

Brooklyn Journal of International Law

Volume 20

Issue 3

Selected Articles from the United States Court of
International Trade Ninth Judicial Conference

Article 1

1-1-1995

Recent Deveopments in Antidumping and Countervailing Duty Cases: November 1992-October 1994

Elizabeth C. Seastrum

Priya Alagiri

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Elizabeth C. Seastrum & Priya Alagiri, *Recent Deveopments in Antidumping and Countervailing Duty Cases: November 1992-October 1994*, 20 *Brook. J. Int'l L.* 503 (1995).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol20/iss3/1>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

SELECTED ARTICLES FROM THE U.S. COURT OF INTERNATIONAL TRADE NINTH JUDICIAL CONFERENCE

RECENT DEVELOPMENTS IN ANTIDUMPING AND COUNTERVAILING DUTY CASES: NOVEMBER 1992 - OCTOBER 1994

*Elizabeth C. Seastrum**
*Priya Alagiri***

I. INTRODUCTION

This paper surveys those decisions issued by the U.S. Court of International Trade (CIT) and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) from November of 1992 to early October of 1994 which concern the antidumping and countervailing duty determinations of the United States Department of Commerce (Commerce). We have not attempted to discuss all such decisions of the past two years but have instead chosen those cases which we believe are of interest to attorneys attending the 1994 CIT Judicial Conference and to trade practitioners generally, as well as those opinions which particularly pique our own interests or are not being discussed at the Conference by other panelists. Where appropriate, we have grouped our discussion of cases by issue.

* Senior Counsel, Office of Chief Counsel for Import Administration, Office of the General Counsel, United States Department of Commerce.

** Attorney Advisor, Office of Chief Counsel for Import Administration, Office of the General Counsel, United States Department of Commerce.

II. THE "VAT TAX" DILEMMA

How to treat value-added (VAT) or indirect taxes under the U.S. antidumping and countervailing duty laws has long been a thorny problem. Two Federal Circuit decisions issued last year laid to rest some major aspects of that dilemma,¹ while several CIT decisions have since addressed subsidiary issues.² In addition, a third Federal Circuit decision addressed the related "physical incorporation test" for treatment of rebated domestic taxes in antidumping cases.³

In *Zenith Electronics Corp. v. United States*,⁴ the Federal Circuit held that Commerce may not deduct from foreign market value (FMV) those foreign taxes imposed on merchandise sold in the home country, but must instead add those taxes to the price at which the merchandise is sold in the U.S. (United States price or USP). The appellate court based its holding on its reading of title 19 of the U.S. Code,⁵ stating that:

Title 19 explicitly requires Commerce to increase USP by the amount of tax that the exporting country would have assessed on the merchandise if it had been sold in the home market Section 1677a(d)(1)(C), the section dealing with tax adjustments, does not provide for any adjustment to FMV to correct for tax-related distortion of the dumping margin.⁶

In so holding, the Federal Circuit rejected Commerce's application of the circumstance-of-sale provision⁷ as authority for deducting the amount of the tax from FMV.

While *Zenith* settled the major issue of which side of the FMV-USP equation Commerce must make its tax adjustment, it left unsettled the exact amount of tax which Commerce must add to USP in order to make the equation a fair comparison of

1. *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573 (Fed. Cir. 1993); *Daewoo Elecs. v. International Union of Elec., Electrical, Technical Salaried and Mach. Workers, AFL-CIO*, 6 F.3d 1511 (Fed. Cir. 1993).

2. See *Torrington Co. v. United States*, 853 F. Supp. 446 (Ct. Int'l Trade 1994); *Hyster Co. v. United States*, 848 F. Supp. 178 (Ct. Int'l Trade 1994); *Federal-Mogul Corp. v. United States*, 834 F. Supp. 1391, 1397 (Ct. Int'l Trade 1993), *aff'd*, Nos. 91-07-00530, 91-08-00569, 1994 WL 50290 (Ct. Int'l Trade Feb. 14, 1994).

3. *American Alloys, Inc. v. United States*, 30 F.3d 1469 (Fed. Cir. 1994).

4. 988 F.2d at 1573.

5. 19 U.S.C. § 1677a(d)(1)(C) (1988).

6. *Zenith*, 988 F.2d at 1580.

7. 19 U.S.C. § 1677b(a)(4)(B) (1988).

the respective home market and U.S. prices. In a subsequent Federal Circuit decision, *Daewoo Electronics v. International Union of Electronic, Electrical, Technical Salaried and Machine Workers, AFL-CIO*,⁸ the appellate court sustained Commerce's calculation of the amount of tax to be added to USP as based on the point in the chain of commerce in the Korean home market where tax authorities would have applied the Korean tax on the exported merchandise, had their practice been to tax such merchandise.⁹ Several subsequent CIT decisions have confirmed this approach.¹⁰

The Federal Circuit addressed another VAT tax conundrum in the "tax pass-through" portion of the *Daewoo* decision. The court held that Commerce need not conduct an econometric analysis of tax incidence in foreign markets when it decides whether it may add to USP the full amount of foreign taxes levied upon merchandise sold in the home market but forgiven upon export to the United States.¹¹ The CIT had held that § 1677a(d)(1)(C) of the U.S. Code, which allows augmentation of USP "only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation,"¹² required the International Trade Administration (ITA) to analyze the consumer tax incidence or "pass through" of the commodity taxes.¹³

8. 6 F.3d 1511 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 2672 (1994).

9. *Id.* at 1519-20.

10. See *Avesta Sheffield, Inc. v. United States*, 838 F. Supp. 608 (Ct. Int'l Trade 1993) (remanding the case to Commerce to calculate the amount to add to USP in accordance with the *Federal-Mogul* rationale); *Federal-Mogul Corp. v. United States*, 834 F. Supp. 1391, 1397 (Ct. Int'l Trade 1993), *aff'd*, Nos. 91-07-00530, 91-08-059, 1994 WL 50290 (Ct. Int'l Trade Feb. 14, 1994) (ordering Commerce to "apply the Japanese VAT rate to USP calculated at the same point in the stream of commerce where the Japanese VAT is applied for home market sales and add the resulting amount to USP"); see also *Torrington Co. v. United States*, 853 F. Supp. 446 (Ct. Int'l Trade 1994) (affirming Commerce's calculation of the VAT tax adjustment by adding to USP the result of multiplying the foreign market tax rate by the price of the United States merchandise at the same point in the chain of commerce that the foreign market tax was applied to foreign market sales, and by adjusting the USP tax adjustment and the amount of tax included in FMV to account for certain expenses included in FMV and USP which might otherwise create margins where none would exist if no taxes were levied upon foreign market sales); *Hyster Co. v. United States*, 848 F. Supp. 178 (Ct. Int'l Trade 1994) (remanding to Commerce for adjustment to USP consistent with *Zenith*).

11. *Daewoo*, 6 F.3d at 1513-19.

12. 19 U.S.C. § 1677a(d)(1)(C) (1988).

13. *Daewoo*, 6 F.3d at 1513.

