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ARTICLES

Treatment of Border Tax Rebates of Consumption Taxes Under the Antidumping Law

*John D. McInerney**

I. INTRODUCTION

This Article describes how *Zenith Electronics Corp. v. United States*[1] ("*Zenith*") made the treatment of export rebates of consumption taxes an issue under the U.S. antidumping law. It explains the position of the Department of Commerce ("Commerce") that dumping margins should be calculated on a tax net basis (so that they equal the margins that would be found in the absence of taxes), and offers a general criticism of the argument in *Zenith*.

A. Consumption Tax Rebates Under the Antidumping Law

A dumping margin is essentially the amount by which the home-

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1 Zenith Elecs. Corp. v. United States, 633 F. Supp. 1382 (Ct. Int'l Trade 1986).

market price of a good exceeds its price in the United States.[2] The calculation of dumping margins is complicated by the fact that almost every free-market country levies a consumption tax on most goods sold in the home market, but either refunds or does not collect ("forgives")[3] the tax on exported goods. In such circumstances, the home-market price automatically will exceed the U.S. price by the amount of consumption tax forgiven on export (absent an offsetting adjustment).

Where the consumption tax rate in the foreign market is 15%, this effect may be illustrated as follows.

Home Market	United States
$100	
+$ 15 (15% Tax)	
$115	$90 (tax exempt)

Dumping Margin = $115 − $90 = $25

The tax net margin ($10) is increased by $15, solely as a result of the forgiveness of the consumption tax on export. In order to avoid this result, section 772(d)(1)(C) of the Tariff Act of 1930 (the "Act") directs Commerce to add an offsetting adjustment to U.S. price, in the amount of the tax forgiven on export.[4]

For many years, Commerce did not apply the tax clause strictly according to its terms. Instead, it deducted home market consumption taxes from foreign market value, thereby eliminating the tax from the dumping equation.[5] Again using a 15% consumption tax, Commerce's original procedure may be illustrated as follows:

FMV	USP
$115 (incl. tax)	
− $ 15 (tax)	
$100	$90

Dumping Margin = $100 − $90 = $10

Commerce viewed this procedure as implementing the broad purpose of the tax clause to offset any consumption-tax differential between the two

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[2] *See* Tariff Act of 1930 §§ 731, 781, Pub. L. No. 71-361, 46 Stat. 590 (1930) (codified as amended 19 U.S.C. §§ 1671-1677 (1982 & Supp. V 1987)) [hereinafter Tariff Act of 1930].

[3] The term "forgiven" is used to refer to the government practice of either not collecting or refunding consumption taxes on export. Similarly, the term "export tax rebates" is used to describe both practices.

[4] 19 U.S.C. § 1677a(d)(1)(C) directs Commerce to add to the U.S. price:

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

[5] *See, e.g.*, Final Results of Antidumping Duty Administrative Review; Television Receiving Sets, Monochrome and Color, From Japan, 50 Fed. Reg. 24,287 (Dep't Comm. 1985).

markets, while avoiding several thorny problems inherent in adding a tax adjustment to U.S. price.[6]

B. The *Zenith* Decision

In 1986, the Court of International Trade ("CIT") overturned Commerce's practice in *Zenith*, which arose from the second administrative review of televisions from Japan.[7] *Zenith* had three basic holdings. First, Commerce was required to restore the consumption tax to foreign market value and add the offsetting adjustment to U.S. price, as required by the statute. Second, Commerce was required to calculate the tax adjustment by multiplying the home-market tax rate by the tax base of the U.S. price, and adding that amount to the U.S. price (with no adjustments).[8] Finally, Commerce was required to measure the incidence of the consumption tax in the home market and limit the addition to U.S. price to that proportion of the tax found to be "passed through" to home market customers. Commerce has acceded to the first ruling, and now adds an imputed tax to U.S. price, rather than subtracting the home-market tax from foreign-market value. The Department has not acceded, however, to the second and third points. These are discussed in detail below.

1. *Calculation of the Basic Tax Adjustment*

Where there is dumping absent tax considerations, calculating the tax adjustment on the basis of the lower U.S. price produces a smaller addition to U.S. price, thereby raising the dumping margin. The following equation illustrates this inflation of the dumping margin:

FMV	USP
$115 (incl. 15% tax)	$ 90.00
	+$ 13.50 (15% tax)
	$103.50

Dumping Margin = $115.00 − $103.50 = $11.50

The increase in the absolute margin over the tax-net level of $10 is $1.50—*i.e.*, the difference between the $15.00 home market tax and the $13.50 tax imputed to the U.S. price. Because the tax adjustment has the

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[6] First, it eliminated the need to determine the hypothetical tax on the exported merchandise not collected under foreign law. Second, by eliminating taxes from the equation, it avoided subsequent distortions in the *ad valorem* margin (or deposit rate) caused by adding the tax to U.S. price.

[7] Television Receiving Sets, Monochrome and Color, from Japan; Final Results of Administrative Review of Antidumping Finding, 50 Fed. Reg. 24,278 (Dep't Comm. 1985).

[8] Absent any compensating adjustment, this would increase the dumping margin in any case where the U.S. price was lower than foreign market value. *See infra* section B(1). The Court ordered Commerce to refrain from making any offsetting adjustment to foreign market value.

practical effect of multiplying the dumping margin by the tax rate when calculated in this way, the resulting increase in the margin has been called the "multiplier effect."[9]

In the *Zenith* litigation, one of the Japanese companies proposed that the "multiplier effect" be eliminated by subtracting from foreign market value as a circumstance-of-sale ("C-O-S") adjustment the amount by which the home-market tax exceeded the imputed tax in the U.S. market.[10] In its determination on remand, the CIT prohibited Commerce from making such a C-O-S adjustment, and Commerce duly refrained.[11]

In the next administrative review of televisions from Japan, however, Commerce adopted the consumption tax differential C-O-S adjustment. Commerce first calculated the hypothetical tax not collected on each export model by multiplying the home-market tax rate by the tax base of the U.S. price, and added the product to U.S. price. It then offset the amount by which the tax on home-market sales exceeded the imputed tax on U.S. sales by deducting the excess from foreign-market value as a C-O-S adjustment.[12] That calculation may be illustrated as follows.

FMV	USP
$115.00 (incl. 15% tax)	$ 90.00
−$ 1.50 (C-O-S adjustment = $15 − $13.50)	+$ 13.50 (15% tax)
$113.50	$103.50

Dumping Margin = $113.50 − $103.50 = $10.00

This is the same margin that would have been found absent any tax in the home market. In its final determination, Commerce stated that it had made the C-O-S adjustment "to avoid artificially inflating or deflating margins"—in other words, to preserve tax net margins.[13] Zenith challenged the adjustment in the CIT, and the issue is now before that

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9 *See Zenith*, 633 F. Supp. at 1386 n.9.

10 Circumstance-of-sale adjustments are provided for by the Tariff Act of 1933, *supra* note 2, § 773(a)(4)(B) (codified at 19 U.S.C. § 1677b(a)(4)(B) (1982)).

11 *See Zenith*, 633 F. Supp. at 1392-94.

12 More precisely, Commerce equalized the amount of tax in the home and U.S. markets by adjusting the foreign market price up or down by the absolute difference of the tax in each market. As a matter of programming, this was accomplished by subtracting the home market tax from the foreign market price and substituting the imputed tax on the sale in the United States.

13 Television Receivers, Monochrome and Color, From Japan; Final Results of Antidumping Duty Administrative Review, 53 Fed. Reg. 4051 (Dep't Comm. 1988). The C-0-S adjustment lowers the deposit rate below the tax-net level because of the addition of tax to U.S. price, which is the denominator in the deposit rate equation. Once tax is added to U.S. price, it is impossible to preserve both the tax-net absolute (or dollar) margin and the tax-net deposit rate through a C-O-S adjustment.

Court.[14]

2. *Calculation of Tax Pass Through*

Commerce's traditional interpretation of the tax clause allowed an adjustment offsetting the full home-market consumption tax, provided that the tax had been charged and paid on the home-market sales being compared. The *Zenith* decision required Commerce to limit the tax added to U.S. price to that proportion of the home-market tax "passed through" to home-market customers, in an economic sense.[15] In other words, the Court directed Commerce to make the tax adjustment on the basis of value (or the effect of the tax on the price) rather than cost (or the amount of the tax).[16]

The following example illustrates the concept of "pass through." Assume that a 15% tax is nominally added to the price of a $100 television, so that the invoice reads "$100 + $15 = $115." Commerce would regard this as a conclusive showing that the tax had been added to the home-market price, as required by the statute. According to *Zenith*, however, the inquiry may not end there. *Zenith* would also require an analysis of whether the price would have been higher than $100 if there had been no tax. If that analysis indicated that the price would have been $105 if there had been no tax, this would signify that the manufacturer had succeeded in "passing through" to customers only two thirds ($10) of the tax, and had effectively "eaten" the remaining third ($5) himself. This remaining third would create a dumping margin of $5, or increase the margin by that amount.

Commerce devoted the first stage of the remand to determining how it should measure tax incidence. After accepting briefs and holding hearings on that issue, Commerce selected an econometric study as offering the greatest potential for accurate results.[17] Econometrics uses the techniques of statistical analysis to derive economic functions such as supply and demand from empirical data about costs, prices, sales volume, and the like. Because the accuracy of the results of an econometric analysis is directly dependent on the size of the data base employed, Commerce was compelled to require respondents to supply an enormous amount of in-

[14] *See* Zenith Elecs. Corp. v. United States, No. 88-2-00122 (Ct. Int'l Trade entered Jan. 14, 1988).

