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Abstract

Expansion of the availability of judicial review of agency actions has had a marked effect on the nature of trade proceedings, particularly in the antidumping and countervailing duty areas. Since the emergence of the Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit (CAFC or Federal Circuit), a number of major substantive decisions involving the antidumping and countervailing duty laws, as well as a few other import relief laws, have been issued. The following discussion highlights CIT and CAFC accomplishments in these areas.

UNITED STATES IMPORT RELIEF LAWS: CURRENT DEVELOPMENTS IN LAW AND POLICY

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INTRODUCTION

Expansion of the availability of judicial review of agency actions has had a marked effect on the nature of trade proceedings, particularly in the antidumping and countervailing duty areas. While the agencies charged with administering these import competition laws are still cloaked with broad discretionary power, the availability of judicial review and the growing expertise of the courts have done much to keep the agencies in check. The courts ensure that the factual data upon which agency determinations are based is complete and accurate, that proper procedures are utilized in the conduct of administrative investigations and review proceedings, and that statutory mandates are followed.

Since the emergence of the Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit (CAFC or Federal Circuit),[1] a number of major substantive decisions involving the antidumping and countervailing duty laws, as well as a few other import relief laws, have been issued. The following discussion highlights CIT and CAFC accomplishments in these areas.

I. *ANTIDUMPING AND COUNTERVAILING DUTY PROCEEDINGS*

A. *Initiation of an Administrative Proceeding*

One example in which the CIT acted to keep an administrative agency in check is *Republic Steel Corp. v. United States*,[2] which involved review of the Commerce Department's (Com-

1. The Court of International Trade (formerly the Customs Court) was created by virtue of the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727. The Court of Appeals for the Federal Circuit (formerly the Court of Customs and Patent Appeals) was created by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

2. 4 CIT 33, 544 F. Supp. 901 (1982).

merce) decision not to commence a number of countervailing duty investigations and an antidumping investigation regarding certain steel products imported from ten foreign nations and the European Economic Community (EEC). Commerce dismissed the countervailing duty petition respecting some of the steel products and countries on the ground that, in recent years, there had been either no or *de minimis* importations of those products.[3] Commerce also declined to initiate a separate investigation of the allegations relating to the EEC and, instead, limited each investigation it did initiate to products from a single nation. When the nation was a member of the EEC, Commerce investigated both the national and EEC subsidies with respect to products of that nation.[4]

The CIT rejected Commerce's approach, noting that the agency's refusal to treat the EEC as a separate country and to make its allegedly subsidized merchandise the subject of separate investigations would leave "the ITC with the understandable impression that the ITC could only measure injury on the basis of the subsidized production from each country separately . . . [which] may tend to narrow the ITC's mandate" by precluding a unified consideration of injury.[5] The court also found that Commerce did not have unbridled discretion to determine whether the EEC was "a country" for the purpose of the countervailing duty law, citing to the statute[6] and the legislative history as evidencing an intention that customs unions, like the EEC, are subject to the countervailing duty law in all respects.[7]

The court also held that in evaluating the sufficiency of petitions, Commerce may not use a *de minimis* standard to determine whether the level of importations warrants initiation of an investigation. The CIT held that use of such a standard unduly "usurped the role of the ITC whose duty it is to gauge whether the levels of importation have any meaningful effect."[8] Accordingly, the court found that the petitions contained sufficient allegations and information to warrant initia-

3. 4 CIT at 34, 544 F. Supp. at 903.
4. 4 CIT at 34-35, 544 F. Supp. at 903-04.
5. 4 CIT at 36, 544 F. Supp. at 904-05.
6. 19 U.S.C. § 1677(3) (1982).
7. 4 CIT at 37, 544 F. Supp. at 905.
8. 4 CIT at 39-40, 544 F. Supp. at 907.

tion of investigations and ordered Commerce to commence investigations of *all* the products described in the petitions.

In *United States v. Roses Inc.*,[9] the CAFC determined that during the 20-day period following the filing of an antidumping petition Commerce can evaluate the facts alleged and assess those facts in light of its own knowledge and expertise. Commerce, however, may not receive additional information from the respondent or the respondent's government in deciding whether to initiate an investigation. Notwithstanding this conclusion, the CAFC also determined that the CIT had erred in ordering Commerce to commence an investigation. The CAFC disapproved the CIT's independent determination that the antidumping petition was sufficient to warrant an investigation, noting that "it must as a general rule be an abuse of authority for a CIT judge to substitute his own opinion for that of the agency and order an investigation on his own, instead of remanding the case for agency determination according to correct procedures."[10]

B. *Best Information Available*

The courts also have spoken on the question of an agency's "duty to investigate" and to use the "best information available" once an investigation has been commenced. Both Commerce and the ITC are obligated to use the "best information available" in reaching their respective determinations under the antidumping and countervailing duty laws.[11] The cases indicate that the "best information available" standard may not be satisfied by information that is supplied by the parties in response to antidumping or countervailing duty questionnaires. For example, in *Budd Co., Railway Division v. United States*,[12] Judge Boe emphasized that the "best information available" is not limited to that furnished by a petitioner or party in interest to the proceedings. In the CIT's view, the term "available" must be construed in accordance with its common meaning, and the agency has an affirmative duty to obtain *all* information that is accessible or may be obtained,

9. 706 F.2d 1563 (Fed. Cir. 1983).
10. *Id.* at 1569.
11. 19 U.S.C. § 1677e(b)(1982).
12. 1 CIT 67, 507 F. Supp. 997 (1980).

whatever its source may be.[13]

Similarly, in *Krupp Stahl AG v. United States*,[14] the court refused to rule that Commerce *must* consider information provided by a party in response to an antidumping questionnaire in reaching its preliminary determination. The information at issue was not provided in sufficient time to allow for its analysis prior to issuance of the preliminary determination. This delay, coupled with the fact that there remained ample opportunity for further investigation prior to issuance of a final determination, led the court to conclude that the plaintiffs did not suffer enough hardship to warrant intrusion into the administrative process.[15]

More recently, in *Atlantic Sugar, Ltd. v. United States*,[16] the CAFC determined that the "best information available" standard does not necessarily mean the best possible information, but the best information that the agency can find within the statute's strict time limits. *Atlantic Sugar* involved a final injury determination in an antidumping case.[17] In considering whether the regional industry had been materially injured or threatened with injury by less than fair value imports, the ITC utilized data that was not confined to the corporation's operations within the eleven state region involved. The CIT twice rejected the ITC's determination on the ground that it was not the best information available because the ITC had utilized aggregate data which included information from outside the region being investigated. The CAFC reversed, and reinstated the antidumping order. The court noted that the ITC had correctly invoked the best information rule in utilizing the aggregate data and that inclusion of data from outside the region was not so debilitating as to render the ITC's final determina-

13. 1 CIT at 75, 507 F. Supp. at 1003-04.

14. 4 CIT 244, 553 F. Supp. 394 (1982).

15. 4 CIT at 245-46, 553 F. Supp. at 395-96.

16. 744 F.2d 1556 (Fed. Cir. 1984).

17. 744 F.2d at 1559-60. The International Trade Commission (ITC) is the agency charged with determining whether an industry in the United States is materially injured or threatened with material injury, or whether the establishment of an industry in the United States is materially retarded by reason of imports, or sales (or the likelihood of sales for importation of merchandise with respect to which Commerce has made an affirmative less than fair value (LTFV) determination under 19 U.S.C. § 1673d(a)(1)(1982)). *See* 19 U.S.C. § 1673d(b) (1982 & Supp. III 1985).

tion unsupported by substantial evidence.[18]

C. *Scope of an Administrative Order*

Questions regarding the proper scope of an administrative finding or order have also come before the courts over the past five years. Ever since passage of the Trade Agreements Act of 1979,[19] authority to determine the scope of an investigation has rested with Commerce. Nevertheless, the courts have had an opportunity to rule upon the parameters of agency discretion in this area, and have done so in quite a few cases.

For example, in *Royal Business Machines, Inc. v. United States*,[20] the plaintiff sought to compel the Customs Service to liquidate certain entries without imposition of antidumping duties on the ground that the imported merchandise was not within the scope of the antidumping duty order that described the imported merchandise as portable electric typewriters provided for under item 676.0510, Tariff Schedules of the United States (TSUS). In denying the plaintiff's application, the CIT stated:

> Each stage of the statutory proceeding maintains the scope passed on from the previous stage. Thus, the class or kind of merchandise described in the petition, which becomes the subject of investigation under 19 U.S.C. 1673a(c)(2), is the subject of the preliminary injury determination of 19 U.S.C. 1673b, the suspension of liquidation under 19 U.S.C. 1673b(d), the possible terminations or suspensions of 19 U.S.C. 1673c, and the final determinations of 19 U.S.C. 1673d.[21]

The typewriter had been included in the merchandise described in the antidumping petition, the final sales at less than fair value determination, and the ITC's material injury determination. The antidumping duty order subsequently issued was "directed to portable electric typewriters and [the order] defined the term by reference to item 676.0510, Tariff Schedules of the United States (TSUS), a statistical extension (for portable electric typewriters) of the TSUS item 676.05, cover-

18. 744 F.2d at 1562-64.
19. Pub. L. No. 96-39, 93 Stat. 144 (1979) [hereinafter The 1979 Act].
20. 1 CIT 80, 507 F. Supp. 1007 (1980), *aff'd*, 669 F.2d 692 (C.C.P.A. 1982).
21. 1 CIT at 87, 507 F. Supp. at 1014.

ing *all* typewriters."[22] Yet the description of the merchandise contained in the order was the same as that used at the outset of the investigation.

The plaintiff persistently argued to Commerce that the typewriter was not portable and continued to do so after publication of the order. Finally, Commerce sought advice from the Customs Service, which concluded that the typewriter was a *non-portable* electric typewriter within TSUS item 676.0540, and was thus outside the scope of the antidumping order and material injury finding. Nevertheless, Commerce evidently continued to regard the typewriter as one falling *within* the scope of the antidumping order.[23]

The court upheld Commerce, noting that the final antidumping order "is *not* the final expression of the administrative *determinations* . . . [but] really the first step in the *enforcement* of the consequences mandated by statute when it has been determined that certain articles are being sold at less than their fair value and are materially injuring a domestic industry."[24] The court further observed that the final order must express the result of the previous determinations "without alterations" by Commerce or by the Customs Service.[25]

To similar effect is *Diversified Products Corp. v. United States*,[26] in which the CIT reaffirmed the agency's authority to make scope determinations irrespective of tariff classification determinations of the Customs Service. The court went even further by recognizing that Commerce has the authority to determine whether new products, *not even in existence at the time* of the initial dumping findings, are within the scope of the finding.[27] The *Diversified Products* court also endorsed the following criteria for making determinations as to whether imported products are within the class or kind of merchandise embraced by an antidumping finding: general physical characteristics of the merchandise, cost, ultimate use, channels of distribution and

22. 1 CIT at 83, 507 F. Supp. at 1010-11.

23. 1 CIT at 84, 507 F. Supp. at 1011.

24. 1 CIT at 86, 507 F. Supp. at 1012-13 (emphasis in original).

25. 1 CIT at 86-87, 507 F. Supp. at 1013. Since the plaintiff's aggrievement was inclusion in the final determination, and the action had not been brought unde 19 U.S.C. § 1516a(a)(2) to contest the factual findings or legal conclusions underlying the determination, the court dismissed the case for lack of jurisdiction.

26. 6 CIT 155, 572 F. Supp. 883 (1983).

27. 6 CIT at 158-60, 572 F. Supp. at 886-88.

purchaser's expectations.[28]

The relevance of these factors to *all* scope determinations involving new products was discussed in two subsequent cases, *Kyowa Gas Chemical Industry Co. v. United States* (Kyowa I),[29] and *Kyowa Gas Chemical Industry Co. v. United States*, (Kyowa II).[30] The issue in *Kyowa I* was whether a product known as Kyowaglas-XA was within the scope of an antidumping finding involving *Acrylic Sheet from Japan*.[31] In resolving this question, Commerce did not examine the *Diversified Products* criteria, but instead reviewed the descriptions of the product in the petition, initial investigation, and the ITC's determination.[32] Based on these factors, Commerce published notice of the final results of its administrative review of the antidumping finding on *Acrylic Sheet* and concluded that the Kyowaglas-XA was acrylic sheet subject to the finding. In that notice, Commerce outlined a two-step process which it claimed to use in resolving scope questions. The process involved: 1) an examination of "the descriptions of the product contained in the petition, the initial investigation, and the ITC, Treasury, or Commerce Determinations" to ascertain whether the product description is vague and, *if so*, 2) application of the *Diversified Products* criteria to determine whether a newly imported product not previously included within the scope of an antidumping finding is within the class or kind of merchandise contemplated by the finding.[33]

Judge Boe rejected the two-step process and remanded the case to Commerce directing that it apply the *Diversified Products* criteria and consider all relevant evidentiary facts in light of those criteria in making its determination. Specifically, Judge Boe stated that "[n]either precedent nor authority has been submitted to substantiate the newly enunciated ITA standard. When the record is replete with differing evidentiary facts upon which the [*Diversified Products*] criteria may be applicable, the court is unable to accept this qualified application" which conditions their use upon a preliminary finding that the

28. 6 CIT at 162, 572 F. Supp. at 889.
29. 7 CIT 138, 582 F. Supp. 887 (1984).
30. 7 CIT 311 (1984).
31. 7 CIT at 138, 582 F. Supp. at 888.
32. 7 CIT at 139, 582 F. Supp. at 888.
33. Acrylic Sheet from Japan, 48 Fed. Reg. 34,490 (1983) (final admin. review).

initial product description is vague.[34]

In reviewing the redetermination in *Kyowa II*, Chief Judge Re again rejected Commerce's two-tiered approach in favor of one which would go *directly* to consideration of the *Diversified Products* criteria. Specifically, he stated that "in every scope determination involving a new product, the ITA should examine the product in light of the *Diversified Products* criteria to determine whether the product is of the class or kind of merchandise contemplated by the pertinent antidumping finding."[35] Chief Judge Re then went even further, stating that the court "*mandates* that the ITA apply the pertinent criteria to determine whether a new product is within the confines of the order."[36] In its redetermination, Commerce had again referred to the two-step process which it claimed was its practice in scope determinations under Section 751. However, since Commerce had applied the *Diversified Products* criteria and otherwise complied with the remand order issued in *Kyowa I*, the CIT upheld Commerce's redetermination as supported by substantial evidence, and directed it to issue a clarification ruling on the merchandise involved.[37]

A more recent decision regarding scope is *Alsthom Atlantique and Cogenel, Inc. v. United States*,[38] in which the CAFC reversed the CIT's decision that Commerce is empowered to modify the scope of an antidumping finding made by the Department of the Treasury.[39] In this case, the Notice of Antidumping Proceeding embraced "large power transformers . . . ."[40] The final dumping finding issued by the Treasury established a dumping margin of 24% ad valorem, but did not mention shunt reactors.[41] Also, there was no finding of less than fair value (LTFV) sales as to shunt reactors other than

34. 7 CIT at 140, 582 F. Supp. at 889.

