 8703, when imported with hinged rear side doors and equipped with windows.

(iv) It is also typical for two-door sport-utility vehicles to have the features described in paragraph A(i). However, unlike four-door vehicles, the two door vehicles do not have other structural features that evidence transportation of persons as a design priority. Therefore, they generally will be classified [under]... heading 8704, even when imported with folding or removable rear seats.

Id. at 1-2 (emphasis added).
The new instructions are quite favorable toward four-door sport utility vehicles and less favorable to the two-door models. The Customs Service probably intended to prevent importers from merely adding removable or foldable rear seating in order to enter the United States under HTSUS heading 8703, dutiable at 2.5%, rather than under HTSUS heading 8704, dutiable at 25%. In fact, the Commissioner gave specific instructions that two-door sport utility vehicles, like the Nissan Pathfinder, should enter the United States as trucks under HTSUS heading 8704 despite their importation with rear seats.

Finally, pursuant to the March 4, 1989 Treasury Department memorandum, the Commissioner of Customs issued written instructions to his Regional Commissioners, District Directors, Area Directors, and Port Directors regarding minivan classification. The Commissioner set forth certain features which, if met, would allow minivans to be classified as passenger vehicles under HTSUS heading 8703 and therefore subject only to one-tenth the tariff rate.

D. THE DECISION OF THE COURT OF INTERNATIONAL TRADE

An appeal was taken before the Court of International Trade. As previously discussed, the principal issue was whether 1989 and 1990 model year two-door Nissan Pathfinders should be classified as "motor vehicles for the transport of goods" under HTSUS heading 8704 or as "motor vehicles principally designed for the transport of persons" under HTSUS heading 8703. After a detailed examination of all the issues,

70. *Id.* at 2-3.
71. *Id.* at 3; *see infra* notes 74-94 and accompanying text (reviewing the successful appeal of the Treasury Department's classification of two-door sport utility vehicles as trucks dutiable at a 25% tariff rate under HTSUS heading 8704 before the Court of International Trade in *Maruben America Corp. v. United States*).
73. *Id.* The Commissioner's instructions stated:
   (i) Vans will be classified in heading 8703 when imported with all of the following features:
   (1) Windows in the rear side panels
   (2) Rear seating for two or more persons
   (3) Three or more side doors, one of which offers access to the rear of the compartment
   (ii) Vans imported without all three of these features will be classified under heading 8704 [as motor vehicles for the transport of goods].

*Id.*
75. *Id.* at 1522. The vehicle in question, the Nissan Pathfinder, is a two-door
the court reversed the Customs Service's 1989 classification of two-door sport-utility vehicles primarily because it was convinced that the Pathfinder's overall structural and non-structural design characteristics and its available features more closely resembled a car's design rather than a truck's design. The court openly acknowledged the government's difficult task of justifying the Pathfinder's classification under HTSUS heading 8704. First, the government tried to convince the court that the Pathfinder fits the common industry meaning of a truck rather than a passenger vehicle and also attempted to demonstrate the similarities between the Pathfinder and the Nissan Hardbody pick-up truck. The court found that while these vehicles have certain structural components in common, the Pathfinder's major design modifications significantly differentiated it from the Hardbody's pick-up truck design.

The court cited passenger ride and the overall body design as the most significant differences and noted that in designing the Pathfinder, Nissan engineers went to great lengths and expense to improve the passenger ride. The court also endeavored to understand the difference

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76. Id. at 1529.
77. Id. at 1523. In fact, Judge Restani explained from the outset of the case that "[t]he sample [Nissan Pathfinder] virtually shouts to the consumer, 'I am a car, not a truck.'" Id.
78. Id. at 1523-24.
79. Marubeni Am. Corp., 821 F. Supp. at 1524-25. The Hardbody is Nissan Motor Corporation's compact pick-up truck, which is classified under HTSUS heading 8704 as a motor vehicle for the transport of goods. Id. at 1524. While the Hardbody has certain features in the passenger compartment which contribute to the feeling of a passenger car, "it is accepted as a 'truck' by the foreign and domestic automobile industry largely because it has an "open [rear] cargo box that is characteristic of a pick-up truck." Id.
80. Id. at 1524-26. Nissan built the Pathfinder for the purpose of securing some of the fast emerging market for compact multi-purpose vehicles, which can carry both passengers and cargo. Id. at 1524. With this in mind, the Nissan's principal design engineer testified that primarily for economic reasons, Nissan wanted to borrow as much as possible from the Hardbody design. Id. For example, Nissan engineers used the Hardbody's costly frame side rails on the Pathfinder. Id. There were, however, a number of differences including a shorter rear bumper, a different frame/bumper configuration, a new spare tire and gas tank position, and a larger standard engine. Id. at 1524-25.
81. Id. at 1525 (discussing the development of an altogether new rear suspension
in suspension by test driving the two vehicles. Most importantly, the court found that the Pathfinder's station wagon-like body allows for sufficient back seat space capable of carrying average sized passengers with a surprising amount of comfort. The Pathfinder's ability to transport comfortably adult sized passengers in its rear seating area without any modification was crucial to the court's overall determination that its design more closely resembled a car than a truck.

In its second argument, the government sought to demonstrate that the Pathfinder's strength and weight were principally designed for off-road cargo and not merely for general off-road use. The court rejected this argument largely because the Pathfinder had both the physical capability and the standard car-like passenger amenities to hold adult passengers system that was developed exclusively for the Pathfinder). According to the court, the Pathfinder received a five link coil suspension, instead of a standard truck leaf spring suspension, which has a different ride depending on the size of the cargo load. Id.

82. Id. During the test drive, Judge Restani found a noticeable difference in ride between the Pathfinder and the Hardbody primarily because the Hardbody's ride was "bumpier" and was, therefore, more "trucklike" in both ride and in road feel. Id.

83. Id.

84. Marubeni Am. Corp., 821 F. Supp. at 1525-26. In turning its attention to the rear seat area of the Pathfinder, the court found the rear seats not only well designed, but both "comfortable" and "reclining." Id. at 1525. Equally important, the court found that while the Pathfinder's rear seats fold down to form a flat cargo area, they are not removable. Id. at 1526. While this analysis appears to contradict the Treasury Department's recently issued memorandum regarding the significance of design criteria for sport utility vehicle classification, the court relied on already mentioned structural design features as well as other auxiliary design features such as arm rests, ashtrays, handholds, operable windows, footwells, rear seat stereo outlets, seat belts, and child seat tie down hooks as evidence of the significant differences between the Pathfinder and the Hardbody's rear seating and cargo areas. Id. at 1525-26. Moreover, the court explained that while the Pathfinder and the Hardbody do share a number of structural features, they were designed independently, and they were "based on totally different concepts." Id. at 1526. The court also found a notable price difference between the Hardbody and the Pathfinder and also found a significant reduction in cargo capacity, with the Pathfinder's cargo capacity more comparable to a midsize station wagon due to its rear seat configuration. Id.

85. Id. at 1527. The government contended that because of its lack of rear seat head room, the "strength and weight of the Pathfinder must be for off-road hauling of cargo, not people." Id. To support this argument, the government asserted that because of its shorter rear seat head room, an above-average sized person would have a difficult time keeping his head from bumping into the top of the Pathfinder's roof when driving over considerable off road terrain. Id. According to the government, this lack of rear seat comfort during off-road use should be regarded as evidence of a vehicle design meant primarily for cargo rather than passenger transport. Id.
comfortably in the rear seating area. Furthermore, the government cited evidence of the Pathfinder’s “low off-road usage” and sought to prove that the Pathfinder’s “passenger amenities” were similar to those offered by several other compact pick-up trucks in the marketplace. The court ultimately dismissed these arguments because while such evidence may be probative of the emerging similarities between compact pick-up trucks and passenger vehicles, it failed to see how low off-road usage and similar amenities with other brand name pick-up trucks had any bearing whatsoever on the actual classification of the Pathfinder.

Finally, the court addressed the government’s most compelling argument, that Nissan’s corporate documents and advertising materials actually refer to the Pathfinder as both a “truck” and a “car.” While recognizing that some sport utility vehicles have truck-like frames, are often assembled in truck divisions, and are often included with trucks in advertising, the court found that industry terminology and regulatory schemes that are used to classify sport utility vehicles as a subcategory of trucks are not controlling factors for tariff classification purposes.

86. Id. The court also provided other reasons why the Pathfinder’s rear seat was more suitable for hauling people than for cargo. First, the Pathfinder and other sport utility vehicles with rear seats contain seat belts for rear passenger protection. Id. at 1527. Second, the rear seats recline, giving taller people the option to increase their rear head room space. Id. Third, the court surmised that a taller person would probably want to sit in the front seat if the vehicle was destined to go over rough terrain.

87. Id. In response to this contention, the court referred to Maritz market studies that indicated both “high occasional off-road usage” and “little frequent off-road use.” Id. The court concluded that it was an undisputed fact that the Pathfinder was “designed for the most stressful [off-road] use” and that it cannot be sold without this capability regardless of whether customers wish to utilize its more rugged design features.

88. Id. The Ford Ranger is a suitable example of a truck in the domestic marketplace which shares similar amenities and arguably superior ride characteristics with the Pathfinder.

89. Marubeni Am. Corp., 821 F. Supp. at 1527-28. The government’s attempt to show that the Pathfinder was marketed to appeal to the average truck consumer was similarly dismissed by the court because “cargo capacity” did not appear to be a high priority in the Pathfinder’s development and marketing. Id. at 1528. The court stated that the Pathfinder’s advertising and product development was geared more toward “family use, loading groceries and sports equipment and ‘go anywhere’ clan” in contrast to the truck industry’s emphasis on ruggedness and masculinity.

90. Id.

91. Id. at 1528-29. The court also explained that such a classification is not governed by the fact that certain design structures are more suitable for trucks.
Most importantly, the court concluded that there were both structural and non-structural design changes integrated into the Pathfinder's construction that were all adopted for the express purpose of carrying passengers—not cargo. As a result, the court classified the Pathfinder at one-tenth the tariff rate under HTSUS heading 8703 as a vehicle “principally designed for the transport of persons.”

What is difficult to determine is whether the court is trying to establish a numerical standard that attempts to balance a vehicle's passenger-like design and production qualities with its similarly calculated cargo-like qualities. What appears certain, however, is the decision's limiting effect on the ability of the Clinton Administration to increase the duty on multi-purpose vehicles from 2.5% to 25% by reclassifying them as trucks under HTSUS heading 8704.

E. THE APPEAL BEFORE THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The outcome of this case on appeal offers further evidence of the difficult task the Clinton Administration will face as it attempts to reclassify two-door and four-door multi-purpose vehicles under HTSUS heading 8704. On appeal before the Federal Circuit, the Government

92. Id. In fact, when asked about potential vehicle improvements, automotive engineers could articulate very few vehicle modifications that would serve to improve the Pathfinder's overall ability to comfortably accommodate passengers. Id.

93. Id. at 1529.

94. See Max Gates, Big 3 Seek Appeal of Pathfinder Ruling, AUTOMOTIVE NEWS, July 5, 1993, at 4 (stating that the recent Court of International Trade decision was a “major setback” both for the Big Three and the Clinton Administration in their renewed effort to reclassify two-door and four-door multi-purpose vehicles, sport utility vehicles and minivans at the higher 25% tariff rate); see also Jim Henry & Max Gates, Congress, imports prepare for battle over court's ruling on 25% tariff, AUTOMOTIVE NEWS, May 24, 1993, at 4 (noting that the decision by the Court of International Trade to reverse the classification of the two-door Nissan Pathfinder was viewed as “legal precedent” making it more difficult for President Clinton to reclassify these vehicles at the higher 25% rate). But see id. at 4 (reporting that the Court of International Trade's decision may have the opposite effect because it could lead to a renewed Congressional effort to overturn the court's decision).

