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The U.S. Court of International Trade Approves a New Use of the Circumstances of Sales Adjustment and Expands its Remand Authority: The Case of Tubeless Steel Disc Wheels from Brazil

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I. INTRODUCTION

This article examines charges levied by Budd Company Wheel and Brake Division [hereinafter Budd Company], a United States manufacturer of tubeless steel disc wheels (TSDWs), that two Brazilian competitors were dumping TSDWs into the U.S. market.[1] Budd Company petitioned the Department of Commerce, International Trade Administration [hereinafter Commerce], and the International Trade Commission (ITC) to assess an antidumping duty against Borlem S.A.-Empreedimentos Industriais [hereinafter Borlem] and FNV-Veiculos E Equipamentos S.A. [hereinafter FNV] to protect U.S. TSDW manufacturers from the harmful effects of the alleged dumping. The ensuing investigations into whether Borlem and FNV were actually dumping TSDWs into the United States involved legal, economic, and policy questions of first impression.[2]

Because of the complex legal and economic issues raised in dumping cases, it is possible that a single case will be reviewed by Commerce and the ITC, and appealed to the courts several times before the issues are finally resolved. The case of *Borlem S.A.-Empreedimentos Industriais v. United States* is an extreme example of the procedural and substantive complexities involved in dumping cases.[3] In an attempt to avoid the confusion which would result if this article was presented in chronological order, the article is structured so that each agency's investigations are presented

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1. *See infra* notes 42-55 and accompanying text (defining dumping); *see also infra* notes 60-79 and accompanying text (describing the facts of the case).

2. *See infra* notes 5-59 and accompanying text (providing an overview of U.S. dumping statutes and the economics of dumping).

3. This case adds new meaning to the legal phrase: "Who is suing whom for what?" Originally, the case was brought to the International Trade Commission (ITC) under the caption: *Borlem S.A. Empreedimentos Industriais and FNV Veiculos E Equipamentos S.A. plaintiffs v. United States, defendant, The Budd Company, Wheel and Brake Division, defendant-intervenor*, 10 I.T.R.D. (BNA) 1623 (1988) (No. 87-06-00693) (Slip op. 88-77). Each time the case was remanded back to Commerce, or the ITC from the Court of International Trade (CIT) new administrative findings were issued. These new administrative findings generated further reviews by the CIT and Court of Appeal for the Federal Circuit (CAFC). For example, as Commerce changed its position on the matter, the parties' names, and pairings as plaintiff and defendant, shifted dramatically. FNV dropped out of aspects of the litigation altogether based on an Amended Final Determination by Commerce.

together, and each issue appealed to the courts is presented together in a single section.[4]

Part II provides an overview of U.S. antidumping statutes and a review of the economics of dumping. Part III states the facts of this case and describes the administrative proceedings. Part IV traces the appeals of determinations made by Commerce. Part V covers appeals resulting from ITC findings and decisions. Part VI analyzes the legal ramifications of all the proceedings. Part VII provides some concluding thoughts.

II. UNITED STATES ANTIDUMPING STATUTES AND THE ECONOMICS OF DUMPING

The first U.S. antidumping statutes were contained in the Revenue Act of 1916.[5] This original, antidumping legislation eventually proved inadequate because it required proof that the foreign company was intentionally dumping its products into the United States.[6] Therefore, Congress passed replacement legislation in the form of the Antidumping Act of 1921.[7] Although subsequently replaced, the Antidumping Act of 1921 was important because it introduced many of the concepts which are contained in current antidumping statutes.[8]

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4. *See infra* notes 26-41 and accompanying text (providing the procedural aspects of investigations). The reader should note that many of the administrative proceedings and multiple appeals to the courts were dependant on the outcome of another proceeding which occurred earlier or which was being conducted simultaneously.

5. Grey Bryan & Dominique Guy Boursereau, *Antidumping Law in the European Communities and The United States: A Comparative Analysis*, 18 GEO. WASH. J. INT'L L. & ECON. 631, 655 (1985). The Revenue Act of 1916 is codified at 15 U.S.C. § 72 (1988). The legislation was based in part on fears that pricing by German cartels, particularly chemical companies, would cause injury to U.S. industries. *Id.*

6. *Id.*

7. *Id.* at 666; Antidumping Act of 1921, ch. 136, 42 Stat. 227 (1921), *repealed by* Trade Agreement Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified as amended at 19 U.S.C. §§ 1671-1677 (1988)).

8. Bryan & Boursereau, *supra* note 5, at 666. Concepts introduced in the Antidumping Act of 1921 include injury determinations, purchase price, exporter's sale price, and foreign market value. Additionally, the Act introduced the bifurcated administrative process still in use today. Originally the U.S. Treasury Department determined whether dumping was occurring and the U.S. Tariff Commission determined whether the dumping resulted in injury to U.S. industry. Today those roles are filled by the Commerce Department and the International Trade Commission respectively.

Due the growth of international trade in the last forty-five years, countries have sought to harmonize their antidumping remedies through multilateral agreements on the structure and form of antidumping laws. Internationally, antidumping remedies are authorized under the General Agreement of Tariffs and Trade (GATT), and the GATT Antidumping Code.[9] The U.S., as a signatory of GATT, currently has antidumping statutes that are consistent with the GATT provisions.[10] The United States has adopted a bifurcated system which administered by Commerce and the ITC.[11]

A. Overview of U.S. Antidumping Statutes

As defined by GATT and U.S. antidumping law, dumping occurs when a product manufacturer charges a lower price in the export market than in the home market for similar merchandise, after accounting for differences in sales conditions and merchandise characteristics.[12] Dumping is a form of predatory pricing by a firm seeking to maximize profits through international price discrimination.[13] Because the foreign manufacturer is selling goods below cost, it is likely that domestic manufacturers will lose

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Michael S. Knoll, *United States Antidumping Law: The Case for Reconsideration*, 22 TEX. INT'L L.J. 265, 269 (1987).