Commerce had done so by using an econometric study of the foreign market. The Federal Circuit rejected this approach as insufficiently supported by the statute or its legislative history, and deferred to Commerce's original, reasonable interpretation of the statute as allowing the "accounting" method of verifying that the taxes were in fact added to or included in the price of the merchandise sold in the home country.¹⁴

Finally, the Federal Circuit spoke to a related VAT tax issue in *American Alloys, Inc. v. United States*.¹⁵ In that case, the court interpreted the statute¹⁶ as requiring Commerce, before it adds foreign domestic taxes rebated upon export to U.S. price, to determine that the taxes were imposed "directly" upon the exported goods.¹⁷ The Court's opinion arose from an antidumping investigation concerning silicon metal from Argentina and, in particular, Argentina's "Reembolso" program of rebates on, or waivers of, taxes assessed on exported goods that are also assessed on domestic goods.¹⁸

The court noted Commerce's practice of conducting a "physical incorporation" inquiry of domestic taxes at issue in countervailing duties cases and stated that it made little sense not to do the same under the parallel antidumping law.¹⁹ In addition, the Federal Circuit reaffirmed its earlier decision not requiring Commerce to measure tax incidence (tax pass-through) by means of an econometric study before making an upward adjustment to U.S. price for such taxes.²⁰

III. "BEST INFORMATION AVAILABLE" CASES

In two related cases, the Federal Circuit addressed Commerce's new "two-tier" best information available (BIA) policy; subsequent CIT decisions have addressed the matter as well.

In *Allied-Signal Aerospace Co. v. United States*,²¹ the Federal Circuit affirmed Commerce's two-tier best information

14. *Id.* at 1514-16.

15. 30 F.3d 1469 (Fed. Cir. 1994).

16. 19 U.S.C. § 1677a(d)(1)(C) (1988).

17. *American Alloys*, 30 F.3d at 1472-73.

18. *Id.* at 1471.

19. *Id.*

20. *Id.* at 1474-75.

21. 996 F.2d 1185 (Fed. Cir. 1993) [hereinafter *Allied Signal I*].

available policy for use in administrative reviews of antidumping orders as a reasonable interpretation of the statute.²² The use of BIA arises when Commerce is unable to verify the accuracy of the information it receives or "whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation."²³

Commerce's new two-tier methodology distinguished between companies which refused to cooperate with the Department's requests for information, as opposed to those which substantially cooperated, but nonetheless failed to provide the requested information. The rate chosen in an administrative review for the former group was the most adverse margin of the possible choices, whereas that for the latter group was adverse, but less so.²⁴ The Federal Circuit upheld the new methodology taking into account a respondent's degree of cooperation as a reasonable and permissible exercise of Commerce's statutory authority.²⁵ Nevertheless Commerce contended, on the facts of the case, that the respondent had provided so little information that it was not cooperative.²⁶ The court disagreed and found that the respondent had tried to provide the requested information to the extent it could. It therefore remanded the case for further proceedings.²⁷ A related case, *Allied-Signal Aerospace Co. v. United States*,²⁸ likewise involved the Federal Circuit's affirmance of Commerce's two-tier BIA methodology in administrative reviews. In particular, the court rejected Allied-Signal's argument that Commerce was required to provide a "reasoned analysis" justifying its departure from established agency practice concerning BIA for nonresponsive parties.²⁹

22. *Id.* at 1192.

23. 19 U.S.C. § 1677e(c) (1988).

24. *Allied Signal I*, 996 F.2d at 1190-91. As "first tier" BIA, Commerce selects the higher of the highest rate assigned for *any* firm in the less-than-fair-value (LTFV) investigation or the highest rate calculated in the review. As "second tier" BIA, Commerce selects the higher of the respondent's own prior LTFV rate or the highest rate calculated in the current administrative review. *Id.*

25. *Id.*

26. *Id.* at 1192-93.

27. *Id.* at 1193.

28. 28 F.3d 1188 (Fed. Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3295 (U.S. Sept. 26, 1994) (No. 94-542) [hereinafter *Allied Signal II*].

29. *Id.* at 1191. For recent CIT BIA cases of note see Persico Pizzamiglio, S.A.

IV. "SCOPE" CASES OF INTEREST

The Federal Circuit handed down two scope cases in June of 1993.³⁰ In *NTN Bearing Corp. v. United States*,³¹ the court affirmed the CIT's holding that Commerce's inclusion of imported bearing components within the scope of an antidumping duty order on antifriction bearings from Japan was supported by substantial evidence on the record and in accordance with the law.³² The components were properly included within the scope because they had no independent application other than to be combined and further refined into completed bearings.³³ In addition, the Federal Circuit upheld Commerce's application of the same dumping margin to the imported components as to the assembled bearings.³⁴ Commerce had tried to calculate separate margins for the components, but the data proved unreliable.³⁵

In *Nitta Industries Corp. v. United States*,³⁶ the Federal Circuit upheld the CIT's affirmance of Commerce's scope ruling that nylon core flat belts were properly included within an antidumping duty order covering industrial belts used for power transmission.³⁷ The court agreed with Commerce's analysis that the written descriptions of the product were sufficiently clear that further analysis under the criteria developed in *Diversified Products Corp. v. United States*³⁸ were not necessary.³⁹

Another scope case handed down by the CIT last year was

v. United States, No. 94-61 (Ct. Int'l Trade Apr. 14, 1994) (sustaining Commerce's application of "cooperative" BIA and rejecting plaintiff's contention that its cooperation should obviate any use of BIA); *Krupp Stahl, A.G. v. United States*, 822 F. Supp. 789 (Ct. Int'l Trade 1993) (sustaining Commerce's use of the petition-based dumping margin as BIA in the administrative review).

30. *NTN Bearing Corp. v. United States*, 997 F.2d 1453 (Fed. Cir. 1993); *Nitta Indus. Corp. v. United States*, 997 F.2d 1459 (Fed. Cir. 1993).

31. 997 F.2d 1453 (Fed. Cir. 1993).

32. *Id.* at 1457-58.

33. *Id.* at 1458.

34. *Id.*

35. *Id.*

36. 997 F.2d 1459 (Fed. Cir. 1993).

37. *Id.* at 1462-63.

38. 6 Ct. Int'l Trade 155 (1983). The "Diversified Products" criteria include physical appearance of the merchandise, ultimate use, expectations of the ultimate purchaser, or channels of trade. *Id.*

39. *Nitta Indus.*, 997 F.2d at 1464.