35. 7 CIT at 312.

36. 7 CIT at 313 (emphasis added).

37. 7 CIT at 313.

38. 787 F.2d 565 (Fed. Cir. 1986).

39. 787 F.2d at 571. The Court of International Trade's decision is reported at 604 F. Supp. 1234 (Ct. Int'l Trade 1985).

40. Large Power Transformers from France, 35 Fed. Reg. 9934 (1970) (antidumping notice).

41. Large Power Transformers from France, 37 Fed. Reg. 11,772 (1972) (antidumping determination); *see* Large Power Transformers from France, 47 Fed. Reg. 10,269 (1982) (final admin. review).

those within the class or kind of merchandise described as large power transformers. There was also no evidence of any shipments of shunt reactors from France, the country from which the plaintiff's merchandise was exported, during the investigatory period.[42]

In its section 751 review, Commerce concluded that the plaintiff's shunt reactors were within the class or kind of merchandise subject to Treasury's dumping determination and that it could not change the scope of Treasury's finding.[43] The CIT disagreed. Based on its reading of the legislative history of the antidumping law, the court concluded that Commerce was able to review LTFV determinations underlying Treasury orders, because to hold otherwise could force the agency to follow an erroneous Treasury order which would frustrate, rather than further, Congressional intent to transfer authority in antidumping matters to Commerce.[44]

The Federal Circuit reversed, holding that although Commerce is empowered, in a section 751 review, to determine whether an article is within the scope of an original antidumping finding, "the ITA cannot change the scope of an underlying antidumping determination when Treasury has *specifically* included the article within the scope of its underlying determination."[45] Since Treasury had specifically included shunt reactors within the class or kind of merchandise subject to investigation, shunt reactors were within the scope of its antidumping determination. The Federal Circuit did not address the lower court's concern that Commerce might be forced to follow an erroneous Treasury order. Instead, it concluded that Commerce is not obligated to review de novo whether Treasury correctly included certain merchandise within the scope of the determination, and, indeed, cannot substitute its judgment for that exercised by the Treasury Department.[46]

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42. 787 F.2d at 568.

43. Large Power Transformers from France, 47 Fed. Reg. 10,268-69 (1982) (final admin. review).

44. 604 F. Supp. at 1237 (Ct. Int'l Trade 1985).

45. 787 F.2d at 571 (emphasis in original) (citing 507 F. Supp. 1007 (CIT 1980), *aff'd*, 669 F.2d 692 (C.C.P.A. 1982)).

46. 787 F.2d at 571.

D. *Deposit and Assessment of Duties*

The courts have also interpreted statutory requirements involving deposit and assessment of antidumping and countervailing duties. For example, in *Asahi Chemical Industry Co. v. United States*,[47] the court was faced with the question of whether cash deposits of estimated antidumping duties could be required where no shipments of dumped merchandise occur during a review period. Commerce had initially determined that the weighted average margin on sales of spun acrylic yarn from Asahi was 29.05% ad valorem.[48] The ITC subsequently determined that the yarn was causing material injury to the United States industry.[49] Accordingly, Commerce ordered the imposition of antidumping duties on shipments of Asahi spun acrylic yarn imported into the United States.[50]

During the administrative review conducted pursuant to section 751 of the Tariff Act of 1930, Commerce found that Asahi had not shipped spun acrylic yarn to the United States at any time during the review period. It nevertheless required a deposit of estimated antidumping duties equal to the weighted average margin of dumping established as a result of the fair value investigation.[51] The court upheld Commerce's review determination, noting that:

> Congress was primarily concerned with the collection of antidumping duties once an antidumping duty order had issued, not with providing exceptions to or avoidance of such collection . . . . [and that] Congress intended that in the ascertainment of LTFV margins, actual entries, sales and purchases of merchandise be utilized, not their absence.[52]

The court then held that the statute and legislative history supported Commerce's construction of the law and its use of the most recent price and value information available based on ac-

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47. 4 CIT 120, 548 F. Supp. 1261 (CIT 1982).

48. Spun Acrylic Yarn from Japan, 44 Fed. Reg. 61,492, 61,493 (1979) (LTFV determination).

49. Spun Acrylic Yarn from Japan, 45 Fed. Reg. 19,682, 19,683 (1980) (mat'l injury determination).

50. Spun Acrylic Yarn from Japan, 45 Fed. Reg. 24,127 (1980) (antidumping order).

51. Spun Acrylic Yarn from Japan, 46 Fed. Reg. 32,929 (1981) (prelim. results of admin. review).

52. 548 F. Supp. at 1265.

tual entries, sales and purchases of merchandise.[53]

Another novel issue that has come before the courts is whether retroactive assessment of countervailing duties is contrary to the statutory framework which provides for assessment of countervailing duties and governs liquidations of entries subject to such duties. This issue arose in *Ambassador Division of Florsheim Shoe v. United States*,[54] in which an importer of leather footwear from India challenged the final results of the first administrative review of a countervailing duty order. Throughout the pendency of the administrative review proceedings, liquidation of entries of the footwear subject to the countervailing duty order had been suspended and no countervailing duties had been finally assessed. Once the results of the review were published in 1982, Commerce directed Customs to liquidate the suspended entries and assess countervailing duties at the rates of 15.08% ad valorem for footwear and 12.58% ad valorem for lasted leather uppers.[55]

The CIT interpreted the countervailing duty law and 19 U.S.C. § 1504[56] as requiring that the results of periodic administrative reviews have only *prospective* application.[57] Under the CIT's approach the entries embraced by the review period would have been deemed liquidated by operation of 19 U.S.C. § 1504 within one year of being entered. It would thus follow that the first entries or withdrawals of merchandise from the warehouse to which the 1980 investigation could apply would be those made *after* publication in February 1982 of the results of the administrative review.

The CAFC reversed, observing that although the CIT might "be right as a matter of cold textual analysis," its interpretation "produces absurd results . . . that were not and could not have been within the contemplation of Congress."[58] In short, unless the statutory scheme were interpreted as permit-

53. *Id.* at 1266.

54. 748 F.2d 1560 (Fed. Cir. 1984).

55. 748 F.2d at 1562.

56. 19 U.S.C. § 1504 states, *inter alia*, that subject to certain exceptions, an entry of merchandise not liquidated within one year from the date of entry, or the date of the final withdrawal of all such merchandise covered by a warehouse entry, shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer, his consignee, or agent.

57. 6 CIT at 275, 280, 577 F. Supp. 1016, 1020 (1983).

58. 748 F.2d at 1563.

ting suspension of liquidation of entries subject to countervailing duties and retroactive assessment of duties after completion of an administrative review, Commerce would be precluded from acting on its factual findings with respect to the very year in which they applied. Thus the government would be unable to add to the liquidated amount of each entry the applicable countervailing duty.[59] Therefore the CAFC held that suspension of liquidation of entries subject to countervailing duties was not prohibited by 19 U.S.C. § 1504, and that the countervailing duty law must be construed as permitting retroactive assessments.[60]

E. *Settlement Authority*

Both the CIT and CAFC have upheld Commerce's authority under section 617 of the Tariff Act of 1930,[61] to compromise claims arising under the customs laws, including claims for antidumping duties. The courts addressed this issue in *Committee to Preserve American Color Television (COMPACT) v. United States*.[62] Aside from clarifying Commerce's power under 19 U.S.C. § 1617, the *COMPACT* decisions also indicate that the merits and substance of a settlement recommendation, as well as the reasons underlying such a recommendation, are immune from judicial scrutiny.

F. *Antidumping Law and Methodology*

A number of cases involving interpretation of the antidumping law and challenges to Commerce methodology in administering the law have arisen over the years. Perhaps the most extensively litigated issues in this area involve the agency's determinations of foreign market value and its allowance or disallowance of adjustments thereto. The cases thus far indicate that Commerce has considerable discretion in interpreting and applying the law, and that the courts are extremely hesitant to disturb Commerce's findings.

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59. *Id.*

60. *Id.* at 1562, 1565.

61. Tariff Act of 1930, ch. 497, § 617 (codified as amended in 19 U.S.C. § 1617 (1982)).

62. 2 CIT 208, 527 F. Supp. 341 (1981), *aff'd*, 706 F.2d 1574 (Fed. Cir. 1983).

1. Method of Determining Foreign Market Value

For example, in reviewing Commerce's foreign market value computation in the case of *Silver Reed America, Inc. v. United States*,[63] the CIT held that where home market sales amounted to 8.6% of total sales to third countries other than the United States, Commerce correctly determined FMV on the basis of home market sales without regard to comparisons of the size of the home market with the United States market. In reaching this conclusion, the CIT essentially upheld Commerce's regulation set forth at 19 C.F.R. § 353.4, which provides a five percent market test to be used in determining whether the quantity of merchandise sold for consumption in the country of exportation is so small in relation to the quantity sold for exportation to countries other than to the United States as to be an inadequate basis for determining the foreign market value of merchandise by reference to home market sales.[64]

Similarly, in *Southwest Florida Winter Vegetable Growers Association v. United States*,[65] the CIT approved Commerce's practice of determining the adequacy of third country sales as a basis for computing foreign market value. Commerce compares the volume of such sales to the volume of sales in the United States. The court upheld Commerce's view that third country sales constituting approximately 20% of United States sales were adequate for comparison purposes and within established administrative guidelines for determining the adequacy of third country sales.[66]

The court also rejected the plaintiff's argument that constructed value, rather than third country sales, should have been utilized by the Commerce Department. The court observed that the law exhibited a preference for third country sales, and that the use in this case of constructed value would have been inappropriate given certain economic factors in the case, namely the perishable nature of produce and the susceptibility of the fresh winter vegetable market to wide price fluc-

63. 581 F. Supp. 1290 (Ct. Int'l Trade 1984), *rev'd on other grounds sub nom.* Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc., 753 F.2d 1033 (Fed. Cir. 1985).

64. 581 F. Supp. at 1297.

65. 7 CIT 99, 584 F. Supp. 10 (Ct. Int'l Trade 1984).

