

1993 FEDERAL CIRCUIT DECISIONS IN THE SHADOW OF THE URUGUAY ROUND

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Trade law in 1993 will be remembered primarily for the Uruguay Round¹ and the North American Free Trade Agreement,² not for the decisions of the United States Court of Appeals for the Federal Circuit (Federal Circuit). With few exceptions, the Federal Circuit's trade law decisions were limited in subject matter and precedential value. Despite its broad jurisdiction over trade matters,³ the Federal Circuit's published opinions dealt almost exclusively with the Department of Commerce's (Commerce) administration of the antidumping duty law.⁴ This Article summarizes the Federal Circuit

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1. General Agreement on Tariffs and Trade, Multilateral Trade Negotiations (The Uruguay Round), Dec. 15, 1993, 33 I.L.M. 81 [hereinafter Uruguay Round Agreement].

2. North American Free Trade Agreement between the United States, Government of Canada and Government of the Central Mexican States (final draft Sept. 13, 1993), reprinted in H.R. DOC. NO. 159, 103d Cong., 1st sess., Vol. 1 (1993).

3. The Federal Circuit's jurisdiction includes appeals of trade determinations by the Department of Commerce, the International Trade Commission, and the Department of Labor. 28 U.S.C. § 1295(a) (1988). The Federal Circuit has direct jurisdiction over appeals of § 337 intellectual property cases, *id.* § 1295(a)(6), and appellate jurisdiction over the Court of International Trade (CIT) decisions regarding antidumping and countervailing duty cases, customs decisions, and trade adjustment assistance, *id.* § 1295(a)(5).

4. While several of the issues raised are equally applicable to countervailing duty cases, the issues primarily arose in the context of antidumping investigations. The only exception is *Belton Industries v. United States*, 6 F.3d 756 (Fed. Cir. 1993), *cert. denied*, 62 U.S.L.W. 3491 (U.S. Jan. 25, 1994). Those issues applicable to both antidumping and countervailing duty investigations are noted.

opinions published in 1993 and highlights the anticipated effects of the Uruguay Round Agreement on the Federal Circuit decisions.

I. INTRODUCTION TO ANTIDUMPING LAW

To understand the 1993 Federal Circuit cases, a brief outline of antidumping duty law and the responsibilities of Commerce is critical.⁵ U.S. law and the relevant international agreements provide that the United States may impose additional duties on imports⁶ that: (1) are sold at "less than fair value" (LTFV) (i.e., "dumped"), and (2) cause or threaten to cause material injury to a domestic industry, or materially retard the establishment of a domestic industry.⁷

LTFV sales are generally calculated as the difference between the price of the foreign product in the United States and the price of the same product in the country where it was manufactured.⁸ Determin-

In addition to the published decisions, there were several unpublished opinions. See, e.g., *Chr. Bjelland Seafoods A/S v. United States International Trade Commission*, Nos. 93-1148, 93-1235, (Fed. Cir. June 15, 1993); *Suramerica de Aleaciones Laminadas, C.A. v. United States International Trade Commission*, Nos. 93-1337, 93-1350, (Fed. Cir. May 26, 1993).

5. This brief summary includes only those provisions related to the 1993 Federal Circuit decisions and is not intended to provide a complete description of antidumping duty law. For example, it does not discuss suspension agreements or critical circumstances, issues that were not before the court last year.

6. 19 U.S.C. § 1673(1)-(2) (1988). If the Department of Commerce and the International Trade Commission (ITC) make the requisite affirmative findings, an antidumping duty will be imposed on foreign merchandise. *Id.* This duty will be "in addition to any other duty imposed and in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise." *Id.* § 1673(2)(B); see also General Agreements on Tariffs and Trade, Oct. 30, 1947, 61 Stat. All, 55 U.N.T.S. 187, art. VI [hereinafter GATT]. United States law and the international agreements similarly provide for additional duties on subsidized imports. 19 U.S.C. § 1671(a) (providing authority to impose countervailing duties in amount equal to net subsidy); GATT, *supra*, art. VI.

7. 19 U.S.C. § 1673(1)-(2) (1988). Commerce and the ITC administer the antidumping laws in a bifurcated process. Commerce is responsible for determining the sufficiency of the petition, whether there is dumping, the scope of any order, the amount of any dumping margin, and annually reviewing the dumping margin. The ITC determines which products manufactured in the United States are like the imported products, which U.S. companies should be investigated as members of the domestic industry, and whether that industry is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of the subject imports.

8. *Id.* § 1677b(a). This section provides:

(1) In General

The foreign market value of imported merchandise shall be the price, at the time such merchandise is first sold within the United States by the person for whom (or for whose account) the merchandise is imported to any other person . . . with respect to such [unrelated] person—

(A) at which such or similar merchandise is sold or, in the absence of sales, 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 . . .

Id.; see 19 C.F.R. § 353.46 (1993) (explicating general rule that foreign market value will be based on price in home market country).

Alternatively, LTFV is calculated as the difference between the U.S. price and the price in a third country, or between the U.S. price and the constructed value of the merchandise. See 19

ing LTFV sales involves three steps: (1) calculation of the U.S. market price (USP);⁹ (2) calculation of the foreign market value (FMV);¹⁰ and (3) calculation of the difference between these two amounts.¹¹ This difference is the "dumping margin."¹² To determine the USP and the FMV, numerous technical adjustments are needed to arrive at "ex-factory" prices, thereby making an "apples-to-apples" comparison possible.¹³

If Commerce determines, on the basis of the imports investigated,¹⁴ that the USP is less than the FMV, the importer must pay a cash deposit or post a bond or other security in the amount of the

U.S.C. § 1677b(a)(1)(B) (1988) (calculating LTFV based on price at which merchandise is sold for exportation to third countries, when merchandise is not sold for home use or is sold in comparatively small amounts); *see also id.* § 1677b(a)(2) (1988) (allowing use of constructed value of imported merchandise when actual home market value cannot be ascertained); 19 C.F.R. § 353.49 (1993) (explaining LTFV calculation when foreign market value relates to sales to third country); *id.* § 353.50 (calculating constructed value based on costs of materials used for merchandise); *id.* § 353.51(a)(2) (authorizing use of constructed value method if calculations based on sales made at below-production costs are inadequate).

9. *See* 19 U.S.C. § 1677a (providing methodology for ascertaining U.S. market price). This section provides the following definitions:

(a) United States Price

For purposes of this subtitle, the term "United States price" means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.

(b) Purchase Price

For purposes of this section, the term "purchase price" means 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. Appropriate adjustments for costs and expenses . . . shall be made if they are not reflected in the price paid by the person by whom, or for whose account, the merchandise is imported.

(c) Exporter's Sales Price

For purposes of this section, the term "exporter's sales price" means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, as adjusted . . .

Id. § 1677a(a)-(c); *see* 19 C.F.R. § 353.41 (indicating that actual or likely sales will generally be used when calculating U.S. price).

10. 19 U.S.C. § 1677b (providing methodology for ascertaining foreign market value).

11. *Id.* § 1673 (providing that antidumping duty imposed on foreign merchandise should equal amount by which foreign value exceeds U.S. price).

12. *See* 19 C.F.R. § 353.2(f) (defining dumping margin as "amount by which the foreign market value exceeds the United States price of the merchandise").

13. *See* Michael J. Coursey & David L. Binder, *Hypothetical Calculations Under the United States Antidumping Duty Law: Foreign Market Value, United States Price, and Weighted-Average Dumping Margins*, 4 AM. U. J. INT'L L. & POLY 537, 539 (1989) (arguing that adjustments allow comparison between respective sales prices, "as if the customers of both sales had (1) taken delivery at the factory gate and (2) paid cash for the goods at that time").

14. Commerce typically investigates all relevant imports entered during the month the petition is filed, as well as the five preceding months. INTERNATIONAL TRADE ADMINISTRATION, ANTIDUMPING MANUAL Ch. 6, at 6 (1992). In investigations involving a large number of sales, however, Commerce tends to conduct the investigations based on sampling or averaging techniques. 19 U.S.C. § 16.77f-1 (1988); 19 C.F.R. § 353.59 (1993).

estimated dumping margin.¹⁵ This amount reflects the difference between the USP and the FMV.¹⁶ The actual duty is calculated and paid after the first administrative review, a process commenced approximately one year after the order is entered.¹⁷ Once an antidumping duty order is issued, it can be revoked if: (1) Commerce investigates the imports and determines there is no dumping for a period of three years; (2) no party requests an administrative review for four years; or (3) Commerce or the International Trade Commission (ITC) determines that the order is no longer necessary because of changed circumstances.¹⁸

II. STANDING

Commerce generally initiates antidumping cases in response to a petition¹⁹ filed by an interested party on behalf of a U.S. industry.²⁰

15. 19 U.S.C. § 1673b(d). This provision states: "If the preliminary determination of [Commerce] is affirmative, [Commerce] . . . (2) shall order the posting of a cash deposit, bond, or other security, as it deems appropriate, for each entry of the merchandise concerned equal to the estimated average amount by which the foreign market value exceeds the United States price" *Id.*

16. *Id.* § 1673b(d)(2).

17. *Id.* § 1675(a). At the time of the administrative review, Commerce investigates every entry and calculates the actual amount of dumping on each sale. *Id.* This calculation also determines the estimated duties to be deposited until the next administrative review. *Id.*

(a) Periodic Review of Amount of Duty—

(1) In General.—At least once during each 12-month period beginning on the anniversary of the date of publication of . . . an antidumping duty order . . . [Commerce], if a request for such a review has been received and after publication of such review in the Federal Register, shall—

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty . . .

and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited . . . in the Federal Register.

Id. In practice, Commerce often does not complete the administrative review within the statutory time-period.

18. *Id.* § 1675(c). "[Commerce] may revoke, in whole or in part . . . an antidumping duty order . . . after review under this section. . . . Any such revocation . . . shall apply with respect to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on and after a date determined by [Commerce]." *Id.*; see also *id.* § 1675(b); 19 C.F.R. § 353.25 (1993).

19. See 19 U.S.C. § 1673(b) (1988) (describing procedures for petition-initiated antidumping duty investigations). Alternatively, Commerce may self-initiate an investigation "whenever [it] determines, from information available to it, that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a duty under section 1673 of this title exist." *Id.* § 1673a(a)(1); see 19 C.F.R. § 353.11 (providing antidumping duty procedures for investigations initiated by Secretary of Commerce). Countervailing duty cases are similarly initiated. See 19 U.S.C. § 1671a(a) (authorizing Commerce to initiate countervailing duty investigations).

20. 19 U.S.C. § 1673a(b)(1). The statute requires that an antidumping proceeding be initiated "whenever an interested party . . . files a petition with [Commerce], on behalf of an industry, which alleges the elements necessary for the imposition of the [antidumping] duty . . . and which is accompanied by information reasonably available to the petitioner supporting those allegations." *Id.*; see *id.* § 1671a(b)(1) (providing corresponding requirements for

Because the term "interested party"²¹ is clearly defined by statute, there has been little litigation on the meaning of this term.²² The term "on behalf of an industry," however, is not defined in the statute and has generated substantial controversy and litigation.²³

Commerce, the agency responsible for determining standing,²⁴ assumes that the petition is filed on behalf of a domestic industry unless a majority of domestic companies affirmatively opposes the petition.²⁵ Only after opposition is expressed does Commerce

initiation of countervailing duty proceedings).

The Court of International Trade outlined the standing requirements as a two-step process in *Gilmore Steel Corp. v. United States*, 7 Ct. Int'l Trade 219, 226, 585 F. Supp. 670, 676 (1984), holding that § 1673a(b) requires a showing (1) that petitioner is an "interested party" within the meaning of the statute and (2) that a majority of that industry supports the petition. *Id.*

21. 19 U.S.C. § 1677(9). The statute defines the relevant interested parties as:

(C) a manufacturer, producer, or wholesaler in the United States of a like product,
(D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a like product,

(E) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States,

(F) an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) with respect to a like product . . .

Id. The Senate Committee on Finance approved the interested party provision "to provide an opportunity for relief for an adversely affected industry and to prohibit petitions filed by persons with no stake in the result of the investigation." S. REP. NO. 249, 96th Cong., 1st Sess. 63 (1979).

22. See *Florex v. United States*, 13 Ct. Int'l Trade 28, 29-31, 705 F. Supp. 582, 585-87 (1989) (deciding that wholesale flower trade association is interested party); *Sandvik AB v. United States*, 13 Ct. Int'l Trade 738, 741-45, 721 F. Supp. 1322, 1327-29 (1989) (ruling United Steel Workers is interested party), *aff'd mem.*, 904 F.2d 46 (Fed. Cir. 1990).

The interested party determination, while not often controversial, is critical. See, e.g., *Belton Indus. v. United States*, 6 F.3d 756, 759, 761 (Fed. Cir. 1993) (reversing CIT finding and allowing Commerce to revoke apparel order on basis that companies requesting continuation were not "interested parties"); see also discussion *infra* at notes 265-83 and accompanying text.

23. See *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 666-67 (Fed. Cir. 1992) (analyzing Commerce's interpretation of term "on behalf of an industry"). The Federal Circuit noted that "it is not entirely clear whether Commerce construes 'on behalf of' to be a standing requirement in the traditional sense, with a relaxed evidentiary showing, or merely a characterization of the nature of the petition, the satisfaction of which is left to Commerce's reasonable determination." *Id.*; see *Trent Tube v. Avesta Sandvik Tube*, 975 F.2d 807, 812 (Fed. Cir. 1992) (agreeing with *Suramerica* decision that term "on behalf of an industry" is subject to range of permissible interpretation).

24. See 19 C.F.R. § 353.13(a) (1994) (providing guidance for assessing sufficiency of antidumping duty petition). Commerce assesses standing in the context of determining the sufficiency of the petition and decides whether the petition properly alleges the elements necessary for an antidumping duty, whether the allegations are supported by "information reasonably available to the petitioner," and whether the petition is submitted by an interested party. *Id.*; see also *id.* § 355.13(a) (providing guidance for assessing sufficiency of countervailing duty petition).