Smith Corona Corp. v. United States.⁴⁰ The CIT upheld, as in accordance with law, Commerce's interpretation of the anticircumvention statute as requiring it first to determine whether the difference in value between completed portable electric typewriters and parts was "small."⁴¹ If the difference was small, Commerce had discretion to include the parts and components within the antidumping order, taking into account the factors set forth in the statute.⁴² In addition, the court affirmed Commerce's exclusion of third-country parts from its calculation of the "small" value difference between parts and completed typewriters.⁴³ The CIT held that consideration of the Japanese content of parts produced in Malaysia was not required by the statute,⁴⁴ which addresses a comparison of the value of merchandise sold in the U.S. with parts or components produced in the foreign country (Japan) to which the antidumping order applies.⁴⁵

Finally, the CIT addressed the coverage of an antidumping order on cellular mobile telephones (CMTs) from Japan in *Ericsson GE Mobile Communications, Inc. v. United States*,⁴⁶ and a second case of the same name.⁴⁷ In *Ericsson I*, the CIT reversed and vacated Commerce's determination concerning nine of eleven products at issue and remanded the case to Commerce to determine whether use of "two duplexers in a 'booster,' . . . constituted a non-CMT use."⁴⁸ When Commerce answered affirmatively, the court remained unconvinced, holding that the agency had unlawfully expanded the scope of the CMT order, which included subassemblies which transmitted calls but not, the court found, signals.⁴⁹ Since a booster can only transmit signals, the CIT reversed the agency.⁵⁰

40. 811 F. Supp. 692 (Ct. Int'l Trade 1993).

41. *Id.* at 694.

42. *Id.*; see also 19 U.S.C. § 1677j(a)(2) (1988).

43. *Smith Corona*, 811 F. Supp. at 695.

44. 19 U.S.C. § 1677j(a)(1)(B) (1988).

45. *Smith Corona*, 811 F. Supp. at 695.

46. 825 F. Supp. 1085 (Ct. Int'l Trade 1993) [hereinafter *Ericsson I*].

47. *Ericsson GE Mobile Communications, Inc. v. United States*, 850 F. Supp. 34 (Ct. Int'l Trade 1994) [hereinafter *Ericsson II*].

48. *Id.* at 35.

49. *Id.* at 37-38.

50. *Id.* at 38.

V. CHINA CASES OF INTEREST

In *Lasko Metal Products v. United States*,⁵¹ the CIT affirmed Commerce's "mix-and-match" methodology for valuing factors of production in an antidumping investigation involving a non-market economy (NME).⁵² The court examined the relevant part of the statute which provides for special methods to calculate foreign market value for NMEs when insufficient information exists to allow foreign market value to be calculated by the usual methods.⁵³ In such a case, Commerce applies a "factors of production" approach using surrogate country values to build up an estimated foreign market value.⁵⁴ The "[s]urrogate values reflect the cost of producing goods in one or more market economy countries that are (A) at a level of economic development comparable to that of non-market economy country, and (B) significant producers of comparable merchandise."⁵⁵ In this case involving ceiling fans from the People's Republic of China, Commerce based its calculations both on information from surrogate countries (Pakistan and/or India) and on prices paid by Chinese manufacturers for raw materials imported from market economy countries.

In interpreting the statute, the court noted its purpose: "With respect to NME goods, the statute's goal is to determine what the cost of producing such goods would be in a market economy."⁵⁶ The court acknowledged that an alternative interpretation of the statute could be that, once Commerce resorts to surrogate country values, it must abandon market prices.⁵⁷ However, such a reading would conflict with the overall purposes of the statute. The CIT therefore affirmed Commerce's use of both market economy and non-market economy information to value the factors of production needed to calculate foreign market value.⁵⁸

A further opportunity for the CIT to address antidumping

51. 16 Ct. Int'l Trade 1079 (1992).

52. *Id.*

53. *Id.* (citing 19 U.S.C. § 1677b(c) (1988)).

54. *Id.* at 1080.

55. *Lasko Metal Prods. v. United States*, 16 Ct. Int'l Trade 1079, 1081 (1992) (citing 19 U.S.C. § 1677b(c)(4) (1988)).

56. *Id.* (citing *Tianjin Mach. Import & Export Corp. v. United States*, 16 Ct. Int'l Trade 931, 940 (1992)).

57. *Id.* at 1082.

58. *Id.* at 1079.

issues concerning China arose from consecutive administrative reviews on iron construction castings in two cases called *Sigma Corp. v. United States*.⁵⁹ In *Sigma I*, the CIT addressed a host of issues, which we touch upon here. The court affirmed the agency's use of the Philippines as a surrogate country with an economy "comparable" to that of China, even though the Philippines did not necessarily have the most comparable economy.⁶⁰ The court adopted Commerce's rationale that companies in non-market economy countries are presumed to be part of a state-controlled operation, but explicitly held that the presumption can be rebutted by affirmative evidence, which it is the exporter's burden to produce, proving the company's independence.⁶¹ If the exporter can prove it meets the criteria which the court, citing Commerce, outlined, then it will be eligible for separate, company-specific dumping rates.⁶² However, the case was remanded to provide the exporter the opportunity to submit additional evidence of independence on grounds of procedural unfairness.⁶³

In *Sigma II*, the CIT likewise addressed a host of issues. In particular, the court remanded to Commerce for reconsideration the question of the agency's use of Indian pig iron and scrap iron prices as a surrogate for Chinese prices.⁶⁴ The court was not convinced by the agency's arguments against the plaintiffs' claims that Indian government subsidies and involvement in the pig iron and scrap iron industry rendered Indian prices inappropriate surrogates.⁶⁵ On the other hand, the court did affirm the agency's use of the Indian "official" price for coke.⁶⁶ As in *Sigma I*, the CIT approved of

59. 841 F. Supp. 1255 (Ct. Int'l Trade 1993) [hereinafter *Sigma I*]; 841 F. Supp. 1275 (Ct. Int'l Trade 1993) [hereinafter *Sigma II*].

60. *Sigma I*, 841 F. Supp. at 1259-60.

61. *Id.*

62. *Id.* at 1266 n.3. The court cited the "Sparklers" test requiring an exporter to demonstrate "an absence of central government control, both in law and in fact, with respect to exports." *Id.* (citation omitted).

"Evidence supporting de jure absence of central control includes: (1) absence of restrictive stipulations on individual exporter's business and export licenses; (2) legislative enactments decentralizing control of companies; or (3) formal measures by the government decentralizing control of the government." *Id.* (citation omitted).

63. *Id.* at 1274.

64. *Sigma II*, 841 F. Supp. 1275, 1280 (Ct. Int'l Trade 1993).

65. *Id.* at 1279.

66. *Id.* at 1279-80.

Commerce's criteria for determining whether a Chinese exporter is independent from central government control, but held that Commerce had not given adequate notice to one particular exporter, a subsidiary of a Beijing company, such that it did not receive the chance to prove its independence from central government control.⁶⁷

VI. BURDEN OF PROOF/STANDARD OF REVIEW

In *Creswell Trading Co. v. United States*,⁶⁸ the Federal Circuit addressed the appropriate burdens of proof and production to be applied in a countervailing duty inquiry concerning "Item (d)" of the Illustrative List of Export Subsidies of the GATT "Subsidies Code."⁶⁹ The court first recognized, however, that the standard of review which it, as well as the CIT, is bound by law to apply is whether Commerce's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law."⁷⁰ While the Federal Circuit did not elucidate the difference between standard of review and burden of proof here, it has in the past taken great care to distinguish between these two concepts.⁷¹

67. *Id.* at 1281-82; see also *D & L Supply Co. v. United States*, 841 F. Supp. 1312 (Ct. Int'l Trade 1993) (concerning similar issues) [hereinafter *Sigma III*].

68. 15 F.3d 1054 (Fed. Cir. 1994).