[15] *Zenith*, 633 F. Supp. at 1394-1400.

[16] *Zenith*, 633 F. Supp. at 1401. This aspect of the decision is discussed in more detail in sections II and V B below.

[17] *See* Zenith Elecs. Corp. v. United States, No. 85-06-00788 (Ct. Int'l Trade Apr. 14, 1987) (determination on remand) [hereinafter Determination on Remand] [on file at the NW. J. INT'L L. & BUS. offices].

formation. Even after this request had been pared to a minimum in response to the respondents' pleas, it covered virtually all of their sales of televisions over a ten-year period.[18] Once the data had been received, it was analyzed by means of a mathematical model that acted as a stand-in for the structure of the television market in Japan.[19] A final determination on remand was reached approximately one year after the order of remand.[20]

The results of the study were perfectly consistent, from an economic viewpoint, with Commerce's original assumption that the home-market consumption tax was "included" in the price charged.[21] From an accounting standpoint, the assumption of full tax inclusion is straightforward where the price is higher than total cost. The econometric study indicated that the economic burden of the tax was also shifted forward to consumers in Japan during the review period.[22]

After the remand results had been affirmed, Commerce appealed the "pass-through" aspect of the *Zenith* decision to the Court of Appeals for the Federal Circuit.[23] That court dismissed the appeal, reasoning that because the result Commerce obtained on remand was the same as that

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[18] *See* Determination on Remand, *supra* note 17, at 48 and Technical Appendix.

[19] Commerce lacked the necessary expertise in econometrics to conduct the study, and was forced to hire a Ph.D. econometrician at a cost of $25,000 to perform the core of the analysis. *See id.* at 16-44.

[20] The econometric model used in the Japanese remand is generally explained in Commerce's Determination on Remand. The details of that model are not (and could not be) explained here. A good idea of the complexity of the undertaking may be obtained, however, by reflecting on the fact that the formula used by Commerce's econometrician to specify the demand function for televisions in Japan was:

$$\ln Q = vo + vlt + v2 + v3t3 \quad v4 \ln I + nc \ln Pc + nb \ln pb + e2$$

Although the model employed was "state of the art" in sophistication, the accuracy of the results was nevertheless limited by: (l) potential statistical errors in processing the data; (2) the accuracy of the assumptions about firm behavior inherent in the study; (3) inadequacies in the data; (4) difficulties in constructing the economic model; and (5) the uncertainty inherent in extrapolating from the data obtained. *Id.* at 20-27, 45-50. Consequently, the measurement obtained on remand may be regarded as only a reasonable estimate (although perhaps the best obtainable) of the incidence of the commodity tax in Japan. Because Zenith did not challenge the results of the econometric study, the methodology it employed has never been judicially reviewed.

[21] *See* Determination on Remand, *supra* note 17, at 54-56.

[22] In fact, the econometric study indicated that one manufacturer (Matsushita), as a result of the tax, was able to add 117% of the tax to its price. Commerce did not increase U.S. price by more than the amount of the tax, however, because more than 100% of the tax cannot have been forgiven by the Japanese government. *See id.* at Table 1.

[23] *See* Zenith Elecs. Corp. v. United States, 875 F.2d 291 (Fed. Cir. 1989). The government did not appeal the Court's instructions prohibiting the C-O-S adjustment because it was essentially dicta—Commerce had not made the prohibited adjustment in the administrative proceeding, so there was no administrative record on which to base an argument on appeal. The C-O-S issue will be appealed, if necessary, should the CIT strike it down in a subsequent administrative review.

obtained in the administrative review, the CIT's judgment affirming the remand results was not adverse to the Government, and thus there was no case or controversy to sustain the appeal.[24]

C. The *Daewoo* Decision

In the spring of 1989, the same CIT court that decided *Zenith* applied that ruling to an administrative review of televisions from Korea.[25] In accordance with the court's order of remand, Commerce again explored various means to estimate tax incidence and concluded that only an economic study would provide the required measurement.[26] Commerce devised a second econometric questionnaire, which required the Korean respondents to submit ten years of price data on a quarterly basis, in addition to a broad range of general information about the Korean market.[27] The final results of the *Daewoo* econometric study were reported to the CIT in April 1990.[28] They indicated that, as with consumption taxes on televisions in Japan, 100% of the Korean consumption taxes were borne by home-market customers in Korea during the period of review. The tax pass-through issue is also being litigated in the context of the antidumping order on televisions from Taiwan.[29]

D. The *Paver Parts* Decision

The tax pass-through issue was also raised in a challenge to Commerce's final determination in an administrative review of replacement parts for self-propelled bituminous paving equipment from Canada.[30] This challenge, originally brought by the domestic petitioners in the

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24 *See id.*

25 *See* Daewoo Elecs. Co. v. United States, 712 F. Supp. 931 (Ct. Int'l. Trade 1989).

26 *See* Motion for an Extension of Time to File Remand Results Filed with the Court of International Trade, Daewoo Elecs. Co. v. United States, 712 F. Supp. 931 (Ct. Int'l. Trade 1989) (No. 85-01-00140).

27 *See* Letter from Richard W. Moreland, Director, Office of Antidumping Compliance, to Respondents in the Korean Televisions Proceeding on Remand in Commerce No. A-580-008 (Oct. 6, 1989).

28 *See* Determination on Remand, Appendix A, Measurement of Tax Incidence in the Korean TV Home Market, on file in Daewoo Elecs. Co. v. United States, 712 F. Supp. 931 (Ct. Int'l Trade 1989) (No. 85-01-00140).

29 *See* Zenith Elecs. Corp. v. United States, No. 87-01-0039 (Ct. Int'l Trade filed Jan. 6, 1987). A decision of the court is pending.

30 Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada; Final Results of Antidumping Duty Administrative Review, 54 Fed. Reg. 12,467, *amended*, 54 Fed. Reg. 19,581 (Dep't Comm. 1989).

CIT,[31] was essentially transferred to a Bi-National Panel ("Panel") under the United States-Canada Free Trade Agreement when the Canadian respondents requested a Panel review.[32] Largely the same arguments concerning tax pass-through were made before the Panel as were made before the CIT in *Zenith*. The Panel, however, explicitly declined to follow *Zenith* and ruled that the statute did not require a measurement of tax incidence.[33]

Commerce's approach to the tax issues is based on the proposition that the statute is intended to redress price discrimination by individual firms. Accordingly, the extent to which consumption taxes change firm prices so as to magnify or reduce dumping margins is a distortion that should be eliminated. On the other hand, the approach to the tax issues implicit in *Zenith* is that the statute also is intended to redress any difference between the foreign-market and U.S. prices caused by differences in taxation (calculated in accordance with *Zenith*). Foreign firms must answer, not only for their pricing decisions, but also for the effect of national differences in taxation on those decisions. A response to the *Zenith* approach is offered below.

II. POLICY CONSIDERATIONS

This Article will leave to economists the broad issue of whether the law of comparative advantage would be better served by dumping margins calculated on a tax-net or tax-inclusive basis. Commerce's experience with the tax issues to date, however, suggests a few general observations regarding the treatment of export tax rebates under the antidumping law.

First, the *Zenith* decision treats consumption taxes as integral to dumping.[34] Admittedly, some consumption taxes are an element of final prices charged to consumers and could be described as integral to those prices. It is less clear that consumption taxes are integral to dumping *per se*. For example, consider a consumption tax imposed strictly at the retail level. Because many dumping investigations compare prices purely at the wholesale level,[35] they would not take retail-level taxes into ac-

[31] Blaw Knox Construction Equipment Corp. v. United States, No. 89-05-00285 (Ct. Int'l Trade filed May 25, 1989).

[32] *See* U.S.-Canada Free Trade Agreement Article 1904 Bi-National Panel No. U.S.A. 89-1904-03 (decided Mar. 7, 1990) [hereinafter *Paver Parts*].

[33] *Id.*

[34] The accompanying Article specifically claims that consumption taxes are integral to dumping. *See* Henderson, *Taxes, Market Structure, and International Price Discrimination*, 10 NW. J. INT'L L. & BUS. 244, 247 (1989) [hereinafter Henderson].

[35] In some dumping investigations, all of the U.S. sales are wholesale because they are made to

count, notwithstanding the fact that they would be included in the price charged to the ultimate consumer and could influence the wholesale price. Similarly, where foreign-market value is based on constructed value, there is no tax in foreign-market value,[36] notwithstanding the fact that a consumption tax normally is added to the final price charged in the home market. In short, the statute provides for the calculation of dumping margins on a tax-net basis in certain instances, implying that consumption taxes are not really "integral" to dumping. At the very least, the assertion that taxes are "integral" to dumping needs to be proved, and it is not clear that the answer is economic, rather than political.

Second, calculating the tax forgiven "by reason of export"[37] to be added to U.S. price is an inherently speculative exercise. Determining the tax forgiven requires Commerce to calculate either: (a) the amount of tax that the foreign government would have collected had it taxed the export sale; or (b) the amount of tax that the foreign government would have collected had the product sold in the United States been sold in the home market. The statute gives no indication as to which of these two inquiries is intended.