25. See *Frozen Concentrated Orange Juice from Brazil*, 52 Fed. Reg. 8324, 8325 (Dep't Comm. 1987) (final determination) ("[T]here is nothing in the statute, its legislative history, or our regulations which requires that petitioners establish affirmatively that they have the support of a majority of their industries."). Commerce recognized that in many cases, an affirmative duty to show majority support "would be so onerous as to preclude access to import relief under the antidumping and countervailing duty laws." *Id.*; see *Certain Stainless Steel Hollow Products*

investigate the depth of the opposition.²⁶ The burden of proof, therefore, is in effect on the opposing companies to prove that they represent more than fifty percent of U.S. production.²⁷ Consequently, current litigation has focused on how Commerce determines whether a majority exists.

from Sweden, 52 Fed. Reg. 5794, 5803 (Dep't Comm. 1987) (final determination) (deciding that opposition does not eliminate standing). Commerce insists that it may rely on petitioner's representation to support its finding that standing exists "until it is affirmatively shown" that the petitioner does not enjoy the majority support of its industry. Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 1010, 1011 (Dep't Comm. 1986) (aff. prelim. determination) (excluding importers when deciding standing issue and finding no affirmative proof that petitioner lacked standing); Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041, 10,043 (Dep't Comm. 1986) (final determination) (finding that opposition has not affirmatively shown that petitioner does not have support of industry).

The courts have upheld Commerce's presumption. See, e.g., *NTN Bearing Corp. of Am. v. United States*, 15 Ct. Int'l Trade 75, 78-79, 757 F. Supp. 1425, 1429 (1991) (holding that Commerce's presumption of majority support is reasonable and consistent with statute), *aff'd mem.*, 972 F.2d 1355 (1992), *aff'd*, 997 F.2d 1453 (Fed. Cir. 1993); *Citrosuco Paulista, S.A. v. United States*, 12 Ct. Int'l Trade 1196, 1204-05, 704 F. Supp. 1075, 1084-85 (1988) (positing that Commerce has considerable discretion and is not required to dismiss cases that are questionable as to majority support).

26. See *Stainless Steel Hollow Products from Sweden*, 52 Fed. Reg. 37,810, 37,812 (Dep't Comm.) (final determination), *amended by* 52 Fed. Reg. 45,985 (Dep't Comm. 1987) ("Where domestic industry members opposing an investigation provide a clear indication that there are grounds to doubt a petitioner's standing, [Commerce] will review whether the opposing parties do, in fact, represent a major proportion of the domestic industry."). The Court of International Trade has affirmed this practice. See *NTN Bearing Corp. of Am.*, 15 Ct. Int'l Trade at 78-79, 757 F. Supp. at 1429 (requiring Commerce to investigate proportion of industry support for petition once opposition becomes apparent).

If those companies not opposing the petition comprise a "major proportion" of the relevant industry, Commerce proceeds with the investigation. If those affirmatively opposing the petition constitute a majority, Commerce decides whether it will continue or terminate the investigation. Again, the courts have affirmed Commerce's policy. See *Comeau Seafoods Ltd. v. United States*, 13 Ct. Int'l Trade 923, 927, 724 F. Supp. 1407, 1411 (1989) (finding it unnecessary for petitioners to affirmatively establish majority support); *Citrosuco Paulista*, 12 Ct. Int'l Trade at 1205, 704 F. Supp. at 1084-85 (stating that Commerce may, but is not obligated to dismiss claims unsupported by evidence that majority of domestic industry endorses petition); see also *Florex*, 13 Ct. Int'l Trade at 32, 705 F. Supp. at 588 (deeming it reasonable to accept petition as representative of majority support if large fraction supported and no one opposed it).

27. See *NTN Bearing Corp.*, 15 Ct. Int'l Trade at 78-79, 757 F. Supp. at 1429 (requiring Commerce to investigate proportion of industry support for petition); *Stainless Steel Hollow Products from Sweden*, 52 Fed. Reg. at 37,812 (stating Commerce's policy of reviewing whether opposition to investigation represents majority of domestic industry).

This percentage calculation raises two issues. In addition to the issue discussed in *Minebea Co. v. United States*, 984 F.2d 1178, 1181 (Fed. Cir. 1993), regarding the source of information for the numerator, the calculation raises questions regarding which companies are members of the domestic industry and thus included in the denominator.

Even though the ITC is responsible for determining the domestic like product and domestic industry, Commerce rules on these same issues in the context of its standing determination. See, e.g., *Certain Fresh Atlantic Groundfish from Canada*, 51 Fed. Reg. at 1011; *Low-Fuming Brazing Copper Rod and Wire from South Africa*, 50 Fed. Reg. 21,328, 21,329 (Dep't Comm. 1985) (neg. prelim. determination) (explaining Commerce's inquiries into nature of one industry to determine membership in domestic industry); cf. *Gilmore Steel Corp. v. United States*, 7 Ct. Int'l Trade 219, 227, 585 F. Supp. 670, 678 (remarking that ITC has exclusive authority to identify and define "regional industry").

In *Minebea Co. v. United States*,²⁸ a foreign producer challenged Commerce's calculation of majority support.²⁹ Petitioner Torrington filed a petition in the underlying petition that it claimed was on behalf of the U.S. antifriction bearing industry, seeking the imposition of antidumping duties on antifriction bearing imports from nine countries.³⁰ Consistent with its policy, Commerce issued questionnaires to several U.S. companies that opposed petitioner's standing.³¹ In response to Commerce's questionnaire, Minebea's subsidiary, New Hampshire Ball Bearings (NHBB), provided information on its own production.³² It did not, however, provide the requested estimates of its share of the U.S. industry.³³ None of the other companies responded.³⁴ Consequently, Commerce upheld petitioner's standing, ruling that the companies challenging standing failed to establish that a majority of the domestic industry opposed the petition.³⁵

Importers and foreign producers from Japan and Germany, including Minebea, challenged Commerce's standing determination in three separate appeals to the Court of International Trade (CIT).³⁶ In each case, the party opposing standing failed to provide the required market-share data in the underlying proceeding, and in each case, the CIT upheld Commerce's standing determination.³⁷

Minebea appealed the CIT decision to the Federal Circuit, arguing that Commerce did not have substantial evidence that petitioner had majority support and that Commerce erred in not relying on the ITC's market-share data.³⁸ The Federal Circuit rejected Minebea's substantial evidence argument.³⁹ Recognizing that petitioner is

28. 984 F.2d 1178 (Fed. Cir. 1993).

29. *Minebea Co. v. United States*, 984 F.2d 1178, 1180 (Fed. Cir. 1993).

30. *Id.* at 1179.

31. *Id.* at 1180. The questionnaires requested an estimate of the "percentage share of the U.S. market as it relates to the domestic production of antifriction bearings" and an estimate of its "percentage share of the U.S. market as it relates to the sale of antifriction bearings" for the various classes and kinds of bearings subject to the antidumping investigation," including the spherical plain bearings imported by Minebea. *Id.* (quoting questionnaire).

32. *Id.*

33. *Id.*

34. *Id.*

35. Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 Fed. Reg. 18,992, 19,005 (Dep't Comm. 1989) (final determination).

36. See *Minebea Co. v. United States*, 16 Ct. Int'l Trade 20, 782 F. Supp. 117 (1992); *NTN Bearing Corp. of Am. v. United States*, 15 Ct. Int'l Trade 75, 757 F. Supp. 1425 (1991); *SKF USA v. United States Dep't of Commerce*, 15 Ct. Int'l Trade 152, 762 F. Supp. 344 (1991).

37. See *Minebea Co.*, 16 Ct. Int'l Trade at 20, 782 F. Supp. at 119-20; *NTN Bearing Corp.*, 15 Ct. Int'l Trade at 80-81, 757 F. Supp. at 1430-31; *SKF USA*, 15 Ct. Int'l Trade at 156, 762 F. Supp. at 348.

38. *Minebea Co. v. United States*, 984 F.2d 1178, 1180 (Fed. Cir. 1993).

39. *Id.* at 1181.

presumed to have standing, the court focused on whether NHBB provided sufficient evidence to overcome the presumption.⁴⁰ The court concluded that NHBB's failure to provide market-share data and the other companies' failure to provide any data was substantial evidence to support Commerce's finding of standing.⁴¹

The court further rejected Minebea's argument that Commerce should be required to use the ITC's market-share data.⁴² Although the ITC had gathered market-share data for its injury finding, the court refused to require Commerce to use this data.⁴³ The court held that Commerce "may determine what information it should use in order to carry out its statutory duty" regarding standing.⁴⁴ The court further noted that even if Commerce would have reached a different result using the ITC data, this would not invalidate Commerce's standing determination.⁴⁵ The court found that the only question was whether Commerce's decision was supported by substantial evidence.⁴⁶ Finding that it was, the court affirmed Commerce's decision.⁴⁷

Dissatisfied with the U.S. presumption of standing, U.S. trading partners pressed for, and obtained, significant changes in the Uruguay Round agreements.⁴⁸ The Antidumping Agreement provides that:

An investigation shall not be initiated . . . unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the petition. However, no investigation shall be initiated when domestic producers expressly supporting the application account

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1182.

45. *See id.* (stating that "[t]he possibility of drawing different and inconsistent conclusions from the evidence does not prevent [Commerce's] determination from being supported by substantial evidence").

46. *Id.*

47. *Id.*

48. Uruguay Round Agreement, *supra* note 1.

for less than 25 per cent of total production of the like product produced by the domestic industry.⁴⁹

Thus, under the new Antidumping Agreement, there must be an affirmative showing that at least twenty-five percent of the domestic industry supports the petition. Only if this threshold is met, is Commerce allowed to presume that the petition is supported by fifty percent of that industry. Opponents of the petition would still have the opportunity to demonstrate that they account for at least fifty percent of the industry. Consequently, Commerce's current practice of presuming support, affirmed in *Minebea*, is expected to be overturned as a result of the new Antidumping Agreement and the U.S. legislation implementing that agreement.⁵⁰ Moreover, the proposed legislation excludes related parties from the calculation of support,⁵¹ and the factual scenario presented in *Minebea* probably will not arise in the future.

III. BEST INFORMATION AVAILABLE

To obtain information for its dumping calculations, Commerce issues questionnaires to respondent companies requesting specific sale transaction data.⁵² If respondents are unwilling or unable to provide the requested data, Commerce applies the "best information

49. Uruguay Round Agreement, *supra* note 1, Agreement on Implementation of Article VI [hereinafter Antidumping Agreement], art. 5.4; *see id.*, Agreement on Subsidies and Countervailing Measures, part V, art. 11.4 (providing parallel countervailing duty provision).

50. At the time this Article went to press the U.S. legislation implementing the Uruguay Round had not been enacted. The Clinton Administration had proposed changes to U.S. law, congressional hearings had been held, and the House of Representatives Ways and Means Committee and the Senate Finance Committee had suggested modifications to the Administration proposals. *See* Administration's Proposals on Antidumping Agreement and Agreement on Subsidies and Countervailing Measures, June 20, 1994 [hereinafter Administration Proposal]; Gibbons - Matsui En Bloc Amendment, June 20, 1994, [hereinafter House Proposal]; United States Senate Committee on Finance Chairman's Proposal, July 19, 1994 [hereinafter Senate Proposal]; and Committee on Finance Consideration of Legislation Implementing the Uruguay Round of Multilateral Trade Negotiations, Staff Recommendation on Amendments, July 27, 1994 [hereinafter Senate Amendments] (proposals and amendments on file with authors). The official bill will not be presented to Congress until sometime in the Fall, and hence it was not possible to confirm the final provisions at the time this Article went to press.

Legislation implementing the Uruguay Round is being handled under "fast track" procedures. Fast track procedures differ significantly from normal legislation in that the legislation originates from the Administration, and Congress must approve or reject the entire bill without amendment. *See* 19 U.S.C. §§ 2191-2194, 2902-2903 (1988 & Supp. V 1993). The fast track procedures are not a statutory requirement but have been adopted as an exercise of the rulemaking power of the House of Representatives and the Senate. *See id.* § 2191(a)(1). To ensure that Congress will approve the final bill, the Administration currently is consulting closely with Congress and "mock" congressional hearings and a conference are being held.

51. Administration Proposal, *supra* note 50, at 39; House Proposal, *supra* note 50, at 16; Senate Proposal, *supra* note 50, at 48.

52. 19 C.F.R. § 353.31(b) (1994).

available" (BIA) rule.⁵³ The BIA rule is "an investigative tool, which [the] agency may wield as an informal club over recalcitrant parties."⁵⁴ Its purpose is to provide the data necessary for Commerce's calculations within the strict statutory deadlines, either by inducing cooperation or by providing alternative sources of data for the calculation.⁵⁵

The courts have interpreted the BIA rule to allow Commerce to reject incomplete or improperly formatted submissions,⁵⁶ even if the response substantially complies with Commerce's data request.⁵⁷ Moreover, the courts have held that it is within Commerce's discretion to determine which data is "best."⁵⁸ Commerce has the authori-

53. 19 U.S.C. § 1677e(c) (1988). This statutory rule provides: "In making their determinations under this subtitle, [Commerce] and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available." *Id.* A second BIA provision refers to unverifiable information, and provides that "[i]f [Commerce] is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its action, which may include . . . the information submitted in support of the petition." *Id.* § 1677e(b).

54. *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1560 (Fed. Cir. 1984); *see U.H.F.C. Co. v. United States*, 13 Ct. Int'l Trade 119, 129-30, 706 F. Supp. 914, 922 (1989) (finding that ITA's use of information was proper), *aff'd in part, rev'd in part, and remanded*, 916 F.2d 689 (Fed. Cir.), *vacated and remanded*, 14 Ct. Int'l Trade 753 (1990), *dismissed*, 15 Ct. Int'l Trade 433 (1991).