66. 7 CIT at 103, 584 F. Supp. at 15.

tuations. These factors made it a necessary practice for many sales to be below the average cost of production. "The use of a price arrived at by constructed value would necessarily give the appearance of dumping even though sellers would be acting in a normal . . . manner in light of industry demands."[67] Thus, constructed value would be inappropriate as a basis for determining foreign market value because it would require finding that an economically necessary business practice is unfair.[68]

The court also upheld Commerce's decision to consider below cost sales in determining foreign market value when such sales constituted up to 50% of a grower's total sales of the merchandise under consideration.[69] Below cost sales in the fresh winter vegetable market were "common and expected" due to the perishability of the merchandise and the seasonal nature of the market. Thus, because there was substantial evidence in the record indicating that the below cost sales were "made in the normal course of trade at prices that permit full cost recovery within a reasonable period of time," the court concluded that Commerce had properly regarded those sales in its determination of foreign market value.[70]

In *Zenith Radio Corp. v. United States*,[71] the CIT likewise upheld Commerce's decision to turn to *constructed* value rather than home market prices as a basis for determining foreign market value. Notwithstanding the existence of evidence as to the declared amounts on which foreign producers paid Japanese Commodity Tax, which constituted secondary sources of information as to price, the court concluded that when actual home market prices were inadequate for comparison purposes, Commerce was under no obligation to use secondary sources of price before turning to an alternative statutory method of valuation.[72]

2. Adjustments to Foreign Market Value

A similar trend of judicial deference to the administrative

67. 7 CIT at 103, 584 F. Supp. at 14.
68. *Id.*
69. 7 CIT at 103, 584 F. Supp. at 15.
70. 7 CIT at 104, 105, 584 F. Supp. at 16.
71. No. 81-06-00734, slip op. 85-30 (Ct. Int'l Trade March 13, 1985).
72. Slip op. 85-30 at 8, 10-11.

agency is evident in the cases dealing with adjustments to foreign market value. For example, in *Brother Industries, Ltd. v. United States*,[73] the CIT found that the antidumping law required that a causal link between differences in circumstances of sale and differentials between United States price and foreign market value must be established only to the satisfaction of the administering authority, and that Commerce's regulation on this subject[74] was a reasonable exercise of authority under the antidumping law. The CAFC agreed, also noting that the statute gives the Secretary of Commerce broad discretion in making adjustments.[75]

Brother also marked the start of a dispute regarding the validity of the so-called Exporter's Sales Price (ESP) offset. Pursuant to regulation Commerce may make comparisons and adjustments using exporter's sale price, and "reasonable allowance will be made for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market."[76] The offset, which allows adjustments to foreign market value that reduce the dumping margin, was upheld by the CAFC, inasmuch as the offset permits a fair value comparison on an "apples to apples" basis.[77] Thus, the court regarded the offset as a proper and reasonable exercise of Commerce's authority to administer the antidumping law.[78]

In *Silver Reed America, Inc. v. United States*,[79] the CIT departed from its ordinary course and held that Commerce had acted arbitrarily and beyond its authority in limiting or capping the ESP offset for home market selling expenses to the amount of selling expenses incurred in the United States. The CAFC, however, disagreed and reversed the CIT's decision in *Consumer Products Division, S.C.M. Corp. v. Silver Reed America, Inc.*[80] In the CAFC's view, the cap on the ESP offset did no more than prevent undue distortion of the price comparison in favor

73. 3 CIT 125, 540 F. Supp. 1341 (1982), *aff'd sub nom.* Smith-Corona Group v. United States, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).
74. 19 C.F.R. § 353.15(a) (1986).
75. 3 CIT at 130-32, 540 F. Supp. at 1348-52; 713 F.2d at 1575-77.
76. 19 C.F.R. § 353.15(c) (1986).
77. 713 F.2d at 1574, 1578.
78. 713 F.2d at 1579.
79. 7 CIT 23, 581 F. Supp. 1290 (1984).
80. 753 F.2d 1033 (Fed. Cir. 1985).

of foreign manufacturers. Accordingly, the court upheld the validity of Commerce's ESP offset regulation,[81] including the ESP offset cap, as a reasonable exercise of administrative authority.[82]

Other issues raised in the *Smith-Corona*, *Brother* and *Silver Reed* cases as well as in other cases include: 1) the propriety of after-sale rebate adjustments to the foreign market value of merchandise based on total sales; 2) adjustments for advertising; 3) technical services expenses; 4) inland freight charges incurred in the home market; 5) differences in physical characteristics of the merchandise; and 6) differences in levels of trade. As indicated below, in most instances, Commerce's decision has been upheld.

For example, in *Smith-Corona* the CAFC upheld Commerce's determination to allow after-sale rebate adjustments to the foreign market value of portable electric typewriters based on total sales of all merchandise subject to the rebate program, where the rebates were apportioned to correlate with appropriate sales of portable electric typewriters.[83] The court also found that advertising expenses may be a basis for adjusting foreign market value even if multiple products are being advertised, so long as the portion of advertising expense directly related to the sales of merchandise under investigation during the relevant period can be isolated and identified to the satisfaction of Commerce.[84]

Similarly, in *Rhone Poulenc, S.A. v. United States*,[85] the CIT found that although technical service expenses may be differences in circumstances of sale requiring adjustment to foreign market value, Commerce properly disallowed a claimed adjustment based on technical expenses. These expenses were not directly related to the sales under consideration, but were provided for the more general purposes of research and maximizing future sales through developing new uses for the plaintiff's products.[86]

In *Silver Reed*, however, the court disagreed with Com-

81. 19 C.F.R. § 353.15(c) (1986).
82. 753 F.2d at 1040.
83. 713 F.2d at 1579-80.
84. *Id.* at 1581-82.
85. 8 CIT 47, 592 F. Supp. 1318 (1984).
86. 592 F. Supp. at 1333-34.

merce's disallowance of an adjustment based on differences in levels of trade based on the fact that "large wholesale quantities" of merchandise were sold to customers at different levels of trade in the foreign and U.S. markets. The court noted that Commerce should have focused on whether the data submitted supported a finding that different levels of trade affected price comparibility and whether the claimed adjustment was duly quantified based on proof of higher expenses in selling to retailers in the home market rather than to wholesalers.[87]

Another area in which the CIT disagreed with Commerce involved adjustments to foreign market value for differences in tax treatment of merchandise sold for exportation. In *Zenith Electronics Corp. v. United States*,[88] the CIT held that Commerce had abused its discretion by deducting from foreign market value the actual amount of indirect commodity tax imposed on home market merchandise. The statute provides that Commerce estimate the amount of indirect tax forgiven on exported merchandise, measure the amount of tax absorption in home market sales and add that amount to the United States price.[89] The court remanded the case to Commerce and directed that it calculate the appropriate adjustment to United States price in a manner consistent with its opinion, which had suggested that Commerce could calculate the adjustment using an econometric analysis.[90] Commerce seized upon this methodology and incorporated it into a special questionnaire intended to elicit information purportedly necessary to determine the effect, if any, of the commodity tax on the price of the merchandise sold in Japan.[91] Numerous parties to the proceeding objected to the econometric methodology and the commodity tax questionnaire because it was extremely burdensom and more accurate methodologies were available. Commerce was thus prompted to hold a hearing on this subject.[92] Subsequently, the agency reissued a shortened version of the

87. 581 F. Supp. at 1295-96.

88. 633 F. Supp. 1382 (Ct. Int'l Trade 1986).

89. 19 U.S.C. § 1677a(d)(1)(C) (1982).

90. 633 F. Supp. at 1402.

91. Antidumping Questionnaire (August 25, 1986) (copies available at the law offices of Weil, Gotshal & Manges).

92. *Antidumping Hearing on: Television Receiver Sets, Monochrome and Color, From Japan*, United States Department of Commerce, Antidumping Duty Division, October 10, 1986 (available at the law offices of Weil, Gotshal & Manges).

commodity tax questionnaire, but adhered to the econometric approach which the court had suggested was appropriate.[93] In view of the fact that the decision in this case could affect virtually every antidumping case involving products from a country that forgives indirect taxes on exported merchandise, it is expected that the case will be litigated further.

G. *Countervailing Duty Law and Methodology*

Litigation involving the countervailing duty (CVD) law has focused on such issues as the scope of the law, the practices or programs that constitute subsidies, and whether valuation of the subsidies by the administrative agency has been done in accordance with law. In these cases, unlike the antidumping area, the courts appear to have reversed as many agency determinations as they have upheld.

1. Applicability of Countervailing Duty Law to Non-Market Economies

One of the more significant recent decisions involving countervailing duty law was *Continental Steel Corp. v. United States*.[94] The CIT held that the CVD law could be applied to nonmarket economy countries (NME) thus flatly rejecting Commerce's position that subsidies can exist only where a free market exists.[95]

The CIT noted that the language of the statute was completely indifferent to variations in economic structure, and observed that it was purposely drafted to embrace all possible conveyors of subsidies, forms of conveyance, levels of commercial activity, and methods of importation.[96] The CIT also found that subsequent legislation, such as amendment of the antidumping law to provide a reference point for measuring whether or not sales of merchandise from state-controlled economies were being made at less than fair market value, were irrelevant to whether the CVD law applied to NME countries. Unlike the antidumping law, the CVD law did not re-

93. Revised Antidumping Questionnaire, (October 24, 1986) (copies available at the law offices of Weil, Gotshal & Manges).

94. 614 F. Supp. 548 (1985), *rev'd sub nom.* Georgetown Steel Corp. v. United States, 801 F. 2d. 1308 (Fed. Cir. 1986).

95. 614 F. Supp. at 550.

96. *Id.* at 551.

quire a market value reference point in order to determine whether a bounty or grant was being provided.[97]

Nor was the CIT persuaded by Commerce's reference to section 406 of the Trade Act of 1974 and congressional approval of the Subsidies Code in the Trade Agreements Act of 1979 as indications of a legislative intent to exclude NME's from the reach of the CVD law. In the court's view, section 406 was a separate remedy to combat market disruption caused by imports from Communist countries; it did not affect applicability of the countervailing duty law.[98] As to the Subsidies Code, the court found that the choice of dumping or countervailing duty remedies available thereunder compelled a conclusion that the countervailing duty law did apply to nonmarket economy countries.[99]

The court also fundamentally disagreed with Commerce's definition of the term "subsidy" as a distortion of the operation of a market economy. Viewing subsidization as "the encouragement of exportation by means of some type of special preference," the court declared that "if [subsidy] has to be stated in terms of distortion then it is a distortion of a pattern of regularity or even a pattern of reasonably expected fairness."[100] The court expressly left refinement of its definition and discussion of the methods of detecting subsidies within a NME country for the future, stating that discernment and measurement of subsidies are matters which fall squarely within Commerce's authority and expertise.[101]

The Federal Circuit's decision in *Georgetown Steel Corp. v. United States*,[102] squarely reversed the decision of the Court of International Trade, and ended the ongoing controversy regarding the applicability of the CVD law to NME imports.

In considering the scope of the law, the Federal Circuit observed that at the time of its original enactment as section 5 of the Tariff Act of July 24, 1897,[103] no NMEs existed. Thus, the enacting legislature had no occasion to consider whether

97. *Id.* at 555-56.
98. *Id.* at 555.
99. *Id.* at 556-57.
100. *Id.* at 554.
101. *Id.*
102. 801 F.2d 1308 (Fed. Cir. 1986).
103. Tariff Act of 1897, ch. 11, 30 Stat. 151, 205 (1897).

the countervailing duty law could be appropriately invoked against imports from NMEs. In NMEs decisions respecting investment, production, pricing and exportation are determined by a central planning authority rather than by operation of market principles of supply and demand.[104] These factors indicated to the court that the statute's expansive language did not, as the lower court opined, demonstrate a purposeful attempt to embrace within the countervailing duty law all possible beneficial acts by all countries, regardless of economic structure.

The court likewise rejected the CIT's position that exclusion of NMEs from the reach of the countervailing duty law was contrary to the purpose of the statute. Whereas the lower court's opinion stated that the sole purpose of the law was to protect domestic industry from the effects of subsidies conferred by any country on merchandise entering the United States,[105] the Federal Circuit took a more limited view. The CAFC recognized, as has the United States Supreme Court, that the countervailing duty law was intended to offset only those unfair competitive advantages that foreign producers enjoy due to export subsidies paid by their governments:[106]

> A government subsidy on sales to the United States . . . . enabled a foreign producer to sell in the American market in a situation in which otherwise it would not be in the seller's best economic interest to do so . . . . It was this kind of 'unfair' competition, resulting from subsidies to foreign producers that gave them a competitive advantage they otherwise would not have, against which Congress sought to protect in the countervailing duty law.[107]

In the court's view, even benefits such as those alleged in the underlying countervailing duty investigations, namely, dual exchange rates, direct price equalization payments on exports

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104. *See* 801 F.2d at 1315.

105. 614 F. Supp. at 553.

106. 801 F.2d at 1315 (*citing* Zenith Radio Corp. v. United States, 437 U.S. 443, 455-56 (1978)). In *Zenith*, the Supreme Court stated the purpose of the countervailing duty law as follows:

> The countervailing duty was intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments.

Id.

107. *See* 801 F.2d at 1315.

and retention by exporting countries of a portion of hard currency earned on foreign sales, did not confer countervailable subsidies.[108] Specifically, the court stated:

> Although these benefits may encourage those entities to accomplish the economic goals and objectives the central planners set for them . . . they do not create the kind of unfair competitive advantage over American firms against which the countervailing duty act was directed.
>
> There is no reason to believe that if the Soviet Union or the German Democratic Republic had sold the potash directly rather than through a government instrumentality, the product would have been sold in the United States at higher prices or on different terms. Unlike the situation in a competitive market economy, the economic incentives the state provided to the exporting entities did not enable those entities to make sales in the United States that they otherwise might not have made.[109]

Moreover, continued the court, even if such incentives could be considered subsidies in the loosest sense of the word, the governments of NMEs would be subsidizing themselves, which is not the kind of "unfair" practice intended to fall within the law's reach.[110]

In examining the underlying purpose of the countervailing duty law, the Federal Circuit agreed with Commerce's definition of the term "subsidy" as a distortion of the operation of a *market* economy.[111] The CAFC futher agreed with the agency's view, shared by a variety of commentators, that, logically, a NME country cannot subsidize the manufacture, production or export of particular merchandise, since decisions respecting investment, production, pricing, and exportation are predetermined and enforced by a central planning authority.[112] In doing so, the CAFC again came out on the opposite side of the decision below, which rejected Commerce's conclu-

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108. *Id.*

109. *Id.* at 1315-16 (citation omitted).

110. *Id.* at 1316.

111. *Id.* at 1315.

112. *Id.* at 1315; *See generally* P. MARER, PRICES AND EXCHANGE RATES IN CENTRALLY PLANNED ECONOMIES, FOCUSING ON THE USSR AND GDR (1984); G.M. PICKERSGILL & J.E. PICKERSGILL, CONTEMPORARY ECONOMIC SYSTEMS: A COMPARATIVE VIEW, 208, 232-33 (1974); Potter, *East-West Countertrade: Economic Injury and Dependence Under U.S. Trade Law*, 13 LAW POL'Y INT'L BUS. 413, 415-16 (1981) (citing State-

sion that bounties or grants simply cannot exist in NMEs.[113] It also implicitly disposed of the lower court's murky description of subsidization as a "distortion of a pattern of regularity or reasonably expected fairness,"[114] thereby eliminating potential problems of discerning and measuring benefits arising from unfair variations in such "patterns" presumed by the lower court to exist in NMEs.