Whichever answer is posited, intractable difficulties arise. On one hand, if Commerce attempts to calculate an imputed tax on export sales, it must determine what tax base the foreign government would have used. Because the foreign government does not tax exports at all, the answer is unavoidably hypothetical. On the other hand, if Commerce attempts to calculate the tax that would have been assessed on the U.S. product had it been sold in the home market, it must adjust the home-market tax base for the usual physical differences between the U.S. and home-market products. In making such adjustments, Commerce would be forced to speculate as to how such differences would have altered any selling expenses included in the home-market tax base. At present, Commerce prevents these factors from distorting dumping margins by using the circumstance-of-sale adjustment disallowed in *Zenith* to equalize the taxes in each market.

Third, calculating dumping margins on a tax-inclusive basis will cause those margins to differ on the basis of tax rates. For example, take Firm A, located in Country A, which does not levy any consumption

an independent U.S. importer. In such cases, the comparison home-market sales would also be at the wholesale level.

[36] *See* Tariff Act of 1930, *supra* note 2, § 773(e) (codified at 19 U.S.C. § 1677b(e) (1982)).

[37] Tariff Act of 1930, *supra* note 2, § 772(d)(1)(C) (codified at 19 U.S.C. § 1677a(d)(1)(C) (1982)).

taxes. Firm A sells widgets in Country A for $100 and in the United States for $90. The dumping margin is $10.[38] If a 15% consumption tax is introduced in Country A and rebated on export, the addition of the tax to the U.S. price (with no offsetting C-O-S adjustment) will raise the margin to $11.50.[39] Thus, the size of the dumping margin depends in part on how country A chooses to raise revenue. If the government of Country A elects to levy indirect taxes, higher dumping margins will be assessed than if it had relied on direct taxes to raise the same amount of revenue. The dumping margin thereby punishes a practice which may be an important economic policy in Country A and which, in any event, is quite beyond the control of Firm A, which is penalized by the higher margin.

The fact that dumping margins would be affected by consumption tax rates leads to the second consequence of calculating margins in accordance with *Zenith*, which is that dumping margins will vary from country to country with tax rates. For example, assume that, in addition to Firm A in Country A, Firm B in Country B and Firm C in Country C also sell widgets at $100 in their home markets and $90 in the U.S. market. The only difference between the three countries is that Country A has a 15% consumption tax, Country B has a 10% consumption tax, and Country C has a 5% consumption tax. Absent a device to equalize consumption taxes in the foreign and U.S. markets, this would lead to three different dumping margins. Although the tax-net pricing decisions made by each firm are identical, the dumping margins will vary with the indirect tax rate in each country.[40]

Fourth, *every* expense adjusted for in an antidumping equation is susceptible to an economic "pass-through" analysis. For example, a foreign manufacturer might claim an adjustment to home-market price to offset freight charges it paid in the home market. Just as with taxes, the fact that the manufacturer paid the bill does not establish that it was able to shift the entire economic burden of the freight expense onto its customers. Therefore, it would be inconsistent to base just one adjustment

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38 $100 – $90.00 = $10.00.

39 The margin calculation is as follows:

FMV	USP
$100	$ 90.00
+$ 15 (tax)	+$ 13.50
$115	$103.50

The margin calculation is: $115 – $103.50 = $11.50. With no taxes, the margin would have been $100 – $90.00 = $10.00.

40 A's margin is $11.50 ($115.00 – $103.50); B's margin is $11.00 ($110.00 – $99.00); and C's margin is $10.50 ($105.00 – $94.50).

in a dumping equation (out of approximately twenty)[41] on economic factors, while all of the others are based on cost. Whatever advantage economists might find in making the tax adjustment on an economic basis would likely be diluted to insignificance in such circumstances.

Fifth, it would be inconsistent to calculate supply and demand elasticities in the home market (for the purpose of limiting adjustments to either home-market or U.S. prices) and not also calculate supply and demand elasticities in the U.S. market for the purpose of generally limiting adjustments to U.S. price.[42] For example, the statute provides for the deduction of commissions from the U.S. price in certain circumstances.[43] It is not clear, however, that such commissions are entirely passed through to U.S. customers in the form of higher prices. Only an econometric analysis could determine the exact degree of "pass-through." Accordingly, in order to calculate dumping margins entirely on an economic basis, it would be necessary to produce economic models of both the foreign and U.S. markets.[44]

Sixth, because virtually every free-market country in the world rebates consumption taxes on export,[45] acceptance of the approach implicit in *Zenith* would force Commerce to measure home-market tax incidence in virtually every dumping proceeding. This would create vast problems because the econometric studies that Commerce has concluded are necessary to produce measurements of tax incidence are so mathematically complex that they cannot readily be understood even by many trained economists. Consequently, the Commerce Department would have to continue subcontracting those studies to outside specialists at substantial expense, or else hire a corps of econometricians to do the work.

More importantly, virtually no individuals currently involved in the

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41 *See* Tariff Act of 1930, *supra* note 2, §§ 772(d) & (e), 773(a)(4) (codified at 19 U.S.C. §§ 1677a(d) & (e), 1677b(a)(4) (1982)).

42 Although the tax adjustment is made to U.S. price, the market analysis required is of tax incidence in the home market, and this would more normally relate to adjustments made to the home-market price.

43 *See* Tariff Act of 1930, *supra* note 2, § 772(e)(1) (codified at 19 U.S.C. § 1677a(e)(1) (1982)).

44 In fact, the entire U.S. dumping law is premised on the assumption that U.S. importers (who must pay antidumping duties) pass them through into the prices they charge their U.S. customers. This assumption might not be correct.

45 *See, e.g.*, PRICE WATERHOUSE, DOING BUSINESS IN BRAZIL 97 (1986) [hereinafter DOING BUSINESS IN BRAZIL]; PRICE WATERHOUSE, DOING BUSINESS IN CANADA 174 (1983) [hereinafter DOING BUSINESS IN CANADA]; PRICE WATERHOUSE, DOING BUSINESS IN GERMANY 148 (1983) [hereinafter DOING BUSINESS IN GERMANY] (like Germany, every member state of the European Economic Community rebates a value-added tax on export); PRICE WATERHOUSE, DOING BUSINESS IN KOREA 74, Appendix X (1987) [hereinafter DOING BUSINESS IN KOREA]; PRICE WATERHOUSE, DOING BUSINESS IN MEXICO 152 (1984); PRICE WATERHOUSE, DOING BUSINESS IN TAIWAN 120 (1984).

administration of the antidumping law will be in a position to critique the results of these studies. This includes the administrative and legal staff of the Department of Commerce, the private bar, and the judges who must review these decisions. It is safe to say that the overwhelming majority of these individuals will never understand the mathematics involved. Both administrative and judicial review will have to proceed by proxy, with the econometric analysis being delegated to the mathematical specialists, and the results accepted on faith. For example, if the parties disagree about whether there is substantial evidence that 94.5% of a particular consumption tax is passed through to home-market customers, there will be no direct way for a court to evaluate that evidence.

Seventh, econometric analysis is dependent on large amounts of data spanning several years. Small companies, companies in developing countries, and companies that have changed ownership during the years for which data are needed often will not be able to produce the required information.[46] In such cases, Commerce may be compelled to assume, as the best information available,[47] that a low percentage of the tax was passed through to home-market customers, raising their dumping margins in proportion to the applicable consumption tax. Any other course of action would reward non-compliance. Thus, acceptance of the *Zenith* decision likely will generate substantial dumping margins in many cases,[48] owing to respondents' simple inability to supply the data necessary to measure tax incidence. The burden will fall most heavily on those companies that can least afford it—small companies and companies in developing countries.

Eighth, the information collected by Commerce to date indicates that, at least insofar as consumption taxes are concerned, making the

46 During the *Zenith* remand, three out of five of the Japanese respondents could not provide sufficient information to support specific econometric estimates of their tax shifting. A fourth company was able to provide the bare minimum of data required to produce an estimate, but this was not enough for Commerce's outside econometrician to give even a rough estimate of the accuracy of his results. This is particularly significant in light of the fact that the four companies in question (Mitsubishi, NEC, Fujitsu, and Victor) are among the most sophisticated industrial concerns in the world. *See* Determination on Remand, *supra* note 17, at 48 & Table 1.

It should be noted in this regard that Commerce normally gives respondents 45 days (plus one fifteen-day extension) to answer already lengthy antidumping questionnaires. The tax incidence questionnaire would have to be answered within this same time period.

47 *See* Tariff Act of 1930, *supra* note 2, § 776 (codified at 19 U.S.C. § 1677e (1982)).

48 Assuming no dumping margins otherwise, the potential dumping margin equals the amount of the tax. The rates of consumption taxes range from: the 9% sales tax in Canada, DOING BUSINESS IN CANADA, *supra* note 45, at 174; and the 10% value-added tax in South Korea, DOING BUSINESS IN KOREA, *supra* note 45, at 88; to the 14% value-added tax in West Germany, DOING BUSINESS IN GERMANY, *supra* note 45, at 149; to the 16-17% sales tax (to which an excise tax is often added) in Brazil, DOING BUSINESS IN BRAZIL, *supra* note 45, at 109.

adjustments on an economic basis probably will have little, if any, effect on dumping margins, provided that the respondent can supply the necessary information.[49] Apparently, most manufacturers of mass-produced goods have costs of production that remain roughly constant as production increases.[50] Economists appear to agree that constant-cost producers generally shift consumption taxes entirely onto consumers.[51] Moreover, the economic logic of dumping is that high profits in the home market are used to subsidize low-profit sales in the United States. Producers who are reaping high profits in their home markets are also likely to possess the market power to shift consumption taxes forward to their customers.[52]

In sum, requiring that dumping margins be calculated on other than a tax-net basis could make sense, if at all, only under a completely different antidumping statute.[53] Such a statute would tell Commerce how to calculate the imputed tax on export sales, and generally place the entire calculation in each market on the basis of value. Calculating dumping margins in this manner would be so complex and burdensome that it would be nearly impossible for small or unsophisticated companies to participate, and Commerce determinations would be fully understood only by professional econometricians. The margins obtained would vary with the tax laws of the exporting country and the size and sophistication of the responding firm. Apparently, however, no substantial difference in dumping margins would result from limiting the tax adjustment in accordance with home-market tax incidence.