55. *See H.R. REP. NO. 317*, 96th Cong., 1st Sess. 24 (1979) (explaining that purpose of rule is to facilitate timely completion of proceedings within deadlines). The BIA provisions were enacted in 1979 as one of the administrative reforms to shorten the timeframe of antidumping investigations. *Id.* Congress believed that delay in the assessment and collection of data was responsible, in part, for the previously lengthy process. *Id.*; *see Tai Yang Metal Indus. v. United States*, 13 Ct. Int'l Trade 345, 350, 712 F. Supp. 973, 977 (1989) (confirming Commerce's authority to use best information available "to facilitate timely completion of administrative proceedings").

56. *See Rhone Poulenc, Inc. v. United States*, 13 Ct. Int'l Trade 218, 224, 710 F. Supp. 341, 346 (1989) (upholding Commerce's rejection of submission because information was not provided in sufficient detail or in requested computer format), *aff'd*, 899 F.2d 1185 (Fed. Cir. 1990); *Uddeholm Corp. v. United States*, 11 Ct. Int'l Trade 969, 971-72, 676 F. Supp. 1234, 1237-38 (1987) (sustaining Commerce's use of best information available because of inability to attain data in proper requested form).

57. *See, e.g., Olympic Adhesives v. United States*, 899 F.2d 1565, 1572 (Fed. Cir. 1990) (justifying use of best information available to prevent respondent from controlling investigation by selectively providing data); *Rhone Poulenc*, 13 Ct. Int'l Trade at 224, 710 F. Supp. at 346 (commenting that substantiality test could effectively permit respondents to determine outcome of administrative proceeding by strategically withholding and revealing requested information); *Pistachio Group of Ass'n of Food Indus. v. United States*, 11 Ct. Int'l Trade 668, 679, 671 F. Supp. 31, 40 (1987) (interpreting best information rule as means of precluding respondents from controlling investigation by providing partial information).

58. *See, e.g., Neuweg Fertigung GmbH v. United States*, 16 Ct. Int'l Trade 724, 725, 797 F. Supp. 1020, 1024 (1992) (indicating that Commerce is granted broad discretion in deciding which information to use and is only required to provide reasonable explanation of its decision); *N.A.R., S.p.A. v. United States*, 14 Ct. Int'l Trade 409, 414, 741 F. Supp. 936, 942 (1990) (suggesting that courts will not question whether Commerce has chosen "best" information, and will respect Commerce's decision if it is supported by substantial evidence); *Chemical Prods. Corp. v. United States*, 10 Ct. Int'l Trade 626, 633, 645 F. Supp. 289, 295 (1986) (approving Commerce's use of discretion to decide what constitutes BIA after respondent fails to provide

ty to replace the actual figures with different numbers even if the substitute data is not accurate⁵⁹ or appears punitive.⁶⁰ Particularly in instances where respondents do not cooperate, the courts have approved margin calculations based on the highest numbers possible.⁶¹ These calculations usually reflect those alleged by petitioners,⁶² or in the alternative, the highest margin found for any company in the investigation.⁶³ The courts have interpreted BIA as the "common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less."⁶⁴

In the administrative procedure underlying *Allied-Signal Aerospace Co. v. United States*,⁶⁵ Commerce modified its prior BIA approach by adopting a two-tiered methodology.⁶⁶ The first tier would be applied to companies that refuse to cooperate or otherwise significantly

requested information), *remand order vacated*, 10 Ct. Int'l Trade 819, 651 F. Supp. 1449 (1986).

59. *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 Ct. Int'l Trade 13, 28, 704 F. Supp. 1114, 1126 (1989) (remarking that best information available is not synonymous with most accurate information available and that BIA merely serves as surrogate for information respondent has failed to supply), *aff'd*, 901 F.2d 1089 (Fed. Cir. 1990); *Uddeholm Corp.*, 11 Ct. Int'l Trade at 971, 676 F. Supp. at 1236 (permitting Commerce to replace information provided by party with less accurate data, "if it is the best information otherwise available"); *Pistachio Group*, 11 Ct. Int'l Trade at 679, 671 F. Supp. at 40 (allowing Commerce to use unverified data if it is best information otherwise available).

60. *Rhone Poulenc*, 899 F.2d at 1190. The Federal Circuit found that BIA would not be punitive unless the agency rejected a low margin in favor of a higher margin that was demonstrably less probative of current conditions. *Id.* The court interpreted Commerce's use of BIA as a presumption that induces importers to comply with questionnaires. *Id.* Because the presumption is rebuttable, it "implements the basic purpose of the statute—determining current margins as accurately as possible." *Id.* at 1190-91.

61. See *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1190 (Fed. Cir. 1993) (upholding Commerce's use of highest calculation as BIA).

62. 19 C.F.R. § 353.37(b) (1993). Commerce's regulations provide that "[t]he best information available may include the factual information submitted in support of the petition or subsequently submitted by interested parties." *Id.*

63. See *Cyanuric Acid from Japan*, 56 Fed. Reg. 2741, 2742 (Dep't Comm. 1991) (final admin. review). In *Cyanuric Acid*, Commerce explained its use of "highest margin found" data as follows:

When a company refuses to provide the information requested in a timely manner, or otherwise significantly impedes [Commerce's] review, [Commerce] assigns to that company the highest margin for the subject merchandise of: (1) The highest margin calculated for that company in any previous review; (2) the highest margin calculated for any respondent that supplied adequate responses in this review; or, (3) the margin for that company calculated in the less than fair value (LTFV) investigation.

Id. (emphasis added). The Federal Circuit has upheld Commerce's use of the highest rate calculated in the current review for any firm or the firm's own prior rate as BIA. *Allied-Signal*, 996 F.2d at 1190.

64. *Rhone Poulenc*, 899 F.2d at 1190.

65. 996 F.2d 1185 (Fed. Cir. 1993).

66. *Allied-Signal*, 996 F.2d at 1188 (citing 56 Fed. Reg. 31,705 (1991)).

impede the investigation.⁶⁷ This would result in the selection of the most adverse margin possible.⁶⁸ The second tier would be applied to companies that substantially cooperate but are unable to provide the information in a timely manner or in the form requested.⁶⁹ This would result in a less punitive margin.⁷⁰ The second-tier approach is substantively similar to Commerce's previous policy that had been validated by the Federal Circuit.⁷¹

In *Allied-Signal*, appellant argued that this new two-tiered BIA methodology was "impermissibly punitive, frustrating the remedial purposes of the law."⁷² The Federal Circuit was not persuaded by this argument and found that the two-tiered methodology would induce essential cooperation and that it was appropriate to consider the degree of a particular respondent's cooperation, as well as the adequacy of the response.⁷³

The Federal Circuit, however, did find that the first tier could not be properly applied to *Allied-Signal*.⁷⁴ *Allied-Signal's* exporter had

67. *Id.*

68. *Id.*; see Antifriction Bearings (other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 56 Fed. Reg. 31,692, 31,705 (Dep't Comm. 1991) (final admin. review). Commerce would be permitted to select the highest margin of any company as the best information available. Commerce offered this explanation of its first-tier policy:

When a company refused to cooperate with [Commerce] or otherwise significantly impeded these proceedings, we have used as BIA the higher of (1) the highest of the rates found for any firm for the same class or kind of merchandise in the same country of origin in the less than fair value investigation (LTFV) or (2) the highest rate found in this review for the same class or kind of merchandise in the same country of origin.

Allied Signal, 996 F.2d at 1188.

69. *Allied Signal*, 996 F.2d at 1190.

70. See *id.* at 1188. Commerce would be permitted to select only the higher of a company's own prior margin or the highest rate calculated in the current proceeding. *Id.* at 1190. Commerce explained:

When a company substantially cooperated with our requests for information including, in some cases, verification, but failed to provide the information requested in a timely manner or in the form required, we have used as BIA the higher of: (1) the firm's LTFV rate for the subject merchandise (or the "all others" rate from the LTFV investigation, if the firm was not individually investigated), or (2) the highest calculated rate in this review for the class or kind of merchandise from the same country of origin.

Id.

71. *Id.* at 1191 (explaining that Commerce's new policy is consistent with statutory purpose underlying BIA rules, which is to facilitate determination of dumping margins as accurately as possible within tight statutory deadlines); see *supra* notes 56-64 and accompanying text (discussing courts' interpretation of BIA rule).

72. *Allied-Signal*, 996 F.2d at 1189.

73. *Id.* at 1191-92.

74. *Id.* at 1191. *Allied-Signal* asserted that, given its willingness to cooperate, use of the first-tier margin against it was "inordinately harsh and punitive." *Id.* at 1187. Commerce countered that its decision to use the higher rate was reasonable because *Allied-Signal* "offered no evidence indicating that recent margins were more probative of current market conditions than the other companies' dumping rates from the original investigation." *Allied-Signal Aerospace Co. v. United States*, 802 F. Supp. 463, 464 (Ct. Int'l Trade 1992).

attempted to comply with the law and offered to supply the information requested by Commerce in an alternative form.⁷⁵ The Federal Circuit held that because Allied-Signal's exporter made an effort to supply information, the case should be analyzed under the second-tier methodology.⁷⁶ The court specifically found that application of the first tier would neither induce Allied-Signal to comply nor encourage other companies to comply in the future.⁷⁷ Furthermore, the court found that Commerce's refusal to accept the simplified reporting method suggested by respondent resulted in its not using the best information, as the statute requires.⁷⁸

In future cases, the Antidumping Agreement will modify U.S. application of the BIA rule significantly.⁷⁹ U.S. legislation implementing that agreement is expected to alter: (1) Commerce's authority to reject respondent's entire submission as long as some of the data is usable,⁸⁰ and (2) Commerce's responsibility to confirm the BIA information chosen.⁸¹ The Antidumping Agreement and the implementing legislation, however, are not expected to overturn the basic two-tiered approach upheld by the court in *Allied-Signal*.⁸²

75. *Allied-Signal*, 996 F.2d at 1192. Allied-Signal's exporter, SNFA, notified Commerce that because of its costing system and limited accounting resources it would not be able to provide the data as Commerce requested. *Id.* Instead, SNFA sought a simplified process and corresponded with Commerce regarding a possible accommodation to SNFA that would meet Commerce's needs. *Id.*

76. *Id.* at 1193. "However, in view of the undisputed fact that SNFA supplied as much of the requested information as it could and offered to provide the remaining information in a simplified form, we must conclude that it was unreasonable for [Commerce] to have characterized SNFA's behavior as a refusal to cooperate." *Id.* at 1192.

77. *Id.* at 1192-93.

78. *Id.* at 1193.

79. See Antidumping Agreement, *supra* note 49, art. 6 and Annex II.

80. The Administration and Senate Proposals would require Commerce to consider such information if (1) it is submitted by the deadline; (2) it can be verified as required by U.S. law; (3) it is not so incomplete that it cannot serve as a reliable basis; (4) the party acted to the best of its ability; and (5) the information can be used without undue difficulty. Administration Proposal, *supra* note 50, at 54; Senate Proposal, *supra* note 50, at 52. The House Proposal would require Commerce also to take into account the "computer capabilities" of the submitting party when determining if that party has acted to the best of its ability. House Proposal, *supra* note 50, at 22.

81. The Administration Proposal would require Commerce to corroborate information if it makes an adverse inference. Administration Proposal, *supra* note 50, at 54. In such cases, it is to use independent sources "reasonably at [Commerce's] disposal" "to the extent practicable." *Id.* at 54. The House Proposal would require that Commerce corroborate all secondary source information, not just that used in making adverse inferences. House Proposal, *supra* note 50, at 22.

82. The Antidumping Agreement specifically states that "[i]f an interested party does not cooperate, it could lead to a result which is less favorable to the party than if it did cooperate." Antidumping Agreement, *supra* note 49, Annex II.

IV. EXISTENCE OF A "SALE" IN THE UNITED STATES

The current U.S. antidumping statute requires Commerce to determine whether the merchandise under investigation "is being, or is likely to be, sold in the United States" at less than fair market value.⁸³ The statute does not clearly define the term "sold" and, consequently, there has been considerable litigation on this provision. In particular, the statute does not address whether components that are incorporated into a finished product before sale fall within the definition of "sold."⁸⁴

Under past decisions of the Federal Circuit, components are within the definition of "sold" if they have no purpose other than to be assembled into the finished product and if the finished product is subject to the antidumping duty order.⁸⁵ The Federal Circuit has found that to hold otherwise, even if there is significant value added to the component in the United States before sale, would allow imports "to escape the purview of the [antidumping] order."⁸⁶

In *NTN Bearing Corp. of America v. United States*,⁸⁷ the Federal Circuit, consistent with prior case law, held that imported bearing components were effectively being "sold" in the United States, thereby meeting the statutory requirement.⁸⁸ The court further found that Commerce did not abuse its discretion by not calculating a separate margin for components. Commerce had conducted an extremely complex investigation to determine whether imports of antifriction bearings were being dumped into the United States.⁸⁹ In order to ease the burden on respondents, Commerce decided that it was too onerous to require importers of bearing components to calculate a constructed price at importation by backing out the value added to

83. 19 U.S.C. § 1673 (1988).

84. *Id.*

85. *Samsung Elecs. Co. v. United States*, 873 F.2d 1427, 1428-29 (Fed. Cir. 1989) (*per curiam*).

86. *Gold Star Co. v. United States*, 12 Ct. Int'l Trade 707, 692 F. Supp. 1382 (1988), *aff'd*, *Samsung Elecs. Co. v. United States*, 873 F.2d 1427 (Fed. Cir. 1989). In *Gold Star*, Commerce imposed an antidumping order on color television receivers from Korea. *Id.* at 1383. A Korean producer challenged Commerce's subsequent determination that components imported into the United States for assembly into color television receivers were within the scope of the antidumping order. *Id.* The CIT affirmed Commerce's scope ruling, reasoning that applying the antidumping duties to components subsequently assembled into the product subject to the order was necessary to prevent circumvention of the order. *Id.* at 1385.