69. *Id.*

70. *Id.* at 1056 (citing 19 U.S.C. § 1516a(b)(1)(B) (1988)); see also *id.* at 1062, 1063.

71. See, e.g., *SSIH Equip. S.A. v. U.S. International Trade Comm'n*, 718 F.2d 365, 379-83 (Fed. Cir. 1983) (addressing the "recurring confusion" between "standards of proof at the trial level and standards of review at the appellate level"). Standards of proof, Judge Nies explained, concern the "particular quantum or burden of proof at the trial level" (such as preponderance of evidence, clear and convincing proof, and proof beyond a reasonable doubt), and are generally a "judge-made requirement shaped in accordance with considerations of due process and/or the importance of certain facts". *Id.* at 380. Standards of review are usually statutorily imposed. *Id.* at 381. The most common are: de novo, clearly erroneous, supported by substantial evidence, and arbitrary or capricious. Judge Nies explained the relationship between the two concepts as follows:

While the standard of review and the standard of proof are distinct concepts, nevertheless, the degree of proof below affects the appellate decision whether to affirm or reverse, regardless of what standard of review is applicable. For example, in reviewing whether the evidence supports a finding of fact on a "clearly erroneous" standard, the decision might be affirmed if the standard of proof below were "weight of evidence" and might be reversed on the same record if the standard of proof were "clear and convincing" evidence. Thus, the appellate court must first focus on what support is needed for the trial court determination and

With this distinction in mind, the Federal Circuit in *Creswell* held that Commerce committed a procedural error justifying reversal and remand when it failed to come forward with evidence demonstrating that international benchmark prices which the Indian government had provided regarding its International Price Reimbursement Scheme (IPRS) for exporters of iron-metal castings were in fact inaccurate.⁷² The court examined Item (d) and held that the "if" clause of that provision set forth a statutory condition that Commerce must establish before it may levy a countervailing duty against an investigated party.⁷³ The mere existence of the IPRS program, the court explained, created a presumption of countervailability under Item (d) which shifted to the exporters the burden of coming forward with evidence that the input product (pig iron) was not provided to them at prices more favorable than those on the world market.⁷⁴ In the court's view, the evidence the exporters presented was sufficient to shift the burden back to Commerce to establish the existence of a subsidy by a preponderance of the evidence.⁷⁵ Commerce failed in this particular instance, the court held, so that substantial evidence on the record that the program was countervailable was lacking.⁷⁶ The Federal Circuit therefore remanded the case for this reason and for an additional point concerning procedural unfairness.⁷⁷

then review, in accordance with the standard of review permitted in the type of case, whether that finding is properly supported. For example, in applying the substantial evidence standard of review (i.e., the reasonableness of the lower decision), the appellate court in *Whitney v. SEC*, 604 F.2d 676, 681 (D.C.Cir. 1979), correctly, in my view, stated its function to be: "We review the Commission's findings only to ascertain whether . . . there is evidence which a reasonable person might find clear and convincing."

Id. at 383.

72. *Creswell Trading Co.*, 15 F.3d at 1054.

73. *Id.*

74. *Id.* at 1061.

75. *Id.* at 1062.

76. *Id.* at 1061. Note that, in instances other than the Item (d) matter before the Federal Circuit in *Creswell*, the burden of proof lies on the responding party. See, e.g., *International Trade Administration, Commerce*, 19 C.F.R. § 353.54 (1994) (requiring that any interested party claiming an adjustment to foreign market value (differences in quantity, differences in circumstances of sale, differences in physical characteristics, and level of trade) must establish its claim to the satisfaction of Commerce).

77. *Id.*

VII. ADMINISTRATIVE PROCEDURES

The Federal Circuit's decision in *Belton Industries, Inc. v. United States*⁷⁸ and the Court of International Trade's decisions in *Kemira Fibres Oy v. United States*,⁷⁹ *Hosiden Corp. v. United States*,⁸⁰ and *Industria de Fundicao Tupy v. United States*⁸¹ emphasize the importance of Commerce's procedural regulations. In *Belton Industries*, the Federal Circuit upheld the CIT's determination in finding that Commerce did not properly provide notice to interested parties in accordance with its regulations.⁸² Strictly reading the code,⁸³ the Federal Circuit held that Commerce violated its regulations by failing to notify each interested party in writing of its intent to revoke certain countervailing duty (CVD) orders and to terminate certain suspension agreements under § 353.25(d)(4) of Commerce's regulations.⁸⁴ However, the Federal Circuit found that because the interested parties' counsel happened to have received actual notice of Commerce's intent, Commerce's violation was harmless error.⁸⁵

While *Belton Industries* strictly held Commerce to the notification standard in § 353.25(d)(4) to inform interested parties of its intent to revoke, *Kemira Fibres Oy* strictly held interested parties to the notification standard in § 353.25(d)(4) to inform Commerce of objections to its intent to revoke.⁸⁶ The CIT held that because no interested party objected to revocation of the finding of antidumping or requested an administrative review by the last day of the fifth anniversary month as required under § 353.25(d)(4)(iii), Commerce must revoke the Treasury finding.⁸⁷ Even though Commerce did not publish its notice of intent to revoke under § 353.25(d)(4)(i) until two

78. 6 F.3d 756 (Fed. Cir. 1993).

79. No. 94-139 (Ct. Int'l Trade Sept. 8, 1994).

80. No. 94-128 (Ct. Int'l Trade Aug. 12, 1994).

81. No. 94-156 (Ct. Int'l Trade Oct. 6, 1994).

82. *Belton Indus.*, 6 F.3d at 761.

83. International Trade Administration, Commerce, 19 C.F.R. § 353.25(d)(4)(ii) (1994).

84. *Belton Indus.*, 6 F.3d at 761-62 (citing International Trade Administration, Commerce, 19 C.F.R. § 353.25(d)(4) (1994)).

85. *Id.* at 762.

86. *Kemira Fibres Oy v. United States*, No. 94-139, slip op. at 13-14 (Ct. Int'l Trade Sept. 8, 1994) (citing International Trade Administration, Commerce, 19 C.F.R. § 353.25(d)(4) (1994)).

87. *Id.* at 16-17.

months after the last day of the fifth anniversary month, the CIT determined that interested parties should still have filed objections by the last day of the fifth anniversary month in accordance with § 353.25(d)(4)(iii).⁸⁸

The CIT focused exclusively on the requirements of paragraph (iii) of § 353.25(d)(4), which the CIT states "places the domestic industry *on notice* that, when four consecutive anniversary months have passed without any request for administrative review, it must register its interest in an outstanding order by a particular date either through objection to revocation or by requesting administrative review."⁸⁹ Accordingly, pursuant to § 353.25(d)(4)(iii), Commerce must revoke an order or finding if, by the last day of the fifth anniversary month, no interested party objects to revocation or requests an administrative review, regardless of whether or when Commerce published a notice of intent to revoke the order.⁹⁰

In *Fundicao Tupy*, the plaintiffs, citing the CIT's holding in *Kemira Fibres Oy*, filed a motion for a preliminary injunction to enjoin Commerce from conducting an administrative review of the antidumping duty order at issue.⁹¹ As discussed below, because the CIT found there was no likelihood of success on the merits, which is one of the elements plaintiffs must establish in order for a preliminary injunction to issue, the CIT denied the motion.⁹² The plaintiffs argued that Commerce was barred from conducting an administrative review because Commerce violated § 353.25(d)(4)(i)⁹³ regarding several publications of the "Notice of Intent to Revoke Order," and because the domestic industry violated § 353.25(d)(4)(iii) regarding interested parties' obligation to request administrative reviews and to object to notices of intent to revoke.⁹⁴ The CIT primarily held that the plaintiffs did not have a cause of action against Commerce because they did not timely file for judicial

88. *Id.* at 11-13.