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49 In the Japanese televisions case, at least, there was absolutely no difference in the margins attributable to the tax pass-through analysis. *See* Determination on Remand, *supra* note 17, at 55-56.

50 Evidently, this assumption generally holds true unless one of the factors of production is in limited supply. For example, a manufacturer of catalytic converters might, in attempting to expand his output indefinitely, trigger an increase in the price of platinum, raising his costs and limiting his ability to pass them through to his customers. Similarly, producers with severe limitations of labor or capital might cause their costs to rise by increasing production, inhibiting their ability to shift the incidence of a consumption tax onto consumers. Crandall, The Effect of the Japanese Commodity Tax on the Price of Television Receivers in Japan (submitted on Behalf of Respondents Oct. 1, 1986) (on file at Dept. of Commerce Reading Room B-099 in the antidumping proceeding Television Receivers, Monochrome and Color, From Japan; Final Results of Antidumping Duty Administrative Review, 53 Fed. Reg. 4051 (Dep't Comm. 1988), and with the CIT in the record of the Determination on Remand, *supra* note 17).

51 *Id.*

52 The economic study performed on the Japanese TV market indicated that at least one company was actually able to increase its home market price by more than the amount of the tax, as a result of the tax. *See* Determination on Remand, *supra* note 17, at Table 1.

53 The accompanying Article does not quarrel with this assertion. *See* Henderson, *supra* note 34.

III. TAX-NET MARGINS UNDER GATT

No GATT provision specifically authorizes the rebate of indirect taxes on exports. That GATT authorizes such rebates is nevertheless clear from the various provisions of the treaty which touch on the issue. First, Article III provides that: "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly, or indirectly, to like domestic products. . . ."[54] This provision is designed to ensure that imported goods do not bear a greater tax burden than domestic goods, so that they can compete on equal terms in that respect.[55] This intent would be thwarted if the exporting country were not permitted to forgive its internal consumption taxes on export.[56] In that case, the importing country's consumption taxes subject the goods to double taxation.

The implication of Article III of GATT that border tax rebates are permitted is made more explicit by Article XVI, on export subsidies, which provides that: "The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption . . . shall not be deemed to be a subsidy."[57] This provision is necessary to achieve the larger goal of Article III of ensuring that imported goods compete with domestic goods on equal terms, insofar as consumption taxes are concerned. Adding export tax rebates to the price of goods in the United States in the form of countervailing duties would subject them to double taxation just as surely as if the rebates were eliminated altogether.

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[54] General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, A18, T.I.A.S. No. 1700, 55 U.N.T.S. 187, at Art. III (effective Jan. 1, 1948) [hereinafter GATT].

[55] *See, e.g., General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Superfund Excise Taxes*, 27 I.L.M. 1596, 1612-13 (1988), which describes Article III as follows: [I]t protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement."

[56] *See, e.g.*,.J. JACKSON, WORLD TRADE AND THE LAW OF GATT 294-95 (1969):

> Although the border tax adjustment is not governed directly by Article III of GATT, it is appropriate to discuss it . . . because it reflects a desire to equalize domestic tax treatment on goods consumed domestically, whether domestically produced or imported, and a desire to relieve other goods (exports) of that burden. . . . This problem has two sides, however: the imposition of an equalizing tax on imported goods, on the one hand, and the revision or exemption from domestic taxes on exported goods, on the other hand.

[57] This principle was also recognized by the United States Supreme Court in Zenith Radio Corp. v. United States, 437 U.S. 443 (1978). Article VI(4) reinforces this provision by providing that any excessive rebate of indirect taxes may be treated as a countervailable subsidy. GATT, *supra* note 54, at 61 Stat. A24.

For the same reason, GATT does not permit export tax rebates to increase dumping margins. Offsetting export tax rebates through antidumping duties would simply provide another way of nullifying the basic GATT rule that export subsidies are not unfair trade practices. Consequently, Article VI(1) of the GATT provides that [in calculating dumping margins]: "Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability."[58]

In requiring that "due allowance" be made for "differences in taxation" and "for other differences affecting price comparability," Article VI(1) implies that a difference in taxation is a difference in price comparability, *per se*. It follows that differences in taxation must be offset in the same manner as discounts or rebates given directly by the seller to the buyer which, as we have seen, are not subject to pass-through analysis even under U.S. law. To the extent that there is any doubt as to how much allowance is "due" under GATT for differences in taxation, the answer is supplied by Article VI(4), which provides that: "No product of . . . any contracting party . . . shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation."[59]

In sum, export tax rebates are not recognized as an unfair trade practice under GATT, and no method of penalizing such rebates on importation is permissible under GATT. Accordingly, the treaty requires that antidumping duties be imposed in such a way that no duties are imposed "by reason of" export tax rebates. If Commerce were to increase dumping margins either by the increment caused by applying the home-market tax rate to the lower U.S. price or by the proportion of indirect taxes forgiven on export which it determined was not "passed through" to home market customers, that increase would indisputably be "by reason of" the exemption of the imported product from taxes "borne by the like product" in the home market.

Although U.S. law prevails when it conflicts with the GATT,[60] U.S. courts should at least avoid resolving ambiguities in the antidumping law

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[58] GATT, *supra* note 54, at 61 Stat. A23.

In addition, Article 2, paragraph 6, of the GATT Antidumping Code provides: "In order to effect a fair comparison between the export price and the domestic price in the exporting country [in calculating dumping margins] . . . due allowance shall be made . . . for the differences in taxation" between the two markets. Agreement on the Implementation of Article XI of the General Agreement on Tariffs and Trade, Article 2(f), *signed on* June 30, 1967, *reprinted in* 6 I.L.M. 926 (1967).

[59] GATT, *supra* note 54, at 61 Stat. A23.

[60] 19 U.S.C. § 2504(a) (1982).

in ways that violate that treaty. The *Restatement of U.S. Foreign Relations Law* provides: "Where fairly possible, a United States statute is to be construed so as not to bring it into conflict with international law or with an international agreement of the United States."[61] The CIT has recognized the "necessity and desirability whenever possible, of harmonizing [the antidumping] law with the international agreements it was intended to implement."[62] As discussed below, there is little question that it is "fairly possible" to interpret and apply the tax clause to yield tax-net margins.

IV. THE LEGISLATIVE HISTORY OF THE TAX ADJUSTMENT

The legislative history of the tax provision is entirely consistent with, and in many instances supports, the proposition that dumping margins should be calculated on a tax-net basis.

A. The 1921 Antidumping Law

The 1921 antidumping law, which remained in effect until 1974, provided for the treatment of export tax rebates as follows:

> [T]he purchase price of imported merchandise shall be the price at which such merchandise has been purchased . . . plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, in respect to the manufacture, production, or sale of merchandise to the United States.[63]

The intent of the new adjustment was to offset that portion of the price differential between the foreign and U.S. markets caused by differences in taxation between the two markets. The Senate Report on the legislation demonstrates this intention by stating that:

> [I]n order that any drawback given by the country of exportation upon the exportation of the merchandise, or any excise tax which is refunded or not collected upon the exportation of the merchandise shall not constitute dumping, it is necessary also to add such items to the purchase price.[64]

Congress evidently understood the tax provision to mean that the addition to U.S. price would prevent the tax exemption on export from "constituting dumping." During the 1919 hearings, Representative Kitchin explained to the Ways and Means Committee that: "[T]he foreign excise

61 *See* RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 134 (Tent. Final Draft 1985).

62 *See* Matsushita Elec. Indus. v. United States, 569 F. Supp. 853 (Ct. Int'l Trade 1983), *rev'd on other grounds*, 823 F. 2d 505 (Fed. Cir. 1987).

63 *See* Antidumping Act of 1921, Pub. L. No. 67-10, 42 Stat. 11, 13 (1921) (codified as amended 19 U.S.C. § 162 (1970)) (repealed by Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144) [hereinafter Antidumping Act of 1921].

64 *See* S. REP. No. 16, 67th Cong., 1st Sess. 12 (1921).

tax levied on the article for domestic use and not levied on the exported article, just as we do here, can have no possible connection with unfair competition or dumping."[65] It has been argued that the fact that a tax adjustment is added to U.S. price indicates an intention to have dumping margins calculated on a tax-inclusive basis. The legislative history of the 1921 Act does not support this argument. That history indicates that Congress thought that it was eliminating consumption taxes from dumping calculations, just as it was eliminating export duty drawbacks by adding them to U.S. price.[66]

B. The 1974 Amendments

The Trade Act of 1974 made two changes to the tax clause. First, the phrase "[imposed] upon the manufacturer, producer, or seller in respect to the manufacture, production, or sale" was replaced with the phrase "directly upon the exported merchandise or components thereof."[67] Secondly, a clause was added limiting the addition to U.S. price "to the extent [the home-market tax was] added to or included in the price of" home-market sales.[68] As revised, the clause directs Commerce to add to U.S. price:

> [T]he amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.[69]

Zenith ruled that the words "to the extent added to or included in the price" require Commerce to measure the amount of tax "passed through" (economically speaking) to home-market customers. The problem with this interpretation is that the tax clause does not say "passed through," does not mention tax "burden" or "shifting," and does not otherwise refer to tax incidence. The clause speaks of tax "added to or included in" the price of such or similar merchandise in the home market.