95. See Jonathan M. Moses, Nissan Ruling May Hurt Effort By Big Three: Pathfinder Case Is Setback For U.S. Firms Seeking To Extend 25% Tariff, WALL ST. J., May 17, 1993, at A4 (stating that the Court of International Trade's reversal of the Treasury Department's decision to place a 25% tariff on the two-door Nissan Pathfinder was a serious setback for the United States automobile industry and poses a
attempted to demonstrate that the Court of International Trade applied "improper and inconsistent standards" by holding that the Nissan Pathfinder is designed primarily to transport persons rather than goods under the HTSUS.\textsuperscript{96} The government argued that the correct standard in determining a vehicle's principal design purpose should be its basic construction\textsuperscript{97} rather than both structural and auxiliary design features relied on by the Court of International Trade\textsuperscript{98} and by the Customs Service in its March 1, 1989 memorandum.\textsuperscript{99}

In contrast to the Court of International Trade's and the Customs Service's tariff interpretation, the government contended that the appropriate question to ask is whether the vehicle's construction "is uniquely for passenger transportation."\textsuperscript{100} The Court of Appeals disagreed with the government's interpretation, calling it a "constrictive interpretation" of the tariff's language,\textsuperscript{101} and found that both structural and auxiliary design features are necessary in reaching an accurate tariff classification determination.\textsuperscript{102} With no legally binding notes to the HTSUS,\textsuperscript{103} the Court of Appeals construed HTSUS heading 8703 and 8704 in accordance with "their common and popular meaning"\textsuperscript{104} and articulated its own statutory interpretation that a "vehicle's intended purpose of transporting persons [under HTSUS heading 8703] must outweigh an intended purpose of transporting goods [under HTSUS heading 8704]."\textsuperscript{105}

\textsuperscript{96} Marubeni America Corp. v. United States, 35 F.3d 530, 533-34 (Fed. Cir. 1994).
\textsuperscript{97} Id. at 534. The government stated that a vehicle's construction includes its "structure, body, components and layout." Id.
\textsuperscript{98} See supra notes 48-66 and accompanying text (discussing two-door multi-purpose vehicle classification and the important role of structural and auxiliary design features in their classification).
\textsuperscript{99} Id.; see McPherson and Martoche Memorandum, supra note 48, at 7-8 (outlining the criteria to be used for the classification of sport utility vehicles); see also supra notes 48-66 and accompanying text (discussing multi-purpose vehicle classification and the role of structural and auxiliary design features in their classification).
\textsuperscript{100} Marubeni Am. Corp., 35 F.3d at 534.
\textsuperscript{101} Id. at 534-35 (noting that there is no legislative, statutory, or administrative authority to support the government's position that structural design features should be exclusively used for determining a vehicle's proper tariff classification under the HTSUS).
\textsuperscript{102} Id. at 535.
\textsuperscript{103} Id. at 534.
\textsuperscript{104} Id. at 535.
\textsuperscript{105} Marubeni Am. Corp., 35 F.3d at 535.
After examining these structural and auxiliary design features, the Court of Appeals affirmed the Court of International Trade's reclassification of the two-door Nissan Pathfinder, finding "substantial structural changes" and "other design" and "auxiliary design" aspects to be strong indicators of passenger use rather than cargo use.106


A. THE COMMERCE DEPARTMENT PRELIMINARY AND FINAL LESS THAN FAIR VALUE DETERMINATIONS

On July 15, 1991, in response to written notification from the Department of Commerce, the ITC issued a preliminarily determination that there was a "reasonable indication of material injury" to the United States minivan industry.107 On January 2, 1992, the Department of Commerce issued a preliminary determination finding that Japanese minivans manufactured by Toyota Motor Corporation and Mazda Motor Corporation were sold in the United States at less than fair value.108 After identifying the investigation scope to include new minivans from Japan, the Department of Commerce identified seven characteristics in determining whether a vehicle can be classified as a minivan.109

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106. Id. at 536-38.
107. Preliminary Determination, supra note 35.
108. Id.
109. Id. at 44. The Department of Commerce defined new minivans as: an on-highway motor vehicle which generally has the following seven characteristics:
(1) a cargo capacity behind the front row of seats that is 100 cubic feet or greater and less than 200 cubic feet;
(2) a body structure, width, and seat configuration capable of providing full walk-through mobility from the front seat row to the third seat row, or at least partial walk through mobility from either, (a) the front seat row to the second seat row, or (b) the second seat row to the third seat row;
(3) a hood that is sloping and a short distance from the cowl to the front bumper relative to the overall length of the vehicle;
(4) a gross vehicle weight that is less than 6,000 pounds;
(5) a height that is between 62 and 75 inches;
(6) a single, box-like structure that envelopes both the space for the driver and front-seat passenger and the rear space (which has flat or nearly flat floors and is usable for carrying passengers and cargo); and
Department of Commerce then turned to define the appropriate period of investigation and decided to expand it from October 1, 1990 through May 1, 1991 for Mazda because it would more accurately reflect Mazda's seasonal pricing.

Regarding fair value comparisons, the Department of Commerce compared United States new minivan sales to comparable new minivan sales in Japan. In making this comparison, the Department of Commerce based the United States price on the exporter's sales price and

(7) a rear side passenger access door (or doors) and a rear door (or doors) that provide wide and level access to the rear area.

Id.

The Department of Commerce also declared that a vehicle need not meet all seven criteria for consideration as a new minivan. Id. The Department of Commerce did identify, however, interior space as the most meaningful of the seven criteria. Id.

110. Id. The Department of Commerce found that the period of investigation for this dumping investigation should begin for Toyota on December 1, 1990 and end on May 31, 1991, but for Mazda it should begin two months earlier. Id. at 44-45. General Motors, Chrysler, and Ford, the petitioners, requested that the period of investigation commence two months earlier, in October of 1990, and offered a number of reasons:

(1) To capture all post sale price adjustments which occur on sales of minivans;
(2) To account for the possibility of seasonal price variations;
(3) To account for potential price manipulation by [Mazda and Toyota] which may have been triggered by media speculation in Japan of a possible antidumping petition prior to its filing.

Id.

Both Mazda and Toyota objected to this request because they believed these adjustments would be accurately reported during the actual investigation. Id. Furthermore, Toyota argued that the petitioners had not provided any "factual support" to warrant a broadening of the period of investigation. Id.

111. Id. at 44-45 (stating that the expansion of the period of investigation is the most effective mechanism to address seasonal pricing practices). The Department of Commerce indicated, however, that based upon the evidence, there was no "factual basis" for modifying Toyota's period of investigation. Id. at 45.

112. Preliminary Determination, supra note 35, at 45.

113. Id. at 45. United States price is defined in the Tariff Act of 1930 as "the purchase price or the exporter's sales price of the merchandise, whichever is appropriate." 19 U.S.C. § 1677a(a) (1988). The purchase price is defined in the Act as "the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States." 19 U.S.C. § 1677a(b) (1988).

114. Preliminary Determination, supra note 35, at 45. Exporter's sales price is defined by the Act as "the price at which merchandise is sold or likely to be sold in the United States, before or after the time of importation, by or for the account of
foreign market value. Foreign market value was determined by comparing the volume of Mazda’s and Toyota’s new minivan home market sales with the volume of new minivan sales to third markets. Finally, if the Department of Commerce issues an affirmative final determination, the ITC must ascertain whether there is a material injury or a threat of material injury to the United States minivan industry.

the exporter . . . .” 19 U.S.C. § 1677a(c); 19 C.F.R. § 353.41(c) (1993). The Department of Commerce calculated the exporter’s sales price based upon “delivered prices to unrelated customers in the United States.” Preliminary Determination, supra note 35, at 45. In calculating the exporter’s sales price, the Department of Commerce, in accordance with 19 U.S.C. § 1677a (d) & (e), made a variety of adjustments to the United States price, including freight, brokerage and handling, and post sale incentives. Id. The Department of Commerce also reduced all the value added to the minivan after its importation. Id. The United States value added includes production costs from minivan sales “and a proportional amount of profit or loss.” Id. All sales costs are deducted from the minivan’s sales price. The following three factors were considered in calculating the minivan’s production costs: (1) manufacturing costs (2) movement expenses and (3) general expenses, such as research and development, sales, and administrative and interest expenses. Id.

115. Preliminary Determination, supra note 35, at 45. Foreign market value is defined in the Tariff Act of 1930 as:

the price, at the time the merchandise is first sold within the United States by the person for whom . . . the merchandise is imported to any other person who is not described [in the constructed value section] . . . (A) at which such or similar merchandise is sold or . . . offered for sale in the principal markets of the country from which exported, in the usual commercial quantities and in the ordinary course of trade for home consumption, or (B) if not sold or offered for sale for home consumption, or . . . the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States.


116. Preliminary Determination, supra note 35, at 46. Foreign market value based on sales to a third country is calculated “based on the price at which such or similar merchandise is sold or offered for sale to a third country, plus when not included in the price . . . other expenses incident to placing the merchandise in condition packed ready for shipment to the United States.” 19 C.F.R. § 353.49(a)(1) (1993). The Department of Commerce found that Toyota and Mazda had “viable home markets” for the sale of new minivans during the period of investigation. Preliminary Determination, supra note 35, at 46. Currency or exchange rate conversions, which are necessary in comparing the price of Japanese and American minivans, were made using established exchange rates at the time of the United States transaction date and were certified by the Federal Reserve Bank. Id. at 47.

117. Preliminary Determination, supra note 35, at 47.
On May 26, 1992, the Department of Commerce issued its final determination that Japanese minivans were sold at less than fair value.\textsuperscript{118} After restating its position regarding the investigation's scope, the Department of Commerce began a more in-depth analysis of fair value comparisons by comparing United States price to foreign market value\textsuperscript{119} and concluded that well over 90% of Toyota and Mazda's new minivan home market sales were priced below the minivan's actual cost of production.\textsuperscript{120} It also compared sales of new United States minivans to foreign market value based on their constructed value\textsuperscript{121} and investigated whether there were sufficient home market sales of new minivans to calculate foreign market value.\textsuperscript{122}

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\textsuperscript{118} Final Determination, \textit{supra} note 37.

\textsuperscript{119} \textit{Id.} at 21,938; \textit{see supra} notes 113-15 and accompanying text (defining United States price and foreign market value under the Act).

\textsuperscript{120} Final Determination, \textit{supra} note 37, at 21,938. Cost of production is defined as "the cost of materials, fabrication, and general expenses, but excluding profit, incurred in producing such or similar merchandise." 19 C.F.R. § 353.51(c). To obtain this information, the Department of Commerce solicits information through a cost of production questionnaire, which "consists of a detailed set of questions seeking to elicit comprehensive cost information from the respondent for its most recently completed fiscal year." \textit{Pattison, supra} note 31, at § 5.05[7].

\textsuperscript{121} \textit{Id.} at § 5.05[4]. If the Department of Commerce cannot determine foreign market value based upon home market or third country sales, it may use constructed value to calculate foreign market value. \textit{Id.; see} 19 U.S.C. § 1677b(a)(2) (1988) (stating that the constructed value of the merchandise may be utilized in determining its foreign market value). Constructed value is calculated based on the sum of the cost of materials, fabrication or processing, general expenses and profit, and the costs associated with preparing the merchandise for shipment to the United States. 19 U.S.C. § 1677b(e)(1)-(C) (1988); \textit{see} 19 C.F.R. § 353.50 (1993) (listing the same criteria for calculating the constructed value).