9. General Agreements on Tariffs and Trade, art. VI, *opened for signature* Oct. 30, 1947, 61 Stat. A3, A1365, T.I.A.S. No. 1700, 55 U.N.T.S. 187. The Antidumping Code is a separate document named, AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE (ANTIDUMPING CODE), Apr. 12, 1979, 31 U.S.T. 4919, 18 I.L.M. 621 (entered into force Jan. 1, 1980) *reprinted in* H.R. Doc. 96-153, Part I, 96th Cong. Sess. 309 (1979) (relating to antidumping measures); *see* Michael Sandler, *Primer on United States Trade Remedies*, 19 INT'L LAW. 761, 763 (1985) (discussing statutory authorization for antidumping laws). As a signatory, United States antidumping laws are predicated on GATT.

10. Bryan & Boursereau, *supra* note 5, at 668-69 (detailing movement towards international approach to dumping problems).

11. 19 U.S.C. §§ 1671-1677k (Subtitle IV - Countervailing and Antidumping Duties). *See infra* notes 16-41 and accompanying text (explaining the roles of Commerce and the ITC).

12. Knoll, *supra* note 8, at 267; For the seminal work on dumping, see JACOB VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE (1923); *see also* Richard D. Boltuck, *An Economic Analysis of Dumping*, 21 J. WORLD TRADE L. 45, 45-47 (1987).

13. Boltuck, *supra* note 12, at 45-47.

market share and, finally, be driven from the market.[14] Therefore, antidumping remedies are designed to counteract the predatory pricing practices of firms from other countries.[15] Determining whether an antidumping duty is warranted under U.S. law requires entry into the administrative maze, created by Congress.

1. Substantive Aspects of Administrative Investigations

When Commerce begins an investigation, it seeks to establish the foreign market value of such or similar merchandise by discovering the sales price of the merchandise in the foreign firm's domestic market.[16] If the merchandise is not sold or offered for sale in the foreign firm's domestic market, Commerce looks at the price at which the product is sold or offered for sale in countries other than the United States.[17] Finally, if there are no sales to third countries, the statute authorizes Commerce to utilize a constructed value.[18] If dumping is found, Commerce then establishes the amount by which the foreign market value exceeds

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14. *See infra* notes 53-55 and accompanying text (describing how dumping affects both U.S. manufacturers and consumers).

15. *See infra* notes 56-59 and accompanying text (describing the rationale behind antidumping remedies and their impact on the dumping party).

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

17. § 1677b(a)(1)(B). Commerce may also look at sales in third countries if sales in the firm's domestic market are too small for comparison.

18. § 1677b(a)(2) (permitting the use of constructed value). § 1677b(e)(1) provides that the constructed value determination shall be the sum of:

> (A) the cost of materials . . . and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise under consideration which would ordinarily permit the production of that particular merchandise in the ordinary course of business;
>
> (B) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual commercial quantities and in the ordinary course of trade, except that-
>
> > (i) the amount for general expenses shall not be less than 10 percent of the cost as defined in subparagraph (A), and
> >
> > (ii) the amount for profit shall not be less than 8 percent of the sum of such general expenses and cost; and
>
> (C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise under consideration in condition, packed ready for shipment to the Untied States.

the price of the product in the United States (this is called the "dumping margin").[19] The finding of dumping and the fixing of the dumping margin establishes only one of the two requirements necessary for imposition of an antidumping duty.

The objective of the ITC investigation is to discover whether the dumping has caused, or threatens to cause, material injury[20] to a U.S. industry.[21] Any finding of threatened injury must be based on evidence that the threat of material injury is real and actual injury imminent, and not merely based on conjecture or supposition.[22] Additionally, sufficient grounds to impose an antidumping duty exist if the ITC determines that a U.S. industry may be materially retarded by foreign dumping.[23] An ITC finding of material retardation of a U.S. industry occurs when it is discovered that an industry did not develop in the United States due to the dumping of imports.[24] The governing statutes direct the ITC to consider various factors in the course of its investigation.[25]

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19. § 1673b(b)(1)(A) (Preliminary); § 1673d(c)(2) (Issuance of Antidumping Duty Order).

20. "The term 'material injury' means harm which is not inconsequential, immaterial, or unimportant." § 1677(7)(A).

21. 19 U.S.C. § 1673(a) (1988); *see* N. David Palmeter, *Dumping Margins and Material Injury: The USITC Is Free to Choose*, 21 J. WORLD TRADE L. 173 (1987) (Commission has broad discretion in using dumping margins to determine injury). "The term 'industry' means the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major portion of the total domestic production of that product . . . ." § 1677(4)(A).

22. § 1677(7)(F)(ii).

23. § 1673(2)(B).

24. Certain Dried Salted Codfish from Canada, USITC Pub. 1711, Inv. No. 731-TA-199, at 4-5, 7 I.T.R.D. (BNA) 2353, 2355 (1985) (final); Knoll, *supra* note 8, at 49.

25. *See, e.g.*, 19 U.S.C. §§ 1673b(a), 1673d(b), 1677(7). Generally, the ITC must consider in each case:

> (I) the volume of imports of the merchandise which is the subject of the investigation,
>
> (II) the effect of imports of that merchandise on prices in the United States for like products, and
>
> (III) the impact of imports of such merchandise on domestic producers of the like products, but only in the context of production operations within the United States.

§ 1677(7)(B)(i).