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65 *See Hearings on H.R. 9983 and H.R. 10071 Before the House Comm. on Ways and Means*, 66th Cong., 1st Sess. 16 (1919).

66 Duty drawback was also added to U.S. price, rather than subtracted from the home market price, under the original 1921 statute. *See* Antidumping Act of 1921, *supra* note 63, at 42 Stat. 9.

67 Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified as amended 19 U.S.C. §§ 2101-2487 (1982 & Supp. IV 1986)) [hereinafter Trade Act of 1974].

68 *Id.* There were parallel changes in the then separate provisions on purchase price and exporter's sales price. These two provisions have now been consolidated into a single provision on U.S. price. *Id.* § 772, 19 U.S.C. § 1677a (1982).

69 19 U.S.C. § 1677a(d)(1)(C) (1982).

The most literal reading of the requirement that the tax be "added to" the home-market price requires that the company in fact add the tax to that price. This condition is satisfied in any instance where there is substantial evidence that the tax was charged and paid on the home-market sales being compared. Similarly, the most literal reading of the requirement that the tax be "included in the price" requires that the tax *have been added* to that price, although it might be carried as a separate item on the company's books, rather than listed as a separate item on each sales receipt.[70] Such a straightforward application of the tax clause does not, and need not, address the issue of tax incidence. The fact that a consumption tax that was added to and included in the home-market price might not have been entirely borne by the consumer in an *economic* sense is irrelevant.

The legislative history of the 1974 amendments supports this literal reading of the new language that Congress added to the tax clause. The bill originally introduced in the House[71] did not contain the phrase "only to the extent that such taxes are added to or included in the price." As a result, although the House Committee held extensive hearings on H.R. 6767 in May and June of 1973,[72] the transcripts do not contain a single word regarding the meaning of those words.[73] In fact, very little was said during the hearings about the new requirement that the tax be levied "directly" upon the exported merchandise.[74]

Those few participants who seemed aware that the rebate of consumption taxes on export had economic implications also realized that such rebates are explicitly sanctioned under the GATT. These persons appear to have regarded the subject as essentially a subsidy issue, and to have believed that any remedy would have to be obtained in the upcoming round of multilateral trade negotiations.[75] For example, then-Treasury Secretary Schultz testified that the proposed legislation "does not affect the way in which the [European] value added tax is treated" under

70 The phrase "included in the price" is also used to qualify all of the adjustments to U.S. price in the Trade Act of 1974 § 772(d)(2)(A) and (B), *supra* note 67, 19 U.S.C. § 1677a(d)(2) (A) and (B) (1982). There has never been any suggestion that a "pass-through" analysis is required in connection with these adjustments.

71 *See* H.R. 6767, 93rd Cong., 1st Sess. 203 (1973).

72 *Trade Reform: Hearings before the Committee on Ways and Means of the House of Representatives on H.R. 6767*, 93d Cong., 1st Sess. (1973) [hereinafter *House Hearings*].

73 *Id.*

74 *Id.* at 135, 362, 679, 778, 1022, 1357, 1576, 2153, 2158, 2242, 2397, 2710, 3028, 3274, 3957, 4022, 5246-53.

75 The legislation provided the President with authority to negotiate a comprehensive set of trade agreements. Trade Act of 1974, *supra* note 67, at tit. I, ch. 1.

U.S. law.[76] A few moments later, Representative Flanigan referred to a study (quoted in the transcript) concluding that rebates of indirect taxes on export "are allowed under the provisions of the General Agreement on Tariffs and Trade."[77] The realization that export tax rebates are sanctioned by GATT evidently was widespread,[78] and precluded consideration of proposals fundamentally changing their treatment under the antidumping law.

The Committee appears to have thought that the "directly upon the exported merchandise" change made in the tax clause would help ensure that the adjustment to U.S. price offset actual indirect tax rebates, rather than countervailable subsidies in disguise.[79] The change evidently was viewed as tightening the requirement for the tax adjustments as far as permissible under the GATT, consistent with the countervailing duty law.[80]

On October 3, 1973, the Ways and Means Committee reported the Trade Reform Act of 1973 to the full House. The reported bill bore a new number (H.R. 10710) and differed from the original version in many respects.[81] One of the changes was the addition to the tax clause of the

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76 *House Hearings, supra* note 72, at 192-94, 334 (colloquy between Sec'y Schultz and Representatives Griffiths and Flanigan). Secretary Schultz emphasized to Representative Vanik that: "It was my understanding that the way this has operated over the years and with the GATT understanding we have, that we are in the position where [export rebates of] the VAT [value added] type tax is not considered an item against which we countervail."

77 *See id.* at 193.

78 *Id. See* Statement of Ambassador Eberle, *id.* at 472; complaint of Mr. Robert Barnard, *id.* at 1724-34 ("Under an interpretation of the GATT apparently agreed to by the United States . . . an indirect tax is treated as a tax on the product and may be assessed on imports at the border and rebated on exports."). *See also* Statement by Representative Corman to Mr. Eugene Stewart, *id.* at 3847 ("[W]e don't consider the rebate or failure to collect VAT from a European country. That doesn't get them in violation of the antidumping laws, does it?"); *Tax Adjustments in International Trade; GATT Provisions and EEC Practices, id.* at 5127-37 ("[T]he GATT permits countries to exempt exported products from domestic consumption taxes and to rebate to exporters such taxes as may have been collected on the exported product.")

79 An example of such a subsidy would be a rebate of an income tax or an excessive rebate of a consumption tax.

80 The second amendment deals with the treatment of certain types of tax rebates in computing purchase price. The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. However, your committee, in recommending this amendment, does not express approval or disapproval of the standard employed by the Treasury Department in administering the countervailing duty law with regard to the treatment under that law of rebates or remissions of direct and indirect taxes.

Report of the Comm. on Ways and Means on H.R. 10710, H. REP. No. 571, 93d Cong., 1st Sess. 69 (1973) [hereinafter *Ways and Means Report on H.R. 10710*].

Zenith confines this harmonizing intent to the first of the two 1974 changes. 633 F. Supp. at 1397. According to *Zenith* then, the first of the two 1974 changes insured that the statute was in harmony with GATT, while the second of those changes destroyed that harmony.

81 "[T]he bill that the committee has favorably reported is based on the President's trade propos-

language "but only to the extent added to or included in the price . . . ."[82] The transcript of the hearings contains no evidence of the reason for the change. Summaries of H.R. 10710 gloss over the tax clause.[83] The only statement in the entire legislative history that provides any detail concerning the new language is the House Report on H.R. 10710, which states that:

> With the amendment, no adjustment to the advantage of the foreign exporter would be permitted for indirect tax rebates unless the direct relationship of the tax to the product being exported, or components thereof, could be demonstrated. Further, an adjustment for such tax rebates would be permitted 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. This is to insure that the rebate of such taxes confers no special benefit on the exporter of the merchandise that he does not enjoy in sales in his home market. *To the extent that the exporter absorbs indirect taxes in his home market sales, no adjustments to purchase price will be made* and the likelihood or size of dumping margins will be increased.[84]

The *Zenith* court's analysis of the legislative history of the "added to or included in" language is essentially based upon the emphasized excerpt from this statement. The court's analysis boils down to the assumption that, when the report refers to "the extent that the exporter absorbs indirect taxes in his home market sales," it means "to the extent that the exporter bears the economic burden of the tax."[85] This is the same assumption that the court had already made about the meaning of "added to or included in the price" in the legislation itself. It is equally unwarranted. The passage from the House Report is simply a paraphrase of the tax clause. Although the word "absorbed" could be interpreted as alluding to tax incidence, it is also commonly employed by accountants to describe the allocation of costs.[86] Consequently, its use in

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als to the Congress embodied in H.R. 6767 . . . ." *Ways and Means Report on H.R. 10710, supra* note 80, at 3.

[82] Amendments to the Antidumping Act of 1921, H.R. 10710, 93d Cong., 1st Sess. § 321 (1973).

[83] The Summary of Trade Reform Act of 1974 as ordered reported by the Committee on Finance (pp. 9-10 in the Nov. 20, 1974 version, and p. 12 in the Dec. 30, 1974 version) does not mention the tax clause. (This summary appears in the CONG. REC. S21,273 (Dec. 12, 1974).) The one exception is the Summary of the Principal Features of the Bill contained in the Report of the Committee on Ways and Means, which provides simply that "Other amendments relate to the definition of purchase price for purposes of fair-market-value determinations and in the treatmeent of certain tax rebates or remissions in the computation of the purchase price." *Id.* at 10.

[84] *Ways and Means Report on H.R. 10710, supra* note 80, at 69 [emphasis added].

[85] *Zenith*, 633 F. Supp. at 1396, 1399.

[86] *See, e.g.*, C. HORNGREN, COST ACCOUNTING: A MANAGERIAL EMPHASIS 52 (5th ed. 1982) ("Two major methods of product costing will be emphasized in the book . . . absorption costing and variable costing."); L. RAYBURN, PRINCIPLES OF COST ACCOUNTING: MANAGERIAL APPLICATIONS 223 (rev. ed. 1983) ("Under *conventional, full, or absorption costing*, both fixed and variable overhead costs are applied to production."). This is not to suggest that the House Report used the

the House Report does not indicate that the clause refers to tax incidence.