In another clear departure from the lower court's decision, the Federal Circuit attached considerable significance to legislative developments after enactment of the countervailing duty law and to the existence of a statutory remedy specifically tailored to address the problem of NME import competition. In particular, it noted that the statutory language regarding the scope of the countervailing duty law remained materially unchanged from the time of its original enactment. This silence, in the face of contemporaneous legislation amending the antidumping law, demonstrated to the court a legislative recognition that the countervailing duty law is unsuitable to address import competition from NMEs, as well as the congressional intent that NME imports at unreasonably low prices be dealt with under our antidumping law.[115]

Finally, the CAFC disagreed with the lower court that congressional approval of the Subsidies Code with knowledge that NME countries had participated in the Code's preparation, constituted "overwhelming evidence" that Congress understood the countervailing duty law to apply to NMEs. Instead, it

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ment by Myer Rashish, Undersecretary for Economic Affairs, before the Joint Economic Committee, U.S. Congress, July 14, 1981).

113. *See* Continental Steel Corp. v. United States, 614 F. Supp. 548, 553 (1985), *rev'd sub nom.* Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).

114. *Id.* at 554.

115. *See* 801 F.2d at 1316-17. Congress amended the antidumping law to deal specifically with imports from NMEs in the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) [hereinafter the 1974 Act] and in the Trade Agreements Act of 1979, The 1979 Act, *supra* note 19.

> Congress' realization, reflected in both the 1974 and 1979 Acts, that changes in the antidumping law were necessary to make that law more effective in dealing with exports from nonmarket economies, coupled with its silence about application of the countervailing duty law to such exports, strongly indicates that Congress did not believe that the latter law covered nonmarket economies.

801 F. 2d at 1317.

concluded that the Code merely prescribed *alternative* methods for detecting and measuring subsidies, leaving each country to choose the method it would employ to address the problem of NME imports.[116] According to the CAFC, inasmuch as Congress had indicated an intention that NME imports be addressed under the antidumping law, there was no reason to believe that it also elected to have the countervailing duty law apply.[117] In the court's view, if the antidumping law were to prove inadequate to protect United States industry from the effects of unfair competition from NME imports, then corrective legislation, rather than application of the countervailing duty law, would be appropriate.[118]

2. What Constitutes a Subsidy?

a. *Domestic Subsidies*

A domestic subsidy is defined as one "provided . . . to a specific enterprise or industry, or group of enterprises or industries . . . ."[119] In examining whether a program is aimed at a specific enterprise or industry, Commerce has focused on whether the program is "generally available." If so, the program is not industry specific, and hence, will not be countervailable.[120]

The courts have sometimes, but not always, endorsed this approach. For example, in *Carlisle Tire and Rubber Co. v. United States*,[121] the court upheld Commerce's determination that special income tax deductions available under Korean law to *all* manufacturers based on certain record keeping and machinery utilization requirements, did not grant preferential treatment to one group of industries or enterprises and, thus, did not confer a countervailable subsidy.[122] Similarly, in *Bethlehem Steel*

116. 801 F. 2d at 1317-18. The Subsidies Code permits a signatory country to identify and quantify the existence of a subsidy from an NME using either the surrogate country methodology contained in the Antidumping Code or the country's countervailing duty legislation.

117. *Id.*

118. *Id.*

119. 19 U.S.C. § 1677(5)(B) (1982).

120. *See, e.g.*, Certain Refrigeration Compressors from Singapore, 50 Fed. Reg. 30,493, 30,494 (1985); Certain Softwood Products from Canada, 48 Fed. Reg. 24,159, 24,167-68 (1983).

121. 5 CIT 229, 564 F. Supp. 834 (1983).

122. 5 CIT at 235, 564 F. Supp. at 839.

Corp. v. United States,[123] the court affirmed a determination by Commerce that a generally available tax deduction was not a bounty or grant on the ground that tax laws are not subsidies to the taxpayer unless the laws are selective in their terms or administration.[124]

Notwithstanding the court's holding in *Bethlehem Steel*, the CIT stated in dictum that a broad exception for generally available benefits is contrary to the plain meaning and intention of the law.[125] According to the court, "[t]he only place for a test of 'general availability' is in the determination of whether a practice which is normally not a subsidy, but merely a decision as to the level of an adverse effect, has been transformed into a subsidy by means of selective application."[126]

The question raised in *Bethlehem Steel* regarding the appropriateness of Commerce's "general availability" test as a standard for determining countervailability of alleged subsidies has not yet been resolved. In fact, in *Cabot Corp. v. United States*,[127] the court concluded that the "generally available" approach used by Commerce is an unacceptable legal standard for determining countervailability of benefits, reasoning that *availability* of the benefit is not determinative of whether the benefits *actually received* are countervailable subsidies. In the court's view, an appropriate standard would concentrate first on "the *de facto* case by case effect of benefits provided to recipients rather than on the nominal availability of benefits."[128] If bestowal upon a particular class were found, then a second inquiry would take place to determine whether the bestowal amounted to an additional benefit or a competitive advantage.[129]

The government appealed the *Cabot* decision, arguing

123. 7 CIT 339, 590 F. Supp. 1237 (1984).

124. 7 CIT at 349, 590 F. Supp. at 1245.

125. In spite of the CIT's disapproval of the "generally available" standard, Commerce has continued to employ it in subsequent investigations. *See, e.g.*, Certain Refrigeration Compressors from Singapore, 50 Fed. Reg. at 30,493, 30,494 (1985).

126. 7 CIT at 349, 590 F. Supp. at 1245.

127. No. 83-7-01044, slip op. 85-102 (Ct. Int'l Trade Oct. 4, 1985), *appeal dismissed*, No. 86-729, slip op. 86-729 (Fed. Cir. Apr. 9, 1986).

128. Slip op. 85-102 at 20.

129. *Id.* at 21. Also, in Agrexco, Agricultural Export Co. v. United States, 604 F. Supp. 1238 (Ct. Int'l Trade 1985), the CIT determined that Commerce erred in concluding that government research and development results disseminated to all rose growers and to the general public were not a subsidy. In the court's view, it was "immaterial whether the information is disseminated to all groups, but whether the

against the lower court's substitution of a "competitive advantage" standard for the "generally available" standard traditionally used by Commerce in analyzing subsidy allegations. Although the appellate court dismissed the appeal on unrelated technical grounds, it specifically stated that "the issue regarding the proper legal standard to be applied to countervailability of benefits may be considered on a proper appeal from the trial court . . . "[130] Thus, it appears that for the time being, the "generally available" standard is still valid.[131] However, in view of the court's evident disagreement with Commerce's interpretation of the specificity requirement of 19 U.S.C. § 1677(5)(B), Commerce may ultimately be required to reformulate its approach.

The courts have examined various programs alleged to constitute domestic subsidies. Highlights of the cases are discussed below.

i. Provision of Capital

In *British Steel Corp. v. United States*,[132] the CIT reviewed a Commerce determination involving capital allegedly provided on terms "inconsistent with commercial considerations," within the meaning of 19 U.S.C. § 1677(5). The funds in that case involved equity investments provided by the United Kingdom to the British Steel Company (BSC) during a period of industry restructuring. Given the deteriorating financial condition and precarious economic situation of BSC, Commerce determined that investment in BSC was unsound.

In considering whether Commerce correctly found that the funds provided by the government conferred subsidies, the court observed that in examining whether government funds were provided on terms inconsistent with commercial considerations, the "rationality" of the restructuring must not be considered.

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research and development is targeted to assist a particular rather than a general industry." 604 F. Supp. at 1241-42.

130. Slip op. 86-729 at 12 (Fed. Cir. 1986).

131. Actually, the statute does not require that a program be "generally available" to escape countervailability; the program need only be provided to more than a specific industry or group of industries. 19 U.S.C. § 1677 (5)(B) (1982).

132. 605 F. Supp. 286 (Ct. Int'l Trade 1985), *appeal docketed*, No. 85-2386 (Fed. Cir. May 20, 1985).

> While government investment in its state-owned enterprises may indeed be rational in terms of national policy, such investment may not be consistent with commercial considerations, depending upon the soundness and terms of the investment. However, neither the reasonableness of the action taken by the government, nor the results ultimately achieved (viewed in retrospect), are pertinent to the 'commercial considerations' test.[133]

The court agreed with Commerce that the British government's equity investments were made on terms inconsistent with commercial considerations. The court also agreed with Commerce that government funds used for closure of inefficient plants and discharge of a redundant workforce are countervailable, since they enhance the recipient's efficiency and relieve the recipient of significant financial burdens. As such, the funds provided indirect benefits to the BSC's manufacture, production or export of steel, and they are countervailable on the basis of the amount of funding the BSC received.[134]

Also countervailable were funds used by BSC to acquire capital assets prematurely retired in the course of restructuring. The court found that "the competitive benefit of funds used to acquire assets does not cease upon the assets' premature retirement, but rather such benefit continues to contribute to the firm's manufacture, production, or exportation of products accomplished by the firm's remaining assets."[135]

Furthermore, since the equity investments in the BSC benefited all of its remaining manufacturing and exporting operations by eliminating excess capacity and unnecessary workers, the court agreed with the ITA that it is unnecessary to trace the use of the funds or find that they directly related to enhancing product competitiveness. "General financial benefit to the production is sufficient to support a determination of subsidy and a quantification of exact competitive benefit to the products need not enter into the allocation of the benefit."[136]

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133. 605 F. Supp. at 293.

134. *Id.* at 293-94.

135. *Id.* at 296.

136. *Id.* at 296 (quoting Michelin Tire Corp. v. United States, 4 CIT 252, 255 (1982), *vacated*, No. 75-9-02467, slip op. 85-11 (Ct. Int'l Trade Jan. 28, 1985)). The *Michelin* case was vacated based on a Submission on Agreed Statement of Facts and

ii. Loans

The statute provides that loans, like provision of capital, are not subsidies unless provided on terms inconsistent with commercial considerations.[137] In *Michelin Tire Corp. v. United States*,[138] the court explained that in determining whether a loan from the government is a subsidy, the appropriate standard for comparison involves the same type of financing offered: (a) on comparable terms and conditions, (b) in an appropriate commercial market to which the recipient has access, (c) on or about the date when the interest rate on the loan was fixed.[139] Using this guideline, the court concluded that the loans involved in *Michelin* conferred a bounty, because the interest rate of 6% was appreciably lower than the 7.56% rate which Michelin would otherwise have paid.[140]

The CIT also found that a deferral of the first seven loan repayments constituted a countervailable benefit, noting that "[t]he removal of the necessity of making a payment of principal has a value separate and apart from the value of the new loan in which the deferred principal is incorporated."[141] The court disagreed with Commerce's calculation of the benefit, stating that the benefit of the deferral itself is limited to a single principal amount.[142] If benefits are found to exist in the years after the year of deferral, they are not more than the interest ramifications, the conventional financing benefits of the deferral.[143]

iii. Research and Development Grants

Research and development grants do not confer subsidies when provided for a broad range of disciplines and projects.

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joint motion to vacate filed by the parties to that action. Nevertheless, the validity of the subsidy analysis contained therein remains undiminished, and *Michelin* has been cited not only in *British Steel*, but also in other CIT decisions involving countervailing duties. *See, e.g.*, Agrexco, Agriculture Export Co., Ltd. v. United States, slip op. 85-13 at 7 (Ct. Int'l Trade 1985).

137. 19 U.S.C. § 1677(5)(B)(i) (1982).

138. 2 CIT 143 (1981), *vacated*, No. 75-9-02467, slip op. 85-11 (Ct. Int'l Trade Jan. 28, 1985); *see supra* note 136.

139. *See* 2 CIT at 150-54.

140. *Id.* at 155.

141. *Id.* at 156.

142. *Id.* at 157.

143. *Id.*

However, when aimed at a particular industry, they confer subsidies. In *Agrexco, Agricultural Export Co., Ltd. v. United States*,[144] the published results of research and development were made available to all rose growers worldwide and to the general public. The court expressed its opinion that "it is immaterial whether the information is disseminated to all groups, but whether the research and development is targeted to assist a particular, rather than a general, industry . . . . If the research and development is targeted to the production of roses, it is a subsidy."[145] Accordingly, the court remanded this program to Commerce for a determination of its value.[146]

iv. Exemption from Payment of Taxes

In *Agrexco*, the CIT concluded that Agrexco's exemption from payment of real property taxes paid by other firms constituted a countervailable subsidy.[147] To similar effect is the decision in *Michelin Tire Corp. v. United States*,[148] in which the court determined that a real property tax calculated in a manner different from other real property taxes in the same taxing district is a bounty when lower tax payments result.[149]

As noted earlier, however, laws of taxation are not subsidies to the taxpayer unless they are selectively administered relieving only some business enterprises from the obligation of payment.[150]

b. *Export Subsidies*

The countervailing duty law defines export subsidies by reference to Annex A to the Agreement on Subsidies and Countervailing Measures which set forth an illustrative list of export subsidies (Illustrative List).[151] Pursuant to Subparagraph (g) of the Illustrative List, a nonexcessive rebate of indirect taxes upon exportation is not a subsidy. In the absence of

144. 604 F. Supp. 1238 (Ct. Int'l Trade 1985).

145. 604 F. Supp. at 1241-42.