2. *The Administrative Process*

Usually, a dumping investigation begins when an interested party,[26] such as Budd Company, files with both Commerce and the ITC a petition alleging dumping and material injury.[27] However, Commerce may initiate an investigation *ab initio* whenever the facts warrant.[28] After the investigation is initiated, the ITC has forty-five days to conclude whether there is a reasonable indication that a U.S. industry has suffered injury due to imports of the goods under investigation.[29] If the ITC makes an affirmative preliminary finding, Commerce ordinarily has 160 days to reach a preliminary determination whether the foreign goods are being dumped into the United States.[30] If Commerce reaches an

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26. An interested party, as defined in 19 U.S.C. § 1673a(b), which refers to § 1677(9)(C), (D), (E), (F), or (G) respectively, which includes: a manufacturer, producer, or wholesaler in the United States of a like product; a certified union; a trade association marketing a like product in the United States; an association with a majority of members as described in §§ (C)-(E); an industry engaged in producing a processed agricultural product.

27. § 1673a(b)(2) (A party must file petitions with Commerce and the ITC simultaneously). For a more detailed discussion of the procedural process under U.S. antidumping statutes, see Bryan & Boursereau, *supra* note 5, at 682-90.

28. § 1673a(a), (b) (providing the procedures for initiating an antidumping investigation).

29. 19 U.S.C. § 1673a(b). The statute states that:

> . . .the Commission [ITC], within 45 days after the date on which the petition is filed . . . or on which it receives notice from the administering authority [Commerce] of an investigation commenced [*ab initio* by Commerce], shall make a determination, based on the best available information available to it at the time of the determination, of whether there is a reasonable indication that-
>
> (1) an industry in the United States—
>
> (A) is materially injured, or
>
> (B) is threatened with material injury, or
>
> (2) the establishment of an industry in the United States is materially retarded,
>
> . . . If that [the ITC's conclusions] are negative, the investigation shall be terminated. *Id.*

30. § 1673b(b)(1)(A). The statute states that:

> . . .within 160 days after the date on which a petition is filed . . . but not before an affirmative [preliminary] determination by the Commission . . . the administering authority [Commerce] shall make a determination, based upon the best information available to it at the time of the determination, of whether there is a reasonable basis to believe or suspect that the merchandise is being sold, or likely to be sold, at less than fair market value.

Id.; *see* § 1673b(b)(1)(B) (shortening the maximum time to 120 days or 100 days from date of the ITC's preliminary determination); *see also* § 1673b(c)(1) (extending the maximum time to no more than 210 days in extraordinarily complicated cases).

affirmative dumping determination, it forwards all information obtained in the investigation to the ITC for use in its subsequent final injury investigation.[31] After the preliminary investigations are complete, then the agencies conduct final investigations.

Commerce must issue a final determination of whether foreign manufacturers are dumping goods into the U.S. market within seventy-five days of the preliminary determination, unless a sixty-day extension is granted.[32] Commerce's final dumping determination precedes the beginning of the ITC's final injury investigation.[33] If either agency's final investigations result in negative dumping or injury findings, the administrative process ends.[34] If final affirmative determinations of dumping and material injury are reached by Commerce and the ITC, Commerce will publish a final antidumping duty order to the United States Customs Service authorizing the imposition of an antidumping duty on the foreign merchandise.[35]

The short time limitations contained in U.S. antidumping statutes reveal Congress' desire to move the administrative process along rapidly. Rapid dumping and injury determinations by the administrative agencies were designed to benefit both foreign and

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31. *See* § 1673b(d) (stating the effect of determination by administering authority).

32. § 1673d(a)(1). The statute states:

> General Rule.—Within 75 days after the date of its preliminary determination under section 1673(b) . . . the administering authority [Commerce] shall make a final determination of whether the merchandise which was the subject of the investigation is being, or is likely to be sold in the United States at less than its fair value."

Id.; *see* § 1673d(a)(2) (allowing an extension of period for determination).

33. § 1673d(b)(2). The statute states:

> Period for injury determination following affirmative preliminary determination by administering authority [Commerce] . . . before the later of–
>
> (A) the 120th day after the day on which the administering authority makes its affirmative preliminary determination . . . or
>
> (B) the 45th day after the day on which the administering authority makes its affirmative final determination . . . .

Id. According to 19 U.S.C. § 1673d(b)(3), if Commerce's preliminary determination is negative but its final determination is affirmative, then the ITC shall have 75 days after the date of the final affirmative determination to issue its final determination. *Id.*

34. 19 U.S.C. § 1671d(c)(3).

35. § 1673e (Assessment of duty). If Commerce reaches an affirmative preliminary determination, it will order the suspension or liquidation of entries of all merchandise subject to the order, and require a bond or cash deposit to secure potential antidumping duties. § 1673b(d)(1), (2).

domestic manufacturers, by providing them with a swift resolution of their disputes.[36] However, the administrative process described above may not resolve the dispute for the parties as the decisions of Commerce and the ITC are subject to appeal in federal court.

Final affirmative findings or preliminary negative findings of Commerce or the ITC are appealable to the United States Court of International Trade (CIT).[37] The CIT's scope of review is limited to matters occurring within the administrative process.[38] The standard of court review is extremely deferential to the decisions of Commerce and the ITC.[39] Parties may appeal a decision of the CIT to the Court of Appeals for the Federal Circuit (CAFC)[40] and ultimately, if certiorari is granted, to the United States Supreme Court.[41]

B. The Economics of Dumping

Dumping is defined as the sale of foreign merchandise in the United States at less than fair value.[42] The foreign market value

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36. Foreign manufacturers found to be dumping can adjust their pricing policies accordingly. *See infra* notes 56-59 and accompanying text. Domestic manufacturers gain quick relief from unfair foreign pricing before further injury occurs.

37. § 1516a(1)-(2); *see* William E. Perry, *Administration of Import Trade Laws by the United States International Trade Commission*, 3 B.U. INT'L L.J. 345, 386 (1985) (formerly named the United States Customs Court, the name changed to CIT and was given exclusive jurisdiction under § 1516a in 1980); *see also*, RALPH H. FOLSOM, INTERNATIONAL BUSINESS TRANSACTIONS 498 (CIT is an Article III court with exclusive subject-matter jurisdiction over civil matters commenced by or against the United States and authority to review administrative agency decisions).