\textsuperscript{122} Final Determination, \textit{supra} note 37, at 21,939. Foreign market value is calculated by comparing the volume of new minivan home market sales to third country new minivan sales. \textit{Id.} In order to determine whether the home market prices were above or below the cost of production, the Department of Commerce calculated the cost of production based on Mazda and Toyota's "cost of materials, labor, other fabrication costs and general expenses." \textit{Id.} at 21,939-40. Mazda contended that its home market was not sufficiently representative for calculating foreign market value. \textit{Id.} at 21,939. The Department of Commerce disagreed, however, stating that the percentage of Mazda's home market to third market sales was "viable" and therefore, adequate to calculate foreign market value. \textit{Id.}

If, however, sales in the home market country are deficient, foreign market value is calculated the following way:

Except as provided in § 353.53, if the quantity of such or similar merchandise sold during the period being examined for consumption in the home market
In analyzing the issue of transfer pricing,\textsuperscript{123} the Department of Commerce took the unusual step of examining the "keiretsu system," the close relationship that exists between the auto makers and their suppliers.\textsuperscript{124} Toyota contended that its reported transfer prices for parts supplied by both related and unrelated companies were accurate and maintained that it had "arms length" business transactions\textsuperscript{125} with its related

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country is so small in relation to the quantity sold for exportation to third countries (normally, less than 5% of the amount sold to third countries) that it is an inadequate basis for the foreign market value of the merchandise . . . the foreign market value of the merchandise [will be calculated] under either § 353.49 or § 353.50.


123. 19 U.S.C. § 1677b(e)(2) (1988). Transfer pricing or a transaction directly or indirectly between related parties may be disregarded if:

in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise under consideration. If a transaction is disregarded . . . the determination . . . shall be based on the best evidence available as to what the amount would have been if the transaction had not occurred between [related parties] . . . .

Id. Transfer pricing is not based on an arms length agreement between competing parties, but on what a parent corporation decides to send to its affiliate, which does not necessarily reflect the product's actual fair market value. Professor Joel R. Paul, Address at the American University, Washington College of Law, (Feb. 9, 1994).

124. Final Determination, \textit{supra} note 37, at 21,942. The Act defines related parties in the following manner:

(B) Any officer or director of an organization and such organization.
(C) Partners.
(D) Employer and employee.
(E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting stock or shares of any organization and such organization.
(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.


A related company is one that is subject to some form of corporate control or influence by another company during its normal business practices or transactions, while an unrelated company is one that maintains an independent business relationship such that its business transactions with another company are considered to be "at arms length." Final Determination, \textit{supra} note 37, at 21,941; see Auerbach & Brown, \textit{supra} note 34, at A1 (stating that the decision to examine the keiretsu system played an important role in the Commerce Department's conclusion that the Japanese were selling minivans at less than their fair value).

125. Final Determination, \textit{supra} note 37, at 21,941-42. An arms length transaction is defined as a "transaction negotiated by unrelated parties, each acting in his or her
companies. The Department of Commerce found otherwise, however, citing considerable data collected on transactions between Toyota and its related and unrelated suppliers and a "systematic pattern of differences" in home market versus third market parts pricing. Based on these analyses, the Commerce Department issued its final determination and concluded that Toyota and Mazda sold minivans in the United States at less than fair value.

B. THE INTERNATIONAL TRADE COMMISSION DETERMINATION OF MATERIAL INJURY OR THREAT OF MATERIAL INJURY

On January 22, 1992, the ITC began its inquiry into the claim that imports of Japanese minivans were being sold at less than fair value within the meaning of section 733(b) of the Tariff Act of 1930. In order to determine whether there is a material injury or a threat of material injury to a domestic United States industry, the ITC defined the like product and relevant industry.


126. Final Determination, supra note 37, at 21,941. Toyota offered four reasons to accept the current data without modification:

(1) All of reported prices verified;
(2) Toyota uses the same procedures to negotiate prices with all of its suppliers;
(3) The material and components supplied by related parties were sold at prices that were above the supplier's fully allocated costs of production; and
(4) There is no indication that prices differed between Estima [the Japanese version of the Previa] and Previa parts from the same supplier.

Id.

127. Final Determination, supra note 37, at 21,942. Interestingly, the Department of Commerce came to this conclusion despite its lack of comparative data on unrelated party transactions, often used as a benchmark to assess the accuracy of the transfer pricing data. Id. Despite this data, Commerce contended that it observed a pattern that was "not consistent with an arm's-length negotiating process." Id.; see Auerbach & Brown, supra note 34, at A1 (stating that the Department of Commerce investigators found a "systematic pattern of lower prices for parts going into export models compared to the prices charged for parts destined for vehicles which are to be sold in Japan.").

128. Final Determination, supra note 37, at 21,957-58.

129. 19 U.S.C. § 1677(10) (1988) (defining "like product" 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 ITC relied on six factors in defining "like
The ITC considered whether the minivan production of Chrysler Canada, Ltd., a Canadian subsidiary of Chrysler, should be included as part of the overall United States domestic minivan industry. While General Motors, Chrysler and Ford conceded that the Act precludes consideration of production operations outside the United States, they asserted that the ITC should not ignore the injury to domestic producers, measured in part by their inability to sell Canadian-assembled minivans in

product for purposes of this investigation:

(1) physical characteristics and end uses;
(2) interchangeability of the products;
(3) channels of distribution;
(4) producer and consumer perceptions;
(5) common manufacturing facilities and employees, and;
(6) price, where appropriate.

Minivans From Japan: Determination of the Commission in Investigation No. 731-TA-522 (Final) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigation, USITC Pub. 2529, Inv. No. 731-TA-522 [hereinafter Minivans From Japan] (July 1992) at 3 n.3. The ITC declared that its preliminary definition of “like product” included only minivans and vehicles such as “station wagons, full size vans and sport utility vehicles.” See id. at 5 (stating that since none of the parties had challenged the preliminary definition of “like product” the ITC included only minivans in its final determination). While recognizing that there is some degree of market overlap or substitutability between minivans, station wagons, vans, and sport utility vehicles, the ITC explained that these vehicles do not serve an adequate portion of the minivan market. Id. Furthermore, minivans are produced at assigned facilities in the United States which cannot be modified easily to produce other classes of vehicles while expanding the “product” of the investigation to include such a broad spectrum of passenger vehicles would significantly alter the ITC’s narrow investigative scope. Id. at 6.

The Tariff Act of 1930 defines the relevant “industry” as “the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product.” 19 U.S.C. § 1677(4)(A) (1988). Some have estimated that General Motors, Ford, and Chrysler’s collective output of minivans dominate the domestically-produced minivan industry, controlling at least 85% of the minivan market. A Vehicle to Ditch, BOSTON GLOBE, May 3, 1993, at 10. See Minivans From Japan, supra note 130, at 7 (reaffirming the Commission’s preliminary determination that while the overall consequences of dumped or subsidized minivans must be considered, it must be carried out only by an analysis of United States domestic production operations); cf. Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1155, 1167 (Ct. Int’l Trade 1988) (determining which domestically-produced products are most “like” the products under the investigation is essential before moving onto a more detailed examination as to whether the domestic industry is materially injured or threatened with material injury).
the United States as a result of illegally dumped Japanese imported minivans in the United States.\footnote{132} Petitioners also asserted that the ITC must consider “lost minivan sales” on the domestic industry’s ability to sell less fuel efficient vehicles under the corporate average fuel economy standards and future lost minivan sales due to “brand loyalty” developed from a buyer’s initial vehicle purchase.\footnote{133} While acknowledging its discretionary authority to consider all relevant economic factors and its authority to measure all such factors that have an influence on the industry in question, the ITC rejected petitioners’ arguments primarily because it believed it was statutorily obligated to follow the statute’s specific instructions, which preclude the consideration of any United States-owned foreign production operations.\footnote{134} In short, the ITC concluded that it could not define the

\footnote{132. \textit{Minivans From Japan}, supra note 130, at 7. This particular argument was articulated by Chrysler Motor Corporation, which operates a substantial minivan manufacturing facility in Ontario, Canada. \textit{Id.} Since its parts and components from its domestic assembly plant are also used in its Canadian assembly operations, Chrysler asserted that the overall loss of its Canadian sales due to dumped Japanese minivans “has a direct adverse impact on the per-unit material costs associated with [its] United States assembly operations.” \textit{Id.}}

\footnote{133. \textit{Id.} Specifically, petitioners contended that the Act authorizes the ITC to consider “other economic factors” relevant to its determination and that the Act allows the ITC to examine all “relevant factors” having an influence on the condition of the industry. \textit{Id.} at 8.}

\footnote{134. \textit{Id.; see 19 U.S.C. § 1677(7)(C)(iii) (1988) (outlining the factors used in determining the impact of imports on the domestic industry). In addition, the Commission could not use customary statutory provisions to analyze “other relevant economic factors” in place of the more specific provisions relating to the definition of “the industry” and the “like product” because to do so would unnecessarily broaden the scope of its investigation. \textit{Minivans From Japan}, supra note 130, at 8-9; see 2A Sutherland Stat. Constr. (1992) § 46.05 at 105 (stating when there is a conflict between a statute’s general and specific terms, the statute’s specific terms should prevail over its more general terms), \textit{cited with approval in Minivans From Japan}, supra note 130, at 7. The ITC also looked to the legislative history and determined that in measuring the impact of imports on the United States industry, the consideration of relevant factors does not include offshore production operations of a United States business. \textit{Minivans From Japan}, supra note 130, at 9 & n.25 (citing S. REP. NO. 71, 100th Cong., 1st Sess. 115, 117 (1987) and H.R. REP. NO. 100, Part 1, 100th Cong., 1st Sess. 128-29 (1987)) (instructing the International Trade Commission not to consider profits from the import operations of the domestic industry).}

Furthermore, the Tariff Act of 1930 does not define the “industry” to encompass all “operations of a legal entity identified as producing a like product” nor to include “producers of related products, or upstream products, such as parts and components.” \textit{Id.} at 10. This product line provision is defined as “domestic producers as
"relevant industry" for minivans to encompass the automobile industry as a whole.\textsuperscript{135}

Before examining material injury, the ITC first addressed the related parties issue\textsuperscript{136} and found no direct evidence that either Ford or Chrysler had exercised any meaningful influence or control over their related firms with regard to the marketing or sale of minivans.\textsuperscript{137} The ITC al-

\textsuperscript{a}whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product." 19 U.S.C. § 1677(4)(A) (1988). Because this provision affords an exception to the general principle that "relevant" operations are limited to those that produce a "like product," the ITC declined to carve out an additional exception to the statute's requirements. \textit{Minivans From Japan, supra} note 130, at 11 n.34, citing \textit{Allied Tube & Conduit Corp. v. United States}, 898 F.2d 780, 784 (Fed. Cir. 1990) (stating that the ITC must not read additional exceptions into the statute absent specific or contrary legislative intent).

135. \textit{Minivans From Japan, supra} note 130, at 10 (refusing to accept petitioners' contention that the loss of sales of Canadian minivans due to less than fair value minivan imports should be considered "relevant" because it harms the domestic minivan industry through higher per unit costs for minivan parts and components).

136. \textit{Id.} at 13-14. According to the Act, related parties may be used:

When some producers are related to the exporters or importers, or are themselves importers of the allegedly subsidized or dumped merchandise, the term 'industry' may be applied in appropriate circumstances by excluding such producers from those included in that industry.

19 U.S.C. § 1677(4)(B) (1988); see \textit{supra} note 124 (outlining the statutory provision for related parties). In deciding whether to apply the related parties provision, the ITC should consider "whether the domestic producer substantially benefits from the relation to the subject imports." \textit{Empire Plow Co. v. United States}, 675 F. Supp. 1348, 1353 (Ct. Int'l Trade 1987). In directing an analysis of related parties, the ITC maintains broad discretion in addressing the facts of each individual dumping investigation. See \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.} 467 U.S. 837, 843-44 (1984) (granting broad agency discretion in the interpretation of United States anti-dumping laws unless the interpretation is held unreasonable); see also \textit{Empire Plow}, 675 F. Supp. at 1351-52 (stating that the administrative agency "has broad discretion in the enforcement of the trade laws" and has the discretionary right to invoke the related parties provision when undertaking a factual determination) (citation omitted).