146. *Id.* at 1242.

147. 604 F. Supp. at 1243.

148. 2 CIT 143 (1981), *vacated*, No. 75-9-02467 slip op. 85-11 (Ct. Int'l Trade Jan. 28, 1985); *see supra* note 136.

149. 2 CIT at 157.

150. *See* Bethlehem Steel Corp. v. United States, 7 CIT 339, 342, 590 F. Supp. 1237, 1245 (1984).

151. *See* 19 U.S.C. § 1677(5) (1982).

statutory guidelines regarding application of Subparagraph (g), Commerce has developed a three-prong test to determine whether an export payment made as a rebate of an indirect tax is an export subsidy. The three prongs of Commerce's test are: 1) does the export payment operate for the purpose of rebating indirect taxes; 2) is there a clear link between eligibility for export payments and payment of indirect taxes; and 3) has the government reasonably calculated and documented the actual indirect tax incidence borne by the exported product and demonstrated a clear link between such tax incidence and the amount of the export payment?[152] The CAFC upheld this test as a reasonable interpretation of the requirements of the countervailing duty law in *Industrial Fasteners Group, American Importers Ass'n v. United States*.[153] In considering this test, the court determined that the proper time to establish the "clear link" between the indirect tax incidence and the rate of export payment is the time when the export payment rate is established,[154] and, that a determination by Commerce that a clear link exists must be supported by substantial evidence.[155]

Since the information submitted to Commerce by the plaintiff in *Industrial Fasteners* was insufficient for the agency to draw any conclusions regarding the extent to which certain Cash Compensatory Support on Export program payments represented a rebate of indirect taxes, the court upheld Commerce's determination that the payments were completely countervailable.[156]

c. *Valuation of Subsidies*

Commerce's determinations have not fared as well in cases that have called into question Commerce's measurement, allocation and valuation of subsidies. For example, in another case entitled *Industrial Fasteners Group, American Importers Ass'n v. United States*,[157] the court remanded a Commerce determina-

152. *See, e.g.*, Leather Wearing Apparel from Argentina, 46 Fed. Reg. 23,090 (1981); Certain Iron-Metal Castings from India, 45 Fed. Reg. 55,502 (1980); Certain Fasteners from India, 45 Fed. Reg. 48,607 (1980).

153. 710 F.2d 1576, 1580 (Fed. Cir. 1983).

154. *Id.* at 1581.

155. *Id.* at 1581-83.

156. *Id.* at 1582.

157. 3 CIT 25 (1982), *reh'g denied*, 3 CIT 56 (1982).

tion regarding quantification of the benefit conferred by certain packing credit loans and income tax deductions. In doing so, the court observed that Congress intended that the amount of gross subsidy be measured by the value of the subsidy to the extent the subsidy is actually used.[158] In view of the above, the court could not sustain Commerce's determination regarding tax deductions, since it appeared to be based on figures for the amount of benefits *claimed* rather than the amount of benefits *allowed*. Similarly, it could not sustain Commerce's determination respecting packing credit loans, because it was not based on the extent to which the loan was actually used.[159]

Another case in which the court was called upon to review calculation of a bounty was *Michelin Tire Corp. v. United States*.[160] The court upheld the administrative determination that certain imported tires had benefited from bounties or grants from governmental regional development programs. However, it found error in the calculation of the bounty from a loan to the manufacturer and in the allocation of grants over the period of the loan.

The court rejected Treasury's calculation of the benefit of certain loans, since it "exaggerated" the benefit of a deferral of principal "beyond reason" by failing to limit the benefit to a single principal amount. The court stated: "If benefits exist in years after the year of deferral, they cannot be more than interest ramifications of an original benefit in the year of deferral. To revive the deferred amount year after year defies reality."[161]

The court also questioned Treasury's method of allocating cash grants over the period of Michelin's original loan. Ac-

158. 3 CIT at 25-26.

159. *Id.* at 27-28.

160. 2 CIT 143 (1981), *vacated*, No. 75-9-02467, slip op. 85-11 (Ct. Int'l Trade Jan. 28, 1985); *see supra* note 136. At the time of the countervailing duty proceeding at issue in *Michelin*, the only countervailing duty law in force was set forth at 19 U.S.C. § 1303, and it was administered by the Secretary of the Treasury. After the enactment of the Trade Agreements Act of 1979, all functions of the Secretary of the Treasury in administering the countervailing duty law were transferred to the Secretary of Commerce pursuant to Reorg. Plan No. 3 of 1979, § 5(a)(1)(C), 44 Fed. Reg. 69,275, 93 Stat. 1381, effective January 2, 1980, except that the Customs Service was to accept such deposits, bonds or other security deemed appropriate by the Secretary of Commerce, and assess and collect such duties as directed by the Secretary of Commerce.

161. 2 CIT at 157.

cording to the court, the grant of a new loan freed Michelin from having to apply the grants toward repayment of the original loan. Thus, any linkage between the grants and the loan period terminated, as did any justification for allocating the benefit of the grants over the period of the original loan.[162]

In this connection, the court noted that the funds are usually allocated over the life of the assets purchased.[163] However, where grants on capital assets such as plant and equipment are concerned, the court noted the "possibility that benefits may have a disproportionately beneficial effect in the early years."[164] In view of the paucity of evidence establishing the correct useful life of the capital assets in question, the court remanded the matter to the "Secretary of Commerce to consider whether any justification existed for allocating the grants to a period shorter than the useful life of the capital assets, or to determine the useful life of the assets if no shorter period [of allocation] was justified."[165]

In its redetermination, Commerce concluded that the grants should be calculated over half the useful accounting life of the capital assets they were used to purchase. It based its determination on a variety of factors such as an "inferred congressional directive . . . for presumptive use of periods of less than full useful life, . . . the congressional intent to front load the benefit of grants which aid an enterprise in acquiring capital plant and equipment, . . . [and] the inherent nature of these grants to bestow a disproportionate benefit in the earlier years after receipt."[166]

The court flatly rejected the redetermination, noting that the asserted legislative mandate does not exist, and that the agency's proferred rationales were not based on generally accepted accounting principles.[167] The court determined that Commerce must allocate the benefits experienced by the recipient of a capital grant according to either uniform and gener-

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162. 2 CIT at 167.

163. *Id.*

164. *Id.*

165. *Id.* at 168.

166. Michelin Tire Corp. v. United States, 4 CIT 252, 253 (1982), *vacated*, No. 75-9-02467, slip op. 85-11 (Ct. Int'l Trade Jan. 28, 1985) (quoting ITA's Final Results of Redetermination and/or Recalculation Pursuant to Court Remand); *see supra* note 136.

167. *Id.* at 254.

ally accepted accounting principles or principles that are based on an independent, direct factual finding of benefit to the company receiving the benefits.[168] It further found that Commerce's use of half the useful life of the capital assets was unsupported by recognized accounting principles or by a factual determination which could justify departure from those principles.[169] Thus, it remanded the issue to the agency for further reconsideration, and spoke approvingly of a method which would recognize the time value of money over the life of the assets purchased.[170]

With respect to the loan allocation, the court concluded that application of the interest differential over the entire loan would correctly reflect the benefit received by the plaintiff.[171]

The court was subsequently faced with the task of reviewing Commerce's redetermination regarding allocation of the benefits received by Michelin by virtue of the capital grants. In *Michelin Tire Corp. v. United States*,[172] the court expounded on its suggestion regarding generally accepted accounting principles, noting that these principles "cannot be allowed to cause significant deviations from the basic correspondence of the subsidy to the benefit."[173] The court found that ITA's method of allocation, which was derived from the present value of an annuity, was not in accordance with law, because it "does not accurately express the benefit in each year in the manner in which the genuine commercial alternatives available to a company would be expressed."[174] In the court's view, the law requires a "correspondence between the [countervailing] duty and the benefit, in accordance with the most likely commercial alternatives."[175]

Regarding the interest rate factor used by the ITA in its attempt to incorporate the time value of money into its calculation of the subsidy, the court noted that

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168. *Id.*

169. *Id.* at 255.

170. *Id.* at 255-56.

171. *Id.* at 256.

172. 6 CIT 320 (Ct. Int'l Trade 1983), *vacated*, No. 75-9-02467, slip op. 85-11 (Ct. Int'l Trade Jan. 28, 1985); *see supra* note 136.

173. *Id.* at 321.

174. *Id.* at 324-25.

175. *Id.* at 325.

> [t]he value of money given to a beneficiary is directly related to the cost of those alternatives to that particular beneficiary. To the extent that the grant relieves the beneficiary of the need to obtain alternative financing, it is the interest rate associated with that alternative which is the real and ascertainable benefit.[176]

The court concluded that the ITA's use of an interest rate derived from long-term Canadian government bonds was flawed and not in accordance with law, as it was not based on a factual finding of the rate which Michelin would have had to pay for alternative financing.[177]

In the court's view, the ITA has a duty to determine "what would have been the cost to the beneficiary of the most likely alternative" based on the evidence before it or based on the interest terms that would have been applied to the alternative financing. In order to satisfy the statute, the interest rate on the alternative financing must be applied to the grant such that it expresses the value of the grant over the years of its utility and corresponds to the benefit in each year.[178] The court rejected the argument that valuation of subsidies must be limited to their face value regardless of the period of their usefulness, noting that this view defies commercial and financial reality. The court noted that a method of providing for the time value of money was "in harmony with the law and with the relevant international agreements."[179]

This case was tried de novo rather than "on the record,"[180] and therefore the court decided without further remand to the ITA. The court held that the proper method of allocating benefits from the grant to the recipients is to allo-

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176. *Id.* at 326.

177. *Id.* at 327.

178. *Id.* at 327. In this connection, the court noted that the rate of interest on alternative financing (used in calculating the time value of the grant) reasonably may be determined as of the date of the financing agreement rather than the date of receipt of the funds and may reasonably be calculated on an annual rather than shorter basis, in accordance with the normal commercial practice for this type of transaction. *Id.* at 328.

179. *Id.* at 328-29.

180. *Id.* at 327. The Trade Agreements Act of 1979 added a new section, 516A, to the Tariff Act of 1930, altering the availability and scope of judicial review in countervailing duty and dumping cases. One of the changes provides that judicial review will be based on the record before the administrative agency and not be a de novo proceeding.

cate the principal amount of the grant "on a straight-line basis over the life of the asset it was used to purchase [and add to the amount, the] interest expense", which the beneficiary would have to pay on the remaining balance of the principal in accordance with the normal commercial financial practices."[181]

d. *Suspension of Countervailing Duty Investigations*

In *United States Steel Corp. v. United States*,[182] the court interpreted section 704 of the Trade Agreements Act of 1979[183] to require suspension of an investigation if at any time prior to the end of the investigation Commerce finds that the foreign interests have acted to end or offered to end the practice alleged or preliminarily found to be a subsidy.[184] The CIT tempered this requirement by recognizing that, notwithstanding the foregoing, the ITA has discretion to continue an investigation provided that it can articulate reasons that are sanctioned by section 704.[185]

H. *International Trade Commission (ITC) Injury Determinations*

In the area of injury determinations by the ITC, cases have arisen involving both preliminary[186] and final[187] injury determinations.

1. Preliminary Injury Determinations

Within 45 days from receipt of an antidumping or countervailing[188] duty petition, or from self-initiation of an investi-

181. 6 CIT at 327.

182. 5 CIT 245, 566 F. Supp. 1529 (1983), *modified*, 569 F. Supp. 874 (1983), *vacated*, 7 CIT 48 (1984).

183. 19 U.S.C. § 1671c (1982).

184. 5 CIT at 252.

185. *Id.*

186. Pursuant to statute, the ITC must make a preliminary injury determination within 45 days of filing of an antidumping or countervailing duty petition or of notice of commencement of an investigation. *See* 19 U.S.C. §§ 1671b(a), 1673b(a) (1982). If the determination is affirmative, then the antidumping or countervailing duty investigation will proceed. Conversely, if the determination is negative, then the investigation will be terminated. *See* 19 U.S.C. §§ 1671b(a), 1673b(a) (1982).

187. §§ 1671d(b), 1673d(b) (1982).

188. Injury determinations apply in countervailing duty cases only when the countervailing duty petition is filed under the new countervailing duty law (19 U.S.C. §§ 1671 *et seq.*) by a country under the Agreement on Subsidies and Countervailing Measures.

gation by the Secretary of Commerce, the ITC must decide whether there is a reasonable indication that an industry in the United States is materially injured, or threatened with material injury or whether there is a reasonable indication that an industry is materially retarded from being established in the United States.[189] The purpose of the preliminary injury determination is "to eliminate unnecessary and costly investigations which are an administrative burden and an impediment to trade."[190] In keeping with this purpose, if the ITC's preliminary injury determination is affirmative, then the antidumping or countervailing duty investigation will proceed. On the other hand, if the preliminary injury determination is negative, then the investigations at both the Commerce Department and the ITC will be terminated.[191]

In interpreting the "reasonable indication" of injury standard, the CIT has tended to reject ITC determinations which weighed evidence on injury at the preliminary stage. Thus, for example, in *Republic Steel Corp. v. United States*,[192] which involved a review of several terminations of countervailing duty investigations of imported steel products based on negative injury findings by the ITC, Judge Watson concluded that the ITC's determinations were not made in accordance with law, inasmuch as the agency incorrectly exceeded the "low threshold. . . of whether there is a reasonable indication of injury. . . ."[193] In the court's view, "*[t]he object of these [preliminary injury] determinations should have been simply to find whether there were any facts which raised the possibility of injury. The resolution or interpretation of conflicting facts should have been reserved for a possible final injury determination.*"[194]

The court in *Republic Steel* expressed, inter alia, the following reasons for its holding. First, it noted that the statute's "reasonable indication" language suggests that "only the barest clues or signs [are] needed to justify further inquiry."[195]

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189. *See* 19 U.S.C. §§ 1671b(a), 1673b(a) (1982).