38. *See* 19 U.S.C. § 1516a(b)(2); Perry, *supra* note 37, at 386 (CIT cannot decide cases on the basis of new evidence or a de novo review of record).

39. § 1516a(b)(1) (Standards of review). Reviews of Commerce's decision not to initiate an investigation, the ITC's decision not to review a determination based on changed circumstances, or a negative preliminary determination by the ITC are upheld unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The standard of review for all determinations on the record, § 1516a(2), are upheld unless they are unsupported by substantial evidence on the record, or otherwise not in accordance with law.

40. Perry, *supra* note 37, at 386 (CAFC is formerly known as the Court of Customs and Patent Appeals and the Court of Claims).

41. *Id.* at 386-87.

42. Tariff Act of 1930, *amended by*, Pub. L. 98-573, Title VI, § 602(b) 98 Stat 3024 (1984) (codified at 19 U.S.C. § 1673(1)) [hereinafter all references to the Tariff Act of 1930, as amended will be to the codification in the United States Code]; *see*, Michael S. Knoll, *An Economic Approach To the Determination of Injury Under the United States Antidumping and Countervailing Duty Law*,

of such or similar merchandise[43] exported to the United States is considered the merchandise's fair value.[44] To determine if dumping has occurred, market prices in both the United States and the foreign market must be analyzed.[45] To have a fair basis for comparing prices, both the foreign and domestic manufacture's prices for the merchandise are reduced to the factory cost.[46] The cost of the merchandise in the foreign country is then converted into U.S. dollars for purposes of comparison.[47] Dumping occurs when the ex-factory price of the foreign merchandise sold in the United States is less than the ex-factory price charged for such or similar merchandise sold in the foreign manufacturer's own domestic market.[48]

Dumping is generally considered a form of international price discrimination.[49] Specifically, price discrimination is a function of the manufacturer selling such or similar products at different prices in different markets.[50] For a firm to engage in price discrimination three conditions must be met: (1) the firm's home market and foreign market are separable, (2) the firm can raise prices without losing sales, and (3) the demand for the product differs in the

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22 N.Y.U. J. INT'L L. & POL. 37, pt. II.A (1989) (defining dumping); David M. Repp, Note, *Antidumping and Countervailing Duties: Protection at a Cost*, 15 J. CORP. L. 65, pt. II.B (1989) (discussing antidumping as an unfair trade barrier).

43. 19 U.S.C. § 1677(16) generally defines "Such or similar merchandise" as:
> The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

44. 19 C.F.R. §§ 353.42, .46 (as determined by Commerce); Knoll, *supra* note 42, at 42.

45. Sandler, *supra* note 9, at 763.

46. Knoll, *supra* note 42, at 42.

47. 19 U.S.C. § 1677a(d); Sandler, *supra* note 9, at 764.

48. Sandler, *supra* note 9, at 763; Knoll, *supra* note 42, at 43.

49. Boltuck, *supra* note 12, at 45-46.
> The chief competing explanation of dumping is that it is a form of predatory pricing. Although this belief is closely tied to the origin of antidumping statutes in Canada, the United States, and some other countries, many economists doubt that predatory pricing is a frequent phenomenon.

Id. at 46 n.7. Predatory dumping occurs when a foreign firm discriminates in favor of some foreign buyers temporarily, in order to lower the market price, win market share, and eliminate competitors before raising its prices after the competition is no longer in the market. P. LINDERT, INTERNATIONAL ECONOMICS 183 (8th ed. 1986).

50. Boltuck, *supra* note 12, at 46; LINDERT, *supra* note 49, at 184-85.

firm's home and foreign markets.[51] When the conditions make it feasible, price discrimination results in a firm maximizing its profits.[52]

When a foreign firm dumps products in the United States, domestic producers that cannot compete at the lower prices will be driven from the market.[53] U.S. consumers initially enjoy lower prices due to the dumping of foreign merchandise.[54] However, after the U.S. firms are driven from the market, the foreign firm will recoup any losses by charging a higher price for its merchandise.[55] Antidumping duties are designed to eliminate the impact of a foreign firm's attempts at dumping.

After determining that dumping is occurring, customs officers are directed to assess an antidumping duty equal to the amount by which the foreign market value of the merchandise exceeds the U.S. price for such or similar merchandise.[56] The antidumping duty is not intended to punish the foreign firm; rather, it is intended to force the foreign firm to cease its dumping practices.[57] When dumping is no longer feasible, a profit maximizing firm will raise the price of its merchandise sold in the U.S. while simultaneously lowering the price domestically.[58] Eventually, the foreign producer

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51. Boltuck, *supra* note 12, at 46-47. A profit-maximizing firm will price discriminate when:
(1) Markets are separable. This means customers purchasing the same product in different markets cannot trade among themselves, thereby equalizing the price through arbitrage;
(2) The firm has market power in at least some markets. Market power means the firm will not lose all sales if it raises its price. (Monopoly is the extreme case of market power.) Raising the price will have two effects on the revenue of such a firm: it will increase due to the higher unit price, but fall due to smaller sales volume; and
(3) The demand curves for different markets have different elasticities. Demand elasticity is the percentage change in quantity purchased caused by a one per cent increase in price. It is generally negative. This means customers are more responsive to price changes in some markets than in others. The firm will charge a lower price in the market where customers are more price responsive. *Id.*

52. LINDERT, *supra* note 49, at 184-85; *see infra* figs. 1, 2, at 197, 199 (illustrating the firm's profit maximizing behavior).