87. 997 F.2d 1453 (Fed. Cir. 1993).

88. *NTN Bearing Corp. of Am. v. United States*, 997 F.2d 1453, 1457 (Fed. Cir. 1993).

89. *Antifriction Bearings (Other than Papered Roller Bearings) and Parts Thereof from Japan*, 54 Fed. Reg. 19,101, 19,101-03 (Dep't Comm. 1989) (final determination); see *NTN Bearing Corp.*, 997 F.2d at 1454-56 (providing detailed summary of administrative proceedings before Commerce).

the components during the U.S. production process.⁹⁰ Instead, Commerce imposed the same antidumping duty on the components as it calculated for the bearings imported into the United States, a rate it calculated by taking a sample of the prices of imported bearings.⁹¹

NTN Bearing Corp. of America, American NTN Bearing Manufacturing Corp., and NTN Toyo Bearing Co. (collectively NTN) appealed to the CIT.⁹² The CIT did not address the question of whether the components were sold in the United States but instead focused on whether NTN's components were properly within the scope of Commerce's investigation.⁹³ The CIT held that the components were within the scope of the investigation.⁹⁴

In its appeal to the Federal Circuit, NTN argued that the CIT misunderstood its challenge to Commerce's decision.⁹⁵ NTN agreed that the components were within the scope of Commerce's investigation, but argued that Commerce had no authority to calculate a dumping margin on components that were not sold to an unrelated party in the United States.⁹⁶ Because the components did not constitute merchandise that "is being, or is likely to be, sold in the United States at less than its fair value" under 19 U.S.C. § 1673(1), NTN argued that the components were not covered by the statute.⁹⁷

The Federal Circuit affirmed the CIT's decision.⁹⁸ The court

90. *Antifriction Bearings*, *supra* note 89, at 19,103.

91. *Id.* at 19,101-03.

92. *NTN Bearing Corp. of Am. v. United States*, 16 Ct. Int'l Trade 719, 720, 802 F. Supp. 448, 451 (1992), *aff'd*, 997 F.2d 1453 (Fed. Cir. 1993).

93. *Id.*

94. *Id.*

95. *NTN Bearing Corp. of Am. v. United States*, 997 F.2d 1453, 1456 (Fed. Cir. 1993).

96. *Id.*

97. *Id.*

98. *Id.* at 1458. The Federal Circuit also considered whether Commerce was justified in subjecting components to the duty rate calculated for bearings because Commerce's sample of imported bearings had not included any samples of component prices. *Id.* The court recognized Commerce's authority to select appropriate samples and averages to determine dumping margins, but raised the question of whether Commerce's approach had met the statute's requirement that such samples be "representative of the transactions under investigation." *Id.* (quoting 19 U.S.C. § 1677f(1)(b) (1988)).

The court concluded that Commerce had not abused its discretion in this case. *NTN Bearing Corp.*, 997 F.2d at 1458. In reaching this decision, however, the court relied heavily on the fact that NTN supported at the administrative level Commerce's decision to apply the bearings rate to components and that this decision was taken in part for the benefit of respondents such as NTN. *Id.* Indeed, the court appeared to view the question as one of exhaustion of administrative remedies, stating that NTN could not "mount [a valid legal challenge to Commerce's sales sampling decision] at this time." *Id.*

The Federal Circuit also briefly addressed NTN's request that the case be remanded to Commerce to consider whether the value added to bearing components was so substantial that the components should be considered as outside the scope of the investigations. The court rejected NTN's request, holding that "in an antidumping investigation . . . the burden falls on

stated that its decision in *Samsung Electronics Co. v. United States*⁹⁹ was controlling on the question of whether a dumping margin could be calculated on components that were not sold to an unrelated party in the United States.¹⁰⁰ The Federal Circuit interpreted the *Samsung* precedent,¹⁰¹ as holding that:

an antidumping order may, as a matter of statutory authority, reach imported components which are not sold in the United States as components but instead are sold as part of a product assembled in the United States, in circumstances where the imported components have no purpose other than to be assembled into an end product that would have been within the scope of the order had it been imported in an assembled form.¹⁰²

Central to the Federal Circuit's rationale in *NTN Bearing* was the fact that NTN conceded that its components were dedicated solely for use in manufacturing completed bearings sold in the United States.¹⁰³ Because NTN's components inevitably would be sold in the United States as incorporated into completed bearings, the Federal Circuit concluded that "including these components within the scope of an antidumping order does not constitute an evasion by the ITA of the sold or likely to be sold requirement of § 1673(1)."¹⁰⁴

The Antidumping Agreement neither deals with the "sold" issue directly nor with the underlying circumvention concern.¹⁰⁵ U.S. implementing legislation, however, is expected to modify the current U.S. anticircumvention provision.¹⁰⁶ In addition to the requirements interpreted by the court in *NTN Bearing*, the Senate and House amendments would focus on whether the process of assembly or completion in the United States is minor or insignificant and the value of the parts or components is a significant portion of the total

the importer to demonstrate that its imported products should be excluded from the scope of an antidumping investigation." *Id.* (citing 19 C.F.R. §§ 353.31, 353.37 (1992)). Because NTN had not submitted any evidence of the value added to the components, the court held that NTN could not raise this issue on appeal, particularly because NTN could still request a prospective scope ruling from Commerce. *Id.* at 1459.

99. 873 F.2d 1427 (Fed. Cir. 1989).

100. *NTN Bearing Corp.*, 997 F.2d at 1457. The court specifically found that *Samsung Electronics* "as a matter of precedent, bound [them] to the same answer in this appeal."

101. In *Samsung*, the Federal Circuit had affirmed the CIT's judgment and adopted its opinion in *Gold Star Co. v. United States*, 12 Ct. Int'l Trade 707, 692 F. Supp. 1382 (1988).

102. *NTN Bearing Corp.*, 997 F.2d at 1457.

103. *Id.*

104. *Id.*

105. The Uruguay Round negotiators were unable to agree on specific text regarding anticircumvention, and the issue was referred to the Commission on Antidumping Practices for later resolution. Antidumping Agreement, *supra* note 49, art. 18.

106. House Proposal, *supra* note 50, at 25; Senate Amendments, *supra* note 50, at 8.

value of the merchandise.¹⁰⁷ Thus, if these proposals are enacted as expected, any future court would be interpreting a significantly different statutory provision from that analyzed by the court in *NTN Bearing*.

V. CALCULATION OF FMV AND USP

Commerce determines antidumping duties by calculating the excess of the foreign market value (FMV) of the subject merchandise by its U.S. price (USP).¹⁰⁸ To ensure an accurate calculation, Commerce must make an "apples-to-apples" comparison to ensure that the prices it is comparing are indeed comparable.¹⁰⁹ The appropriate comparison point is called the ex-factory price. Commerce determines the foreign ex-factory price by adjusting the FMV by: (1) discounts and rebates directly related to the subject sales;¹¹⁰ (2) certain circumstances of sale;¹¹¹ (3) differences related to quantities;¹¹² (4) differ-

107. Senate Proposal, *supra* note 50, at 66-67; Senate Amendments, *supra* note 50, at 8; see House Proposal, *supra* note 50, at 25.

108. See *supra* notes 6-13 and accompanying text (discussing statutory bases and methodologies used to determine FMV, USP, and antidumping margins and duties). For discussions of the policies underlying the adjustment methodology for FMV and USP, see generally GREYSON BRYAN, *TAXING UNFAIR INTERNATIONAL TRADE PRACTICES* (1980); U.S. DEP'T OF COMMERCE, *STUDY OF ANTIDUMPING ADJUSTMENTS METHODOLOGY AND RECOMMENDATIONS FOR STATUTORY CHANGE* (1985) [hereinafter *STUDY OF ANTIDUMPING ADJUSTMENTS*]; Charlene Barshefsky & Richard O. Cunningham, *The Prosecution of Antidumping Actions Under the Trade Agreements Act of 1979*, 6 N.C. J. INT'L L. & COM. REG. 307 (1981). The definition of "foreign market value" is contained in 19 U.S.C. § 1677b (1988); the definition of "United States price" is contained in 19 U.S.C. § 1677a.

109. See *Smith-Corona Group v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984) ("One of the goals of the statute is to guarantee that the administering authority makes the fair value comparison on a fair basis—comparing apples with apples.").

110. The statute does not contain express authority to adjust FMV for rebates and discounts, but Commerce has generally relied on 19 U.S.C. § 1677b(1)(A) and 19 U.S.C. § 1677b(a)(4)(B). See, e.g., *Color Picture Tubes from Japan*, 52 Fed. Reg. 44,186, 44,187-88 (1987) (final determination); *Television Receiving Sets, Monochrome and Color, from Japan*, 50 Fed. Reg. 24,278, 24,281 (1985) (final results); *ANTIDUMPING MANUAL*, *supra* note 14, Ch. 8, at 15 ("We generally deduct discounts actually granted by a manufacturer to its home market or third country customers from the sales price in order to determine the net return on the sale. Common types of discounts are quantity discounts, early payment discounts and loyalty discounts. A discount is in effect a reduction in the price for the merchandise.").

111. See 19 U.S.C. § 1677b(a)(4)(B); 19 C.F.R. § 353.56 (1994). Commerce generally deducts from FMV direct selling expenses and offsets for commissions and offsets for indirect selling expenses that are deducted from ESP. The most frequent deductions are expenses related to credit costs, advertising and sales promotion, technical services, warehousing, warranties and guarantees, and certain commissions. *ANTIDUMPING MANUAL*, *supra* note 14, Ch. 8, at 16.

112. See 19 U.S.C. § 1677b(a)(4)(A); 19 C.F.R. § 353.55; *Brass Sheet and Strip from the Netherlands*, 53 Fed. Reg. 23,431 (1988) (final determination). To be eligible for a quantity-based adjustment, a respondent generally must demonstrate a direct link between the price differences and the quantities sold. *Brass Sheet and Strip from the Netherlands*, *supra*.

ences in merchandise;¹¹³ (5) the level of trade;¹¹⁴ and (6) differences in packing costs.¹¹⁵ To reach the comparable U.S. ex-factory price, Commerce adjusts the USP by: (1) expenses incident to bringing the merchandise from the place of shipment in the foreign country to the place of delivery in the United States;¹¹⁶ (2) certain export taxes;¹¹⁷ (3) packing costs;¹¹⁸ (4) duty drawback;¹¹⁹ (5) certain countervailing duties;¹²⁰ and (6) taxes that are charged on

113. See 19 U.S.C. § 1677b(a)(4)(C); 19 C.F.R. § 353.57. Under these provisions, Commerce will adjust FMV for differences in the physical characteristics of the products being compared. Where similar, but not identical, products are being compared, Commerce will make a "difference in merchandise adjustment" to FMV to account for the physical differences between the products. See, e.g., *Antifriction Bearings from Various Countries*, 54 Fed. Reg. 19,070 (1989).

114. See 19 U.S.C. § 1677b(a)(4)(B); 19 C.F.R. § 353.58. Under these provisions, Commerce will compare U.S. sales to home market sales that are at the same level of trade, to the extent possible. Examples of different levels of trade include end users or original-equipment manufacturers, wholesalers or distributors, and retailers.

115. See 19 U.S.C. § 1677b(a)(1)(B); 19 C.F.R. § 353.46(a); see also ANTIDUMPING MANUAL, *supra* note 14, Ch. 8, at 12 (stating that "[a]djustments made for the difference in packing costs (incurred in the home country) between the home market sale and the U.S. sale are made on the home market price. . . . We deduct the packing cost for home market sales from and add the packing cost for export to the United States to the home market price."); *STUDY OF ANTIDUMPING ADJUSTMENTS*, *supra* note 108, at 16, 19, 25; *Personal Word Processors from Japan*, 56 Fed. Reg. 16,296, 16,298-99 (1991) (prelim. determination).

116. See 19 U.S.C. § 1677a(d)(2)(A); 19 C.F.R. § 353.41(d)(iv)(2)(i). Commerce refers to these deductions as "movement charges." They include U.S. import duties; U.S. inland freight and insurance; U.S. brokerage, handling and port charges; international freight; foreign inland freight and insurance; and foreign brokerage, handling and port charges. ANTIDUMPING MANUAL, *supra* note 14, Ch. 7, at 5; *Antifriction Bearings*, *supra* note 35, at 19,048-49.

For Exporter's Sales Price (ESP) sales, Commerce also will deduct commissions paid to unrelated agents for selling the merchandise in the United States; expenses generally incurred on behalf of the exporter in the United States in selling the merchandise under investigation; and any value added to the merchandise after importation but before its sale to the first unrelated customer in the United States. *Id.*; see also *LMI-LaMetalli Industriale, S.p.A. v. United States*, 912 F.2d 455 (Fed. Cir. 1990) (affirming determination of Commerce that sales of brass sheet and strip from Italy were at less than fair value); *High Information Content Flat Panel Displays and Display Glass Thereof from Japan*, 56 Fed. Reg. 32,376 (1991) (final determination); *Certain Small Business Telephone Systems and Subassemblies Thereof from Korea*, 54 Fed. Reg. 53,141 (1989) (final determination).

117. See 19 U.S.C. § 1677a(d)(2)(B); 19 C.F.R. § 353.41(d)(iv)(2)(ii).

118. See 19 U.S.C. § 1677a(d)(1)(A) (requiring that USP be increased by "the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States."); 19 C.F.R. § 353.41(d)(1)(i).

119. See 19 U.S.C. § 1677a(d)(1)(B) (requiring that USP be increased by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States"); 19 C.F.R. § 353.41(d)(1)(ii). For an application of Commerce's duty drawback methodology, see *Brass Sheet and Strip from Japan*, 53 Fed. Reg. 23,298 (1988) (final determination).