89. *Id.* at 11.

90. *Id.* at 11-12.

91. *Industria de Fundicao Tupy v. United States*, No. 94-156, slip op. at 2, 10 (Ct. Int'l Trade Oct. 6, 1994).

92. *Id.* at 7, 20.

93. International Trade Administration, Commerce, 19 C.F.R. § 353.25(d)(4)(i) (1994).

94. *Id.* at 10-13.

appeals under either § 1581(c) or § 1581(i) of the U.S. Code.⁹⁵

The CIT noted that, had the plaintiffs filed a timely appeal, jurisdiction under § 1581(i) would have been proper, even though such jurisdiction may only be invoked where the remedy under § 1581(c) is unavailable or the remedy provided by that subsection would be manifestly inadequate.⁹⁶ The CIT seemed to find that the remedy under § 1581(c) would have been manifestly inadequate, because if the plaintiffs were required to participate in an administrative review in order to invoke the CIT's jurisdiction under § 1581(c), the plaintiffs' challenge with regard the legality of the review would be moot.⁹⁷ The CIT distinguished *Kemira Fibres Oy* from *Fundicao Tupy* in that, unlike *Kemira Fibres Oy*, the *Fundicao Tupy* plaintiffs had an agency determination before them that could have properly been appealed.⁹⁸ The CIT also noted that Commerce's publication of the notices of intent to revoke 1 and 2 days late was still within a reasonable amount of time to publish in the appropriate anniversary month.⁹⁹

In *Hosiden Corp.*, the CIT granted plaintiff Sharp's Motion for a Writ of Mandamus to Enforce Judgment, thereby requiring Commerce to revoke the antidumping duty order on *EL High Information Content Flat Panel Displays and Display Glass Therefor from Japan* in accordance with the CIT's decision affirming a negative injury determination by the International Trade Commission on remand.¹⁰⁰ Since the Federal Circuit's decision in *Timken Co. v. United States*,¹⁰¹ when an adverse court decision is issued, Commerce's practice has been to publish notice of the adverse CIT decision within ten days of the issuance of that CIT decision and to continue suspension of liquidation of the entries until the matter is decided by the Federal Circuit or until the time for appeal has expired.¹⁰² Commerce preserves the status quo in all other respects. The

95. *Id.* at 15-16 (citing 28 U.S.C. §§ 1581(c), (i) (1988)).

96. *Id.*

97. *Industria de Fundicao Tupy v. United States*, No. 94-156, slip op. at 15-16 (Ct. Int'l Trade Oct. 6, 1994) (citing 28 U.S.C. §1581(c) (1988)).

98. *Id.* at 16.

99. *Id.* at 12-13.

100. *Hosiden Corp. v. United States*, No. 94-128, slip op. at 11 (Ct. Int'l Trade Aug. 12, 1994).

101. 893 F.2d 337 (Fed. Cir. 1990).

102. *Hosiden Corp.*, No. 94-128, slip op. at 11.

CIT decision in *Timken* necessitates that Commerce change its practice in factual situations where, unlike in *Timken*, the CIT affirms a negative agency determination that was formerly an affirmative one in the original agency determination.¹⁰³

The CIT distinguished the *Timken* decision in *Hosiden Corp.* In *Timken*, the CIT affirmed an affirmative agency determination on remand that was originally a negative determination, whereas in *Hosiden Corp.*, the CIT, on remand, affirmed a negative agency determination that was originally an affirmative determination.¹⁰⁴ As in *Hosiden Corp.*, the CIT held that Commerce's legal obligations are not limited to instructing the U.S. Customs Service to continue the suspension of liquidation, but also include: (1) immediately instructing Customs to cease collection of cash deposits previously collected, to refund cash deposits previously collected, and to release any bonds; (2) refraining from further action with respect to any administrative review relating to EL displays from Japan; and (3) revoking the antidumping duty order, effective as of the date of Commerce's publication of its preliminary determination of sales at less-than-fair-value (LTFV).¹⁰⁵ Commerce must still publish notice of the adverse CIT decision within ten days of the decision.¹⁰⁶

The CIT stated that when Commerce publishes notice of the adverse court decision, such notification serves to "signal an end to the controlling effect of an agency determination, notwithstanding the unexpired period to file an appeal, or the actual pendency of appellate review."¹⁰⁷ Because the *Timken* court "emphatically stated that it would be 'nonsensical' to say that a CIT decision entering final judgment does not exist and has no effect until the time for appeal expires or the action is finally and conclusively resolved,"¹⁰⁸ the CIT in *Hosiden Corp.* disagreed with Commerce's interpretation of the Federal Circuit's decision in *Timken* as not requiring implementation of the adverse CIT decision.¹⁰⁹

103. *Id.* at 11.

104. *Id.* at 7-8.

105. *Id.* at 10.

106. *Id.* at 11.

107. *Id.* at 8-9.

108. *Id.* at 8.

109. *Id.* at 9.

The Federal Circuit in *Minebea Co. v. United States*¹¹⁰ affirmed the CIT's decision upholding Commerce's determination that a petition for antidumping duties was filed "on behalf of" the domestic industry as required by 19 U.S.C. § 1673a(b)(1) (1988).¹¹¹ Although petitioner stated that it was an interested party filing the petition on behalf of the domestic industry, several parties challenged petitioner's standing to file the petition alleging that it did not file "on behalf of" the domestic industry as required by § 1673a(b)(1).¹¹² Citing to *Suramerica de Aleaciones Laminadas C.A. v. United States*,¹¹³ the Federal Circuit held that Commerce has broad discretion in determining whether to initiate an investigation based on a petition filed on behalf of an industry.¹¹⁴ In essence, the Federal Circuit validated Commerce's practice of presuming a petitioner has standing unless a majority of the domestic industry actively opposes the petition, and noted that this practice is a reasonable implementation of Commerce's discretion.¹¹⁵

The CIT's decision in *Federal-Mogul Corp. v. United States*¹¹⁶ effectively restricts Commerce's administrative authority. The CIT held that Commerce may not correct ministerial errors in those final determinations which have been appealed.¹¹⁷ The CIT found that the filing of a summons "vests the court with exclusive jurisdiction over the challenged administrative review."¹¹⁸ Accordingly, when parties raise ministerial errors after a summons has been filed with the CIT, Commerce must obtain leave from the CIT to correct the errors.

VIII. TAPERED ROLLER BEARING CASES

Commerce has long compared individual U.S. sales prices to an annual-average FMV to calculate antidumping margins in tapered roller bearing cases. The Federal Circuit in *Koyo*

110. 984 F.2d 1178 (Fed. Cir. 1993).