The trade bill was debated on the House floor primarily on December 10 and 11, 1973.[87] In that entire debate, there is not even one discussion of the tax clause. The only statement concerning the clause that appears in the *Congressional Record* is a virtual recitation of the passage in the House Report.[88] There is no evidence that any member of Congress ever focused on the meaning of the words "added to or included in the price."

The Senate held hearings on H.R. 10710 in March and April of 1974.[89] The total failure of any of the participants in the hearings to attribute any special significance to the new language in the tax clause belies the CIT's claim in *Zenith* that its special economic implications were unmistakable. Summaries of the legislation were simplified versions of the House Report, lacking any reference to the new language, much less any indication that it had far-reaching implications.[90]

The change in the tax clause evidently was seen as tightening existing guidelines to insure that any rebates on export be directly tied to the tax, in conformity with countervailing duty law.[91] This goal was ac-

word "absorbed" in some specific technical accounting sense—only that the term "absorbed" is part of the terminology ordinarily employed by accountants in discussing costs.

87 *See* H.R. 10710, 93d Cong., 1st Sess., 119 CONG. REC. 40,489-580, 40,769-814 (1973).

88 *Id.* at 40519 (statement of Mr. Ullman).

89 *See Trade Reform Act of 1973: Hearings before the Committee on Finance of the United States Senate on H.R. 10710*, 93d Cong., 2d Sess. (1974) [hereinafter *Senate Hearings*].

90 *Id.* at 310, 584.

A written question submitted to then-Treasury Secretary Schultz regarding whether it was "envisioned that the language in the House-passed bill would actually result in the exclusion of all or a part of the European value added taxes" in determining dumping margins elicited the following response:

> The proposed amendments to the Antidumping Act would tighten the existing guidelines for adding back rebated or remitted taxes to purchase price. . . . If it were to be determined in a particular instance that such taxes are not directly imposed upon the merchandise or that directly imposed taxes were not included in the foreign home market prices of such or similar merchandise, they will not be added to purchase price or exporter's sales price. In such circumstances, the amendment in question would tend to create or increase the size of dumping margins. Apart from such special circumstances, however, it would not result in the exclusion of the European value added taxes in determining dumping margins.

Id. at 504-05. Thus, Secretary Schultz's understanding, which he conveyed to the Committee, was that the change in the tax clause would alter the treatment of VAT rebates by European governments only in "special circumstances."

91 The Senate Report stated that: "The standard in the proposed amendment parallels that standard employed by the Treasury Department under the countervailing duty law in determining whether tax rebates and remissions constitute bounties or grants." S. REP. No. 1298, 93d Cong., 2d Sess. 172 (1974). The CIT rejected this evidence on the theory that such statements in the legislative history were limited to the first of the two changes (the "directly related" language) in the tax clause made by H.R. 10710. 633 F. Supp. 1397-98. The CIT's argument fails because the legislative history does not indicate that any clear distinction was seen between the two changes. Instead, it

complished by requiring that the tax not only be "directly related" to the exported merchandise, but that the tax actually have been "added to or included in" its home-market price.[92] Together, the two requirements insured that adjustments were permitted only to offset consumption taxes that were actually charged and paid on the sales used to calculate foreign-market value—the strictest limitation that could be imposed on the adjustment consistent with the GATT.

As in the hearings before the House, witnesses who testified before the Senate about the amendments to the antidumping law gave the revision to the tax clause only passing mention and certainly gave no indication that they imagined it might require Treasury to make routine measurements of tax incidence.[93] Conversely, those rare individuals who seemed aware of the possible economic implications of the broader tax-rebate issue apparently perceived no connection between that issue and H.R. 10710.[94]

The Senate Finance Committee's report on H.R. 10710 was published on November 26, 1974. The discussion of the tax clause in that report is a paraphrase of the House Report,[95] with one important excep-

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indicates that the second change was seen simply as tightening the first. This is particularly evident from the Senate Report, which was written *after* the appearance of the new language, and does not make any distinction between the two changes.

[92] This had always been the administration's understanding of the function of the clause. For example, the Assistant Treasury Secretary for Legislative Affairs observed that: "If a tax is imposed in the home market of an exporting country and effectively added to the price of the merchandise there, the failure to add such a tax to the price of the merchandise to the United States, if it is rebated or remitted upon exportation, would distort any price comparisons and unfairly create or increase the size of dumping margins." *House Hearings, supra* note 72 (letter from Assistant Treasury Secretary for Legislative Affairs to the Chief Counsel of the Ways and Means Committee, June 5, 1973).

[93] *See, e.g., Senate Hearings, supra* note 89, at 1548 (testimony of the American Chain Association); *id.* at 1593 (statement of the New York Chamber of Commerce and Industry); *id.* at 1683 (testimony in behalf of the Electronic Industries Association); *id.* at 1934 (testimony of Mr. Noel Hemmendinger); *id.* at 1966 (statement of National Retail Merchants Association); *id.* at 2105 (statement of Nelson A. Stitt, Director, United States Japan Trade Council); *id.* at 2663 (statement of Freeport Minerals Company); *id.* at 2795 (statement of Eugene L. Stewart on behalf of four domestic producers of flat glass).

[94] *See, e.g., Senate Hearings, supra* note 89, at 1294, 1304 (testimony of Mr. Robert Barnard on behalf of the synthetic Organic Chemical Manufacturers Association). Mr. Barnard also testified before the House about the problem presented by the rebates, *House Hearings, supra* note 72, so he was obviously attuned to the issue. Yet, he plainly perceived no connection between the economic aspects of the tax rebate issue and the amendments to the tax clause, for he was still urging a change in the GATT as the only solution to the problem. Similarly, Mr. Irving R. Glass, President of the Tanners' Council of America, Inc., discussed the European VAT problem with Senator Packwood without either man suggesting that the changes in the tax clause had affected it in any significant way. *Senate Hearings, supra* note 89, at 1919.

[95] The passage in the Senate Report reads:

These House amendments [to the Act] have been adopted without change in the Committee

tion. The Senate Report omits most of even the limited explanation in the House Report of the words "to the extent that such taxes are added to or included in the price," including the word "absorbed," which plays such an important role in the *Zenith* decision.[96] It is therefore reasonable to conclude that the authors of the Senate report did not consider that language to be especially important or informative.

The Senate debate on H.R. 10710[97] closely replicated the debate more than a year earlier in the House. The summary of the bill's significant provisions inserted into the *Congressional Record* does not mention any of the amendments to the tax clause,[98] nor does a table summarizing the provisions of the House bill and Senate amendments.[99] Although additional language had been added to the tax clause amendment in the original bill (which would normally attract attention to the provision), there is no discussion whatsoever in the *Congressional Record* of the meaning of the new language. The same is true of the discussion in the House of the Conference version of the bill.[100]

In sum, Congress never debated or discussed the tax clause (and made even superficial references to it only on rare occasions) during the House or Senate debates.[101] This absence of any debate, or even speculation, about the meaning of the clause is especially significant when the huge cast of administration and private trade law experts involved in the legislative proceedings is taken into account. Had the amendments been perceived to have economic implications that would drastically affect the administration of the antidumping laws, they unquestionably would have been the subject of fierce debate. Such a debate would have centered on the fairness of such a change in the law, its consistency with the GATT,

> bill. . . . The second amendment deals with the treatment of certain types of tax rebates in computing purchase price and would provide that foreign indirect taxes, rebated or remitted upon export . . . will be added back to purchase price . . . 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. The present standard for the treatment of such tax rebates or remissions which is now contained in the Act is significantly broader and requires the adding back to the purchase price of a wider range of taxes, to the advantage of the foreign manufacturer, than would be allowed under the proposed amendment. The standard in the proposed amendment parallels that standard employed by the Treasury Department under the countervailing duty law in determining whether tax rebates and remissions constitute bounties or grants.

Report of the Committee on Finance on H.R. 10710, S. REP. NO. 1298, 93d Cong., 2d Sess. 172 (1974).

96 *See Zenith*, 633 F. Supp. at 1399.

97 120 CONG. REC. 39,385, 39,415-19, 39,497-500, 39,503-534, 39,563-64, 39,754-858 (1974).

98 120 CONG. REC. 39,510 (1974).

99 *Id.* at 39,516.

100 120 CONG. REC. 41,592 (1974) (Joint Explanatory Statement of the Committee of Conference).

101 The transcripts to these debates run over 500 pages. *See* 119 CONG. REC. 40,489-580, 40,769-814 (1973); 120 CONG. REC. 38,390-449, 39,385-565, 39,754-858, 41,629-52 (1974).

and whether measurements of tax incidence were either theoretically or practically achievable.

C. The 1979 Re-Enactment

Effective January 1, 1980, the Trade Agreements Act of 1979 repealed the antidumping law then in force and replaced it with a new antidumping statute. The new statute re-enacted the tax clause incorporating the 1974 amendments verbatim.[102] The re-enactment is significant because the legislative history of the 1979 law states explicitly that it was intended to be (and, as far as the Congress was aware, *was*) consistent with the GATT.[103] Furthermore, Congress was aware that consumption tax rebates were not considered unfair trade practices under the GATT.[104]

It is not surprising that neither the Senate nor the House report contains any indication that the tax clause, as amended in 1974, might be inconsistent with the GATT. No interpretation of the tax clause inconsistent with the GATT was developed until the administrative review that led to *Zenith*. Taken as a whole, the legislative history of the tax clause demonstrates an intent to remove consumption taxes from antidumping equations, while preventing unwarranted adjustments from being made under the guise of tax adjustments.