120. See 19 U.S.C. § 1677a(d)(1)(D) (requiring that USP be increased by "the amount of any countervailing duty imposed on the merchandise . . . to offset an export subsidy"); 19 C.F.R. § 353.41(d)(1)(iv). This provision reflects a presumption that export subsidies lower the USP by the amount of the subsidy. In contrast, Commerce makes no adjustment for countervailing duties imposed to offset a domestic subsidy. In addition, Commerce makes no adjustment to USP for deposits of estimated antidumping duties. See *PQ Corp. v. United States*, 11 Ct. Int'l Trade 53, 67, 652 F. Supp. 724, 737 (Ct. Int'l Trade 1987) (explaining intent behind requirement of depositing estimated dumping duties as means of deterring dumping while not "unduly"

home market sales but are rebated or not collected on export sales.¹²¹

The courts have granted broad deference to Commerce's interpretation of the definitions and adjustments required for these calculations. In fact, Commerce is afforded particular deference to its expertise in making these complex adjustments to the FMV and the USP.¹²²

A. Tax Adjustments

Commerce has the authority to make tax adjustments for the USP pursuant to 19 U.S.C. § 1677a(b).¹²³ This provision requires the USP to be increased by:

the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.¹²⁴

The Federal Circuit has recently decided two cases concerning Commerce's interpretation of this provision. In *Zenith Electronics Corp. v. United States*,¹²⁵ the Federal Circuit held that the only permissible adjustment for taxes is to increase the USP.¹²⁶ In *Daewoo Electronics Co. v. International Union of Electronic Workers*,¹²⁷ the court held that the phrase "to the extent" should not be interpreted to require Commerce to determine the tax incidence in the home market.¹²⁸

burdening importers who are attempting to eliminate dumping).

121. See *infra* notes 123-90 and accompanying text.

122. For example, in *Smith-Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 1983), the Federal Circuit upheld Commerce's use of the circumstances-of-sale provision, reasoning that Congress had not expressly addressed this adjustment to FMV, making deference appropriate. *Id.* at 1576-77. Similarly, in *Consumer Prods. Div., SCM Corp. v. Silver Reed Am.*, 753 F.2d 1033 (Fed. Cir. 1985), the Federal Circuit affirmed Commerce's limitation of the adjustment of FMV for indirect home market selling expenses to the amount of such expenses incurred in the U.S. market. The court stressed that Commerce is the "master" of the antidumping law and that limiting the deduction from FMV of indirect selling expenses to the amount deducted from USP for indirect selling expenses was not "irrational." *Id.* at 1039-40.

123. 19 U.S.C. § 1677a(b) (1988).

124. *Id.* § 1677a(d)(1)(C).

125. 988 F.2d 1573 (Fed. Cir. 1993).

126. *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1581 (Fed. Cir. 1993).

127. 6 F.3d 1511 (Fed. Cir. 1993), *cert. denied*, 62 U.S.L.W. 3822 (U.S. June 13, 1994) (No. 93-1328).

128. *Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1516-17 (Fed. Cir. 1993), *cert. denied*, 62 U.S.L.W. 3822 (U.S. June 13, 1994) (No. 93-1328).

In the case underlying *Zenith Electronics*, Commerce attempted to apply a circumstances-of-sale adjustment to FMV in addition to the statutorily required increase to the USP.¹²⁹ Commerce applied this second adjustment to offset the anomaly of the "multiplier effect," a phenomenon that artificially increases the dumping margin.¹³⁰ The "multiplier effect" occurs when the foreign tax is an *ad valorem* tax, that is, it is calculated as a percentage of the FMV, rather than a per-unit tax.¹³¹ While the percentage adjustment would be the same in both the United States and the foreign market, e.g., fifteen percent, it would be applied to different absolute numbers. Specifically, the commodity tax would be applied to the larger home market price (or FMV), while Commerce's adjustment would be applied to the smaller USP.¹³²

The Federal Circuit, affirming the CIT, reversed Commerce's attempt to correct the anomaly and prohibited the use of the circumstances-of-sale provision for this purpose.¹³³ The Federal Circuit emphasized that Congress had provided expressly in § 1677a(d)(1)(C) that rebated home-market taxes should be addressed by adjusting the USP.¹³⁴ The court reasoned that because Congress had expressly provided for tax adjustments to the USP, but had not so provided for adjustments to the FMV, Commerce may account for

129. *Zenith*, 988 F.2d at 1578. The circumstances-of-sale provision states:

In determining foreign market value, if it is established to the satisfaction of [Commerce] that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to . . . (B) other differences in circumstances of sale . . . then due allowance shall be made therefor.

19 U.S.C. § 1677b(a)(4) (1988).

130. *Zenith*, 988 F.2d at 1578.

131. See *id.* (stating that by virtue of use of *ad valorem* tax, when dumping margin exists, adjusting USP under § 1677a(d)(1)(c) will increase dumping margin leading to multiplier effect).

132. For example, if the pre-tax FMV of a hypothetical Japanese television model is \$100 and the USP for the same model is \$90, the absolute dumping margin for the television is \$10 (\$100-\$90). *Zenith*, 988 F.2d at 1578 (citing *Zenith Elecs. Corp. v. United States*, 633 F. Supp. 1382, 1386 n.9 (Ct. Int'l Trade 1986)). If the tax is 15%, the tax on the FMV is \$15 and the after-tax FMV is \$115. The amount of the tax added to the USP, however, would only be 15% of \$90 or \$13.50. *Id.* Adding \$13.50 to the USP adjusts the USP to \$103.50 and increases the absolute dumping margin to \$11.50 (\$115-\$103.50). *Id.*; see John D. McInerney, *Treatment of Border Tax Rebates of Consumption Taxes Under the Antidumping Law*, 10 NW. J. INT'L L. & BUS. 213 (1989) (analyzing the CIT's opinion in *Zenith* and discussing treatment of export rebates of consumption taxes).

The percentage issue would only arise when FMV exceeded USP and, thus, a dumping margin already existed. If no dumping margin exists, however, there is no risk of a multiplier effect. *Zenith*, 988 F.2d at 1581. The Federal Circuit noted that no company would be found to be dumping solely because of the multiplier effect. *Id.* at 1581-82.

133. *Zenith*, 988 F.2d at 1582.

134. *Id.*

home-market taxes only by adjusting the USP.¹³⁵ According to the court, the legislative history further supported this approach. The House-Senate Conference Committee rejected the House of Representatives' provision that defined the FMV to exclude sales taxes levied in the home market, and thus, permit an adjustment to the FMV.¹³⁶ Instead, the Conference Committee decided to include these taxes in the FMV and adjust the USP.¹³⁷

Moreover, the Federal Circuit found that the general circumstances-of-sale provision did not contradict this interpretation of Congress' intent.¹³⁸ First, the court noted that allowing Commerce to use the circumstances-of-sale provision to adjust either the USP or the FMV for home-market taxes would render superfluous the statutory provision authorizing Commerce to adjust only the USP.¹³⁹ Second, the court emphasized that the purpose of the circumstances-of-sale provision did not apply in this case.¹⁴⁰ The distortion in the dumping margin was not caused by different circumstances of sale in the home market and the U.S. market, but rather, by the operation of the antidumping statute.¹⁴¹ Finally, the court found that the legislative history of the circumstances-of-sale provision did not indicate that Congress intended Commerce to use this provision to make home-market-tax adjustments.¹⁴²

In *Daewoo Electronics Co. v. International Union of Electronic Workers*,¹⁴³ the Federal Circuit again ruled on the tax adjustment provision, this time analyzing the last phrase.¹⁴⁴ This phrase provides that the USP is to be increased only "to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation."¹⁴⁵ The court considered whether this provision for adjusting the USP for taxes rebated on exports to the United States required Commerce to engage in an economic analysis to determine the extent to which certain Korean

135. *Id.* at 1580.

136. 61 CONG. REC. 254 (1921) (stating that "'foreign home value' wherever used in this title . . . shall not include any excise tax levied against such merchandise").

137. *Zenith*, 988 F.2d at 1581.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*; see S. REP. NO. 1619, 85th Cong., 2d Sess. 7 (1958); H.R. REP. NO. 1261, 85th Cong., 1st Sess. 7 (1957) (listing only variations in sale and credit terms, and advertising and selling costs, as warranting circumstances-of-sale adjustment under statute).

143. 6 F.3d 1511 (Fed. Cir. 1993).

144. *Daewoo Elecs. Co. v. International Union of Elec. Workers*, 6 F.3d 1511, 1515-16 (Fed. Cir. 1993), *cert. denied*, 62 U.S.L.W. 3822 (U.S. June 13, 1994) (No. 93-1328).

145. 19 U.S.C. § 1677a(d)(1)(C) (1988).

manufacturers were passing on such taxes to their home-market consumers.¹⁴⁶

Commerce interpreted this statutory provision as requiring Commerce to add to the USP the full amount of certain Korean taxes on merchandise, which were forgiven upon export to the United States.¹⁴⁷ These taxes were assessed on sales in the Korean market, and it was undisputed that the Korean companies had paid the taxes.¹⁴⁸ Commerce concluded that it was required, under the statute, to adjust the USP upward by the full amount of these forgiven taxes.¹⁴⁹ In effect, Commerce assumed that the taxes imposed on the Korean companies in the home market were fully passed through to Korean purchasers.

In *Daewoo Electronics Co. v. United States (Daewoo I)*,¹⁵⁰ the CIT rejected Commerce's interpretation of the statute.¹⁵¹ Relying on its prior decision in *Zenith Electronics Corp. v. United States*,¹⁵² the court held that the statute required Commerce to analyze the extent to which the taxes imposed on Korean companies were in fact passed through to Korean purchasers.¹⁵³ The court described Commerce's decision as "rewriting the express requirements of the statute."¹⁵⁴ The court remanded the case to Commerce with instructions to determine the economic incidence of the taxes imposed on Korean companies in the home market.¹⁵⁵ Thus, *Daewoo I* held that the U.S. statute required Commerce to make an economic analysis of the extent to which the taxes were passed through to Korean purchasers.¹⁵⁶

On remand from *Daewoo I*, Commerce hired an expert to do an econometric measurement of the incidence of the Korean taxes.¹⁵⁷ Based on certain assumptions as to the nature of the Korean

146. *Daewoo*, 6 F.3d at 1515.

147. *Id.* at 1514.

148. *Id.*

149. *Id.*

150. 13 Ct. Int'l Trade 253, 712 F. Supp. 931 (1989).

151. *Daewoo Elecs. Co. v. United States*, 13 Ct. Int'l Trade 253, 282, 712 F. Supp. 931, 956 (1989) (*Daewoo I*), *aff'd in part and rev'd in part*, 6 F.3d 1511 (Fed. Cir. 1993), *cert. denied*, 62 U.S.L.W. 3822 (U.S. June 13, 1994) (No. 93-1328).

152. 10 Ct. Int'l Trade 268, 633 F. Supp. 1382 (1986).

153. *Daewoo I*, 13 Ct. Int'l Trade at 281, 712 F. Supp. at 955.

154. *Id.*, 712 F. Supp. at 956.

155. *Id.* See generally PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 387-89 (12th ed. 1985) (applying supply and demand analysis to determine tax incidence).

156. But see *Federal-Mogul Corp. v. United States*, 813 F. Supp. 856, 862 (Ct. Int'l Trade 1993) (declining to follow reasoning in *Daewoo* and sustaining Commerce's view that statute did not require pass-through analysis).

157. *Daewoo Elecs. Co. v. International Union of Elec. Workers*, 6 F.3d 1511, 1515 (Fed. Cir. 1993).

television receiver market, the study found that the tax incidence in the Korean market was 100%.¹⁵⁸ Thus, Commerce determined that the purchaser bore the entire amount of the Korean taxes imposed on the Korean companies.¹⁵⁹

In *Daewoo Electronics Co. v. United States (Daewoo II)*,¹⁶⁰ the CIT rejected Commerce's remand determination.¹⁶¹ The court found that the proper estimation, or elasticity, of the demand curve was of central importance to the result because the demand curve would determine the estimated incidence of the tax.¹⁶² The court rejected Commerce's economic analysis of the demand curve because it was based on theoretical grounds without sufficient connection to substantial evidence in the record.¹⁶³ Thus, while *Daewoo I* held that the statute required Commerce to engage in economic analysis,¹⁶⁴ *Daewoo II* held that in conducting economic analysis, Commerce must base its analysis on substantial evidence in the record rather than relying entirely on theory.¹⁶⁵

On remand from *Daewoo II*, Commerce considered econometric studies submitted by both respondents and petitioners.¹⁶⁶ Commerce rejected the study submitted by respondents and relied on petitioners' study as the best information available.¹⁶⁷ Commerce then found tax incidence ranging from thirty-three percent to sixty-three percent.¹⁶⁸ This reduced pass-through of the tax meant that less of the tax was added to the USP, and therefore the dumping margin was increased.¹⁶⁹ In *Daewoo Electronics Co. v. United States (Daewoo III)*,¹⁷⁰ the CIT affirmed Commerce's decision.¹⁷¹

When the case reached the Federal Circuit as *Daewoo Electronics Co. v. International Union of Electronic Workers*,¹⁷² the Federal Circuit reversed the CIT's decision in *Daewoo I* that had required Commerce

158. *Id.*

159. *Id.*

160. 15 Ct. Int'l Trade 124, 760 F. Supp. 200 (1991).

161. *Daewoo Elecs. Co. v. United States*, 15 Ct. Int'l Trade 124, 130, 760 F. Supp. 200, 206 (1991) (*Daewoo II*).

162. *Id.*

163. *Id.*

164. See *supra* notes 153-59 and accompanying text (discussing *Daewoo I*).

165. *Daewoo II*, 15 Ct. Int'l Trade at 131, 760 F. Supp. at 206.

166. *Daewoo Elecs. Co. v. International Union of Elec. Workers*, 6 F.3d 1511, 1515 (Fed. Cir. 1993).