137. \textit{Minivans From Japan, supra} note 130, at 13-14. In its preliminary investigation, the ITC identified Chrysler and Ford as "related parties" for the following reasons: (1) "Ford's significant equity interest in Mazda," which exports minivans to the United States; (2) "Ford's joint venture with Nissan to produce a minivan in the United States"; and (3) "Chrysler's significant equity interest in Mitsubishi," which exported minivans to the United States during the investigative period. \textit{Id.} According to the ITC, Ford has a 25% interest in Mazda, and Chrysler owns 5.88% of Mitsubishi stock. \textit{Id.} at A-35. Information on General Motors' ownership interest in Isuzu Motors, Ltd. and in Suzuki was not disclosed. \textit{Id.} at A-36.
so concluded it was inappropriate to include Ford and Chrysler as related parties simply because of their respective financial interest in Mazda and Mitsubishi.  

Having examined the related parties issue, the ITC commenced its material injury analysis by considering the volume of imports, the effect of imports, the impact of imports and other economic factors relevant to its determination. Before addressing the volume of minivan imports, the ITC discussed the minivan industry as a whole, paying particular attention to those economic factors having a significant impact on the industry. The ITC identified the 1990-91 economic recession and the Persian Gulf Conflict as relevant economic factors affecting the United States automobile industry because of their combined effect on consumer demand, particularly on such high value consumer purchases as minivans. Because the statutory analysis of economic factors must

138. Id. at 13-15.
139. The Tariff Act of 1930 instructs the Commission to consider:
(I) the volume of imports of the merchandise which is the subject of the investigation,
(II) the effect of imports of that merchandise on prices in the United States for like products, and
(III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States; and
(ii) may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.
141. Id. at 16. The Commission also determined that the minivan industry is "not yet mature, and is still growing and evolving." Id. at 17. Because the market is growing, the Commission stated that the introduction of a new minivan could increase the size of the market by attracting new buyers without actually reducing the existing market share of other minivan producers. Id. at 17-18. The minivan market is expected to follow recognized product cycles for automobiles, beginning with the attainment of high sales volume within the first three years of the minivan's introduction, followed by industry efforts to maintain its market share through a variety of incentives including styling, increased standard equipment and new vehicle options. Id. at 18.

Other important economic factors include: the completion of a new labor contract in 1990 (reducing the domestic industry's ability to reduce its overall costs when the demand for minivans was declining); the lack of uniformity in minivan pricing (indicating the unsurprising fact that consumers do not pay equal prices for the same vehicle, and they are less likely to be cognizant of and responsive to fluctuations in minivan prices); the failed introduction of the "APV triplets" by General Motors during 1989 and 1990; the negative press reported in Automotive News regarding the Chrysler Caravan's ultradrive transmission; and the negative impact of domestic in-
also be made in the context of the competitiveness of the affected industry, the ITC noted that petitioners hold a substantial segment of the domestic minivan market—possibly as high as 85%.  

With regard to the weighed economic factors, the ITC reported that the overall market conditions in the minivan industry were “mixed” during 1989 and 1990 and largely deteriorated from 1990 to 1991. While the domestic industry’s capacity utilization declined from 87.5% in 1989 to 70% in 1991, it nevertheless “remained profitable during the period of investigation.” Despite the recognized relationship between the minivan industry’s economic performance and the nation’s more general economic conditions, the statute specifically requires that the material injury be directly caused or “by reason of the LTFV imports.”

The Act also directs the ITC to examine whether there is an increase in the volume of imports, either in absolute or relative terms to the production or consumption, or whether the actual volume of merchandise imports is meaningful. After weighing the evidence, the ITC found

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142. Id. at 22. While the data on market share is considered confidential and was not released to the public in the Commission’s final determination, many industry analysts believe the domestic minivan producers hold more than an 85% share of the domestic minivan market. See Welfare Compromise for Auto Makers, N.Y. TIMES, Feb. 18, 1993, at A22 (reporting that the United States automobile industry “already controls over 90% of the minivan market” and would, therefore, gain an insignificant number of additional vehicle sales); see also A Vehicle to Ditch, supra note 130, at 10 (stating that the United States dominates the American minivan market, with a United States market share that is estimated at over 85%).

143. Minivans From Japan, supra note 130, at 20.

144. Id. The domestic industry remained profitable even though operating income fell from $1.2 billion in 1989 to $481 million in 1991, the number of workers in the domestic automobile industry declined, as did worker hours, wages, total compensation and worker productivity in 1991. Id. at 20-21.

145. Id. at 21 (emphasis added); see Chaparral Steel v. United States, 901 F.2d 1097, 1104 (Fed. Cir. 1990) (stating that the focus of the ITC determination is whether the United States domestic industry is currently experiencing material injury as a direct consequence of the imported products).

146. Minivans From Japan, supra note 130, at 21-22. With regard to the volume
that the volume or the increase in the volume of the Japanese market share comprised too small a share of the domestic minivan market to constitute a “significant” market share. The slight increase in Japanese market share during 1990 resulted from the introduction of the Toyota Previa to the American market. According to the ITC, even though the introduction of the Previa led to an increase in the Japanese market share, it also occurred during a period of a small expansion of domestic minivan sales. This finding formed an important component of the ITC’s overall unwillingness to find material injury because even though the percentage of the Japanese minivan market share was increasing at the expense of the domestic minivan industry’s market share, the overall number of minivans produced by Japanese and United States manufacturers was increasing. In short, even though domestic producers lost a small percentage of their minivan market share, they nonetheless increased their overall volume of minivan production due to a steady increase in United States consumer demand for both domestically produced and imported minivans.

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of imported merchandise, the statute states that the ITC shall “consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.” 19 U.S.C. § 1677(7)(C)(i) (1988).

147. Minivans From Japan, supra note 130, at 22 (finding that the Japanese have never held more than a 15% share of the domestic minivan market).

148. See id. (stating that the significant increase in the Japanese market share was almost exclusively the result of the sales of the newly introduced Toyota Previa).

149. Id.

150. Id.

151. For example, suppose that 100,000 minivans were produced and sold in the United States by the United States and Japan in 1990. The United States minivan industry produced and sold 85,000 minivans, giving the United States an 85% share of the market. Japan produced and sold 15,000 minivans in the United States in 1990, giving it a 15% share of the minivan market. In 1991, however, due to a large increase in consumer demand, both the United States and Japan combined to produce and sell 125,000 minivans in the United States. The United States produces and sells 105,000 minivans, while the Japanese produce and sell 20,000 minivans. Both the United States and Japan have increased their volume of minivans produced and sold. The United States sold 20,000 more minivans than it did during the previous year (85,000 minus 105,000), even though its market share has slightly decreased from 85% to 84%. Japan, on the other hand, sold 5,000 more minivans than it did in 1990 and increased its market share by only 1%. While it is true that Japan has captured a marginally greater share of the increase in minivan sales in 1991 (20% of the 25,000 additional minivan sales), both sides have substantially benefitted from the increase in demand for minivans in 1991 despite a slight downward change in the United States
Recognizing that a small volume of imports may still have a significant impact on the United States domestic market, the ITC examined the effect of Japanese imports on domestic prices of similar products and considered whether there has been “significant price underselling of imports” and whether the underselling has dramatically depressed prices or prevented increases in price that might otherwise have occurred.\textsuperscript{152} The ITC concluded that because prices steadily rose between 1989 and 1990, it was unlikely that prices had been depressed.\textsuperscript{153} The ITC then identified several other applicable factors in its consideration of price suppression, such as the extent of substitutability, the accessibility of fairly traded imports, the resale of minivans and non-substitute vehicles, the amount of the import market share, and the dumping margin.\textsuperscript{154}

In addressing the minivan's relative substitutability, the ITC found a substantial product differentiation in the minivan market which indicated a lack of product substitutability.\textsuperscript{155} The ITC then identified other important factors in determining a minivan’s substitutability, such as the vehicle’s overall quality and reliability, price, and consumer brand loyalty\textsuperscript{156} and concluded that Japanese minivans generally are considered more reliable and of higher quality than their domestic counterparts.\textsuperscript{157} Equally important, the ITC maintained that the likelihood of minivan substitutability is further diminished because Japanese minivans are more expensive than domestically produced minivans.\textsuperscript{158}

\begin{footnotes}
\footnote{152. Id. at 23-24.}
\footnote{153. \textit{Minivans From Japan}, supra note 130, at 24.}
\footnote{154. Id.}
\footnote{155. See \textit{id.} at 24-25 (identifying additional differences such as a vehicle’s engine size, options, safety, styling, and front versus rear wheel drive capability). There are a number of notable differences between Japanese-designed minivans and their American-made counterparts. The majority of Japanese minivans are sold with four cylinder engines while virtually all of the domestic minivans are sold with larger six cylinder engines. \textit{Id.} at 25. Nearly all Japanese minivans are sold in the United States with rear wheel drive while the majority of domestic minivans sold have either front wheel drive or all wheel drive. \textit{Id.} All Japanese minivans sold in the United States had standard length wheel bases while domestic minivan sales included both standard and extended length wheel bases. \textit{Id.}}
\footnote{156. Id. at 26. With regard to brand loyalty, the ITC concluded that although it is an important non-price factor affecting consumer’s choice, the data tended to indicate that there was very little “cross shopping” or comparison between those who were interested in the domestic minivan market and those who were more interested in the imported minivan market. \textit{Id.} at 27.}
\footnote{157. Id. at 26.}
\footnote{158. See \textit{Minivans From Japan}, supra note 130, at 27-28 (declaring that studies}
The ITC examined the actual pricing data of less than fair value imports and the availability of fairly traded imports and concluded that for the most part while imported Japanese minivan prices tended to increase at a greater level than their United States counterparts, there was no evidence of price suppression by Toyota and Mazda.\textsuperscript{159} With regard to the availability and price effects of fairly traded imports, the ITC found that the smaller the difference between the import's dumped and fair value price, the lower overall effect dumped import sales will have on domestic minivan sales and pricing.\textsuperscript{160} After evaluating all imported and domestically produced minivan pricing, the ITC concluded that imported minivan pricing data did not demonstrate meaningful underselling largely because of inconsistencies and defects in minivan pricing data and limited substitutability between United States and Japanese minivans.\textsuperscript{161}

The ITC turned its attention to the third prong of the Act: the impact indicated a wide variation in price ranges significantly reduces substitutability and finding many consumers in the market for a domestically produced minivans are more price conscious than those in the market for imported minivans).

\textsuperscript{159} See id. at 28 (stating that between 1989 and 1991, prices of Japanese minivans increased by 15%, while domestic minivan prices increased by only 4% during the period); \textit{cf.} Maine Potato Council v. United States, 613 F. Supp. 1237, 1246 (Ct. Int'l Trade 1985) (finding that the ITC must explain how it addressed quality differences between products absent a finding of price suppression and show the impact of its findings on its material injury determination).

\textsuperscript{160} See Minivans From Japan, \textit{supra} note 130, at 29 (finding a 9.72% weighted average dumping margin and that Toyota Previs were sold at 6.41% less than their fair market value, while the Mazda MPV were sold at 12.70% less than their fair market value).

The ITC agreed with the Commerce Department's determination that even if Japanese imports had been fairly traded, a lack of product substitutability coupled with a narrow market share would preclude a substantial increase in demand for domestically produced minivans. \textit{Id.} at 29-30. Consequently, due to the minimal effect of limited market share and low vehicle substitutability on consumer demand for domestically produced minivans, the ITC found that there would be very little incentive to increase domestic minivan prices. \textit{Id.} at 30. In other words, those in the market for a higher-priced Japanese minivan would probably have either spent the extra money for the same vehicle or considered purchasing an entirely different class of vehicle. \textit{Id.} at 29-30.