190. S. REP. No. 1298, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7186, 7308.

191. *See* 19 U.S.C. §§ 1671b(a), 1673b(a) (1982).

192. 8 CIT 29, 591 F. Supp. 640 (1984), *reh'g denied*, No. 82-03-00372, slip op. 85-27 (Ct. Int'l Trade 1985).

193. 8 CIT at 40, 591 F. Supp. at 649-50.

194. *Id.* at 40, 591 F. Supp. at 650 (emphasis in original).

195. *Id.* at 36, 591 F. Supp. at 646.

The court also referred to the legislative history in its analysis, noting that the House Report stated that a reasonable indication of injury would exist in "each case in which the facts reasonably indicate that an industry in the United States could *possibly* be suffering material injury."[196] Similarly, the Senate Report[197] indicated to the court that "the ITC decision is primarily part of the decision as to whether an investigation should be initiated" and therefore "should display the same spirit of receptiveness to the initiation of investigations as the ITA sufficiency [of the petition] determination."[198] In short, the court took the view that the preliminary injury determination has a very limited purpose, namely, to "weed out those cases which were clearly without merit and which could not possibly deserve further investigation."[199]

The *Republic Steel* rationale has been applied in at least three other decisions of the CIT. In *Jeannette Sheet Glass Corp. v. United States*,[200] the court followed the standard articulated in *Republic Steel* and remanded the action to the ITC for reconsideration of whether there was a reasonable indication of material injury or threat thereof to the domestic industry. The court wrote:

> Here, the Commission's preliminary injury determinations did not address the question of whether there is sufficient information in the record to raise the *possibility* of injury, but rather sought to definitively resolve the issues by weighing the conflicting evidence. Put another way, the Commission's "preliminary" determination, in effect, constituted a final determination predicated solely upon data submitted in the forty-five day period permitted at the preliminary stage.[201]

Later in *American Grape Growers Alliance For Fair Trade v. United States*,[202] the court reiterated its view that under the stat-

196. *Id.* (emphasis in original) (*citing* H.R. REP. No. 4537, 96th Cong., 1st Sess. at 52 (1979)).

197. S. REP. No. 39, 96th Cong., 1st Sess. 49, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 435.

198. 8 CIT at 36, 591 F. Supp. at 647 (emphasis in original).

199. *Id.*

200. 607 F. Supp. 123 (Ct. Int'l Trade 1985).

201. *Id.* at 129 (emphasis added).

202. 615 F. Supp. 603 (Ct. Int'l Trade 1985), *appeal docketed sub nom.* Banfi Prods. v. United States, No. 86-556 (Fed. Cir. Oct. 11, 1985).

ute the ITC need only focus on the question of whether there is a "*possibility* of injury." The court reversed the ITC's preliminary negative injury determination, holding that it had used an overly stringent standard. According to the court, the ITC had undertaken far too complex an analysis of conflicting and incomplete evidence in reaching its determination, thereby placing an unduly harsh burden on the petitioner at an early stage of the investigation.[203]

Similarly, in *Armstrong Rubber Co. v. United States*,[204] the CIT reviewed an ITC determination that there was no indication of material injury or threat thereof from imports of tires from Korea. The CIT applied the *Republic Steel* rationale and determined that

> what the ITC has done here is to conduct a final investigation in the guise of an entirely different and more rudimentary proceeding. It has looked to the reality of injury, not the possibility of injury.... In short, it appears that the price of obtaining an investigation is being raised to the point where a petitioner must do much more than simply present the possibility of injury.[205]

This was seen as a "distortion of the law and a major interference with the legislative purpose."[206] Accordingly, the court reversed and remanded the ITC's determination.

The Federal Circuit recently overruled *Republic Steel* and its progeny in the case of *American Lamb Co. v. United States*.[207] In that case the Federal Circuit upheld the Commission's weighing of conflicting evidence at the preliminary injury determination stage as "permissible within the statutory framework."[208] In rejecting the CIT's view that the statutory term

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203. 615 F. Supp. at 607-08.

204. 614 F. Supp. 1252 (Ct. Int'l Trade 1985).

205. *Id.* at 1253.

206. *Id.*

207. 785 F.2d 994 (Fed. Cir. 1986).

208. *Id.* at 1001. In doing so, the court specifically upheld the ITC's longstanding practice of using a two-pronged standard for determining whether a reasonable indication of material injury exists. That standard requires the ITC to reach a negative determination "only when (1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation." *See, e.g.*, *Low-Fuming Brazing Copper Wire and Rod from France, New Zealand and South Africa*, Inv. Nos. 701-TA-237 and 731-TA-247 (Preliminary), U.S.I.T.C. Pub. No. 1673 (1985); *Uncoated Free Sheet Offset Paper From Canada*, Inv. No. AA1921-10, U.S.I.T.C. Pub. No. 869

"reasonable indication" means a mere "possibility," or that it suggests "only the barest clues or signs needed to justify further inquiry," the Federal Circuit interpreted the statute as calling for "a reasonable indication of injury, not a reasonable indication of need for further inquiry."[209] It also put the lower court's interpretation of the House Report in context, noting that the single sentence relied on by the CIT "cannot serve to substitute 'possibility' for 'reasonable indication' in the statute."[210] Furthermore, observed the court, if the CIT's standard were correct, then the "weeding out" purpose of the preliminary injury investigation would be thwarted, since "[v]irtually every petitioner can be expected to submit allegations and information sufficient to show *some* 'possibility' of injury."[211]

The Federal Circuit found support for the ITC's weighing of evidence in the language and legislative history of the statute. Specifically, the court referred to the language of 19 U.S.C. § 1673b(a) requiring that the Commission make its preliminary injury determination on the basis of "the best information available to it at the time of the determination . . . ."[212] It also noted that in so requiring, Congress intended that the Commission conduct a thorough investigation, and that the "ITC cannot conduct a 'thorough investigation' if it is permitted to review only such evidence as might support a petition."[213]

In conclusion, the court determined that:

> the notion that allegations in a petition found unsupportable because of overwhelming contradictory evidence should nonetheless result in a full investigation and potential imposition of provisional remedies is directly contrary to Congress' intent . . . of eliminating 'unnecessary and costly investigations' and the 'impediment to trade' that would reside in an unwarranted imposition of provisional remedies. Considering and weighing, under the ITC's

(1978); *Butadiene Acrylonitrile Rubber from Japan*, Inv. No. AA1921-1, U.S.I.T.C. Pub. No. 727, at 5 (1975). In the court's view, this standard ensured that unwarranted termination of investigations would not occur. 40 Fed. Reg. 18618, 18619 (1975).

209. 785 F.2d at 1001.

210. *Id.* at 1002.

211. *Id.* (emphasis in original).

212. *Id.* at 1002.

213. *Id.* at 1003.

> guidelines, all evidence gathered within the 45 days available for conducting a preliminary investigation, on the other hand, effectuates that legislative intent.[214]

Significantly, even after *American Lamb*, the standard to be utilized by the ITC in making its preliminary injury determinations is still considerably less strict than that which must be applied in a final injury determination.

2. Final Injury Determinations

If the final determination by Commerce in an antidumping or countervailing duty investigation is affirmative, then the ITC must determine whether an industry in the United States is materially injured or threatened with material injury, or whether establishment of an industry in the United States is materially retarded by imports which Commerce has determined are being subsidized and/or sold at less than fair value in the United States.[215]

Material injury is defined by statute as "harm which is not inconsequential, immaterial, or unimportant."[216] In applying the "material injury" standard, the ITC considers three categories of injury indicators: 1) volume of imports; 2) effect of the imports on the price of the like product; and 3) the impact of imports on domestic producers of like products.[217] The weight ascribed to each factor depends on the facts of each case; no single factor is dispositive. In fact, the law specifically disclaims the controlling effect of the presence or absence of any one of the evaluative factors.[218]

Thus, in *SCM Corp. v. United States*,[219] the CIT determined that market penetration of merchandise sold at less than fair value is not, in and of itself, a sufficient basis to make an affirmative finding of injury in a dumping proceeding. Although market penetration was relevant, the court found that the ITC had correctly discharged its obligation in making its determination by considering and weighing a number of other economic and financial factors, including the health of the domes-

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214. *Id.* at 1004.
215. 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1) (1982).
216. 19 U.S.C. § 1677(7)(A) (1982).
217. 19 U.S.C. § 1677(7)(B) (1982).
218. *See* 19 U.S.C. § 1677(7)(E)(ii) (1982).
219. 4 CIT 7, 544 F. Supp. 194 (1982).

tic industry. The weight the ITC chose to give market penetration as opposed to other equally pertinent injury criteria was considered a "matter of discretion and expert judgment."[220]

The court also upheld the ITC's finding that there was no substantial evidence of price suppression. The ITC based its finding on a comparison of respective wholesale price indexes for portable and office typewriters, which showed that the prices for both types of typewriters increased at a comparable pace during the relevant period. In view of this trend, the court agreed with the ITC that imports at less than fair value (LTFV) had not resulted in price suppression.[221]

The ITC's finding that there was no substantial evidence that the domestic industry lost a significant number of sales as a result of LTFV imports was also upheld. "The information before the Commission showed that while the percentage of the market attained by Japanese imports increased during the period of 1971-74, *the market share* in that period for *all imports* dropped, and consequently, *SCM's own sales increased substantially, both relatively to imports and in absolute terms*."[222] Accordingly, the court affirmed the ITC's negative injury determination.

In *British Steel Corp. v. United States*,[223] which involved a challenge to the ITC's affirmative injury determination in a countervailing duty case, the court likewise upheld specific findings by the ITC in connection with import volume, price undercutting and price depression.[224] However, the *British Steel* case is perhaps most significant for confirming that in analyzing whether imported merchandise is causing injury to the United States industry, a direct correlation between price depression and import volume is not required to determine that the imports are "a causal factor of price depression." All that is required by the statute is that the imports *contribute* to the overall injury of the U.S. industry. They need not be a principal or even a significant cause of such injury. "The test of causation is whether the imports from a particular country are contributing to the injury being suffered by the domestic in-

220. 4 CIT at 13, 544 F. Supp. at 199.
221. 4 CIT at 14, 544 F. Supp. at 200.
222. 4 CIT at 15, 544 F. Supp. at 201 (emphasis in original).
223. 8 CIT 86, 593 F. Supp. 405 (1984).
224. 8 CIT at 94-97, 593 F. Supp. at 411-14.

dustry."[225]

Moreover, the court found that the fact that factors other than subsidized imports may also injure the U.S. industry is irrelevant, because the ITC is precluded from weighing the significance of subsidized imports as a *cause* of injury to a domestic industry against other factors that cause injury to the industry.[226] Thus, while the ITC can properly weigh market penetration and other factors in reaching its injury determination, as it was permitted to do in *SCM Corp.*, under *British Steel*, the ITC may not engage in a weighing process in determining whether injury to an industry is "by reason of" subsidized or dumped imports.

Maine Potato Council v. United States,[227] involved a challenge to the ITC's negative injury determination on several grounds. First, the ITC had not considered the size of the dumping margins or their impact on the domestic industry in reaching a decision. Second, it had used an erroneous standard in determining whether imports were a contributing cause of injury. Third, it had not examined proper price levels in deciding that there was no underselling. Finally, the ITC did not properly consider quality differences when evaluating lost sales data, price suppression and underselling. The court agreed with the ITC that the statute does not *require* the agency to consider the amount of dumping margins, but remanded the case for clarification on the other issues raised.[228]

Following the remand, the court upheld the ITC's clarified conclusions and its negative injury determination.[229] Regarding the question of differences in quality of the merchandise, the court noted that although quantification of such differences is ordinarily required, it was not necessary in this case, because the ITC found such differences to be marginal, and the evidence showed wide fluctuations in margins of overselling and differences of opinion as to what external quality factors actually existed.[230]

The court also upheld the ITC's clarified conclusion that

225. 8 CIT at 97, 593 F. Supp. at 413.
226. *Id.*
227. 617 F. Supp. 1088 (Ct. Int'l Trade 1985).
228. *Id.* at 1090.
229. *See id.*, at 1091-92.
230. *Id.* at 1090.

the volume of imports of Canadian potatoes were not a contributing cause of injury.[231] As to the ITC's conclusions on price effects, the court found that on the basis of the evidence before it, the ITC could rationally find that "farm losses and price declines did not correlate with increases in import volume and market penetration."[232] Additionally, the court determined that the ITC could appropriately consider price movements instead of absolute prices in concluding that price effects outside the region where imports competed were parallel to price effects within the region.[233]

In a more recent decision, *Gifford-Hill Cement Co. v. United States*,[234] the court reviewed an ITC negative injury determination in an antidumping case involving Portland Hydraulic Cement from Australia and Japan. At issue was the ITC's conclusion that the United States industry, although "experiencing difficulties," was not injured " 'by reason of' the imported cement."[235]

The plaintiffs alleged various errors in the ITC's analysis of the causation issue. They claimed that the ITC disregarded certain indicators of impact on the domestic industry, that the ITC erred in assessing the impact of imports on domestic prices and that it failed to consider the cumulative effect of the Japanese and Australian imports, along with certain subsidized Mexican cement.[236]