53. Knoll, *supra* note 42, at 71.

54. *Id.*

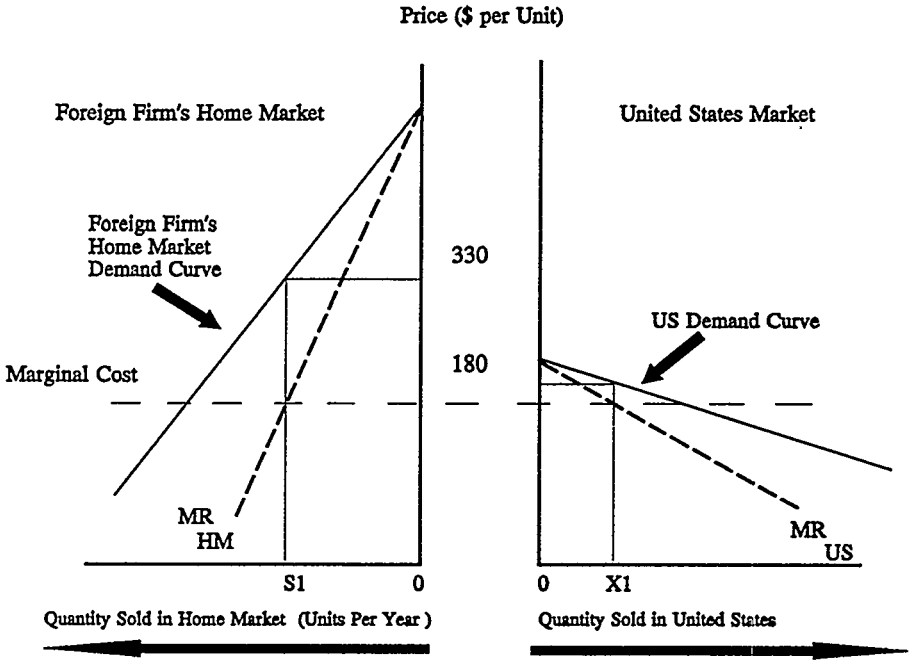
55. *Id.*; R. LIPSEY ET AL., ECONOMICS 790, 800 (7th ed. 1984).

56. 19 U.S.C. § 1673(e).

57. Badger-Powhatan, Div. of Figgie Int'l, Inc. v. United States, 608 F. Supp. 653 (Ct. Int'l Trade 1985) (holding that the antidumping law is remedial not punitive); Perry, *supra* note 37, at 381.

58. *See* Boltuck, *supra* note 12, at 48.

FIGURE 1
DUMPING



The price-discriminating monopolist maximizes profits by equating marginal revenue (MR) in each market with marginal cost. The firm will charge a higher price in the market where the demand curve it individually faces is less elastic (steeper). In this case, that is the foreign firm's home market. In the more competitive U.S. market, with a more elastic demand curve, it charges less. It can get away with such discrimination only if there is no way for buyers in the high-price country to obtain the product from the other countries, and if policy makers do not retaliate.

will charge a single price, falling between the original domestic and U.S. prices.[59]

Antidumping duties serve two purposes: first, they protect domestic industry and jobs in the short run from the effects of unfair pricing from abroad, and second, they protect the consumer from paying higher prices in the long run. In theory, antidumping statutes are designed to even the playing field between foreign firms dumping products and domestic firms facing the prospect of losing market share due to unfair foreign pricing practices. However, under the facts of a given case, it can be very difficult to discover whether dumping is actually occurring. Furthermore, it can be equally hard to conclude whether injury to U.S. industry, if any, results from dumping or some other cause. As the facts of this case illustrate, reaching a correct result is a difficult and time-consuming task.

III. THE FACTS

The two Brazilian companies, Borlem and FNV, were exporting TSDWs[60] to the United States. TSDWs are used with pneumatic tires on class 6, 7, and 8 trucks, buses, tractors, and semi-trailers.[61] Budd Company obtained price quotes in the Brazilian

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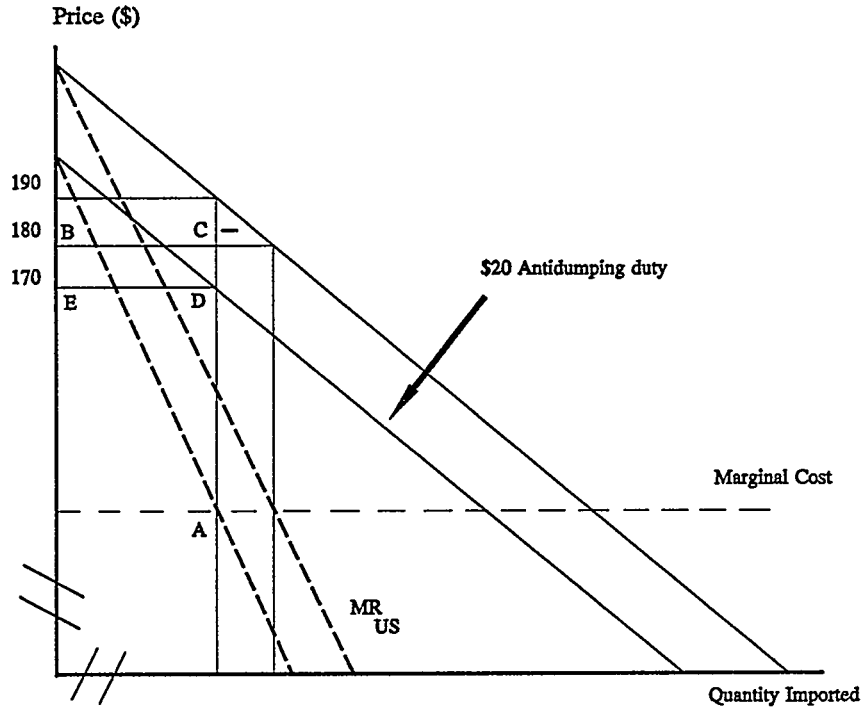
59. *Id.*; *see* LINDERT, *supra* note 49, at 185-86; *see* figs. 1, 2, at 197, 199 (illustrating the effects of antidumping duty on the U.S.).