\textsuperscript{161} \textit{Id.} at 30-31. The Commission also was reluctant to examine or rely on data reflecting "constructed prices" and not actual industry pricing. \textit{Id.} at 30. While the pricing data used by the United States and Japanese automobile industries was not made available to the public because it would reveal confidential operations of the parties in question, the data was considered too questionable to warrant serious consideration in the price effect portion of the investigation. \textit{Id.} at 30, xvi.
of less than fair value imports on domestic producers of like products.\textsuperscript{62} Due to a negligible Japanese minivan sales volume in the domestic minivan market, coupled with a lack of significant import price effects, the ITC could not find a "sufficient impact" on the United States industry by the sale of Japanese minivans to permit a material injury determination.\textsuperscript{63} In addition to the economic recession and the Persian Gulf Conflict, the ITC attributed the loss of new minivan sales to domestic industry sales to fleet buyers, such as rental car companies, because the resale of these rental minivans has a negative effect on the domestic minivan industry's ability to sell their newer model year minivans.\textsuperscript{64}

Petitioners offered two arguments to support their basic position that less than fair value minivan sales from Japan harm domestic minivan sales. First, they claimed that Mazda and Toyota sold their minivans

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\textsuperscript{62} In assessing the impact of imports on the domestic industry, the Act instructs the ITC to "evaluate all relevant economic factors" including:

(I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

(II) factors affecting domestic prices,

(III) actual and potential negative effects on cash flow, inventories, employment, wages growth, ability to raise capital, and investment, and

(IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.

19 U.S.C. § 1677(7)(C)(3) (1988); see Minivans From Japan, supra note 130, at 31 (noting that the Commission considered the following relevant factors in assessing the impact of LTFV imports on the domestic minivan industry: "U.S. consumption, production, shipments, capacity utilization, employment, wages, financial performance, capital investment, and research and development expenses."); see also Torrington Co. v. United States, 747 F. Supp. 744 (Ct. Int'l Trade 1990), aff'd, 938 F.2d 1276 (Fed. Cir. 1991) (finding that the ITC has the statutory authority to decide on domestic products in its consideration of like products, and that such a determination will be sustained if supported by "substantial evidence").

\textsuperscript{63} See Minivans From Japan, supra note 130, at 32 (supporting its position that the primary reason for the decline in demand for minivans in 1990 and 1991 to below 1989 levels was due largely to the economic recession and the Persian Gulf conflict); see also supra notes 140-41 and accompanying text (discussing the impact of the Persian Gulf conflict and the economic recession on consumer demand).

\textsuperscript{64} Minivans From Japan, supra note 130, at 32-33. It is readily apparent why fleet minivan sales erode the ability of the United States minivan industry to sell its new vehicles. Fleet minivans are usually several months old and have low mileage when they are repurchased and made available to the public. Id. In short, these fleet minivans offer the consumer the opportunity to purchase virtually the same vehicle at a lower price, often with similar warranty protection as a newer minivan model. Id.
increasingly in the "higher-end" price range which offers more substantial per unit profit than lesser priced vehicles.\textsuperscript{165} The ITC rejected this argument because the domestic minivan industry had a greater comparative increase in sales in the high end market than imported minivans produced by Japan.\textsuperscript{166} Second, in order to recover lost profits, petitioners asserted that Toyota and Mazda raised their 1992 minivan prices, leading to a 4.2% decline in market share between the third quarter of 1991 and April 1992.\textsuperscript{167} The ITC, however, declined to speculate as to the reasons for the decrease in Japanese market share and the increase in United States market share by relying on "incomplete" or "interim data" that extended beyond the ITC's investigative period.\textsuperscript{168}

In drawing its conclusions, the ITC strongly reiterated its basic position that while many of these factors were detrimental to the United States minivan industry and may have independently contributed to the domestic minivan market's injury, the Act requires the ITC to determine whether the United States minivan industry is "materially injured by reason of the dumped imports."\textsuperscript{169} Furthermore, the ITC concluded that

\textsuperscript{165} Id. at 33.

\textsuperscript{166} Id. at 33-34. Unfortunately, the data used to support this position was designated confidential because it would reveal sensitive material relating to the operations and sales of individual producers. Id. at xvi.

\textsuperscript{167} Id. at 33-34. Petitioners maintained that as a "direct result" of this large price increase, United States manufactured minivan sales expanded. Id. at 34. The implication here is that Toyota and Mazda deliberately underpriced their minivans sold in the United States between July 1991 and June 1992 in order to gain a share of the United States market. Once Toyota and Mazda achieved this market share, they raised their minivan prices to normal or above average levels in order to recover lost profits when they sold these vehicles at less than fair market value. Id.

\textsuperscript{168} Id. at 33-34. While the ITC declined to rely on "interim data," even if the interim data was given consideration there was no evidence to conclude that the increase in United States minivan sales was directly related to the expansion of Japanese minivan prices. Id. at 34-35. Although there was no evidence in the record to support them, the ITC offered a number of "other factors" which "might explain" the increase in domestic minivan sales during the period including: a lessening of the economic recession, favorable reviews and increased sales of Chrysler's new minivan model, and Chrysler's successful sales campaign regarding minivan incentive offerings. Id. at 35.

\textsuperscript{169} Id. at 35-36 (emphasis added); see supra notes 141-46 and accompanying text (discussing the economic recession, the Persian Gulf Conflict, notable problems with domestic minivan models, the aging of certain domestic minivan models, competition resulting from increased fleet sales, a industry labor agreement which significantly raised domestic labor costs on minivans, and competition for low-end minivan buyers from Chrysler's Canadian operations as factors that adversely affected the United
due to reasons of limited substitutability within the minivan industry, Toyota's and Mazda's small percentage of the overall minivan market, and the introduction of the Toyota Previa, even if Toyota and Mazda had sold their minivans at fair value prices, it was probable that American consumers would continue to purchase imported Japanese minivans over their domestic counterparts.\(^\text{170}\)

The ITC also investigated whether the threat of material injury to the United States minivan industry by imported Japanese minivans existed and considered several criteria in support of its overall position that there is no threat of material injury to the domestically produced minivan industry absent any substantial evidence of an actual threat and imminent injury.\(^\text{171}\) In particular, the ITC considered the following criteria: production capacity; import market penetration; suppressing price effects; underutilized capacity; adverse trends; and potential negative effects.\(^\text{172}\)

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170. *Minivans From Japan*, supra note 130, at 36. While there was an increase in market share for Japanese minivan imports during 1989 and 1990, it was largely due to the introduction of a new minivan model—the Toyota Previa—which carried a weighted dumping average of 9.72%. *Id.* Due to the small Japanese market share, any increase in demand within the United States minivan market would not lead to sufficient increased sales or prices that would enable the ITC to find material injury. *Id.* See generally Report To The President on Certain Motor Vehicles and Certain Chassis and Bodies, USITC Pub. No. TA-201-44 (Dec. 3, 1980) (indicating the difficulty in establishing that an importing country's products have caused substantial injury or threat of injury to the United States industry).

171. *Minivans From Japan*, supra note 130, at 38; see § 1677(7)(F)(i) (1988) of the Tariff Act of 1930 (outlining the factors to be used in assessing whether there is a threat of material injury); see also § 1677(7)(F)(ii) (1988) (stating that the ITC determination of a threat of material injury "shall be made on the basis of evidence that the threat of material injury is real and the actual injury is imminent . . . [and] may not be made on the basis of mere conjecture or supposition."); S. Rep. No. 249, 96th Cong., 1st Sess. 89, (1979), reprinted in 1979 U.S.C.C.A.N. 381, 474 (1979) (instructing the ITC "to consider the likelihood of actual material injury occurring" in making a determination regarding the threat of material injury).

172. *Minivans From Japan*, supra note 130, at 37-38. Pursuant to § 1677 of the Tariff Act of 1930, the ITC is required to consider the following criteria:

- (II) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States,
- (III) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level,
- (IV) the probability that imports of the merchandise will enter the United States.
In considering production capacity, the ITC found that while production capacity increased during the period of investigation, capacity utilization continued at elevated levels as well.\(^{173}\) The ITC found that Japan and other overseas export markets for minivans have assimilated large quantities of minivans as a result of a declining demand for minivans.\(^{174}\)

The ITC concluded that although import market penetration may have been earlier in the period of investigation, it did not "rapidly increase" towards the end of the period—during 1990 and 1991—and more recent figures demonstrate that the percentage of Japanese minivans is at best "stable" and at worst "declining."\(^{175}\) Furthermore, the ITC found that at prices that will have a *depressing or suppressing effect on domestic prices* of the merchandise,

(V) any *substantial increase in inventories* of the merchandise in the United States,

(VI) the presence of *underutilized capacity* for producing the merchandise in the exporting country,

\[\ldots\]

(VII) any other demonstrable *adverse trends* that indicate the probability that importation will be the cause of actual injury,

(X) the *actual and potential negative effects on the existing development and production efforts of the domestic industry,* including efforts to develop a derivative or more advanced version of the like product.


Several of the criteria contained in the statute are not addressed by the Commission because the present dispute does not pertain to subsidies (I), a potential for production shifting (VII), or raw agricultural products (IX). *Minivans From Japan, supra* note 130, at 38.

173. *Id.* at 39. Between 1989 and 1991, production capacity increased from 223,000 units in 1989, to 255,900 units in 1990, to 305,200 units in 1992. *Id.* at A-76. Capacity utilization also increased during the same period from 66.3% in 1989, to 96.6% in 1990, to 83.6% in 1991. *Id.*; see Philipp Bros. Inc. v. United States, 640 F. Supp. 1340, 1345-46 (Ct. Int'l Trade 1986) (stating that while an increase in production capacity does not necessarily translate into an increase in exports to the United States, such figures are useful for the ITC in reaching a determination of the threat of material injury by LTFV imports).

174. *Minivans From Japan, supra* note 130, at 39; see *id.* at Appendix A-76, A-77 (indicating that the Japanese are not flooding the United States market with lower-priced models in order to create demand or market share, but are continuing to absorb increasing quantities of minivans). Both end-of-period inventories and home market shipments increased during 1989, 1990 and 1991. *Id.* at A-76, A-77.

175. *Id.* at 38-39. The ITC also stated that even if a "rapid increase" existed, it would not amount to threat of material injury under the Act because the import market penetration was unlikely to "increase to an injurious level" due to adverse global
because the statute’s threat analysis requires an evidence of “recent occurrences and factors indicat[ing] that actual injury is imminent,” the data and overall economic conditions did not support such a finding. The ITC asserted that there was little likelihood of imported Japanese minivans “depressing or suppressing” United States minivan prices and found no risk of a dramatic increase in minivan exports to the United States due to underutilized minivan production capacity in Japan. Finally, because inventories of imported Japanese minivans declined during the period of investigation, the ITC found no “substantial increase in [minivan] inventories” in the United States market.

Finally, the ITC examined whether there were any “actual and potential negative effects” on current domestic minivan development and production and whether these effects are sufficient to warrant finding a threat of material injury. While the United States minivan industry offered data to show that less than fair value imports have in fact affected their future production and development plans, the ITC refused to follow such an argument primarily because capital funding by the domestic minivan industry, as well as research and development, continue to remain at “significant” levels. After considering all the evidence economic conditions as well as to a lack of minivan substitutability and product differentiation. Id. at 37-39.