The court upheld the ITC's determination, finding it to have been based on substantial evidence. As to the ITC's analytical framework, the court stated that the ITC's use of a submarket analysis in a regional industry case was valid. The court also upheld the ITC's correlation of distance and volume of sales in evaluating the effects of imports on submarkets.[237]

The ITC's approach to lost sales and its conclusion that the volume of imports and sales lost to imports was insignificant in the context of the injury in this particular case were

231. *Id.*
232. *Id.* at 1091.
233. *Id.*
234. 615 F. Supp. 577 (Ct. Int'l Trade 1985).
235. *See id.* at 579.
236. *Id.* at 582-84.
237. *See id.* at 582.

likewise upheld.[238] In this regard, the court noted that the statutory scheme does not require the ITC to focus on lost sales *per se* or to analyze the impact of LTFV imports on domestic producers based on a specific type of lost sales analysis.[239]

The court found that absent a showing to the contrary, the ITC was presumed to have considered factors such as profits, market share, productivity, and utilization of capacity as indicia of causation. Thus, the court found that the ITC need not issue findings and conclusions on every statutory element pertaining to injury merely because it was raised by a petitioner.[240]

The court also upheld the ITC's analysis regarding effects of imports on domestic prices. Specifically, it concluded that the ITC's finding that price declines occurred in areas of no import competition was based on a valid sub-market analysis.[241] The court stated that plaintiffs' citation to evidence of record was supportive of the ITC's conclusions, and the plaintiffs could not produce an alternative theory which was sufficient to overturn the ITC's finding.[242]

Finally, the court upheld the ITC's decision not to consider cumulative imports from Japan, Australia and Mexico, noting that the imports in this case entered the region in different areas and affected only limited areas of the region. Furthermore, each area was found to be affected by only one source of imports.[243] These factors, coupled with the ITC's conclusions regarding price effects and lost sales, provided no basis for remanding the case to the ITC for cumulation.[244] No-

238. *Id.*

239. *Id.* at 585-86.

240. *Id.* at 587.

241. *See id.* at 587-88.

242. *Id.*

243. *Id.* at 589-90.

244. By contrast, in American Grape Growers Alliance for Fair Trade v. United States, No. 84-04-00575, slip op. 85-84 (Ct. Int'l Trade Aug. 8, 1985), the CIT reversed a preliminary negative injury determination, holding that it was erroneous for the ITC to fail to consider imports of table wine from France and Italy in a cumulated manner. The ITC decided not to consider the imports cumulatively based on its view that the imports "did not exhibit a collective 'hammering' effect on domestic wine prices." *Id.* at 5. This conclusion was predicated on a finding that the French and Italian wines were of different types (white versus effervescent) and that they were usually marketed by separate groups of importers.

The court found that these conclusions were based on "a depth of analysis and

tably, however, the court specifically limited its finding as to cumulation, leaving open the issue of whether cumulation would be appropriate in another context, absent competition among imports.[245]

3. Threat of Material Injury

The factors considered in determining whether there is a *threat* of material injury to United States industry are slightly different from those considered in determining whether there is existing material injury. The cases teach that in order for an ITC finding of *threat* of material injury to be sustained, the evidence must show that there is a real and imminent likelihood of injury. In fact, the CIT has reversed an injury finding based on evidence which showed only a *mere possibility* that injury might occur at some future time. In *Alberta Gas Chemicals, Inc. v. United States*,[246] the CIT stated that the determination of the 3-2 majority of the ITC was "flawed with supposition and conjecture."[247] The court chided the ITC for finding threat on the basis of the possibility of the construction of a new production facility. And, even if the production facility were built, the injury would not occur until at least three years in the future.[248]

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specificity of information which is unreasonable to expect, and unlawful to demand, in the preliminary phase of the investigation," and further noted that the ITC erred in making the standard of competition needed to justify cumulation more stringent than that utilized for meeting the definition of "like product." *Id.* at 5-6. In the court's view cumulation cannot properly be conditioned on anything more than "the possibility that imports from a given source will participate in a combined injurious effect on domestic industry." *Id.* at 11. *See also* Republic Steel Corp. v. United States, 591 F. Supp. 640 (Ct. Int'l Trade 1984), *reh'g denied*, No. 82-03-00372, slip op. 85-27 (Ct. Int'l Trade Mar. 11, 1985).

245. 615 F. Supp. at 590, n.18. The Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984) recently amended 19 U.S.C. § 1677(7) to *require* the ITC to "cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with other products of the domestic industry in the United States market." This amendment mandates that the ITC add together imports from two or more countries under simultaneous investigation to assess the overall injury to the domestic industry. The change in the law unquestionably limits the ITC's discretion under the old law to decide whether cumulation is appropriate in a given case, and, as a practical matter, the amendment may inure to the detriment of both foreign respondents and importers.

246. 1 CIT 312, 515 F. Supp. 780 (1981).

247. 1 CIT at 324, 515 F. Supp. at 791.

248. *Id.*

In a more recent case, *Rhone Poulenc, S.A. v. United States*,[249] the CIT determined that in making its final determination as to threat, the ITC must examine "demonstrable trends," such as market penetration, in conjunction with the threat of the specific indicia of present material injury set forth in the statute[250] and in the regulations.[251] In the court's view, these concrete factors required to be considered in a final determination of present injury must be reviewed in the threat of injury context to determine the imminence of actual injury. These factors include the volume of imports of the merchandise which is the subject of the investigation, the effect of imports of that merchandise on prices in the United States for like products, and the impact of imports of such merchandise on domestic producers of like products.[252]

Section 612 of the Trade and Tariff Act of 1984[253] incorporates specific criteria to be considered by the ITC. The amended law codifies the standards set forth in the cases, and the ITC now *must* find that the threat of material injury is real and that actual injury is imminent, and such a finding "may not be made on the basis of mere conjecture or supposition."[254]

I. *Administrative Reviews and Revocation*

Over the past few years, the courts have also had occasion to consider cases involving periodic administrative reviews and revocation. In *Smith-Corona Group, Consumer Products Division, SCM Corp. v. United States*,[255] the CIT ruled that although an annual Section 751 review must take place every 12 months following the date of an antidumping order, the law does not preclude a review determination from being made at an *earlier* date. Presumably, this would apply to reviews of countervailing duty orders as well.

The court has also addressed an ITC administrative review based on changed circumstances. Unlike the annual section 751 review, a changed circumstances review is to be con-

249. 8 CIT 47, 592 F. Supp. 1318 (1984).
250. 19 U.S.C. § 1677(7)(B).
251. 19 C.F.R. § 207.26 (1986).
252. 8 CIT at 51, 592 F. Supp. at 1322-23.
253. Pub. L. No. 98-573 (1984) (hereinafter the 1984 Act).
254. 19 U.S.C. § 1677(7)(F)(ii) (1982 & Supp. III 1985).
255. 1 CIT 89, 507 F. Supp. 1015 (1980), *cert. denied*, 465 U.S. 1022 (1984).

ducted *only* if it is shown that changed circumstances sufficient to warrant review exist.[256] Furthermore, the regulations provide that absent a showing of "good cause," this type of review is not to take place within 24 months after the date of an affirmative final determination or a determination to suspend an investigation.

In *Matsushita Electric Industrial Co. v. United States*,[257] the CAFC noted that the decision to undertake a changed circumstances review does not create an inference that an outstanding antidumping order is no longer necessary. It is merely a threshold decision that sets the review process in motion and has no bearing on the merits of whether revocation of the antidumping order is warranted.[258] Thus, it need not be conducted in the same manner as an original investigation.[259] The court also recognized that in conducting such a review, the ITC can draw inferences from available evidence as to the likely effect of revocation on the behavior of importers, and in the absence of direct evidence as to the importers' intent or future plans regarding shipments to the U.S., the ITC may rely on circumstantial evidence to infer likely intent, production capacity, domestic and foreign demand, and incentives to increase imports.[260]

An interesting case that involved the issue of revocation of an antidumping order is *Freeport Minerals Co. v. United States*.[261] In *Freeport,* the CIT found that Commerce had reasonably exercised its discretion in deciding to revoke an antidumping order based on findings of no sales at less than fair value during a period four years prior to the tentative revocation determination. The CIT therefore upheld the ITA's revocation determination.[262]

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256. The regulations governing changed circumstances are set forth at 19 C.F.R. §§ 207.45 (ITC regulation regarding investigation to review outstanding determinations), 353.53 and 355.41 (ITA regulations on administrative review of antidumping and countervailing duty determination).

257. 750 F.2d 927 (Fed. Cir. 1984).

258. *Id.* at 932.

259. Indeed, pursuant to regulation, the agency must be convinced that modification or revocation of an existing order will not materially injure a U.S. industry. *See id.* at 932 (citing 19 C.F.R. § 207.45(a)).

260. *See* 750 F.2d at 933-34.

261. 7 CIT 352, 590 F. Supp. 1246 (1984), *rev'd*, 776 F.2d 1029 (Fed. Cir. 1985).

262. *See* 7 CIT at 357-58, 590 F. Supp. at 1252.

The CAFC disagreed on the basis of its findings that the pertinent law, regulations and legislative history indicated a legislative intent that modification or revocation of a dumping finding be based on current data.[263] The CAFC further found that Commerce's failure to conduct an administrative review within a year of its tentative revocation determination and to require the two respondents covered by the tentative revocation to provide updated sales data placed upon the plaintiff an "impermissible burden of proof contrary to the policies underlying the applicable statute and regulations."[264] In conclusion, the CAFC held that Commerce's failure to obtain more recent data constituted an abuse of discretion. Thus, it reversed the CIT's decision and remanded the case to Commerce for further proceedings.[265]

II. *OTHER IMPORT RELIEF LAWS*

A number of decisions involving other import relief laws have also emerged in recent years, most notably in areas involving challenges to Presidential action, and cases brought under section 337 of the Tariff Act of 1930.[266]

A. *Challenges to Presidential Action*

In the past few years, disgruntled importers have challenged Presidential actions taken under various trade statutes. The courts generally have sustained the Executive action taken. In *Florsheim Shoe Co., Division of Interco., Inc. v. United States*,[267] the CAFC upheld the validity of various Executive Orders issued by the President pursuant to section 504 of the Trade Act of 1974, 19 U.S.C. § 2464, excluding certain leather imports from India from preferential treatment under the Generalized System of Preferences (GSP).[268] The court interpreted section 504(a) as "an explicit grant to the President of plenary authority" to withdraw, suspend or limit preferences *at any time* upon consideration of the factors set forth in the stat-

263. 776 F.2d at 1033-34.
264. *Id.* at 1033.
265. *Id.* at 1034.
266. Tariff Act of 1930, ch. 497, § 337, 46 Stat. 590, 703 (codified as amended at 19 U.S.C. § 1337 (1982 & Supp. III 1985)).
267. 744 F.2d 787 (Fed. Cir. 1984).
268. 19 U.S.C. § 2461-2466 (1982 & Supp. III 1985).

ute. The CAFC found that neither of the provisions alleged by plaintiff[269] to have been violated enlarge or constrict Presidential discretion under section 504(a). The court stressed that the GSP gave broad discretionary authority to the President in a field closely tied to foreign affairs, and that the President's power should therefore be given an expansive rather than narrow construction.[270] In the area of international trade "congressional authorizations of presidential power should be given a broad construction and not 'hemmed in' or 'cabined, cribbed, confined' by anxious judicial blinders."[271]

The court declined to view this broad grant of authority as an unconstitutional delegation of Congress' commerce power, noting that the statute sets forth guidelines which the President must observe in exercising his discretion.[272] The court then fell back on long-standing precedents establishing that in the area of international trade, executive decisions "are reviewable only to determine whether the President's action falls within his delegated authority; the statutory language has been properly construed; and the President has complied with relevant procedural requirements."[273] The court added that the President's motives, reasoning, factual findings and judgment, are not subject to judicial review.[274] Therefore, the court would not go behind the Executive Orders to search for the actual basis for the President's action.[275]

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269. 19 U.S.C. § 2464(c)(1)(B), (d) (1982 & Supp. III 1985).

270. 744 F.2d at 793-96.

271. *Id.* at 793 (quoting South Puerto Rico Sugar Co. Trading Corp. v. United States, 334 F.2d 622, 632 (Ct. Cl. 1964)).

272. For example, he may not withdraw, suspend or limit preferential treatment except upon consideration of the factors set forth in Sections 501 or 502(c). In addition, although he may withdraw preferential treatment entirely he may not adjust rates of duty. Furthermore, under Section 505, [19 U.S.C. § 2465] he must report to Congress regarding operation of the GSP.

273. *See, e.g.*, United States Cane Sugar Refiners Ass'n v. Block, 683 F.2d 399, 404 (C.C.P.A. 1982); Aimcee Wholesale Corp. v. United States, 468 F.2d 202, 206 (C.C.P.A. 1972); *see also* United States v. George S. Bush & Co., 310 U.S. 371, 379-80 (1940).

274. Section 504(c)(1)(B) *requires* the President, if he determines that a certain specified standard has been met, to withdraw duty-free status, unless he nevertheless finds certain other listed facts or qualifications to exist. Subsection (d) of Section 504 provides, in part, that subsection (c)(1)(B) does not apply with respect to any eligible article if a like or directly competitive article is not produced on January 3, 1975, in the United States.

275. 744 F.2d at 795-97.