167. *Id.*

168. *Id.*

169. *Daewoo Elecs. Co. v. United States*, 16 Ct. Int'l Trade 583, 584-85, 794 F. Supp. 389, 390 (1992) (*Daewoo III*).

170. *Id.* at 583, 794 F. Supp. at 389.

171. *Id.* at 393.

172. 6 F.3d 1511 (Fed. Cir. 1993).

to perform an economic analysis of the incidence of the Korean taxes.¹⁷³ The Federal Circuit treated the issue as one of statutory interpretation.¹⁷⁴ The court quoted language from the Supreme Court decisions in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁷⁵ and *Zenith Radio Corp. v. United States*¹⁷⁶ to express the proposition that "considerable weight" and "great deference" should be given to an agency's interpretation of the statute it administers.¹⁷⁷ The court stated that "[t]hese tenets extend to their limits when [Commerce] interprets the antidumping laws."¹⁷⁸

Applying this deferential standard of review to Commerce's statutory interpretation, the Federal Circuit held that Commerce's interpretation of § 1677a(d)(1)(C) was reasonable.¹⁷⁹ The court found that the statute did not expressly require an analysis of tax incidence.¹⁸⁰ The court also found that the legislative history was sparse and ambiguous,¹⁸¹ that subsequent legislation amending the antidumping law had failed to modify Commerce's consistent practice of not conducting tax incidence analysis,¹⁸² and that the CIT's interpretation of the statute would have imposed an "onerous burden" on Commerce while producing "results of dubious soundness," delaying investigations, and eliminating the predictability of antidumping duty assessments.¹⁸³

Because of its disposition of *Daewoo I*, the Federal Circuit did not address the CIT's holding in *Daewoo II* that Commerce had applied a tax-incidence analysis with an insufficient link to the evidence of record.¹⁸⁴ Indeed, to the extent the Federal Circuit addressed the issue raised by *Daewoo II* of the need for economic theory to be based on substantial evidence, it agreed with the concerns expressed in *Daewoo II*.¹⁸⁵ The court noted the difficulties inherent in performing an econometric analysis of tax pass-through due to the uncertainty

173. *Daewoo Elecs. Co. v. International Union of Elec. Workers*, 6 F.3d 1511, 1519 (Fed. Cir. 1993).

174. *Id.* at 1516.

175. 467 U.S. 837 (1984).

176. 437 U.S. 443 (1978).

177. *Daewoo*, 6 F.3d at 1516.

178. *Id.*

179. *Id.* at 1517.

180. *Id.*

181. *Id.* at 1518.

182. *Id.* (stating that Congress amended antidumping law in 1984 and 1988 without addressing Commerce's interpretation of 19 U.S.C. § 1677a(d)(1)(C)).

183. *Id.*

184. *Id.* at 1513. The court explicitly noted that its "disposition of the tax incidence issue moots . . . the Korean Companies' appeal from the holding of *Daewoo II* . . . rejecting Commerce's finding of full pass-through in the Korean receiver market." *Id.* (citation omitted).

185. See *supra* notes 161-68 and accompanying text (discussing decision in *Daewoo II*).

involved in choosing one model over another, precisely the rationale underlying *Daewoo II*.¹⁸⁶

Daewoo raised the additional issue of which USP should be used for the tax adjustment.¹⁸⁷ Commerce used the net delivered selling price to the first unrelated customer as the USP to be adjusted, reasoning that this would have been the price on which the Korean tax was imposed.¹⁸⁸ In *Daewoo II*, the CIT rejected Commerce's decision and held that the Korean statute would have imposed the tax on the ex-factory price, so that Commerce should have used the ex-factory price as the USP to be adjusted.¹⁸⁹ The Federal Circuit disagreed, finding that because the Korean legislation was ambiguous and that the actual Korean tax practice was to impose the tax on the net delivered selling price rather than the ex-factory price, Commerce's determination was reasonable.¹⁹⁰

B. *Principal Market*

In *Zenith Electronics Corp. v. United States*,¹⁹¹ the Federal Circuit also affirmed the CIT's findings regarding three other issues. First, two Japanese producers appealed Commerce's determination that all of their home-market sales were "principal market" sales under § 1677b(a)(1)(A) and should be considered in calculating the FMV.¹⁹² The Federal Circuit held that Commerce had reasonably interpreted the statutory provision, and that Commerce was entitled to presume that all the home-market sales were "principal market" sales.¹⁹³ If the producers possessed any contrary information, they should have presented such information to Commerce in order for it to be considered.¹⁹⁴ The court stated that "[t]he burden of production should belong to the party in possession of the necessary information."¹⁹⁵

C. *Warranty Expenses*

Second, two Japanese producers challenged Commerce's denial of circumstances-of-sale (COS) adjustments for home-market warranty

186. *Daewoo*, 6 F.3d at 1518.

187. *Id.* at 1519.

188. *Daewoo II*, 15 Ct. Int'l Trade at 125, 760 F. Supp. at 202.

189. *Id.* at 127, 760 F. Supp. at 204.

190. *Daewoo*, 6 F.3d at 1519-20.

191. 988 F.2d 1573 (Fed. Cir. 1993).

192. *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1582 (Fed. Cir. 1993).

193. *Id.* at 1583.

194. *Id.*

195. *Id.*

expenses.¹⁹⁶ Commerce required the producers to prove that their related-service companies made a profit on warranty services.¹⁹⁷ The Federal Circuit affirmed the approach employed by Commerce.¹⁹⁸ The court found that § 1677b(a)(4)(B) gave Commerce the authority to require justifications for COS adjustments, and that Commerce had a consistent practice of requiring evidence establishing that payment to related companies was at competitive rates.¹⁹⁹

D. Level of Trade Adjustment

Third, a Japanese producer challenged Commerce's denial of a "level of trade" adjustment for the difference between wholesale and retail market prices.²⁰⁰ The Federal Circuit upheld Commerce's requirement that a producer present evidence establishing that it had not manipulated its transactions with its related sales company in order to obtain this adjustment.²⁰¹

The Antidumping Agreement is expected to modify the antidumping calculations in several ways,²⁰² most significantly to implement the "fair comparison" requirement. The Antidumping Agreement requires that "due allowance shall be made in each case, on its merits for differences which affect price comparability, including differences in conditions and terms of sale, taxation, [and] levels of trade."²⁰³ Despite these changes, many of the proposed amendments would codify current Commerce regulations or are not at the level of detail relevant to the 1993 Federal Circuit cases that addressed the anti-dumping calculations. It therefore is unclear to what extent, if at all, the specific findings in the cases discussed above will be disturbed.

VI. COST OF PRODUCTION

If Commerce determines that a foreign producer is selling below cost of production (COP), Commerce calculates the dumping margin

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 1583-84.

200. See 19 C.F.R. § 353.58 (1993) (stating that when sales at same commercial level are insufficient in number, FMV will be calculated based on sales at most comparable level and adjustments made for resulting price differences).

201. *Zenith*, 988 F.2d at 1584.

202. For example, the agreement (1) requires that price comparisons be made between weighted average normal values and export prices or between individual normal values and export prices; and (2) modifies the calculation of exchange rates. Antidumping Agreement, *supra* note 49, art. 2.

203. Antidumping Agreement, *supra* note 49, art. 2.4.

as the difference between COP and the USP, rather than the difference between the USP and the FMV. The statute provides that:

Whenever the administering authority has *reasonable grounds* to believe or suspect that sales in the home market of the country of exportation, or, as appropriate, to countries other than the United States, have been made at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise.²⁰⁴

The CIT has interpreted the “reasonable grounds” standard as a “particularized and objective basis for suspecting . . . [sales below cost] . . . taking into account the totality of the circumstances.”²⁰⁵ While this standard is less than the “probable cause needed for a search warrant,”²⁰⁶ it still requires “specificity in the information.”²⁰⁷

In *FMC Corp. v. United States*,²⁰⁸ the Federal Circuit explained that “overly generalized and ambiguous statements, outdated information, and mere speculation” do not meet the “reasonable grounds” standard of review.²⁰⁹ The court held that Commerce had applied the correct standard when it denied a request by FCM Corp. (FCM) that Commerce investigate sales below the COP.²¹⁰ The Federal Circuit also found that FMC’s evidence did not meet this standard

204. 19 U.S.C. § 1677b(b) (1988) (emphasis added).

205. *Al Tech Specialty Steel Corp. v. United States*, 6 Ct. Int’l Trade 245, 246-47, 575 F. Supp. 1277, 1279-80 (1983) (citing *United States v. Cortez*, 449 U.S. 411, 417 (1981); *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Merritt*, 695 F.2d 1263, 1268 (10th Cir. 1982), *cert. denied*, 461 U.S. 916 (1983)), *aff’d on other grounds*, 745 F.2d 632 (Fed. Cir. 1984).

206. *Connors Steel Co. v. United States*, 2 Ct. Int’l Trade 242, 248-49, 527 F. Supp. 350, 357 (1981).

207. *Al Tech*, 6 Ct. Int’l Trade at 248-49, 575 F. Supp. at 1280 (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

208. 3 F.3d 424 (Fed. Cir. 1993).

209. *FMC Corp. v. United States*, 3 F.3d 424, 428 (Fed. Cir. 1993). The cost of production issue arose in *FMC Corp.* in the context of a preliminary injunction. *Id.* at 426-27. Interested parties frequently seek preliminary injunctions from the CIT in antidumping or countervailing duty cases to enjoin Commerce from instructing the Customs Service to liquidate entries pending the interested party’s appeal to the CIT. Liquidation of an entry means that the duty rate paid on that entry has been finally determined by the United States, so that interested parties can no longer argue for a higher or lower rate.

210. *Id.* at 428. The court reached this conclusion even though Commerce had imposed an additional requirement that FMC prove “actual sales” below cost, and the court agreed that the language in Commerce’s decision seemed to imply two standards. *Id.* at 428 n.7. The court noted, however, that “FMC is not required under the statute to prove actual sales below the COP. That is a job for Commerce. To require otherwise would go against the grain of common sense because if FMC can prove actual sales at below [the exporters’] COP, then a COP investigation would not be necessary.” *Id.* The court appeared to reason that because FMC had not established the reasonable grounds required for a COP investigation in any case, Commerce’s imposition of an additional requirement for initiating a COP investigation was harmless error. *See id.*

and that Commerce correctly rejected it.²¹¹ The court stated that FMC's evidence was "speculative at best and failed to satisfy the statutory language requiring specific and objective evidence."²¹² The court noted that a consultant's three-year-old report was outdated by current data and that the consultant failed to index properly the costs for inflation.²¹³ Further, the court found that a 1990 financial statement that FMC relied on as indicating losses by the exporter included numerous products not at issue, and that a 1989 financial statement, which was equally relevant, reflected profits by the exporter.²¹⁴

Finally, the court found that Commerce had not violated procedural due process by limiting FMC's time for submitting information regarding its cost of production.²¹⁵ The court noted that Commerce's regulation allows flexibility to determine the time that it allows for COP allegations.²¹⁶

While the Antidumping Agreement does not modify the triggering mechanism for a COP investigation, the U.S. implementing legislation is expected to define the term "reasonable grounds" more precisely. The Administration and Senate Proposals define "reasonable grounds to believe or suspect" as "factual information" based on "observed or estimated prices."²¹⁷ The House Proposal defines the term as "observed or *constructed* prices."²¹⁸ Thus, the standard in future cases is expected to be higher than the ambiguous requirement interpreted by the court in *FMC* that there be "specificity in the

211. *Id.* at 429.

212. *Id.*

213. *Id.* at 428.

214. *Id.* at 428-29.

215. *Id.* at 429. Because Commerce was late in sending out the administrative review questionnaire to the exporter, and the exporter was late in responding, FMC had only 31 days to prepare its COP allegation. *Id.* FMC argued that it should have had 60 days. *Id.* The court stated that "[i]t is unclear to this court how FMC's due process rights were violated." *Id.*

216. *Id.* (citing 19 C.F.R. § 353.31(c) (1994)). The court also addressed whether FMC had shown it would be irreparably harmed if the injunction were not granted. *See id.* at 429-31. Finding that the CIT had erred in holding that FMC would not be irreparably harmed, the court stated that under *Zenith Radio Corp. v. United States*, the liquidation of entries subject to an administrative review pending appeal constitutes irreparable harm. *Id.* at 430-31 (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983)).

The court held, however, that the mere existence of irreparable harm to FMC was insufficient to override the fact that FMC was not likely to succeed on the merits. *Id.* at 430. The court stressed that "FMC's failure to submit any other evidence to establish the extent of that harm now proves fatal to its appeal." *Id.* The Federal Circuit stated that "[t]he failure to prove likelihood of success on the merits presents a formidable obstacle to the granting of an injunction." *Id.* at 431. The court did not address the remaining preliminary injunction issues, "balance of hardships" and "public interest," because these issues were not in the CIT opinion on appeal. *Id.*

217. Administration Proposal, *supra* note 50, at 4-5; Senate Proposal, *supra* note 50, at 38.

218. House Proposal, *supra* note 50, at 3.

information.” Moreover, the Antidumping Agreement significantly modifies the calculation of sales at less than the cost of production, and the U.S. implementing legislation is expected to change the relevant evidence before the courts in future cases.²¹⁹

VII. CAPPING OF BONDS

Once Commerce determines that there is dumping, either in its preliminary or final determination, importers must pay provisional duties on all entries.²²⁰ These provisional duties, in the amount of the estimated dumping margin, are collected during the interim period between the finding of dumping and the entry of the order.²²¹ The provisional duties may be in the form of “a cash deposit, bond or other security.”²²² If the estimated duties are in the form of a cash deposit, the statute provides that the liability is capped at the amount of the cash deposit.²²³ Commerce regulations extended this cap to bonds.²²⁴

In 1991, the CIT overturned Commerce’s regulation regarding bonds. In *Zenith Electronics Corp. v. United States*,²²⁵ the court held that because the statute distinguished between cash deposits and bonds, Commerce had no authority to provide a cap for bonds.²²⁶

219. Antidumping Agreement, *supra* note 49, art. 2.2. In the implementing legislation, the Administration proposes to modify the cost of production calculation, including the allocation of costs, the start-up costs, the profit and loss calculations, and the general selling and administrative expenses. Administration Proposal, *supra* note 50, 7-11; *see also* House Proposal, *supra* note 50, at 4-6; Senate Proposal, *supra* note 50, at 38-40.