176. Id. at 38-39.
177. Id. at 39; see supra notes 156-63 and accompanying text (stating that due to limited import market share, limited product substitutability, and pricing data flaws there is virtually no prospect for Japanese minivan imports suppressing or depressing United States minivan prices when entering the United States market).
178. Minivans From Japan, supra note 130, at 39; see supra notes 156-63 and accompanying text (stating that due to limited import market share, limited product substitutability, and pricing data flaws there is virtually no prospect for Japanese minivan imports suppressing or depressing United States minivan prices when entering the United States market). In further support of this position, the ITC also cited declining overall minivan inventories in 1991 as evidence of a lack of import price suppression. Minivans From Japan, supra note 130, at 39, A-73; see id. at 39 (recognizing that both production capacity and capacity utilization for minivans has increased and that the Japanese and other export markets are continuing to assimilate even greater quantities of minivans).
180. Minivans From Japan, supra note 130, at 38-40.
181. Id. at 40. Ford, Chrysler and General Motors contended that if the Commission allowed Japanese minivan dumping to continue, the chances of redesigning the Chevrolet APV minivan “will be substantially reduced.” Id. at 40 n.154. Figures for
presented in this investigation, the ITC found the evidence regarding the potential adverse impact of imported minivans on the domestically produced minivan industry insufficient to permit a determination of material injury or threat of material injury by reason of less than fair value imported minivans.\textsuperscript{182}

On July 12, 1993, the United States Court of International Trade upheld the ITC's negative determination of material injury.\textsuperscript{183} The court agreed that the ITC's negative determination "was supported by substantial evidence" and found that the degree of competition between Japanese and domestic minivans was "limited" and the resulting impact on the domestic industry "insignificant."\textsuperscript{184} Furthermore, the court concluded that the evidence of injury offered by the United States minivan industry did not amount to material injury and was insufficient to overturn the ITC's negative material injury determination.\textsuperscript{185}

\begin{footnotesize}
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\item\textsuperscript{182} Capital expenditures were not released to the public, because they would reveal confidential information. \textit{Id.} at A-68. Research and development data was reported by the Big Three for the period of investigation. Their combined research and development expenses were $462 million in FY 1989, $392 million in FY 1990, and $413 million in FY 1991. \textit{Id.} at A-69. The ITC, however, refused to read the statute's threat provisions broadly enough to warrant a threat of material injury determination on the assumption that Japanese imported minivans have hindered the domestically produced minivan industry's future production and research and development plans. \textit{Id.} at 40.
\item\textsuperscript{183} \textit{Id.}
\item\textsuperscript{184} \textit{Id.} at 779-88 (stating that low and insignificant import volume and market share, a lack of price depression, suppression, and vehicle underselling due to a lack of minivan substitutability all supported the ITC's negative finding of material injury). The court agreed with the Commission's determination that the Toyota Previa was "largely responsible for increased import market share ... [and] created a good part of its own demand." \textit{Id.} at 788. The court concurred with the Commission's view that very little cross- or comparison-shopping existed between the Japanese and United States minivan models. \textit{Id.}
\item\textsuperscript{185} \textit{Id.} While Chrysler, Ford, and General Motors may have lost the minivan anti-dumping case before the Commerce Department and the ITC, many in the automobile industry nonetheless assert that they have won an important victory because Japanese automakers, fearing a negative determination or United States retaliation, have already increased minivan prices. \textit{See} Robert W. McGee, \textit{The Case to Repeal The Antidumping Laws}, 13 NW. J. INT'L LAW & BUS. 491, 521 (1993) (stating that the Japanese decision to increase minivan prices in order to reduce the likelihood of United States retaliation ironically leads to a less price competitive United States minivan industry and in the long run hurts the American consumer because of increased minivan prices); \textit{see also} Big Three Auto Firms Move to Appeal Decision on Sales of Toyota Minivans, \textit{WALL ST. J.}, Aug. 7, 1992, at B3 (stating that by bringing
\end{itemize}
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IV. MPV RECLASSIFICATION AND THE GATT

One of the most contentious issues in international trade law today is whether the reclassification of multi-purpose vehicles—including two-door and four-door sport utility vehicles and minivans—constitutes a violation of the GATT. As previously discussed, the principal advocate of reclassification is the United States automobile industry, which maintains that a reclassification of multi-purpose vehicles is not illegal under GATT rules.

A. ARGUMENTS IN FAVOR OF MULTI-PURPOSE VEHICLE RECLASSIFICATION

Supporters of multi-purpose vehicle reclassification contend that the classification of multi-purpose vehicles should be based on structural and design features and not based on auxiliary or cosmetic features which importers can readily manipulate for their benefit. They also assert that if consumers purchase multi-purpose vehicles primarily for the transport of persons rather than for the transport of goods, then these vehicles should also be required to meet the same government mandated passenger vehicle safety and emission standards. Moreover, advo-
cates of reclassification believe that there is nothing in the GATT or in any other international trade agreement to which the United States is a party that prevents an agency of the United States government from internally classifying multi-purpose vehicles as "trucks" under HTSUS heading 8704 rather than as passenger vehicles under HTSUS heading 8703.\(^{190}\)

In responding to any alleged illegalities under GATT rules, supporters of multi-purpose vehicle reclassification believe that the United States is only required to confer on imports from other contracting parties "tariff treatment that is no less favorable than the most-favored-nation rate provided for in the tariff schedules of the United States."\(^{191}\) Therefore, they argue that a reclassification of multi-purpose vehicles is not illegal under GATT Article I:1 because it is not discriminatory in nature and instead affects all GATT contracting parties equally.\(^{192}\)

Furthermore, proponents of reclassification argue that reclassifying multi-purpose vehicles would not violate GATT Article II because it does not require the Customs Service to embrace the views of another contracting party (namely Japan) when reviewing a particular classification issue.\(^{193}\) Under the GATT Article II:5, the importing contracting party must first agree that its classification is inconsistent with the terms and conditions of the negotiated tariff concession.\(^{194}\) Those who sup-


191. AMERICAN AUTOMOBILE MANUFACTURERS, supra note 187, at 1.

192. AMERICAN AUTOMOBILE MANUFACTURERS, supra note 187, at 1.

193. Id. at 1-2.

194. Id. GATT Article II:5 will only address classification issues if both contracting parties agree to GATT consultations:

If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. If the latter agrees that the treatment contemplated was that claimed by the first contracting party . . . the two contracting parties, together with any other contracting parties substantially interested, shall enter promptly into further negotiations with a view to compensatory adjustment of
port reclassification acknowledge that a contracting party has the right to claim that such a reclassification "nullifies or impairs" the negotiated and bound 2.5% tariff concession for motor vehicles designed for the transport of persons, to invoke the dispute resolution procedures under the GATT Article XXIII,\textsuperscript{195} and to seek consultations under GATT Article XXII.\textsuperscript{196} If Japan pursued this course of action, the United States would be obligated under the terms and conditions of Article XXII:1 not only to consult on the matter, but at the request of the Japanese government, to submit to the dispute resolution procedures previously adopted by all contracting parties under Article XXII:2.\textsuperscript{197} Proponents argue, however, that simply because Japan raises this reclassification issue and both contracting parties invoke the dispute settlement procedures, it does

the matter.

\textsuperscript{195} GATT, \textit{supra} note 186, art. II:5 (emphasis added).

\textsuperscript{196} \textsc{American Automobile Manufacturers}, \textit{supra} note 187, at 2-3. GATT Article XXIII provides for the following dispute settlement remedy if a contracting party believes that a benefit is being nullified or impaired:

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of any contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement . . . the contracting party may . . . make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time . . . the matter may be referred to the Contracting Parties.

\textsuperscript{197} GATT, \textit{supra} note 186, art. XXIII.

\textsc{American Automobile Manufacturers}, \textit{supra} note 187, at 2. GATT Article XXII explains the following conditions under which consultations can exist:

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

2. The Contracting Parties may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

\textsuperscript{186} GATT, \textit{supra} note 186, art. XXII.

\textsuperscript{197} See GATT, \textit{supra} note 186, art. XXII (discussing the dispute settlement processes and procedures).
not necessarily follow that multi-purpose vehicle reclassification is a violation of obligations of the United States under the GATT.\textsuperscript{198} Equally important, supporters of multi-purpose vehicle reclassification maintain that it is unlikely that a GATT panel would rule in Japan's favor simply because of Japan's "reasonable expectation" of the overall consequence of the 1979 harmonized tariff negotiations on automobiles, concluding that the reclassification of multi-purpose vehicles under HTSUS heading 8704 somehow "nullifies or impairs" a negotiated tariff concession.\textsuperscript{199}

In addition, proponents of reclassification refute the position that reclassifying multi-purpose vehicles under HTSUS heading 8704 violates American obligations under the Harmonized Commodity Description and Coding System (HCCN) because they contend that while this system requires contracting parties to adjust their respective tariffs to the HCCN's terms and conditions, it merely requires the United States to observe ordinary tariff classification nomenclature and does not "direct national authorities on specific classification decisions."\textsuperscript{200}

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\textsuperscript{198} AMERICAN AUTOMOBILE MANUFACTURERS, \textit{supra} note 187, at 2. If the Japanese raised such a complaint, the contracting parties could conclude that the classification nullifies or impairs a negotiated tariff concession on automobiles and permit the Japanese to suspend or withdraw comparable tariff concessions. \textit{Id.} at 3. Under GATT Article XXVII, a contracting party is entitled to withhold or withdraw trade concessions:

Any contracting party shall at any time be free to withhold or to withdraw in whole or in part of any concession, provided for in the appropriate Schedule annexed to this Agreement, in respect of which such contracting party determines that it was initially negotiated with a government which has not become, or has ceased to be, a contracting party. A contracting party taking such action shall notify the Contracting Parties and, upon request, consult with contracting parties which have a substantial interest in the product concerned.

GATT, \textit{supra} note 186, art. XXVII.

\textsuperscript{199} AMERICAN AUTOMOBILE MANUFACTURERS, \textit{supra} note 187, at 3. Under this scenario, a GATT panel would consider whether the objecting government had a reasonable expectation during the prior GATT negotiations with the United States that led the objecting government to believe that the United States would only impose a 2.5% rather than a 25% duty on imported multi-purpose vehicles. \textit{Id.} The proponents also believe that a GATT panel could not support such a claim because: (1) foreign motor vehicle producers have advertised that MPVs [multi-purpose vehicles] are not cars since at least 1971; (2) importers have classified MPVs as both cars and trucks throughout the 1980s; (3) some Japanese MPV producers even asked the United States Customs Service in 1988 to classify as "trucks" certain vehicles that are now classified as "cars." \textbf{AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION, REINSTATE THE ORIGINAL U.S. CUSTOMS MPV CLASSIFICATION RULING IS ALLOWED UNDER GATT RULES 1 (1993).}

\textsuperscript{200} AMERICAN AUTOMOBILE MANUFACTURERS, \textit{supra} note 187, at 3. While the
Furthermore, while the HCCN has an established mechanism for the settlement of disputes through consultation and negotiation under Article 10, recommendations become binding on the parties only if they both agree in advance to be bound by the Harmonized System Committee’s determination. Consequently, if the United States failed to agree on a binding review of its classification decisions, any determination made by the Harmonized System Committee is considered non-binding and strictly advisory in nature. If, therefore, the United States refuses to submit to a binding review, then the Japanese government could attempt to raise the matter under the dispute resolution procedures of GATT Article XXII. Finally, proponents of reclassification assert that these dispute resolution procedures were designed to address tariff classification issues after the ratification of the HCCN, and the failure to address multi-purpose vehicle classification as a potentially divisive issue during the GATT negotiation process precludes its present consideration as a violation of either the GATT or the HCCN.