60. According to the July 1976 Investigative report Tubeless Steel Disk Wheels From Brazil, No. 731-TA-335 (preliminary) USITC Pub. 1872, [hereinafter ITC Preliminary Investigation]:

> A TSDW consists of a rim and a steel disc, produced separately and then welded together. The rim holds the tubeless tire in place and the disc both centers the rim and attaches the rim to the axle. TSDWs complement the longer tire life and stability of a tubeless radial tire.

61. Preliminary Determination of Sales at Less Than Fair Value; Tubeless Steel Disc Wheels From Brazil, 51 Fed. Reg. 46,904, 46,905 (Inv. No. A-351-606) (Dec. 29, 1986) [hereinafter Commerce Preliminary Determination]. There are two segments to the TSDW market in the United States: (1) the larger original equipment manufacturers (OEMs) producing trucks and semi-trailers; and (2) distributors selling to the aftermarket and small OEMs. Sales of Brazilian TSDW's were made primarily to distributors in the aftermarket. However, Budd Company reported indications that Brazilian producers were seeking to expand into the OEM market. Petition for the Imposition of Antidumping Duties Under 19 U.S.C. § 1673(a) on Behalf of The Budd Company Wheel and Brake Division at 10, in the matter of Tubeless Steel Disc Wheels from Brazil Before the Int'l Trade Admin., Inv. No. A-351-606 (May 23, 1986) (Non-Confidential Version) [hereinafter Petition].

FIGURE 2
EFFECTS OF ANTIDUMPING DUTY



The effects of a small antidumping duty to offset injury are illustrated in this figure, which magnifies the right side of Figure 1. A duty of $20 shifts the U.S. demand curve down by this amount, with a corresponding effect on the marginal revenue curve pertaining to the U.S. market. The foreign monopolist finds that profits are now maximized where the new marginal revenues match the marginal costs of extra output at Point A. Therefore, the price is lowered from $180 to $170. Consumers respond by buying fewer sets at the now higher domestic U.S. price of $170 plus the $20 duty, or $190. The United States gains and loses from its duty. The loss is the efficiency loss on the extra sets no longer purchased, or the triangle marked with a minus sign. The United States gains the markdown on the price of the sets that continued to be imported, or the rectangle defined by points B, C, D, and E. As drawn here the gains exceed the losses for the United States. For the world, however, the antidumping duty is still a net loss, since the aforementioned rectangle is not a world gain but just a redistribution from the foreign firm to the United States.

market and compared them with prices charged in the United States for the same or similar TSDWs. Budd Company concluded that Borlem and FNV were selling TSDWs in the U.S. market with dumping margins of up to 160%.[62] Therefore, on May 23, 1986, Budd Company filed a petition on behalf of domestic manufacturers[63] of TSDWs with Commerce and the ITC alleging that the Brazilian companies were dumping TSDWs into the U.S. market.[64]

Budd Company alleged that the U.S. TSDW industry had been materially injured due to sales of Brazilian TSDWs at less than fair value.[65] Supporting the argument that the U.S. TSDW industry was materially injured was evidence that, while consumption of TSDWs declined by 7% from 1984 to 1985, Brazilian imports grew 1150% in the same period.[66] In one year, the percentage of Brazilian imports in the U.S. TSDW market increased from 0.2% to 6%.[67] The petition alleged that Borlem and FNV increased their

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62. Petition, *supra* note 61, at 16.

Tubeless Steel Disc Wheels From Brazil
Estimated LTFV Margins

Size	*FMV-Brazil*	*U.S.Price**	*Difference*	*LTFV*
24.5"x8.25"	$ 132.32**	$ 50.88	$ 81.44	160%
22.5"x8.25"	127.75	49.58	78.17	157%
22.5"x8.25"	111.63	49.58	62.05	125%
22.5"x8.25"	118.33	49.58	68.75	138%

* U.S. price is as calculated above from importer prices in effect November 1985.
** Budd estimate based upon known cost differential for larger size wheel.
Id.

63. The domestic industry consisted of three manufacturers: Budd Company, Firestone Steel Products Division (a wholly owned subsidiary of Firestone Tire & Rubber Company), and Motor Wheel Corp. (a wholly owned subsidiary of Goodyear Tire & Rubber Company). Petition, *supra* note 61, at 3; Commerce Preliminary Investigation, *supra* note 61, at 46,904.

64. Petition, *supra* note 61, at 1-17; Commerce Preliminary Determination, *supra* note 61, at 46,904.

65. Petition, *supra* note 61, at 18 (material injury determination to be made by the ITC).

66. *Id.* note 61, at 18-19. In 1984, Brazilian imports represented 10,000 units sold out of a total market of 2.25 million. In 1985, Brazilian imports represented 125,000 units sold out of a total market of 2.1 million. *Id.*

67. *Id.* at 19. Over the four year period from 1983 to 1986, the percentage of Brazilian imports into the U.S. TSDW market increased from essentially zero in 1983 to an estimated 8.3 percent in 1986. *Id.*

market share in the United States by underpricing U.S. TSDW manufacturers.[68] Budd Company claimed that as a direct result of underpricing by Borlem and FNV, the U.S. TSDW industry had experienced declines in sales, shipments, production, employment, and capacity utilization.[69] Furthermore, Budd Company alleged that there was a continuing threat of material injury to the U.S. TSDW industry.

There were three principle reasons for the assertion that there was a continuing threat of material injury to the U.S. TSDW industry. First, a published report[70] stated that Borlem was planning a $15 million expenditure to modernize and expand its wheel making capability.[71] The planned expansion would increase Borlem's monthly production of truck wheels from 65,000 units in

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68. *Id.* at 19-20.