220. See 19 U.S.C. § 1673b(d) (1988) (“If the preliminary determination . . . is affirmative, [Commerce] . . . (2) shall order the posting of a cash deposit, bond, or other security . . . equal to the estimated average amount by which the foreign market value exceeds the United States price . . .”). At the same time, Commerce also orders the “suspension of liquidation” on all entries. *Id.* § 1673b(d)(1); *see also id.* § 1673d(c)(1), (4) (outlining final affirmation determinations).

221. See 19 U.S.C. § 1673e(a) (noting that final order is entered seven days after Commission renders affirmative material injury determination).

222. *Id.* § 1673b(d)(2).

223. *Id.* § 1673f(a). The statute provides in relevant part:

If the amount of a cash deposit collected as security for an estimated antidumping duty . . . is different from . . . an antidumping order . . . then the difference . . . shall be—

- (1) disregarded, to the extent the cash deposit collected is lower than the duty under the order, or
- (2) refunded, to the extent the cash deposit is higher than the duty under the order.

Id.

224. See 19 C.F.R. § 353.23 (1994) (outlining calculations for bonds similar to 19 U.S.C. § 1873f(a) (1988)).

225. 15 Ct. Int’l Trade 394, 770 F. Supp. 648 (1991).

226. See *Zenith Elecs. Corp. v. United States*, 15 Ct. Int’l Trade 394, 395-400, 770 F. Supp. 648, 651-54 (1991) (noting that distinction made sense because cash deposit was more burdensome to importer than posting of bond, and hence, it was “conceivable that in certain instances Congress might have chosen to protect the provisional duty payments only for those

The CIT's holding was based partially on the fact that the international agreements also distinguished between bonds and cash.²²⁷

The Federal Circuit reversed the CIT in *Daewoo Electronics v. International Union*.²²⁸ Citing the broad deference granted to Commerce, the court found that:

[s]ection 1673f(a) does not prohibit the application of the cap to bonds. This provision simply does not speak to whether estimated duty bonds cap antidumping duties. Given this silence, as well as the statute's authorization to *file* bonds to cover estimated duties, we cannot say that [Commerce's] allowance of a duty ceiling for bonds is contrary to the statute.²²⁹

The court in *Daewoo* agreed that if the statute were considered alone, it might be read as limiting the application of a cap to cash deposits.²³⁰ The court, however, also considered: (1) the fact that Commerce's regulation was promulgated contemporaneously with the statute; (2) Commerce's consistent practice of placing ceilings on antidumping duties irrespective of whether deposits were in the form of a bond or cash; (3) the 1979 legislative history recognizing the burdensomeness of cash deposits; and (4) Congress' failure to amend the law on this issue in the prior two trade laws.²³¹ Moreover, the Federal Circuit found that the CIT's analysis was flawed because it "relied principally" on an incorrect print of GATT.²³² Therefore, the court held that Commerce had reasonably interpreted the statute to permit the cap for both bonds and cash deposits.²³³

The issue of capping of bonds is not addressed in the Antidumping Agreement. The agreement's major change regarding provisional

who made those payments in the more onerous fashion"); see also *Daewoo Elecs. Co. v. United States*, 16 Ct. Int'l Trade 583, 587, 794 F. Supp. 389, 393 (Ct. Int'l Trade 1992) (stating that there is no assessment rate cap if bond is deposited).

227. *Zenith*, 15 Ct. Int'l Trade at 397-98, 770 F. Supp. at 653.

228. 6 F.3d 1511 (Fed. Cir. 1993). In addition to the broad principals of agency deference cited earlier in *Daewoo* and discussed in *supra* notes 172-86 and accompanying text, the court specifically noted:

When the issue is the validity of a regulation issued under a statute that an agency is charged with administering, it is well established that the agency's construction is entitled to great weight. Similarly, agency regulations are to be sustained unless unreasonable and plainly inconsistent with the statute, and are to be held valid unless weighty reasons require otherwise.

Daewoo Elecs. Co. v. International Union, 6 F.3d 1511, 1522 (Fed. Cir. 1993) (quoting *Melamine Chems. v. United States*, 732 F.2d 924, 928 (Fed. Cir. 1984)).

229. *Daewoo*, 6 F.3d at 1522.

230. *Id.* at 1522 n.18; cf. *Nissan Motor Mfg. Corp. v. United States*, 884 F.2d 1375, 1377 (Fed. Cir. 1989) (reciting maxim that *expressio unius est exclusio alterius*, meaning that expression of one thing is exclusion of alternative).

231. *Daewoo*, 6 F.3d at 1522.

232. *Id.* at 1522-23.

233. *Id.* at 1523.

measures—that provisional measures may not be applied until sixty days after initiation²³⁴—will not affect the Federal Circuit's decision. In fact, the relevant language in the Antidumping Agreement parallels the 1979 Antidumping Code language that the Federal Circuit interpreted in *Daewoo*.²³⁵ Therefore, there is no reason to expect that the court's decision in this case will be disturbed by the Uruguay Round implementing legislation.

VIII. SCOPE

At any time after an antidumping duty order is entered, an interested party may request a "scope ruling" from Commerce to determine which products are included within the order.²³⁶ Commerce's scope rulings are meant to clarify whether particular products, components, or later-developed merchandise are included within the order.²³⁷

The courts have stated that when Commerce interprets the scope of its original order—in contrast to when it determines scope for purposes of anticircumvention—it may clarify the earlier determina-

234. Antidumping Agreement, *supra* note 49, art. 7.3. In addition, U.S. law is expected to codify the requirement that provisional duties normally will not be collected for more than four months. Administration Proposal, *supra* note 50, at 63 (proposing to codify art. 7.4 and parallel provision in prior Antidumping Code, art. 10.3).

235. Antidumping Agreement, *supra* note 50, art. 7.2. The Antidumping Agreement provides: "Provisional measures may take the form of a provisional duty or, preferably, a security - by cash deposit or bond - equal to the amount of the antidumping duty provisionally estimated" *Id.*

236. See 19 C.F.R. §§ 353.29, 395.29 (1994) (outlining requests for rulings as to scope of antidumping and countervailing duty orders). Commerce also rules on scope in the context of the investigation. *id.* § 353.12(b)(4).

Commerce normally limits the class or kind of merchandise. *Antifriction Bearings*, *supra* note 35, at 18,999 (distinguishing different types of rollers and bearings). If Commerce finds that there is more than one class or kind of merchandise named in the petition, then it will conduct separate investigations for each. ANTIDUMPING MANUAL, *supra* note 14, Ch. 1, at 9. A single class or kind may include not only the finished product, but also the components of that product. See Initiation & Antidumping Duty Investigation: Certain Light Scattering Instruments and Parts Thereof from Japan, 55 Fed. Reg. 14,333, 14,334 (1990) (including countless components of light scattering devices in scope of investigation); see also *Smith Corona Corp. v. United States*, 16 Ct. Int'l Trade 562, 576-77, 796 F. Supp. 1532, 1535 (1992) (affirming Commerce's decision not to expand scope of its antidumping duty investigation because redefining scope in midstream would create procedural difficulties and could violate United States' international obligations); *Torrington Co. v. United States*, 16 Ct. Int'l Trade 99, 103-04, 786 F. Supp. 1021, 1026 (1992) (affirming Commerce's exclusion of certain products from scope of investigation because petition was ambiguous and Commerce has broad discretion in area).

237. See 19 U.S.C. § 1677j (1988) (authorizing Commerce to include within scope of existing antidumping duty or countervailing duty order certain merchandise completed or assembled in United States, merchandise completed or assembled in other foreign countries, merchandise that has been subjected to minor alterations, and later-developed merchandise); 19 C.F.R. § 353.29(e)-(i) (outlining provisions similar to 19 U.S.C. § 1677j).

tion, but it cannot modify it.²³⁸ In determining scope, Commerce considers the prior written descriptions of the merchandise, including the prior ITC and Commerce determinations and the petition.²³⁹ If these descriptions are unclear, Commerce considers the factors identified by the CIT in *Diversified Products Corp. v. United States*.²⁴⁰ These factors, commonly known as the *Diversified Products* criteria, include the physical appearance of the merchandise,²⁴¹ the ultimate use of the merchandise,²⁴² the expectations of the ultimate purchaser of the merchandise,²⁴³ and the channels of trade in which the merchandise moves.²⁴⁴

In *Nitta Industries Corp. v. United States*,²⁴⁵ the Federal Circuit reviewed the CIT's affirmance of a Commerce scope ruling.²⁴⁶

238. See *Mitsubishi Elec. Corp. v. United States*, 16 Ct. Int'l Trade 730, 749-50, 802 F. Supp. 455, 460-61 (1992) (setting aside Commerce's interpretation of scope of existing antidumping duty order on ground that Commerce had improperly expanded scope of order rather than merely clarifying order); *Alsthom Atlantique v. United States*, 787 F.2d 565, 571 (Fed. Cir. 1986) (reversing CIT finding that Commerce had authority to modify scope of antidumping duty order); cf. 19 U.S.C. § 1677 (granting Commerce authority to modify scope of order to prevent circumvention).

239. See *Nitta Indus. Corp. v. United States*, 997 F.2d 1459, 1461 (Fed. Cir. 1993) (discussing process used by Commerce in determining scope of antidumping order).

240. 6 Ct. Int'l Trade 155, 162-63, 572 F. Supp. 883, 889 (1983).

241. *Diversified Products Corp. v. United States*, 6 Ct. Int'l Trade 155, 162-63, 572 F. Supp. 883, 889 (1983). Differences in physical characteristics are important factors in the class or kind analysis but do not necessarily require a finding that the products belong to different classes or kinds. See *Smith Corona Corp. v. United States*, 12 Ct. Int'l Trade 854, 861, 698 F. Supp. 240, 246 (Ct. Int'l Trade 1988) (analyzing differences between automatic and nonautomatic typewriters); *Final Determination of Sales at Less than Fair Value: Certain Fresh Cut Flowers from Ecuador*, 52 Fed. Reg. 2128, 2218 (1987) (including different types of carnations in scope of investigation); *Cellular Mobile Telephones and Subassemblies from Japan*; *Final Determination of Sales at Less Than Fair Value*, 50 Fed. Reg. 45,447, 45,448 (1985) (including subassemblies in scope of investigation because they can only be used in complete device).

242. *Diversified Products*, 6 Ct. Int'l Trade at 162, 572 F. Supp. at 889. Products that perform a similar function have been found to be the same class or kind even if they do not meet the other *Diversified Products* criteria. See *Certain Iron Construction Castings from Canada: Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 2412, 2415 (1986) [hereinafter *Certain Iron Castings*] (stating Commerce's view that heavy and light castings were not interchangeable but both have similar use and, thus, would be one class).

243. *Diversified Products*, 6 Ct. Int'l Trade at 162, 572 F. Supp. at 889; see *Live Swine from Canada*; *Preliminary Results of Countervailing Duty Administrative Review*, 53 Fed. Reg. 22,189, 22,189-90 (1988) (analyzing different expectations of purchasers of sows and boars); *Erasable Programmable Read Only Memories (EPROMs) from Japan*; *Final Determination of Sales at Less than Fair Value*, 51 Fed. Reg. 39,680, 39,685 (1986) [hereinafter *EPROMs from Japan*] (stating that expectations of final purchaser of different density EPROMs are final).

244. *Diversified Products*, 6 Ct. Int'l Trade at 162, 572 F. Supp. at 889; see *EPROMs from Japan*, *supra* note 243, at 39,685 (arguing that different density EPROMs are traded in same channels and use similar advertising); *Certain Iron Castings*, *supra* note 242, at 2415 (determining that both light and heavy castings move in same channels of trade); *Portable Electric Typewriters from Japan*; *Final Results of Administrative Review of Antidumping Duty Order*, 48 Fed. Reg. 7768, 7770 (1983) (stating that electric and nonelectric typewriters move in same channels of trade).

245. 997 F.2d 1459 (Fed. Cir. 1993).

246. *Nitta Indus. Corp. v. United States*, 14 I.T.R.D. (BNA) 1185 (Ct. Int'l Trade 1992).

Specifically, the issue before the court was whether the CIT had erred in affirming Commerce's ruling that nylon core flat belts produced by Nitta Industries Corp. and Nitta International, Inc. (collectively Nitta) fell within the scope of Commerce's existing antidumping duty order.²⁴⁷

First, the Federal Circuit found that Commerce had properly determined the scope of the antidumping duty order.²⁴⁸ In making its determination, Commerce had considered the description of the subject merchandise contained in the petition, the preliminary and final determinations of Commerce and the ITC, and the antidumping duty order itself.²⁴⁹ Commerce stated that it would not consider the broader *Diversified Products* factors unless it was unable to determine the scope of the order.²⁵⁰ The Federal Circuit affirmed Commerce's decision to conduct a broader scope analysis only if the written descriptions were not dispositive.²⁵¹ The court stated that "[s]uch an analysis finds support in the law, and we see no error in [Commerce's] adoption of this analysis in rendering its scope ruling."²⁵²

Second, the Federal Circuit found that Commerce had properly applied this approach to the facts before it.²⁵³ The court affirmed Commerce's finding that the written description of the antidumping order's scope was dispositive.²⁵⁴ The Federal Circuit found that Commerce's written description of the scope of its antidumping duty order "encompassed Nitta's nylon core flat belts from the initiation

247. *Nitta*, 997 F.2d at 1460.

248. *Id.* at 1463-64.

249. *Id.* at 1461.