V. JUDICIAL PRECEDENT

A. The *Smith-Corona* Decision

Smith-Corona Group v. United States[105] is the landmark decision on Commerce's authority to adjust prices in each market under the an-

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102 *See* Trade Agreements Act of 1979, Pub. L. No. 96-39, §§ 101, 106(a), 107, 93 Stat. 144, 150, 193 (1979). The 1979 Act combined the purchase price and exporters sales price provisions of the old act into one new section—772. The tax clause in the new consolidated section is identical to that which the 1974 Act brought about in the two old provisions.

103 The Senate Finance Committee's Report on the legislation stated: "*General Rule*—Subtitle B of title VII of the Tariff Act of 1930, as added by the bill, would repeal the Antidumping Act, 1921, and replace it with a comprehensive statute built upon the 1921 Act and consistent with the MTN Antidumping Code." S. REP. NO. 249, 96th Cong., 1st Sess. 15-16 (1979).

Similarly, the House Report described the new antidumping law as "encompass[ing] those changes to the current . . . antidumping laws necessary or appropriate to the implementation of the international agreements on these subjects." H.R. REP. NO. 317, 96th Cong., 1st Sess. 45 (1979).

104 The Senate Report also noted: "There are additional special rules in Article VI [of the GATT] . . . prohibiting imposition of [antidumping and countervailing] duties solely for the nonexcessive remission of consumption taxes, *e.g.*, for border tax adjustments such as those employed in value-added tax systems. S. REP. NO. 249, 96th Cong., 1st Sess. 39 (1979).

105 Smith-Corona Group v. United States, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

tidumping law.[106] The case arose from an antidumping investigation of portable electric typewriters from Japan.[107] In conducting that investigation, Commerce made C-O-S adjustments to foreign-market value for freight, packing, advertising, and similar home market expenses.[108] Smith-Corona (the domestic petitioner) challenged both the manner in which these adjustments were calculated and the regulations under which they were made.[109] The Court of International Trade upheld the adjustments[110] and the Federal Circuit affirmed.

Two of the issues in *Smith-Corona* are important here: (1) whether Commerce could allow the so-called "ESP offset" C-O-S adjustment for home-market expenses not "directly related" to home-market sales (which relates to the consumption tax C-O-S adjustment issue); and (2) whether Commerce had authority to make those C-O-S adjustments on the basis of cost (which relates to the tax pass-through issue). The rulings are discussed separately below.

1. The "ESP Offset" Adjustment

In calculating dumping margins, Commerce attempts to compare *ex factory* prices in each market. A number of adjustments to the selling price in each market must be made for this purpose, including adjustments for differences in the circumstances of sale, such as differences between the two markets in freight, insurance, credit, or warranty expenses.[111]

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106 *See also* Zenith Radio Corp. v. United States, 783 F.2d 184 (Fed. Cir. 1986); Consumer Prods. Div., SCM Corp. v. United States, 753 F.2d 1033 (Fed. Cir. 1985); Rhone Poulenc, S.A. v. United States, 592 F. Supp. 1318 (Ct. Int'l Trade 1984); Hercules, Inc. v. United States, 673 F. Supp. 454 (Ct. Int'l Trade 1987); Sawhill Tubular Div. Cyclops Corp. v. United States, 666 F. Supp. 1550 (Ct. Int'l Trade 1987); Ipsco, Inc. v. United States, 687 F. Supp. 633 (Ct. Int'l Trade 1988); LMI-La Metalli Industriale v. United States, 712 F. Supp. 959, *motion denied*, 720 F. Supp. 176 (Ct. Int'l Trade 1989).

107 *See* Portable Electric Typewriters from Japan; Antidumping; Determination of Duty, 45 Fed. Reg. 53,853 (1980); Portable Electric Typewriters from Japan; Antidumping Duty Order, 45 Fed. Reg. 30,618 (1980).

108 *Smith-Corona*, 713 F.2d at 1573 n.12.

109 *Id.* at 1574-75.

110 Brother Indus. v. United States, 540 F. Supp. 1341 (Ct. Int'l Trade 1982), *aff'd sub nom*, Smith-Corona Group v. United States, 713 F.2d 1568 (Fed. Cir.), *cert. denied*, 465 U.S. 1022 (1922).

111 Section 773(a)(4) of the Act, 19 U.S.C. § 1677b(a)(4) (1982), provides that:

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

Thus, to the extent that Commerce is satisfied that the amount of "any difference" between the foreign market and U.S. price is "partly" due to a "difference in circumstances of sale," it must make "due allowance" therefor.

The term "circumstances of sale" is not defined in the Act.[112] Nor does the legislative history shed much light on the meaning of the term.[113] The House and Senate Reports give the following identical explanation of the new provision:

> *Differences due to "other circumstances of sale"*
>
> Under the bill as reported, provision is made . . . for consideration of "other differences in circumstances of sale" in addition to quantity differentials. This is designed to facilitate efficient and fair comparison between foreign market value and price to the United States market. Examples would be differences in terms of sale, credit terms, and advertising and selling costs.[114]

The list of examples plainly is not exhaustive. The passage indicates simply that Commerce should account for a broad range of differences in circumstances-of-sale. The only limitations on such adjustments are those established by the need to make an "efficient and fair" comparison between FMV and U.S. price.

Traditionally, however, Commerce has limited C-O-S adjustments to those that bear a "direct" relationship to the comparison sales.[115] Both the old and new regulations provide that, in general, such adjustments are limited to those that bear a "direct relationship" to the sales being compared. Direct expenses (e.g., freight) are those that would not have been incurred but for the sale in question. Indirect expenses (e.g., advertising) fail this causal test.

The exporter's sales price ("ESP") offset adjustment provides a partial exception to the "directly related" requirement. It permits the deduction of indirect selling expenses from foreign-market value up to the amount of comparable U.S. selling expenses.[116] The ESP offset is not specifically provided for in the statute, but was created by Treasury (and adhered to by Commerce) in order to reduce the unfairness inherent in including expenses that were not part of the U.S. price within foreign-

[112] The C-O-S adjustment was created by the 1958 amendments to the Antidumping Act. *See* Antidumping Act Amendments, Pub. L. No. 85-630, § 202(b), 72 Stat. 583 (1958).

[113] The Federal Circuit found in *Smith-Corona*, 713 F.2d at 1578, that "the legislative history and the legislative purpose are ambiguous" on the C-O-S provision.

[114] Report of the Committee on Ways and Means to Accompany H.R. 6006, H. REP. NO. 1261, 85th Cong., 1st Sess. 7 (1957); Report of the Committee on Finance to Accompany H.R. 6006, S. REP. NO. 1619, 85th Cong., 2d Sess. 7 (1958).

[115] *See* 19 C.F.R. § 353.15(a) (1988), *recodified at* 19 C.F.R. § 353.56(a) (1989). Both the old and new regulations provide that, in general, such adjustments are limited to those that bear a "direct relationship" to the sales being compared.

[116] *See* 19 C.F.R. § 353.15(C) (1988), *recodified at* 19 C.F.R. § 353.56(b)(2) (1989). The adjustment is called the "ESP offset" because such expenses normally exist only on "Exporters Sales Price" sales (sales by related U.S. firms).

market price.[117] In the typewriters investigation, Commerce allowed a variety of "ESP offset" C-O-S adjustments, including one for home market advertising expenses.[118] These adjustments were challenged by Smith-Corona on the basis that the expenses in question were not "directly related" to home market sales.

The Federal Circuit acknowledged that, in allowing adjustments to foreign-market value for such indirect expenses as advertising expenses, the ESP offset went beyond the explicit command of the statute.[119] The Court nevertheless sustained the ESP offset on the basis that it was necessary to achieve a fair comparison between FMV and U.S. price. In the words of the court: "One of the goals of the statute is to guarantee that the administering authority makes the fair value comparison on a fair basis—comparing apples with apples. . . . [The statute] expressly requires a fair comparison."[120]

If the ESP offset is a permissible C-O-S adjustment, an adjustment to equalize consumption taxes in each market is permissible *a fortiori*, because consumption taxes, like freight or credit expenses, are directly related to each sale. Commerce has long taken the position that differences in taxation are essentially no different than any other differences in expenses between the two markets.[121]

The *Zenith* decision does not analyze Commerce's authority to make C-O-S adjustments and then explain why a tax-differential adjust-

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117 *See, e.g.*, U.S. Dep't of Commerce, Study of Antidumping Adjustments Methodology and Recommendations for Statutory Change (Nov. 1985).

118 *See* Portable Electric Typewriters From Japan; Antidumping: Withholding of Appraisement Notice, 45 Fed. Reg. 1220, 1221 (1980). In Portable Electric Typewriters From Japan; Antidumping Determination of Sales at Less Than Fair Value, 45 Fed. Reg. 18,416 (1980), Commerce explained that: "[A]ppropriate adjustments were made to the home market price for differences in circumstances of sales for expenses incurred for advertising (*e.g.* newspaper, radio commercial, calendar) regarded as general media advertising directed to later sales by the purchasers."

119 *Smith-Corona*, 713 F.2d at 1581.

120 *Id.* at 1578.