The CIT followed *Florsheim* in *Sunburst Farms, Inc. v. United States*,[276] a recent decision involving a challenge to the President's removal of cut flowers from Colombia from a list of products eligible for duty free treatment under the GSP. The court concluded that the President's action was authorized because the Executive Order expressly referred to Title V of the Trade Act of 1974 as authority for the President's exclusionary action and that such action was squarely within the President's discretionary authority under section 504(a) of that Act. Thus, the court did not even reach the question raised by the plaintiff regarding the proper methodology for action under the "competitive need" limitation.

By contrast, in *Luggage & Leather Goods Manufacturers of America, Inc. v. United States*,[277] the court determined that the President's designation of certain man-made fiber flat goods as articles eligible for preferential treatment under the GSP was contrary to law.[278] *Luggage and Leather Goods* involved interpretation of 19 U.S.C. § 2463(c)(1), which provides that the President "may not" designate certain categories of "import sensitive articles" as eligible for duty free treatment under the GSP. First among the illustrative list of such articles are "textile and apparel articles subject to textile agreements."[279]

Since the man-made fiber flat goods in question were subject to the Multifiber Arrangement (MFA),[280] and the MFA was a "textile agreement" within the plain meaning of that term as used in section 2463(c)(1)(A), the court determined that the President had acted contrary to law in designating the flat goods as GSP eligible articles.[281] In reaching this conclusion, the court rejected the government's argument that the term "textile agreements" did not include the MFA, but only bilateral agreements that impose restraints on particular products. The court also rejected the government's argument that section 2463 confers upon the President broad discretion regard-

276. 620 F. Supp. 735 (Ct. Int'l Trade 1985).

277. 588 F. Supp. 1413 (Ct. Int'l Trade 1984).

278. The articles designated GSP-eligible were then classifiable under Item 706.39 Tariff Schedules of the United States.

279. 19 U.S.C. § 2463(c)(1)(A) (1982).

280. Entered into pursuant to Section 204 of the Agricultural Act of 1956, as amended, 7 U.S.C. § 1854, to establish standards for regulating imports.

281. 588 F. Supp. at 1423-24.

ing designation of GSP eligible articles.[282] On the contrary, the court noted, section 2463(c) demonstrates a legislative intent to restrict the exercise of Presidential discretion in the case of import sensitive articles.[283]

In the case of *Maple Leaf Fish Co. v. United States*,[284] the court sustained an ITC determination and ensuing Presidential Proclamation arising out of an escape clause proceeding under section 201 of the 1974 Act involving mushrooms. In reviewing whether the scope of the Presidential Proclamation should be restricted to include only certain mushrooms classifiable within the pertinent tariff provision, the court observed that in the escape clause provisions, Congress had delegated its legislative authority in a tariff matter to the President and the ITC. Thus, the ITC's and the President's actions as they pertain to the granting or withholding of import relief are essentially legislative acts and, as such, are subject to judicial review only to determine whether: (1) proper statutory procedures were followed; (2) the statutory language was properly construed; and (3) the action taken was within the scope of delegated authority. Using this 3-pronged inquiry, the court concluded that these criteria had been satisfied.[285]

In a far more controversial action, *Mast Industries, Inc. v. Regan*,[286] plaintiffs challenged the promulgation of certain interim regulations by the Customs Service at the President's direction. These regulations, among other things, provided rules for the determination of country of origin for textile products subject to quota restraints; changed regulations governing manipulation of textile products in bonded warehouses and foreign trade zones; and gave Customs discretion to require more detailed information before allowing textile products to be transported in bond.[287] In issuing the regulations, Customs relied on section 204 of the Agricultural Act of 1956,[288] which permits the President to make agreements with

282. *Id.* at 1424-25.

283. *Id.* at 1426.

284. 596 F. Supp. 1076 (1984), *aff'd*, 762 F.2d 86 (Fed. Civ. 1985).

285. *See* 566 F. Supp. 1077, 1082.

286. 8 CIT 214, 596 F. Supp. 1567 (1984).

287. *Id.* at 1571-1572.

288. Agricultural Act of 1956, Pub. L. No. 540, § 204, 70 Stat. 188, 200 (1956) (codified as amended at 7 U.S.C. § 1854 (1982 & Supp. III 1985)).

foreign governments to limit their textile exports to the United States.[289] Notwithstanding a number of challenges to the validity of both the President's and the Customs Service's actions, the CIT upheld the regulations and the underlying authority upon which they were issued, giving an extremely broad construction to Presidential authority over matters of foreign commerce.[290]

The court determined that the congressional delegation of power to the President in section 204 was valid and should be expansively construed. According to the court, the objective of Section 204 is to limit imports of textiles and agricultural products into the United States. To further this objective, section 204 authorizes the President to negotiate with other governments whenever he considers such action appropriate and to issue regulations to carry out such agreements.[291]

The court also found that the President properly construed his authority under section 204, that he had acted within the scope of authority constitutionally delegated by Congress, and that all relevant procedures were complied with. The CIT found nothing in prior decisions which would prevent the President from implementing his authority under section 204 by having Customs issue regulations. The court thus concluded that although Customs had failed to comply with the notice and comment procedures set forth in the Administrative Procedure Act (APA),[292] the regulations fell within the "general statements of policy" and "foreign affairs" exceptions to the statute and, therefore, were exempt from its prior notice and comment provisions.[293] Accordingly, it denied the plaintiff's motion for summary judgment, and upheld the validity of the regulations and the authority under which they were issued.[294]

To similar effect was the CAFC's decision in *American Association of Exporters & Importers — Textile & Apparel Group v. United States*.[295] This case involved a challenge to the Committee for

289. 596 F. Supp. at 1570.
290. 8 CIT at 223, 596 F. Supp. at 1576.
291. *Id.* at 222, 223, 596 F. Supp. at 1574, 1576.
292. 5 U.S.C. §§ 551 - 706 (1982).
293. *See* 8 CIT at 226, 228-33, 596 F. Supp. at 1575, 1577-82.
294. *Id.* at 233, 596 F. Supp. at 1583.
295. 751 F.2d 1239 (Fed. Cir. 1985).

Implementation of Textile Agreements' (CITA) actions which were alleged to have been taken pursuant to certain international agreements regulating trade in textile products.[296] Specifically challenged were CITA's requests for consultations and unilateral institution of quotas without a proper finding of "market disruption" as required by Multifiber Arrangement and the bilaterals. It was claimed that these acts were arbitrary and capricious, in excess of CITA's scope of delegated statutory authority under section 204 of the Agricultural Act of 1956, and that they violated the rulemaking provisions of the APA.[297]

The CAFC disagreed, however, and, similar to the CIT decision in the *Mast Industries* case, it construed the statutory language broadly and upheld CITA's actions. Specifically, the court noted that section 204 "imposes no restrictions on the President's administration of the textile trade program."[298] The only requirement is that regulations issued to carry out international agreements "pertain to the general subject of the agreement."[299] Furthermore, like the CIT decision in the *Mast Industries* case, the court concluded that CITA's actions did not violate the rulemaking provisions of the APA because an intention to trigger a bilateral agreement's consultation provisions or to impose stricter import restrictions is within the "foreign affairs" exception and thus exempt from the Act's notice and comment provisions.[300]

B. *Section 337*

The section 337 cases thus far decided by the CAFC involve many issues. Most notable for our purposes, however, are those which discuss the scope of the industry protected and injury to such an industry.

In *Schaper Manufacturing Co. v. United States International*

296. The primary source of the United States government's regulation of textile trade is the Arrangement regarding International Trade in Textiles (the "Multifiber Arrangement" or "MFA"), December 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7840. The MFA includes, *inter alia*, provisions for cooperation and elimination of difficulties in the area of textile trade, and encourages parties to the agreement to enter into bilateral textile trade agreements. *See id.* art. 1, § 1; art. 4, § 2.

297. 751 F.2d at 1241-42.

298. *Id.* at 1247.

299. *Id.*

300. *Id.* at 1249.

Trade Commission,[301] the CAFC upheld the ITC's termination of a patent infringement investigation under section 337. The court held that a domestic entity engaged in the development, testing and marketing of certain toy vehicles and a domestic entity engaged in the invention of toys and games which are then licensed to toy manufacturers did *not* constitute a domestic "industry" within the meaning of section 337. The court noted that "the patent must be exploited by production in the United States, and the industry in the United States generally consists of the domestic operations of the patent owner, his assignee and licensees devoted to exploitation of the patent."[302] Although at times the term "industry" may embrace more than the manufacture of the patented item, such as domestic repair and installation activities, servicing, etc., such activities must add "significant value" domestically to the merchandise in order for them to be perceived as an "industry" in the United States.[303]

In *Bally/Midway Manufacturing Co. v. United States International Trade Commission*[304] the CAFC accepted the ITC's definition of the "domestic industry" which encompassed Bally's facilities that produced and sold only one video game.[305] The court noted the uniqueness of this narrow definition in a concurring opinion. "Here we have not just one company, but one product of one company singled out as the whole 'industry.' "[306] The CAFC declined to comment on the potential ramifications of such a definition, but did state that the language defining injury as including acts "to prevent establishment of an industry" is "deprived of all meaning if limited to preventing establishment of another 'industry' to produce the [particular] game."[307]

Neither section 332 nor the legislative history provides a definition of injury for the purposes of the statute. Three cases decided by the CAFC, however, provide limited guidance. In *Bally/Midway*, the court noted that where the unfair practice is

301. 717 F.2d 1368 (Fed. Cir. 1983).
302. *Id.* at 1372.
303. *Id.* at 1373.
304. 714 F.2d 1117 (Fed. Cir. 1983).
305. *Id.* at 1121.
306. *Id.* at 1126.
307. *Id.* (emphasis added).

the infringement of a domestic industry's copyright, trademark or patent right, even a relatively small loss of sales may establish the requisite injury to the domestic industry.[308] This, however, was later qualified in the case of *Textron, Inc. v. United States International Trade Commission*,[309] which involved an appeal from an ITC determination that no violation of section 337 occurred in the importation from Taiwan of vertical milling machines, parts, accessories and attachments. According to the *Textron* decision, the holding in *Bally/Midway* does not require that the ITC find injury whenever a trademark has been infringed, regardless of the amount of damage caused to the domestic industry. On the contrary, at the very least, "the domestic industry must normally establish that the infringer holds, or threatens to hold, a significant share of the domestic market in the covered articles or has made a significant amount of sales of the articles."[310]

In *Corning Glass Works v. United States International Trade Commission*,[311] however, the CAFC declined to lay down a legal standard on the quantum of injury required to constitute a violation of section 337. The court noted that the statement in *Textron* regarding a showing that "the infringer holds or threatens to hold, a significant share of the domestic market in the covered articles or has made a significant amount of sales of the articles gives guidance, but is not definitive of the considerations relevant to the injury inquiry."[312] In the court's view, the injury determination is a highly fact-specific matter within the agency's expertise. Moreover, the court observed that although the amount of sales of the imported and allegedly infringing merchandise is "highly relevant" to the injury determination, whether the amount is "significant," as required under *Textron*, cannot be based on the dollar amount of sales alone. The court stated that comparison of the amount of infringing sales with total sales of the product in question in the United States market as well as with the volume of sales of the domestic plaintiff and its domestic licensees was meaningful. Thus, the ITC's conclusion, that sales of the imported mer-

308. 714 F.2d at 1124.
309. 753 F.2d 1019 (Fed. Cir. 1985).
310. *Id.* at 1029 (citation omitted).
311. 799 F.2d 1559 (Fed. Cir. 1986).
312. *Id.* at 17.

chandise were *de minimis*, was rational and amply supported by the evidence of record.[313]

CONCLUSION

The courts have varied in the extent to which they will encroach upon what are arguably agency prerogatives in administering the antidumping and countervailing duty laws. Thus far, the CIT appears more willing than the CAFC to substitute its own judgment for that of the administrative agency, particularly in the area of initiation of investigations. In addition, the Commerce Department has apparently fared better in those cases challenging its determinations in antidumping cases than in cases challenging its administration of the countervailing duty law. This trend may be due, in part, to the fact that determinations as to what constitute subsidies involve more subjective considerations than do applications of the antidumping law's price comparisons which are based on financial data. It may also be due to the fewer number of countervailing duty cases brought before the courts.

In the area of injury determinations, the CIT has issued decisions that reverse the ITC's determinations as well as decisions which support the agency's specific findings. Furthermore, although the CIT issued a line of decisions chastising the ITC for use of an overly stringent standard in reaching its preliminary injury determinations, the CAFC upheld the ITC's weighing of evidence on injury at the preliminary investigative stage. The courts have also upheld the vast majority of ITC analyses regarding the factors to be considered in reaching a final determination regarding material injury or threat thereof to a domestic industry by reason of dumped or subsidized imports.

In spite of these varying trends, however, it is obvious that both the CIT and CAFC have exhibited considerable deference to the discretion conferred upon the agencies by Congress, while recognizing that such discretion is not unfettered.

It also appears certain that because of the expansion of availability of judicial review, administrative agencies have found it necessary to become more accurate in their determi-

313. *Id.* at 18-19.

nation of facts upon which they act and more open in their consideration of legal and policy issues. Whether this openness and enhanced factual accuracy will continue as the courts develop even greater expertise in deciding cases brought under highly complex trade statutes remains to be seen. Nevertheless, the expanded availability of judicial review in trade cases seems to have improved the substantive quality of import relief law administration, and has helped maintain the delicate balance between the benefits to consumers of fair competition and protection of domestic industry from unfair competition in the marketplace.