U.S. PRICE COMPARISONS
(Borlem vs. Domestic, truckload quantities)

Size	Borlem	Budd	Variance	Percentage
22.5"x 8.25"	$52.42	$58.50	$6.08	10.3%
24.5"x 8.25"	53.54	60.45	6.91	11.4%
	Motor Wheel and Firestone			
22.5"x 8.25"	52.42	58.48*	6.06	10.3%
24.5"x 8.25"	53.54	59.66*	6.12	10.2%

* Includes a .75 cent/wheel pallet charge.

U.S. PRICE COMPARISONS
(FNV vs. Domestic, truckload quantities)

Size	*FNV*	*Budd*	*Variance*	*Percentage*
22.5"x 8.25"	$47.50	$58.50	$11.08	18.7%
24.5"x 8.25"	50.00	60.45	10.45	17.2%
	Motor Wheel and Firestone			
22.5"x 8.25"	47.50	58.48*	10.98	18.7%
24.5"x 8.25"	50.00	59.60*	9.66	16.1%

* Includes a .75 cent/wheel pallet charge.

Id. at 19-20.

69. *Id.* at 20-21. The TSDW industry produces an essentially fungible line of products, and persistent undercutting in price by one manufacturer has a severe and direct impact on competition. *Id.* at 20.

70. *Id.* at 23 (citing a Brazilian publication, GAXETA MERCANTIL, Aug. 8, 1985).

71. *Id.*

1985 to 85,000 units by 1987.[72] Because the United States was the largest market in the world for TSDWs, Budd Company anticipated a large percentage of the increased production would be exported from Brazil to the United States.[73] Second, the U.S. market demand for TSDWs was flat, while Brazilian market share was increasing due to efforts by Borlem and FNV to undercut the prices of U.S. manufacturers.[74] Brazilian market share was expected to increase as new Brazilian production capacity came on line.[75] Third, as Brazilian market share increased, continued predatory pricing by Borlem and FNV would further undercut the market price, thereby suppressing the market for U.S. manufacturers.[76] The alleged material injury and threat of continuing material injury resulting from the sales of TSDWs from Brazil prompted Budd Company to request that Commerce initiate an antidumping investigation pursuant to U.S. antidumping statutes.[77] The preliminary and final determinations of Commerce and the ITC in this case are discussed below.

Under U.S. law, the ITC first makes a preliminary dumping finding whether an actual or threatened material injury to, or retardation of, a U.S. industry exists. Then Commerce conducts a preliminary investigation to determine whether the foreign manufacturers are dumping products into the United States.[78] After the ITC and Commerce report their preliminary analyses, each agency then conducts a second round of investigations resulting in a final determination.[79]

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72. Petition, *supra* note 61, at 23.
73. *Id.* at 23-24.
74. *See infra* notes 182-88 and accompanying text.
75. Petition, *supra* note 61, at 24.
76. *Id.*
77. *Id.* (citing 19 U.S.C. § 1673(a)).
78. *See supra* notes 26-31 and accompanying text.
79. *See supra* notes 32-41 and accompanying text. However, for purposes of organizing this article, Commerce's and the ITC's preliminary and final investigations are presented together to better represent the processes of each agency.

A. Commerce's Investigation of Borlem and FNV

After the petition was filed by Budd Company, Commerce initiated an investigation of sales of the TSDWs by Borlem and FNV for the period December 1, 1985 through May 31, 1986.[80] Commerce requested financial information on both companies' costs of production.[81] Borlem and FNV filed responses to questionnaires sent by Commerce explaining why there was no dumping by either Brazilian manufacturer. Both Borlem and FNV reported that there was a forty-five day delay between the date a TSDW sale was made and the shipment date of the TSDWs to the United States.[82] Commerce requested that both Borlem and FNV present financial information utilizing Commerce's "replacement" cost accounting methodology rather than the Brazilian "historical" cost basis.[83] Borlem and FNV submitted information to Commerce detailing their respective sales of TSDWs and the costs of production. From the information provided by Borlem and FNV, Commerce attempted to determine whether Brazilian manufactured TSDWs were being dumped into the U.S. market.

1. Commerce's Preliminary Investigation

Borlem reported to Commerce that it sold TSDWs in the Brazilian market. However, Borlem stated that sales of TSDWs in Brazil were very limited and not made on a sustained basis until late 1985.[84] Additionally, Borlem reported that sales of TSDWs in the U.S. market were in the after-purchase market, while sales in Brazil were in the original equipment manufacturer (OEM)

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80. Commerce Preliminary Determination, *supra* note 61, at 46,905.

81. *Id.*

82. *See infra* notes 136-40 and accompanying text (discussing the importance of time delays).

83. Commerce Preliminary Determination, supra note 61, at 46,905. *See infra* notes 87-92 and accompanying text (reasons for variation in accounting systems).

84. Response of Borlem S.A.-Empreedimentos Industriais at 2, in the matter of Tubeless Steel Disc Wheels from Brazil Before the Int'l Trade Admin. (Inv. No. A-351-606) (Aug. 25, 1986) (Non-Confidential Version) [hereinafter Response of Borlem].

market because there were no significant after-market sales in Brazil.[85] Nevertheless, Borlem contended that the Brazilian sales prices reported to Commerce were the best measure of Borlem's actual performance in Brazil's hyperinflationary[86] economy.[87]

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85. *Id.* at 1-2.

Quantity and Value of Sales
(Dec. 1, 1985 through May 1, 1986)

Market	*Terms of Sale*	*Units*	*Total Value*
U.S.	C.I.F.	20,000	U.S. $ 800,000
Brazil	Delivered	14,000	Cz 8,000,000*
Canada	C.I.F.	900	U.S. $ 40,000

* Sales in the Brazilian market were denominated in both cruzeiros and cruzados during the period of review. All cruzeiro amounts were converted to cruzado amounts by dividing the cruzeiro figure by 1000 to provide a consistent currency.

Id. at 6.