B. ARGUMENTS AGAINST MULTI-PURPOSE VEHICLE RECLASSIFICATION

Opponents of multi-purpose vehicle reclassification maintain that reclassification constitutes a prima facie violation of several GATT provisions, an inconsistent interpretation of multi-purpose vehicle tariff classification as motor vehicles principally designed for the transport of persons under the HCCN, and an incompatible position in light of the ongoing American commitment to international trade reform through the continued reduction and elimination of tariffs worldwide. More spe-
cifically, opponents of multi-purpose vehicle reclassification argue that any attempt to reclassify these vehicles would violate a number of GATT Articles, including GATT Article I, Article II, and Article XXIII.206

1. MPV Reclassification Would Violate GATT Article I

Opponents argue that reclassification of multi-purpose vehicles violates the Most Favored Nation (MFN) provisions of GATT Article I, which requires all contracting parties to afford the same tariff treatment given to one country's product to all other "like products from all contracting parties."207 Contracting parties may not use their tariff classification system to discriminate against exports of "like products" produced by other contracting parties.208 Furthermore, opponents contend that since passenger cars, sport utility vehicles, minivans and station wagons are considered "like products" under the GATT, the non-discrimination provision of Article I precludes inconsistent tariff treatment for these products.209 Opponents also assert that as the largest exporter of multi-

206. JAPAN AUTOMOBILE MANUFACTURERS, supra note 205, at 2.
207. Id.
208. Id.
209. Id. According to opponents of reclassification, for tariff classification purposes, "like products" only need possess "similar qualities" and need not be "identical" or "equal." Id. To support this view, opponents of reclassification assert that the United States is the only remaining industrial power which believes that certain two-door and four-door multi-purpose vehicles should be classified as trucks under HTSUS heading 8704 rather than as passenger vehicles under HTSUS heading 8703. Id. In addition, opponents insist that multi-purpose vehicles such as minivans, two-door and four-door sport utility vehicles are "principally designed for the transport of persons" under HTSUS heading 8703 and not motor vehicles for the transport of goods under HTSUS heading 8704 because of their "end-uses" and "physical characteristics." Id.
purpose vehicles to the United States, reclassification is disproportionately burdensome and inherently discriminatory against Japan and is therefore a violation of the non-discrimination and “equal treatment” provisions of GATT Article I.\textsuperscript{210} Finally, opponents of reclassification content that because an Article I violation constitutes a “nullification and impairment of a GATT benefit,” Japan has the right to seek compensation, to request the formation of a GATT panel, and the implementation of dispute resolution procedures under GATT Article XXIII.\textsuperscript{211}

\begin{itemize}
  \item Id. at 7.
  \item Id.; see Import, Distribution and Sale of Alcoholic Drinks By Canadian Provincial Marketing Agencies, GATT Doc. L/6304 (Mar. 22, 1988) (requesting the Article XXIII:2 panel dispute mechanism and recommending to Canada that it take reasonable measures in order for its provisional liquor boards to comply with the provisions of the GATT agreement); see also Measures Affecting Exports of Unprocessed Herring and Salmon, GATT Doc. L/6268 (Mar. 22, 1988) (requesting the Article XXIII:2 panel dispute mechanism and requiring Canada to bring its current practices regarding the export of unprocessed salmon and herring into conformity with the GATT agreement); Japan-Trade in Semi-conductors, GATT Doc. L/6309 (May 4, 1988) (requesting the Article XXIII:2 panel dispute mechanism and finding that Japan must take steps to bring the sale of its semi-conductors into conformity with the provisions of the GATT agreement); Japan-Restrictions on Imports of Certain Agricultural Products, GATT Doc. L/6253 (Mar. 22, 1988) (requesting the Article XXIII:2 panel dispute mechanism and requiring Japan to eliminate agricultural quantitative restrictions raised by the United States in this panel); Republic of Korea Restrictions on Imports of Beef, GATT Doc. L/6504 (Nov. 7, 1989) (complaint by Australia) (requesting the Article XXIII:2 panel dispute mechanism, requiring Korea to eliminate illegal beef import practices, and inviting consultations with the United States and other contracting parties to establish a time table for the elimination of restrictive practices on the import of foreign beef into Korea); United States Restrictions on Imports of Sugar, GATT Doc. L/6514 (June 22, 1989) (requesting the Article XXIII:2 panel dispute mechanism and declaring United States restrictions on the importation of sugar pursuant to the Tariff Schedules of the United States (TSUS) inconsistent with GATT Article II:1); European Economic Community Regulation on Imports of Parts and Components, GATT Doc. L/6657 (May 16, 1990) (requesting the Article XXIII:2 panel dispute mechanism and finding EEC anti-circumvention duties charged to Japanese products subject to anti-dumping duties inconsistent with GATT Article III:2); United States Countervailing Duties on Fresh, Chilled and Frozen Pork From Canada, GATT Doc. DS7/R (July 11, 1991) (requesting the Article XXIII:2 panel dispute mechanism and offering the United States the option of reimbursement or determining the effect of United States subsidies on the price of Canadian pork).
\end{itemize}
2. MPV Reclassification Would Violate GATT Article II

Critics of reclassification charge that reclassification of multi-purpose vehicles constitutes a violation of the GATT Article II provisions on previously agreed upon bound rate tariff concessions because, in agreeing to such tariff reduction concessions, the United States and other contracting parties have committed themselves to institute "no more than the negotiated tariff rate specified in [their] tariff schedule." Removal of such barriers is an integral part of the GATT's overall plan for a negotiated reduction in all tariffs worldwide in order to expand international trade.

While the United States agreed to reduce its tariff rate on motor vehicles for the transport of persons to a 2.5% rate during the Tokyo Round negotiations, the United States bound the tariff rate for multi-purpose vehicles at the higher 25% rate at the conclusion of the Uruguay Round negotiations in December 1994. Binding the tariff at this 25% rate, however, does not necessarily mean that the products in

212. JAPAN AUTOMOBILE MANUFACTURERS, supra note 205, at 2-3. GATT Article II:1(b) provides certain customs concessions for contracting parties:
   The products described in Part I of the Schedule, relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory . . . be exempt from ordinary customs duties in excess of those set forth and provided for therein. GATT, supra note 186, art. II:1(b).

213. See President's Uruguay Round Submission, supra note 7 (stating that one of the principal United States negotiating objectives during the Uruguay Round was the promotion of "more open, equitable and reciprocal market access" and the reduction or elimination of all barriers to trade and other trade distorting practices); see also Job Fairness and Trade Equity Act of 1991: Hearings on H.R. 3250 Before the Subcomm. on Trade of the House Comm. on Ways and Means, 102d Cong., 1st Sess. (1991) (statement of the American International Automobile Dealers Association) (asserting that raising the tariff from 2.5% to 25% is illegal under the GATT and is inconsistent with the United States objective to reduce or eliminate tariffs reciprocally worldwide).

214. JAPAN AUTOMOBILE MANUFACTURERS, supra note 205, at 3-4 (stating that a 1,000% increase in the bound tariff rate from 2.5% to 25% is illegal under the GATT because it would exceed the current bound tariff rate of 2.5%).

215. See Proclamation No. 6763, To Implement the Trade Agreements Resulting From the Uruguay Round of Multilateral Trade Negotiations, and for Other Purposes, 60 Fed. Reg. 1007, 1419 (1994) (binding the duty rate for motor vehicles for the transport of goods at 25% under the terms of the implementing legislation for the Uruguay Round Agreements).
question will be dutiable at the 25% rate. While the United States, as a GATT contracting party, reserves the right to raise the tariff on these vehicles up to a maximum 25% rate, it will be constrained from doing so if multi-purpose vehicles and minivans were entering the United States at a lower tariff rate at the time of the Uruguay Round negotiations, strengthening the importing country’s "reasonable expectation" that its vehicles will remain dutiable at the lower 2.5% tariff rate.

Furthermore, binding the tariff rate at 25% does not have an impact on existing principles regarding customs classification as interpreted by United States courts. As demonstrated in the Marubeni decision, United States courts have the statutory authority to change the classification of multi-purpose vehicles based on existing statutory classification interpretations, legal precedent, and customs principles.

3. MPV Reclassification Would Be Actionable Under GATT Article XXIII

In addition to violations under the GATT Articles I and II, opponents argue that multi-purpose vehicle reclassification also is actionable under GATT Article XXIII. This provision is similar to their GATT Article II analysis in that it hinges on the Japanese government’s “reasonable expectation[]” that the United States would continue to afford the same tariff treatment to multi-purpose vehicles before and after the negotiated Tokyo Round tariff concessions. Consequently, opponents

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216. Telephone Interview with Steve Falken, Director, Aerospace and Automobiles, Office of The United States Trade Representative (Mar. 24, 1995).
217. Id.
218. Id.
219. Id.
220. JAPAN AUTOMOBILE MANUFACTURERS, supra note 205, at 7-8.
221. Id. at 8; see Cassidy Letter, supra note 1, at 2 (stating that the most likely standard for determining whether an action is a non-violation, nullification or impairment of another country’s benefits is "whether that signatory had reason to expect, at the time it negotiated the GATT concession . . . that a subsequent . . . measure would impair those benefits"). Moreover, opponents maintain that many other countries classify multi-purpose vehicles as cars rather than as trucks and that before the 1989 Customs Service’s reclassification decision, the United States had consistently classified two- and four-door multi-purpose vehicles as cars and not trucks in its tariff schedules. Id. As a result, the Japanese automobile industry believes that it had a "reasonable expectation" that two-door multi-purpose vehicles with rear seats would continue to be classified as passenger cars and remain dutiable at the lower 2.5% tariff rate. Id. According to opponents of reclassification, this expectation was reinforced by the
contend that any reclassification would thus hinder Japan's expectation that multi-purpose vehicles would receive the same tariff treatment both before and after the tariff concession negotiations.222

4. MPV Reclassification Would Be Inconsistent With United States HCCN Obligations

Furthermore, opponents charge that the United States is not meeting its obligations under the HCCN.223 Since the United States, as a contracting party, has specifically agreed to harmonize its tariff schedules with the HCCN and to “use all the headings and subheadings of the Harmonized System without addition or modification,” opponents assert that the United States is required to adjust its tariff schedules—including HTSUS heading 8703 (“[m]otor cars or motor vehicles principally de-

Harmonized System Committee’s overwhelming determination in 1989 that two-door sport utility vehicles are properly classified as motor vehicles “principally designed for the transport of persons” under HTSUS heading 8703. JAPAN AUTOMOBILE MANUFACTURERS, supra note 205, at 10. But see AMERICAN AUTOMOBILE MANUFACTURERS, supra note 187, at 2-3 (stating that a GATT panel is not likely to conclude that the Japanese government’s expectations concerning the classification of multi-purpose vehicles during the Tokyo Round negotiations are sufficient to warrant a finding of a nullification or impairment of a benefit under GATT Article XXIII).

222. JAPAN AUTOMOBILE MANUFACTURERS, supra note 205, at 8. GATT panels have consistently interpreted Article XXIII:(1)(b) to prevent one contracting party from undermining the reasonable expectations of another contracting party, particularly when such expectations were the result of tariff binding negotiations. Id. at 9; see European Economic Community Restrictions on Imports of Dessert Apples, GATT Doc. L/6491 (June 22, 1989) (complaint by Chile) (stating that the GATT panel “concurred with the view that Article XI protected expectations of the contracting parties as to competitive conditions, not trade volumes”); see also United States—Restrictions on Imports of Sugar, GATT Doc. L/6514 (June 22, 1989) (explaining that the panel had found “all restrictions imposed by the United States on the importation of sugar under the authority of the Headnote of the Tariff Schedules of the United States to be inconsistent with the General Agreement independent of the quota allocation to specific countries”) (emphasis in original); Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, GATT Doc. L/6627 (Jan. 25, 1990) (finding that the “benefits accruing to the United States . . . were impaired as a result of the introduction of production subsidy schemes which operate to . . . prevent the tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds”).