111. *Id.* (citing 19 U.S.C. § 1673a(b)(1) (1988)).

112. *Id.* at 1180-81.

113. 966 F.2d 660 (Fed. Cir. 1992).

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

115. *Id.*

116. 16 Ct. Int'l Trade 975 (1992).

117. *Id.*

118. *Id.* at 981 (citing *Zenith Elecs. Corp. v. United States*, 884 F.2d 556, 561 (Fed. Cir. 1989)).

*Seiko Co. v. United States*¹¹⁹ affirmed Commerce's practice in this regard.

In its argument to the Federal Circuit, Koyo asserted that Commerce erred in only averaging FMV rather than U.S. price also because the goal of the antidumping statute was to compare "apples to apples."¹²⁰ Koyo further argued that a comparison of individual U.S. prices to an annual average FMV would result in margins which may be "unrepresentative of the true situation."¹²¹ The Federal Circuit held that Commerce acted reasonably in deciding to weight-average FMV only.¹²²

Citing to 19 U.S.C. § 1677f-1 (1988),¹²³ the Federal Circuit explained that the language in the statute stating that "averages shall be representative of the transactions under investigation"¹²⁴ does not necessarily require that the margins calculated be representative of the transactions under consideration, but rather that the home market and U.S. sales examined be representative of the transactions under consideration.¹²⁵ The Federal Circuit stressed that by using individual U.S. prices, Commerce identifies respondents who intermittently sell merchandise below fair market value.¹²⁶ The Federal Circuit explained that if an average U.S. price was employed, dumping may go undetected because the calculation combines the higher sales prices with the lower sales prices.¹²⁷ The Federal Circuit noted, however, that Commerce

119. 20 F.3d 1156 (Fed. Cir. 1994) [hereinafter *Koyo I*].

120. *Id.* at 1158 (citing *Smith-Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 1983)).

121. *Id.*

122. *Id.* at 1159.

123. The text of this provision states in pertinent part:

(a) For the purpose of determining United States price or foreign market value under sections 1677a and 1677b of this title, and for purposes of carrying out annual reviews under section 1675 of this title, the administering authority *may* - (1) use averaging or generally recognized sampling techniques whenever a significant volume of sales is involved or a significant number of adjustments to prices is required

(b) The authority to select appropriate samples and averages shall rest exclusively with the administering authority; but such samples and averages shall be representative of the transactions under investigation.

19 U.S.C. § 1677f-1 (1988) (emphasis added).

124. *Id.*

125. *Koyo Seiko Co. v. United States*, 20 F.3d 1156, 1158 (Fed. Cir. 1994).

126. *Id.* at 1159.

127. *Id.*

may average U.S. prices under special circumstances such as those circumstances involving perishable products.¹²⁸ In instances when the product is nearly unsalable, and merchants must sell the products at unusually low prices, a more representative price would be an average U.S. price.¹²⁹

Of note is the Federal Circuit's interpretation of *Smith-Corona Group v. United States*.¹³⁰ The Federal Circuit explained that *Smith-Corona Group* stands for the proposition that Commerce has discretion in calculating dumping margins, not that U.S. prices and FMV must be treated in a similar manner when calculating margins.¹³¹

The CIT decision in *Koyo Seiko Co. v. United States*¹³² required Commerce to alter its "sum of the deviations" model matching methodology which Commerce employs in order to identify similar merchandise in the home market.¹³³ During the administrative review, Commerce selected the most similar home market model to compare to the U.S. model in accordance with its sum of the deviations methodology.¹³⁴ This methodology requires Commerce to evaluate five physical characteristics of home market models in conjunction with a 20% variable cost of manufacture "cap."¹³⁵ If the deviation in variable cost of manufacturing between the most similar pair of U.S. and home market models based on the five physical characteristics is less than 20%, then Commerce matches those models for comparison purposes.¹³⁶ However, the CIT in *Koyo II* held that, in addition, if a U.S. model differs from a proposed home market model by more than 10% on any one of the physical criteria, that match cannot be used.¹³⁷ Moreover, *Koyo II* requires the "10% criterion cap" to be employed in conjunction with Commerce's 20% variable cost of manufacturing cap because, in this manner, Commerce "avoids comparisons between products which differ so dramatically that they simply

128. *Id.*

129. *Id.*

130. 713 F.2d 1568 (Fed. Cir. 1983).

131. *Koyo I*, 20 F.3d at 1159.

132. 834 F. Supp. 431 (Ct. Int'l Trade 1993) [hereinafter *Koyo II*].

133. *Id.* at 435.

134. *Id.* at 435-36.

135. *Id.* at 435.

136. *Id.*

137. *Id.*

cannot be considered commercially similar."¹³⁸

Commerce has appealed this decision to the Federal Circuit arguing, *inter alia*, that the 10% cap is too restrictive, since it results in the elimination of potential matches of models which are overall most similar to the U.S. models.¹³⁹ Such an elimination of potential matches also requires Commerce to more frequently resort to constructed value, instead of price-to-price comparisons, as the basis for FMV.

The Federal Circuit's decision in *Koyo Seiko Co. v. United States*¹⁴⁰ sustained Commerce's treatment of U.S. direct selling expenses in exporter sales price (ESP) transactions.¹⁴¹ Specifically, the issue raised before the Federal Circuit was whether Commerce should adjust for U.S. direct selling expenses incurred on ESP sales pursuant to the "circumstance of sale" provision contained in § 1677b(a)(4) or whether Commerce should adjust for these selling expenses pursuant to the ESP provision contained in § 1677a(e)(2).¹⁴² In the final result, pursuant to § 1677a(e)(2), Commerce deducted from ESP both indirect and direct selling expenses incurred in making the U.S. sales. Koyo argued that Commerce erred in deducting Koyo's direct selling expenses from the ESP rather than adding the direct selling expenses to FMV pursuant to the "circumstance of sale" provision.¹⁴³ However, after examining the legislative history, the Federal Circuit found that the statutory provisions at issue do not preclude direct selling expense adjustments under the ESP provision.¹⁴⁴ In addition, the Federal Circuit found that Commerce's practice attempts to make "mirror-image" adjustments to FMV and ESP were attempts to make "apples to apples" comparisons.¹⁴⁵ Therefore, the Federal Circuit held that Commerce's practice should be sustained as reasonable.¹⁴⁶

138. *Id.*

139. *Koyo Seiko Co. v. United States*, No. 94-123 (Federal Circuit Sept. 30, 1994) [hereinafter *Koyo III*].

140. *Id.*

141. *Id.* at 19-20.

142. *Id.* at 11-12.

143. *Id.* at 10-12.

144. *Id.* at 12.

145. *Id.* at 14-15.