250. See *supra* notes 240-44 and accompanying text (discussing factors in *Diversified Products*).

251. *Nitta*, 997 F.2d at 1461.

252. *Id.* (citations omitted). The court cited the following prior court rulings affirming this procedure for determining scope during the course of an investigation: *Smith Corona Corp. v. United States*, 915 F.2d 683, 685 (Fed. Cir. 1990); *Alsthom Atlantique v. United States*, 787 F.2d 565, 571 (Fed. Cir. 1986); *SKF USA v. United States*, 15 Ct. Int'l Trade 152, 762 F. Supp. 344, 349 (1991), *aff'd*, 972 F.2d 1355 (Fed. Cir. 1992) (only standing issue appealed). *Nitta*, 997 F.2d at 1461. The court noted that Commerce had adopted a regulation implementing this approach after the date of Commerce's scope ruling in *Nitta*. *Id.* at 1461 n.3; see also 19 C.F.R. § 353.29(i) (1993).

253. *Nitta*, 997 F.2d at 1462.

254. *Id.* The court found that the petition filed by Gates Rubber Company (Gates) "clearly encompassed Nitta's nylon core flat belts." *Id.* The court made this finding even though the petition "did not reference specifically nylon core flat belts or list Nitta as a company that [Gates] believed was selling imported products at less-than-fair-value (LTFV)," and the regulation in effect at the time "did require some specificity in Gates' petition." *Id.* at 1462, 1464. The court pointed to Gates' objection at the administrative level to Nitta's request that its belts be excluded from the order as evidence that Gates intended Nitta's belts to be included. The court agreed with the CIT that "a petitioner is not required to circumscribe the entire universe of articles which might possibly be covered by the order it seeks." *Id.* at 1464.

of the investigation through the publication of the resulting order."²⁵⁵ The court noted that the Harmonized Tariff System (HTS) numbers used throughout the investigation included Nitta's belts, and that Commerce's written descriptions plainly included nylon core flat belts.²⁵⁶

The Federal Circuit rejected Nitta's argument that the scope of the antidumping duty order was rendered ambiguous by a post-order letter submitted by the Gates Rubber Co. (Gates),²⁵⁷ which stated that it never intended to cover Nitta's belts, and that Commerce was therefore required to conduct a *Diversified Products* analysis in its scope ruling.²⁵⁸ The court held that Gates' change of heart was irrelevant to the scope ruling "because [Commerce] can only clarify, not modify, the scope of an existing order."²⁵⁹ Thus, if the antidumping order is clear, as the court found it was in this case, Commerce cannot change its scope in a subsequent scope ruling.²⁶⁰

Nitta further argued that Commerce had acknowledged in its final determination that the scope of the order was ambiguous as to whether Nitta's belts were included.²⁶¹ Nitta relied on a statement by Commerce that "[t]he *information received was insufficient* to determine whether the merchandise is properly excluded from the scope of this investigation. . . . [U]pon receipt of proper documentation, [Commerce] may conduct a scope ruling concerning the products imported by these firms."²⁶² The Federal Circuit disagreed with Nitta's contention that the quoted language meant that Commerce had not determined whether its belts were within the scope of the antidumping order.²⁶³ The court held that "[e]ven if this evidence were somehow questionable, [Commerce's] scope ruling was nevertheless proper as being supported by all of the other evidence."²⁶⁴

255. *Id.* at 1463.

256. *Id.*

257. *Id.* at 1464.

258. *Id.*

259. *Id.* (citing *Alsthom Atlantique v. United States*, 787 F.2d 565, 571 (Fed. Cir. 1986)); *see also Mitsubishi Elec. Corp. v. United States*, 16 Ct. Int'l Trade 730, 746-47, 802 F. Supp. 455, 458 (Ct. Int'l Trade 1992) (stating that Commerce may clarify but not expand scope of antidumping order), *aff'd mem.*, 11 F.3d 1070 (Fed. Cir. 1993); *Gold Star Co. v. United States*, 12 Ct. Int'l Trade 707, 709, 692 F. Supp. 1382, 1384 (1988) (stating that Commerce may only clarify scope of determination, not change or modify it).

260. *Nitta*, 997 F.2d at 1464.

261. *Id.* at 1463.

262. *Id.*

263. *Id.* at 1465.

264. *Id.*

The Antidumping Agreement does not deal with the clarification of scope issue, and the U.S. legislation is not expected to address this issue. The Federal Circuit's holding in *Nitta*, therefore, is likely to remain untouched.

IX. REVOCATION

Commerce may revoke an antidumping or countervailing duty order if there is no interest in continuing the order.²⁶⁵ Such disinterest can be found if no interested party requests an administrative review for at least four years.²⁶⁶ Commerce's procedure is to publish a notice in the *Federal Register* to notify the interested parties of its intent to revoke.²⁶⁷ If no interested party objects to the revocation within the given deadlines, Commerce revokes the order.²⁶⁸

In *Belton Industries v. United States*,²⁶⁹ Commerce properly published its intent to revoke three outstanding orders on textiles and four outstanding orders on apparel products.²⁷⁰ Commerce did not

265. 19 C.F.R. § 353.25 (1994); *id.* § 355.25.

266. See *supra* note 18 and accompanying text (discussing other methods of revocation).

267. 19 C.F.R. § 353.25; see *id.* § 355.25 (providing parallel countervailing duty provision).

"If for four consecutive annual anniversary months no interested party has requested an administrative review . . . of an order or suspended investigation, not later than the first day of the fifth consecutive annual anniversary month, [Commerce] will publish in the FEDERAL REGISTER notice of 'Intent to Revoke Order' . . ." 19 C.F.R. § 353.25(d)(4). See, e.g., Notice of Intent to Revoke Antidumping Duty Orders and Findings, 59 Fed. Reg. 14,608, at 14,608 (1994); Intent to Revoke Countervailing Duty Orders and Terminate Suspended Investigations, 59 Fed. Reg. 9727, 9727-28 (1994).

Commerce also is required to "serve written notice of the intent to revoke . . . on each interested party listed on [Commerce's] service list and on any other person which [Commerce] has reason to believe is a producer or seller in the United States of the like product." 19 C.F.R. § 353.25(d)(4)(ii); *id.* § 355.26(d)(4)(ii) (providing parallel countervailing duty provision).

268. If an interested party objects, Commerce does not revoke the order. See, e.g., Determination Not To Revoke Antidumping Duty Orders, 59 Fed. Reg. 14,608, 14,608 (1994) ("Within the specified time frame, we received objections from domestic interested parties to our intent to revoke these antidumping duty orders. Therefore, because domestic interested parties objected to the revocation, we no longer intend to revoke these antidumping duty orders.").

For these purposes, interested parties are limited to the relevant (1) U.S. producers, (2) trade unions, (3) trade or business associations, a majority of whose members are producers or sellers, and (4) an association, a majority of whose members are in one of the prior categories. See 19 U.S.C. § 1677(9)(C)-(F) (1988); 19 C.F.R. § 353.2(k)(3)-(6) (1994); see also *supra* notes 19-22 and accompanying text (discussing interested parties).

269. 6 F.3d 756 (Fed. Cir. 1993), *cert. denied*, 62 U.S.L.W. 3491 (U.S. Jan. 25, 1994).

270. *Belton Indus. v. United States*, 6 F.3d 756, 758-59 (Fed. Cir. 1993), *cert. denied*, 62 U.S.L.W. 3491 (U.S. Jan. 25, 1994). These orders were for textiles from Argentina, Peru, and Sri Lanka and on apparel from Argentina, Peru, Sri Lanka, and Thailand. *Id.* at 759. Commerce also published its intent to terminate suspended investigations on textiles from Thailand and Columbia and on apparel products from Columbia. *Id.* While all of these cases involved countervailing duty orders, the procedures and issues would be the same for antidumping duty orders.

provide written notice to the interested parties for any of these orders nor to the interested parties' counsel for five of the orders.²⁷¹

Counsel for the interested parties in the textile cases, however, filed timely objections to all of the intended revocations on behalf of the American Textile Manufacturers Institute, Inc. (ATMI) and its member companies.²⁷² After the filing deadline, ATMI's counsel clarified that its objections were on behalf of the individual ATMI member companies that Commerce had previously recognized as interested parties.²⁷³ Nevertheless, Commerce revoked the orders on the ground that the only timely objection was from ATMI, which, as an association, was not an interested party and therefore did not have standing to object.²⁷⁴

The Federal Circuit overturned Commerce's revocation of the textile orders.²⁷⁵ First, the court held that Commerce's failure to notify the parties was harmless error because counsel had received actual notice.²⁷⁶ Second, the court further held that Commerce had received "reasonable notice" from the interested parties for the textile orders.²⁷⁷ The court summarized the notice requirements as follows:

The statute does not impose on interested parties an exacting standard for filing objections. Neither does the regulation require

271. *Id.* Commerce did not send separately written notice to the interested parties in any of the proceedings. *Id.* It sent written notice to American Textile Manufacturers Institute (ATMI) of the revocations of orders on products from Argentina and Peru and to ATMI's counsel of the proposed revocations of orders on products from Peru and Sri Lanka. Commerce, however, failed to send written notice of its intent to terminate the remaining orders regarding products from Columbia and Thailand. *Id.*

272. *Id.*

273. *Id.*

274. See *id.* at 758-60 for a detailed summary of the administrative proceedings. Commerce rejected counsel's explanation that Commerce should have known who the ATMI member companies were because the same issues had arisen in the underlying proceeding. *Id.* at 761. Commerce therefore revoked the orders against textile and apparel products from Argentina, Peru, and Sri Lanka, terminated the suspended investigations of textile and apparel products from Columbia, and terminated in part the investigation of textiles from Thailand. *Id.* at 760.

275. *Id.* at 762-63. In the CIT appeal, the CIT held that Commerce had unlawfully revoked all of the orders and terminated the investigations. *Id.* at 760. It found that Commerce had violated its regulations requiring written notice to interested parties of revocation or termination. *Id.* at 761. In the alternative, the CIT found that the interested parties had submitted timely objections to the revocation and termination. *Id.*

276. *Id.* The court stated that "notice to the counsel is notice to the client unless the applicable notice provision expressly requires otherwise." *Id.* (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 92-93 (1990)).

Apparently, the unions that had filed the original apparel cases were not represented by the same counsel, and the court commented that Commerce's failure to provide notice either to the parties or the appropriate counsel "call[ed] into question" Commerce's revocation and terminations of these cases. *Id.* at 762 n.4. Because the unions did not appeal Commerce's action, however, the issue was not before the court. *Id.*

277. *Id.* at 761.

exactitude from objecting parties. Rather, it requires reasonable notice to Commerce of objection to a proposed termination.²⁷⁸

Thus, the Federal Circuit rejected Commerce's application of such technical filing requirements and reversed Commerce's revocation for the textile orders.²⁷⁹ The Federal Circuit, however, upheld revocation of the orders on apparel products because ATMI's member companies were not interested parties for these products, and no interested party had objected to these revocations.²⁸⁰

While the Uruguay Round provision on revocation will significantly alter Commerce's revocation of antidumping and countervailing duty orders,²⁸¹ it does not deal with the issue of notice, and therefore, is not expected to affect the court's holding in *Belton*.

The Antidumping Agreement modifies the definition of interested party to include "a trade or business association a majority of the members of which are producers, exporters or importers" of the subject merchandise, and the U.S. legislation is expected to parallel this change.²⁸² Therefore, the factual issue raised in *Belton* of whether the proper party had provided notice will not arise in the future. The court's finding regarding what constitutes adequate notice, however, was not addressed in the Antidumping Agreement and is not expected to be affected by the legislation.²⁸³

278. *Id.*

279. *Id.* at 762-63.

280. *Id.* at 758. The Federal Circuit also denied Sri Lanka and Peru's motions to intervene as untimely. *Id.* at 762. The court found that the prejudice of having to address new issues and parties outweighed any harm to Sri Lanka and Peru caused by their own tactical decision not to appear in the prior two years. *Id.* In reaching this conclusion, the court balanced the factors presented in *Sumitomo Metal Indus. v. Babcock & Wilcox Co.*, 669 F.2d 703 (C.C.P.A. 1982). *Belton*, 6 F.3d at 762.

281. Antidumping Agreement, *supra* note 49, art. 11.3. The Uruguay Round Agreement provides that antidumping and countervailing duty orders will be automatically revoked in five years unless they are reviewed and it is determined that the "expiry would be likely to lead to continuance or recurrence of dumping or injury." *Id.* This provision, often called the "Sunset" provision, will be one of the most significant changes in U.S. antidumping and countervailing duty law.

282. Antidumping Agreement, *supra* note 49, art. 6.11; see also Administration Proposal, *supra* note 50, at 59.

283. The Antidumping Agreement provision on revocation and the expected modification to U.S. law, however, will contain some of the most significant changes to U.S. law. The "Sunset" provision requires that an order be terminated within five years unless there is a determination that revoking the order "would be likely to lead to continuance or recurrence of dumping and injury." Antidumping Agreement, *supra* note 49, art. 11.3; see also Administration Proposal, *supra* note 50, at 78 (regarding implementation of Sunset provision); House Proposal, *supra* note 50, at 18-19 (same); Senate Proposal, *supra* note 50, at 59-63 (same).

CONCLUSION

The 1993 trade decisions of the Federal Circuit will be overshadowed by the Uruguay Round Agreement. The U.S. amendments implementing that agreement—in conjunction with the restricted subject matter of the court's published decisions—will limit the precedential value of the court's decisions. Practitioners and students therefore should tread cautiously in relying on these decisions. While some of the court's decisions are likely to be unaffected, *e.g.*, the scope of the holding in *Daewoo*, other decisions are likely to be overturned, *e.g.*, the decision on standing in *Minebea*. As a result, the 1993 Federal Circuit decisions are probably more significant for the court's overall approach to judicial review of Commerce decisions than as a guide to the future development of the antidumping laws.