223. JAPAN AUTOMOBILE MANUFACTURERS, supra note 205, at 9-11. According to opponents of multi-purpose vehicle reclassification, the HCCN “provides a standardized nomenclature designed to function as the ‘core’ for national tariff systems.” Id. at 10.
signed for the transport of persons”) and HTSUS heading 8704 (“[m]otor vehicles for the transport of goods”)—to comply with the HCCN’s tariff classification system. Given the parallel construction of the language of the HCCN and the HTSUS, opponents firmly believe that the United States would have a difficult time defending multi-purpose vehicle reclassification before a GATT panel as permissible under GATT Articles I and II. Considering the United States Court of International Trade’s recent interpretation of the HTSUS and its reversal of the 1989 Customs Service decision to reclassify two-door sport utility vehicles from 2.5% to 25% ad valorem, it is unlikely that a GATT dispute resolution panel would view multi-purpose vehicle reclassification in a favorable light, and such a panel could hold that it is a violation of MFN treatment under GATT Article I and bound tariff rate treatment under GATT Article II.

V. RECOMMENDATIONS AND CONCLUSION

Any attempt to reclassify multi-purpose vehicles would place the United States in the uncomfortable position of having to defend such a policy when it has reaffirmed soundly its commitment to seek broad tariff reductions in concluding the Uruguay Round and its clear endorsement of implementing stronger dispute resolution reforms that provide for a more timely review and stricter procedures for the settlement of GATT disputes under Article XXIII. Although the Clinton Adminis-
The American consumer will bear the costs of such a policy in the long run with higher priced minivans and multi-purpose vehicles.\(^2\)

... and shown [its] respect for the multilateral system by bringing disputes to the GATT’’; see also President’s Uruguay Round Submission, supra note 7, at 2163 (discussing the commitment of the United States to establish more effective dispute resolution mechanisms).

229. See Peter Grier, U.S., Japan Stalemate on Trade Spins Toward Retaliation, THE CHRISTIAN SCI. MONITOR, Feb. 14, 1994, at 1 (stating that both the United States and Japan will win support on the domestic political front by maintaining a tough negotiating position); see also Marc Levinson & Rich Thomas, The Noise is the News, NEWSWEEK, Mar. 29, 1993, at 40 (stating that while the Clinton Administration has talked aggressively on trade issues—including minivan and multi-purpose vehicle reclassification—it is uncertain whether this strong stance will lead to concrete action on this issue).

230. See Max Gates, Senate Mulls Import Tariff on Minivans, Sport Utilities, AUTOMOTIVE NEWS, Mar. 9, 1992, at 1 (stating that reclassifying minivans and four-door sport utility vehicles would hurt the American consumer in the form of a $1,500 to $6,000 increase in vehicle prices); see also Jack McLean, Big Problem with Minivan Prices, AUTOWeek, Sept. 14, 1992, at 11 (stating that the United States automobile industry’s usual response to protection from Japanese imported vehicles is to increase their own vehicle prices to achieve greater profits at the expense of the consumer); The War That Has No Winners; How to Avoid a Wingding Trade War With Japan, L.A. TIMES, Feb. 16, 1994, at B6 (stating that a trade war is not only damaging to the United States and Japan, it inevitably has a harsh impact on consumers due to an increase in prices); Japan Official Blasts Push to Raise Minivan Tariff, WALL ST. J., Mar. 9, 1993, at B6 (reporting that Japan’s Ambassador to the United States called the proposal to raise the tariff on imported minivans “an unfair tax on the American middle class”); When is a Truck Not a Truck?, CONSUMER REP., May 1989, at 330 (asserting that an increase in tariffs would lead to a similar result as the voluntary restraint agreements of the early 1980s, namely a dramatic increase in the price of imported and domestic vehicles). In 1984, Japanese cars sold for 22.6% more than they would have without quotas. Id. When the United States and Japan negotiated the voluntary restraint agreements (VRA) in the early 1980s, rather than maintaining prices to gain market share, the United States automobile industry raised its prices in order to increase short-term profits. Id. As a result, it is estimated that during the first four years of the voluntary restraint agreements, American consumers paid $16 billion more for automobiles due to the large price differential between Japanese automobiles and their American counterparts. Id. But see Robert Kuttner, Protectionism: In the Right Dose, a Cure, WASH. POST, July 7, 1992, at A19 (asserting that despite the conventional economic wisdom that quotas or negotiated restraints lead to economic inefficiency in the domestic industry and higher consumer prices, the protection afforded by the voluntary restraint agreements in the 1980s actually led to a revitalized United States automobile industry); Geoff Sundstrom, Vans, Utilities Socked With a 25% Tariff, AUTOMOTIVE NEWS, Jan. 9, 1989, at 1 (stating that Japanese manufacturers benefitted from “flexible classification” of multi-purpose vehicles be-
If the Clinton Administration decides to make multi-purpose vehicle reclassification a political priority, it will face an uphill battle not only from foreign lobbyists and the Japanese government, but also from a domestic legal system that already has rejected such earlier efforts and from a newly negotiated GATT mechanism that provides for more effective and expeditious dispute resolution. Japan, which prefers to handle such trade issues on a bilateral basis, is so confident in its position that it has threatened to invoke the GATT dispute settlement mechanism if the United States attempts to reclassify multi-purpose vehicles. The stronger dispute settlement procedures negotiated at the close of the Uruguay Round in 1994 will reinforce this confidence.

cause by inserting a back seat into these vehicles, it enabled them to export additional vehicles to the United States independently of their passenger car quota under the voluntary restraint agreements).


232. See President's Uruguay Round Submission, supra note 7, at 2163-64 (discussing the strict time limits for each phase of the dispute settlement process (16 months), the right to a GATT panel, the presumption that panel reports will be adopted unless there is a consensus to repudiate the report, and the requirement that a contracting party bring its laws into compliance with its GATT obligations or face retaliation from the complaining party).

233. See Satoshi Isaka, GATT Pact Seen Helping Japan Settle Trade Disputes, THE NIKKEI WKLY., Dec. 20, 1993, at 1 (stating that in the future the Japanese government will rely on bilateral rather than multilateral negotiations for the settlement of trade disputes); Hiroshi Nakamae, supra note 205, at 2 (stating that while the Japanese support "mutual efforts" to address unfair trade policies, if it decides to pursue unilateral action, then the GATT dispute settlement process is "the sole objective forum able to prevent emotional retaliations among trade partners").

234. See Mark Magnier, Japan Threatens to Go to GATT if U.S. Boosts Minivan Tariffs, N.Y. TIMES, Feb. 17, 1993, at A3 (discussing Japanese threats to bring a GATT action if the United States raises tariffs on imported minivans from 2.5% to 25%); see also Hiroshi Nakamae, supra note 205, at 2 (citing a MITI report encouraging the use of the GATT dispute settlement mechanism as an objective means of resolving trade disputes and preventing any unwanted retaliatory action); David Holley, Japan Calls U.S. Trade Threat Regrettable; Commerce: Japanese Official Says U.S. Suggestion That it Might Impose Sanctions Won't Help Foster Trust, L.A. TIMES, Jan. 14, 1994, at D2 (stating Japan's willingness to invoke the GATT dispute settlement procedures because of the significant protection afforded to an injured party under the new Uruguay Round Agreement); Satoshi Isaka, supra note 233, at 1 (reporting that the Uruguay Round's more stringent and structured trade dispute settlement procedures are the "single most important benefit for Japan" which could lead to a "fundamental shift" in Japan's approach to resolving trade disputes with the United States).

235. President's Uruguay Round Submission, supra note 7, at 2163.
Because of its disposition in the United States courts, it appears unlikely that the United States could argue successfully its case before a GATT dispute settlement panel.\textsuperscript{236} Furthermore, as a GATT contracting party, the United States is required to abide by its international obligation to honor other contracting parties' "reasonable expectations" at the conclusion of the Uruguay Round negotiations regarding the tariff rate for specific brand name multi-purpose vehicles and minivans which entered the United States market at the time of the Uruguay Round negotiations and were classified at the lower 2.5% rate.\textsuperscript{237} New multi-purpose vehicle models not mentioned in the tariff schedules and exported to the United States after the conclusion of the Uruguay Round will be subject to the higher 25% rate because it will be more difficult from an international standpoint for the importing country to demonstrate its "reasonable expectation" that the newly introduced vehicle should be dutiable at the lower 2.5%.\textsuperscript{238}

Despite this ongoing international obligation and in light of the new 25% bound rate for multi-purpose vehicles under HTSUS heading 8704, United States courts, such as the Court of International Trade in Marubeni, will continue to rule on multi-purpose vehicle classification issues by taking into consideration existing statutory classification, customs principles, and legal precedent.\textsuperscript{239} Although it remains uncertain how future cases will unfold, it seems likely that existing multi-purpose vehicle models the HTSUS lists heading and the end of the Uruguay Round classified at the 2.5% rate will continue to be classified at the lower 2.5% rate. Newer vehicles, however, may be susceptible to the higher tariff rate, unless the exporting country can argue before a GATT panel that it had a "reasonable expectation" that its vehicle should be classified at the lower tariff rate or convince a United States court that the vehicle's structural and non-structural design features more closely resemble a passenger vehicle under HTSUS heading 8703 rather than a cargo or goods carrying vehicle under HTSUS heading 8704.\textsuperscript{240}

Given United States minivan industry's strong market position,\textsuperscript{241}

\begin{itemize}
\item \textsuperscript{236} See \textit{supra} notes 207-27 and accompanying text (discussing the GATT illegal nature of reclassification and the unlikelihood for success under the GATT dispute resolution process).
\item \textsuperscript{237} Interview With Steve Falken, \textit{supra} note 216.
\item \textsuperscript{238} \textit{Id}.
\item \textsuperscript{239} \textit{Id}.
\item \textsuperscript{240} See \textit{supra} notes 74-94 and accompanying text (discussing the basis for overruling the Customs Service's classification of the two-door Nissan Pathfinder).
\item \textsuperscript{241} \textit{See A Vehicle to Ditch}, \textit{BOSTON GLOBE}, May 3, 1993, at 10 (stating that the
President Clinton should reexamine whether the short-term political and rather limited economic gains outweigh equally important economic and diplomatic costs that are associated with pursuing such an action. Because it is important to sustain and promote free trade principles on a worldwide scale, the United States should refrain from raising the multi-purpose vehicle reclassification issue as well as other tariff reclassification issues unless an American industry is actually threatened by or experiencing a material injury. More importantly, as a major actor in international trade, the United States has an obligation to abide by the terms and conditions of the GATT. If the United States truly stands for free trade, it should not place short-term and rather limited political considerations before its more important long-term international commitment to improve and enhance international cooperation on trade issues.

United States dominates the American minivan market, with a United States market share that is estimated to be over 85%); see also Welfare Compromise for Auto Makers, N.Y. TIMES, Feb. 18, 1993, at A22 (reporting that the United States automobile industry “controls over 90% of the domestic minivan market” and would benefit dramatically from a tariff rate increase in the form of higher profits from the sale of its own minivans); Dumping on U.S. Consumers, CONSUMER REP., Oct. 1992, at 628 (stating that although the United States automobile industry controls more than 90% of the $9 billion minivan market, it continues to fight for additional protection through dumping actions and multi-purpose vehicle reclassification efforts); Commerce Department Final Determination Finds that Japan Dumps Minivans in U.S., Int’l Trade Rep. (BNA), May 27, 1992 (stating that the United States automobile industry controls over 90% of the domestic minivan market); Gates, supra note 230, at 1 (same).

242. See Max Gates, Clinton to Decide Minivan Tariffs, AUTOMOTIVE NEWS, May 3, 1993, at 8 (stating that the President should consider using the reclassification issue as leverage in order to obtain concessions in trade negotiations with the Japanese).

243. See A Vehicle to Ditch, supra note 241, at 10 (asserting that tariff disputes should be reserved to areas where there is a real injury to American consumers and the overall domestic industry).

244. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987) (stating that a rule of international law or international agreement derives its authority as law because of its very nature as a binding legal obligation of the United States).

245. See President’s Uruguay Round Submission, supra note 7, at 2154 (lauding the creation of a new international trade system that will guarantee the systematic and impartial expansion of world trade).