146. *Id.*

IX. "ALL OTHERS RATE/NEW SHIPPER RATE" CASES

The CIT, in *Federal-Mogul Corp. v. United States*¹⁴⁷ and *Floral Trade Council v. United States*,¹⁴⁸ prescribed the methodology Commerce must now employ in calculating the rate for "new shippers" in administrative reviews. This methodology, allowing Commerce to adopt a unitary rate based on the "all others" rate of "old shippers," instead of using a multi-tiered rate based on date of entry, was subsequently affirmed by the CIT in *Jeumont Schneider Transformateurs v. United States*.¹⁴⁹

During the administrative proceeding of *Certain Fresh Cut Flowers from Mexico*,¹⁵⁰ Commerce applied the only positive rate calculated in the review to all shippers, both old and new, who did not receive an individual rate. In *Floral Trade Council*, however, the CIT held that Commerce must instead apply the "all-other" cash deposit rate calculated during the LTFV investigation to all companies which did not receive an individual rate in the administrative review.¹⁵¹ As a basis for its holding, the CIT cited to the legislative history of Commerce's statute which states that Commerce "should provide by regulation for the assessment of antidumping and countervailing duties on entries for which review is not requested, including . . . the conversion of cash deposits of estimated duties, previously ordered."¹⁵² In addition, referring to Commerce's implementing regulation, § 353.22(e), which states that Commerce will assess duties equal to the cash deposit rate for unreviewed companies, the CIT found that Commerce's regulation requires Commerce to apply the calculated "all-other" cash deposit rate from the LTFV investigation to those shippers without individual rates in an administrative review.¹⁵³

In *Federal-Mogul Corp.*, the CIT similarly held that § 1675(a)(2) of the U.S. Code and § 353.22(e) of the Code of Federal Regulations compel Commerce to automatically utilize

147. 822 F. Supp. 782 (Ct. Int'l Trade 1993).

148. 822 F. Supp. 766 (Ct. Int'l Trade 1993).

149. No. 94-137 (Ct. Int'l Trade Sept. 1, 1994).

150. 57 Fed. Reg. 19,597 (1992).

151. 822 F. Supp. at 766.

152. *Id.* at 770 (quoting H.R. REP. NO. 1156, 98th Cong., 2d Sess. 181 (1984), reprinted in 1984 U.S.C.C.A.N. 5220, 5298).

153. *Id.* at 768-69 (citing International Trade Administration, Commerce, 19 C.F.R. § 353.22(e) (1994)).

the "all-other" cash deposit rate from the LTFV investigation as the cash deposit rate for companies which have not been individually reviewed.¹⁵⁴ The CIT explained that because parties rely on existing cash deposit rates when deciding whether or not to request a review, Commerce should not be allowed to "arbitrarily change" the cash deposit rate in accordance with an administrative review.¹⁵⁵ The CIT noted that to do otherwise would increase the number of requests for reviews because foreign and domestic producers would respectively request reviews in order to ensure that future entries would not be subject to potentially higher or lower "all-others" cash deposit rates.¹⁵⁶ The CIT added that such an increase in administrative reviews runs counter to Congress' intent in 1984 to limit the number of reviews by amending the statute to require conduct of an administrative review only upon request.¹⁵⁷

The CIT, in *Jeumont Schneider*, in effect affirmed Commerce's practice of applying the LTFV "all-others" rate as the assessment rate for those exporters and producers not individually reviewed.¹⁵⁸ In deciding whether to affirm Commerce's new methodology, the CIT was primarily concerned with whether the plaintiff was prejudiced by the "abrupt change in rates to the 'old shipper' rate" for new shippers.¹⁵⁹ The CIT concluded that the plaintiff was not prejudiced because: (1) the plaintiff had requested an administrative review, and therefore would eventually receive an individually calculated rate; (2) the plaintiff's first set of entries were liquidated at the invalidated new shipper rate; and (3) the plaintiff did not demonstrate any specific financial harm by the change in deposit rate.¹⁶⁰

154. *Federal-Mogul Corp. v. United States*, 822 F. Supp. 782 (Ct. Int'l Trade 1993) (citing 28 U.S.C. § 1675(a)(2) (1988) and International Trade Administration, Commerce, 19 C.F.R. § 353.22(e) (1994)).

155. *Id.* at 788.

156. *Id.*

157. *Id.*

158. *Jeumont Schneider Transformateurs v. United States*, No. 94-137, slip op. at 3-4 (Ct. Int'l Trade Sept. 1, 1994).

159. *Id.* at 3.

160. *Id.* at 3-4.

X. MISCELLANEOUS CASES OF INTEREST

A. *Antidumping Cases*

The Federal Circuit's decision in *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*¹⁶¹ invalidated Commerce's practice of deducting home market pre-sale movement expenses from FMV when U.S. price is based on purchase price transactions pursuant to Commerce's inherent power as the administering authority to fill in "gaps" in the statutory framework.¹⁶² The Federal Circuit held that there is no "gap" in the statute, or in other words, that the statute is not silent on this issue.¹⁶³ The Federal Circuit explained that since the deduction is included in the provisions for USP but not in the FMV provisions, Congress did not intend home market transportation costs to be deducted from FMV.¹⁶⁴ Therefore, the Federal Circuit concluded that, pursuant to the statute, Commerce may not deduct such expenses from FMV. The Federal Circuit noted, however, that it was leaving open the question as to whether Commerce could deduct pre-sale home market movement expenses under the "circumstance of sale" provision in the 19 U.S.C. § 1677b(a)(4) (1988).¹⁶⁵

Although the Federal Circuit addressed the specific issue of pre-sale home market transportation expenses in purchase price situations, Commerce applied the Federal Circuit's holding to both pre-sale and post-sale home market movement expenses in both ESP and PP situations because there is no statutory provision explicitly authorizing the deduction of home market movement expenses in any situation. Accordingly, consistent with *Ad Hoc*, Commerce adjusts for home market movement expenses under the "circumstance of sale" provisions¹⁶⁶ and the ESP provisions.¹⁶⁷

The significant issue addressed by the CIT in *Independent*

161. 13 F.3d 398 (Fed. Cir. 1994).

162. *Id.*

163. *Id.* at 401.

164. *Id.* at 401-02.

165. *Id.* at 401 n.8.

166. 19 U.S.C. § 1677b(a)(4) (1988); International Trade Administration, Commerce, 19 C.F.R. § 353.56 (1994).

167. 19 U.S.C. § 1677a(e)(2) (1988); International Trade Administration, Commerce, 19 C.F.R. § 353.56(b) (1994).

*Radionic Workers v. United States*¹⁶⁸ was whether Commerce properly rejected Samsung's allocation of rebate expenses as direct selling expenses where the rebates could not be tied to specific sales made during the review period. Citing to *Smith-Corona Group v. United States*,¹⁶⁹ the CIT held that appropriate allocation methodologies do not "deprive . . . rebates of their direct relationship to the sales under consideration."¹⁷⁰ Therefore, the CIT held that if the following factors are met (factors based on *Smith-Corona*), Commerce must treat allocated rebate expenses as direct selling expenses: (1) the rebates were actually paid, (2) the cost to the manufacturer was increased by the amount of the rebate, and (3) the allocation was made on the basis of actual, verified data.¹⁷¹ However, the CIT noted exceptions to the above requirements. The expenses need not be classified as direct selling expenses if: (1) the manufacturer's cost does not establish a direct link between the rebate and the sale of the merchandise, and (2) the rebates were not assessed as fixed percentage of sales.¹⁷² Because Samsung's rebate expenses met all of the aforementioned criteria, the CIT held that Commerce erred in treating the rebate expense as an indirect selling expense.¹⁷³

The CIT rejected Commerce's argument that the rebate expenses could not be classified as direct selling expenses because the expenses could occur at any time subsequent to the sales under review.¹⁷⁴ The CIT found this rationale inconsistent with Commerce's rationale with regard to warranty expenses, which Commerce treats as direct selling expenses even though they are incurred on sales made during prior periods.¹⁷⁵

B. CVD Cases

The CIT recently addressed whether countervailable subsidies previously bestowed upon companies remain with them

168. No. 94-144, slip op. at 8 (Ct. Int'l Trade Sept. 16, 1994).

169. 713 F.2d 1568 (Fed. Cir. 1993).