121 In Grand and Upright Pianos From the Republic of Korea; Final Determination of Sales at Not Less Than Fair Value., 50 Fed. Reg. 37,561, 37,564 (1985), Commerce explained this policy as follows:

> [T]he Department can perceive no economic justification for adjusting the home market U.S. price differential by anything less than the actual amount of final stage taxes paid by the producers. We believe that the antidumping duty law is intended to remedy situations in which a foreign producer accepts a lesser return on his U.S. sales than on his home market sales. Where the costs of production and sale are identical in both markets, any difference in price will represent a difference in return. Where the costs of production and sale differ between markets, any difference in price will represent a difference in return only after the price differential has been adjusted by the net amount of the differences in cost. A difference in final stage tax liability is just as much a difference in the cost of production and sale as any difference in material costs or credit expenses. Therefore, just as we have always adjusted the price differential by the amount of any difference in material costs and credit expenses, we believe we should also make such an adjustment for any difference in final stage tax liability.

ment exceeds that authority. Rather, the Court treated the C-O-S adjustment as a subset of the tax issue.[122] Its analysis of the C-O-S provision is limited to noting that differences in taxation are not contained in the non-exhaustive illustrative lists in the statute and regulations of the types of expenses for which C-O-S adjustments may be made.[123]

The remainder of the *Zenith* opinion argues that permitting C-O-S adjustments to offset the multiplier effect would thwart Congress' intent in requiring the addition to U.S. price of inflating dumping margins.[124] There is no evidence, however, that Congress had any notion that the addition of the tax to the U.S. price would produce the multiplier effect.[125] The CIT buttressed its speculation that Congress intended to inflate dumping margins by incorrectly placing the burden on Commerce of demonstrating that Congress did *not* intend to create the multiplier effect.[126] Finally, *Zenith* incorrectly justified the "multiplier effect" as permissible punishment for dumping.[127] The CIT has correctly recognized elsewhere that the antidumping law is remedial, rather than penal, in design.[128]

2. *Cost-Based Adjustments*

Like the tax clause, the C-O-S provision directs adjustments to be made in calculating dumping margins that arguably could be calculated in terms of either cost or value. In the typewriters investigation, Commerce deducted the difference between the amount by which the *cost* of such expenses in the home market exceeded their *cost* in the United States.[129] Smith-Corona challenged these adjustments on the basis that Commerce had failed to demonstrate that the Japanese manufacturers had actually "passed through" the full amount of the higher home-market expenses to their customers. Commerce responded that it was entitled to assume that the full difference in cost was reflected in the final price under the circumstances (and therefore was properly deducted

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122 *See Zenith*, 633 F. Supp. at 1393.

123 *Id.*

124 *Id.* at 1389-91.

125 In place of the missing evidence, the court substituted the observation that Congress *could* have made calculations demonstrating the multiplier effect, and then jumped to the conclusion that Congress *did* make such calculations, and so knew that dumping margins could be inflated. *Id.* at 1391.

126 "[T]he court is unpersuaded that Congress did not intend the adjustment in § 1677(d)(1)(C) to operate as it does." *Id.*

127 *Id.* at 1392.

128 *See, e.g.*, Badger-Powhatan v. United States, 608 F. Supp. 653, 656 (Ct. Int'l Trade 1985).

129 *Smith-Corona*, 713 F.2d at 1574.

from that price).[130]

The CIT sustained Commerce's assumption regarding home-market expenses on the basis of Commerce's broad discretion under the statute, "the economic logic of the assumption that cost is related to price, and the longstanding administrative practice of using [the] cost" differential as the amount of the adjustment.[131] These considerations also proved persuasive to the Federal Circuit on appeal. In particular, although the Federal Circuit acknowledged that "[a]ntidumping duties are imposed on the basis of differences in value, *not* differences in cost,"[132] and although it cautioned that Commerce may not "blindly rely on cost to the exclusion of its effect on value,"[133] it concluded that, "absent evidence that costs do not reflect value, [Commerce] may reasonably conclude that cost and value are directly related."[134]

As in the C-O-S adjustments at issue in *Smith-Corona,* Commerce's decision to make the consumption tax adjustment on the basis of cost was reasonable. The adjustment is not, as the CIT claimed in *Zenith,* a "brazen" leap to a purely cost-based view of the statute.[135] Rather, it reflects Commerce's judgment that, absent evidence to the contrary, it may use cost as a stand-in for value where there is logically a direct relationship between the two. As the Federal Circuit noted in *Smith-Corona*: "The ready availability of cost data that can be employed without extensive complex econometric analysis supports the reasonableness of the Secretary's decision to rely on cost. Cost may be the only *practical* way to administer the statute."[136]

In sum, both holdings of *Smith-Corona* support the calculation of dumping margins on a tax-net basis. The holding that Commerce has broad power to make C-O-S adjustments in order to compare prices fairly supports Commerce's C-O-S adjustment to equalize taxes in the two markets, so that prices can be compared on a tax-net basis. The holding that Commerce may make adjustments on the basis of cost, even where value provides a potential alternative basis, if that is the only practical way to administer the statute, supports Commerce's refusal to measure tax incidence.

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130 *Id.* at 1574.

131 *Id.* at 1575. The CIT referred to the issue as the "casual link" issue. Brother Indus. v. United States, 540 F. Supp. 1341, 1348 (Ct. Int'l Trade 1982).

132 *Smith-Corona,* 713 F.2d at 1575.

133 *Id.* at 1577 n.26.

134 *Id.*

135 *Zenith,* 633 F. Supp. at 1401.

136 *Smith-Corona,* 713 F.2d at 1577 n.27.

B. The *Atcor* Decision

Atcor v. United States[137] involved a challenge to an antidumping determination on pipe and tube from India. Two Indian taxes were involved: a tax on imported steel ultimately sold in India; and a general tax on domestic sales. The Indian companies in question purchased imported steel to manufacture pipe and tube for export. Accordingly, they paid neither tax. Commerce added both Indian taxes to the U.S. price, based on its determination that the taxes were forgiven by reason of the exportation of the final product. Atcor challenged the import levy (and, to a lesser extent, the general sales tax) on the basis that it had been forgiven solely by reason of the importation of the steel, rather than the exportation of the finished pipe and tube.

The CIT upheld both additions to U.S. price as taxes "that *would [have been]* included in the home market prices," had the exported pipe and tube been sold in India.[138] Because the precise amount of taxes that would have been assessed against the pipe and tube had it been sold in India had not been verified, the Court remanded the proceeding to Commerce for verification of this figure.[139] Thus, in *Atcor,* the CIT read the "added to or included in" requirement as Commerce does, to require simply that any tax added to U.S. price actually be included in the price of home-market sales.[140]

C. The *Paver Parts* Decision

In the *Paver Parts* decision,[141] the U.S.-Canada Bi-National Panel ("Panel") directly addressed the issue of whether 19 U.S.C. § 1677a(d)(1)(C) requires a measurement of home-market tax incidence, and ruled that it does not.[142] The Panel's decision echoes that of the

137 Atcor v. United States, 658 F. Supp. 295 (Ct. Int'l Trade 1987).

138 *Id.* at 303 (Court's emphasis).

139 *Id.* at 303-04.

140 The Court stated that:

> Section 1677a(d)(1)(C) allows an adjustment in the amount of taxes imposed in India directly upon the merchandise exported to the United States which have been rebated by reason of the exportation. The adjustment is allowed only to the extent such taxes are *added to or included in* the price of such or similar merchandise when sold in India. This provision allows for an adjustment in the amount of taxes paid that are rebated. It does not allow adjustment for simply any amount that has been rebated.

Id. at 303 (emphasis added).

141 *See supra* notes 30-33 and accompanying text.

142 The Panel explicitly rejected the CIT's reliance in *Zenith* on the word "absorbs" in the legislative history of the tax clause:

> We agree that the 1973 House Report's use of the single term "absorbs" does not compel Commerce to measure tax incidence in an economic sense. If Congress had contemplated such a burdensome requirement—one that could not readily be performed with confidence or within the statutory framework for investigations—the Senate as well as the House surely would have

Federal Circuit in *Smith Corona* and of the CIT in *Atcor*:

> Absent evidence to the contrary, it is reasonable to assume that when a manufacturer is selling merchandise at a profit, it is recovering all of its costs, including the taxes, and, therefore, all costs are "included" in the customer's price.
>
> * * *
>
> We read the statute as requiring substantial evidence that the taxes are paid on sales within the home market. Commerce indeed insists that it requires respondents to provide evidence that the manufacturer has actually paid the tax and that the sales receipts reflect that the manufacturer "added [the tax] to or included [it] in" the price paid by home-market purchasers. Where Commerce fails to conduct such an inquiry, its determination is subject to remand.[143]

VI. CONCLUSION

The desire to calculate tax-net dumping margins is the common ground for Commerce's C-O-S adjustment to equalize the consumption taxes in the foreign and U.S. markets and Commerce's refusal to place any limitation on the tax adjustment based on tax incidence in the home market. This Article has shown that Commerce's practice is grounded in sound reasons of policy and comports with the GATT principle that export tax rebates are not an unfair trade practice and should not be subject to any trade law remedies. The legislative history of the tax clause, and the judicial approach to dumping adjustments, are both consistent with this GATT principle. Finally, the theory that the tax adjustment (or the entire antidumping law) should be placed on an economic basis is fraught with many problems that have only begun to be explored.

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been more explicit about their intent. We doubt that this methodology was ever considered, much less agreed upon, by the drafters of the legislation.

Paver Parts, supra note 32, at 18.

143 *Id.* at 16.