170. *Independent Radionic Workers*, No. 94-144, slip op. at 15.

171. *Id.* at 23.

172. *Id.* at 15.

173. *Id.* at 23.

174. *Id.* at 11.

175. *Id.* at 28-29.

when they are "privatized" by their former government owners. In *Saarstahl AG v. United States*¹⁷⁶ and *Inland Steel Bar v. United States*,¹⁷⁷ the CIT first affirmed Commerce's determinations that newly privatized companies in both the German and U.K. lead bar investigations were the results of arm's-length transactions between government entities and private parties. However, the court vacated Commerce's determination that previously bestowed subsidies "travel with" the privatized companies to their new home, where they remain countervailable under 19 U.S.C. §§ 1671(a) and 1677(5)(A) (1988).¹⁷⁸ The court held that countervailable benefits due to subsidies previously bestowed on the government-owned companies do not survive the arm's-length transactions.¹⁷⁹ "[O]ne must conclude that the buyer and seller have negotiated in their respective self-interests, the buyer has taken into consideration all relevant facts, and the buyer has paid an amount which represents the market value of all it is to receive."¹⁸⁰ The privatization issue is also pending before the CIT in the "big steel" litigation.¹⁸¹

In *PPG Industries, Inc. v. United States*,¹⁸² the Federal Circuit addressed, among other issues, the question of "specificity" under the countervailing duty law. The issue arose from a 1982 loan program of the Mexican government, *Fidelicomiso para la Cobertura de Riesgos Cambiarios (FICORCA)*, which established a trust fund for Mexican firms with long-term foreign debt for the coverage of exchange rate risks.¹⁸³ The CIT had upheld Commerce's determination that FICORCA was not countervailable because its benefits were not provided to a specific industry or group of enterprises or industries, as required under 19 U.S.C. § 1677(5) (1988).¹⁸⁴ The Federal Circuit agreed.¹⁸⁵

176. 858 F. Supp. 187 (Ct. Int'l Trade 1994).

177. 858 F. Supp. 179 (Ct. Int'l Trade 1994).

178. *Id.*

179. *Id.*

180. *Saarstahl AG*, 858 F. Supp. at 193; *Inland Steel Bar*, 858 F. Supp. at 185.

181. See *British Steel v. United States*, Consol. Ct. No. 93-09-00550-CVD (general issue of privatization and restructuring).

182. 978 F.2d 1232 (Fed. Cir. 1992).

183. *Id.* at 1234-35.

184. *Id.* at 1236.

185. *Id.* at 1240-41 (citing *PPG Indus., Inc. v. United States*, 928 F.2d 1568

The appellate court reiterated that at least three factors must be considered on a case-by-case basis to determine whether a program is specific in its application: (1) the extent to which the foreign government acted to limit availability of the program; (2) the number of enterprises or industries which actually use the program; and (3) the extent to which the foreign government exercises discretion in making the program available.¹⁸⁶ The Court rejected PPG's contention that Commerce's specificity finding was not supported by substantial evidence on the record, based on new information about the number of Mexican users which PPG had submitted to the agency concerning the number of Mexican participants in the program, the distribution of the benefits of the program, and the Mexican government's alleged discretion in administering the program.¹⁸⁷

Another recent CIT case concerning an interesting countervailing duty issue—the “benchmark rate” for subsidized loans—is *Royal Thai Government v. United States*.¹⁸⁸ In that case, the Royal Thai Government provided exporters with low interest, short-term loans at preferential rates under a program called the “export packing credits” program.¹⁸⁹ To calculate the benefit of what was an admitted subsidy, Commerce would usually have compared the countervailable interest rate to a benchmark rate reflecting the interest rate that a Thai exporter, but for the program, would have incurred by obtaining loans through private channels.¹⁹⁰ No single, predominant source of short-term financing existed in Thailand, however, so Commerce constructed a benchmark.¹⁹¹ In so doing, the agency rejected a benchmark calculated by the Royal Thai Government which it had previously used, a decision which the CIT found, on the whole and after remand, to be supported by substantial evidence on the record.¹⁹² The CIT likewise affirmed Commerce's new benchmark methodology, following an analysis of its basis, both in fact and in the agency's proposed regu-

(Fed. Cir. 1991)).

186. *Id.* at 1240-41.

187. PPG Indus., Inc. v. United States, 978 F.2d 1232 (Fed. Cir. 1992).

188. 850 F. Supp. 44 (Ct. Int'l Trade 1994).

189. *Id.* at 45.

190. *Id.* at 45.

191. *Id.* at 45-46.

192. *Id.* at 46, 48.

lations.¹⁹³ Commerce relied upon Bank of Thailand Quarterly Bulletins publishing minimum loan and overdraft rates to determine which types of loans the agency found to account for a "predominant" source of financing in Thailand.¹⁹⁴

Finally, in *Ceramica Regiomontana SA v. United States*,¹⁹⁵ the CIT addressed the issue of whether an injury determination was required for Commerce to continue to impose countervailing duties based on a CVD order issued before the exporting country, Mexico, had become a "country under the Agreement," *i.e.* the Agreement on Subsidies and Countervailing Measures "Subsidies Code" of the General Agreement on Tariffs and Trade (GATT).¹⁹⁶ The CVD order had been issued in 1982, when Mexico was not a member of the Subsidies Code and did not receive the benefit of the injury requirement under the U.S. countervailing duty statute.¹⁹⁷ On April 23, 1985, Mexico and the United States signed an Understanding Regarding Subsidies and Countervailing Duties, which designated Mexico as a "country under the Agreement."¹⁹⁸ The CIT analyzed the applicable statutory and regulatory provisions, including the statutory "transitional rule," and affirmed as reasonable Commerce's interpretation that the agency could continue to assess countervailing duties on imports of ceramic tile from Mexico after April 23, 1985, even though no injury test had been performed.¹⁹⁹

193. *Id.* at 49.

194. *Id.* at 49-50.

195. 853 F. Supp. 431 (Ct. Int'l Trade 1994), *appeal dismissed*, 1994 WL 416446 (Fed. Cir. Aug. 5, 1994).

196. 19 U.S.C. §§ 1303, 1671(b) (1988).

197. *Ceramica Regiomontana, S.A.*, 853 F. Supp. at 432.

198. *Id.*

199. *Id.*