86. *See* DAVID W. PEARCE, THE MIT DICTIONARY OF MODERN ECONOMICS 202 (3d. ed. 1986) [hereinafter MIT DICTIONARY]. Inflation is defined as: "A sustained rise in the general price level. The proportionate rate of increase in the general price level per unit of time." *Id.* Hyperinflation is defined as: "A position of rapidly accelerating inflation. Under conditions of hyperinflation prices rise 10 or even 100 fold in a single month. . . . The exact boundary between inflation and hyperinflation is difficult to define." *Id.* at 186; *see* MILTON FRIEDMAN, STUDIES IN THE QUANTITY THEORY OF MONEY ch.2 (1956); CAGEN, THE MONETARY DYNAMICS OF HYPERINFLATION 25-117 (a seminal work on the study of money and hyperinflation) [hereinafter DYNAMICS OF HYPERINFLATION].

87. Supplemental Response of Borlem S.A.-Empreedimentos Industriais at 1, in the matter of Tubeless Steel Disc Wheels from Brazil Before the Int'l Trade Admin. (Inv. No. A-351-606) (Dec. 5, 1986) (Non-Confidential Version) [hereinafter Supplemental Response of Borlem]. Borlem argued that it was necessary to develop an accounting system based on "replacement costs" and make adjustments to those elements of actual costs that reflect Borlem's effort to operate in a hyperinflationary economy. *Id.* at 1-2.

General, selling, and administrative expenses were also impacted by the use of "replacement cost" accounting because these expenses were taken as a ratio to cost of goods sold. Applying the same ratios to replacement costs would substantially overstate the actual cost per unit. *Id.* at 5.

Use of replacement cost assumes no cost of carrying raw materials, semi-finished products, or finished product inventory. Therefore, all carrying costs of inventory were eliminated from the cost calculation. Consequently, short-term working capital financial costs attributed to production or inventory carrying costs were eliminated from financial costs. *Id.* at 5-6; MIT DICTIONARY, *supra* note 86, at 202-03. Inflation accounting:

> Refers to techniques for dealing with the impact of inflation on accounts and accounting procedures. Traditionally, historic cost methods have been employed whereby accounts were built up from actual records of transactions. In periods of rapid inflation the replacement cost of fixed assets would greatly exceed historic costs. Consequently in real terms depreciation will be understated when historic cost accounting is employed, and profits overstated. The system of capital allowances may then not permit the recovery of capital cost in real terms. . . . The Sandilands Committee . . . recommended the use of value accounting whereby assets were to be measured by reference to their value and not cost. The use of replacement cost accounting whereby assets are revalued from historic

Borlem argued that based on the pricing of TSDWs sold in the Brazilian market, it was not dumping TSDWs into the U.S. market.

In its comment on Borlem's response to Commerce's questionnaire, Budd Company argued that Commerce should continue its investigation of Borlem.[88] Budd Company's analysis indicated that Borlem's sales of TSDWs within the Brazilian market were made in sufficient quantity to constitute a viable market for measuring whether sales prices were above the cost of production.[89] However, Budd Company also asserted that Borlem sold TSDWs in Brazil below the cost of production.[90] Budd Company disputed the "replacement cost" methodology employed by Borlem in calculating actual costs of production.[91] Ultimately, Commerce found Borlem's domestic market sale prices were below the cost of production.[92] Because the sales price in Brazil did not reflect Borlem's production costs, and there were no reported third country sales, Commerce was forced to construct a foreign market value for the TSDWs manufactured by Borlem.

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to current costs was recommended. . . . Three adjustments to trading profits calculated at historic basis are required to arrive at current cost operating profit. The first is the depreciation adjustment which allows for the impact of price changes when determining the charge against revenue for the part of fixed assets consumed in the period. The second is the cost of sales adjustment which allows for the impact of price changes when determining the charge against revenue for stock consumed in the period. The third is the monetary working capital adjustment which represents the amount of additional (or reduced) financed needed for monetary working capital as a result of changes in the input prices of goods and services employed in the business. *Id.*

88. Petitioner's Comment on Borlem's Response at 1-2, in the matter of Tubeless Steel Disc Wheels from Brazil Before the Int'l Trade Admin, Inv. No. A-351-606 (Sept. 16, 1986) (Non-Confidential Version) [hereinafter Comment on Borlem's Response].

89. Petitioner's Comment on Borlem's Supplemental Response to Costs Questionnaire at 3, in the matter of Tubeless Steel Disc Wheels From Brazil Before the Int'l Trade Admin., Inv. No. A-351-606 (Dec. 3, 1986) (Non-Confidential Version) [hereinafter Comment on Cost]. When home market sales of the same or similar merchandise which is the subject of investigation exceeds five percent of third country sales, the home market is a viable market for establishing a fair market value. *Id.* (citing 19 C.F.R. § 353.4(a)).

90. Response of Borlem, *supra* note 84, at 1-2.

91. Letter from Petitioner to Commerce at 1, (Dec. 16, 1986)

> Respondents [Borlem and FNV] seek to minimize the consequences of replacement cost accounting by the use of unwarranted adjustments to their financial and SG&A expenses under the guise of adjustments consistent with the concept of replacement costs. . . . [T]he only appropriate adjustment to such costs is for the extraordinary costs of carrying pre-purchased raw material inventory. *Id.* at 4.

92. *Id.*

As with Borlem, FNV sold TSDWs in the U.S. market to distributors in the truck wheel after-sales market and not to OEMs.[93] Unlike Borlem, which sold TSDWs in Brazil, FNV only sold tube-type wheels in the Brazilian market.[94] Additionally, FNV recorded no third country sales in the period between December 1, 1985 through May 31, 1986.[95] However, FNV stated that Commerce should expand its period of investigation to include two sales of TSDWs to Canada on November 26, 1985 and in July 1986.[96] FNV argued that the TSDWs sold to Canada were identical to the ones sold in the U.S. market and would provide a better comparison for purposes of computing foreign market value.[97] FNV's motion to expand the period of investigation garnered a strong objection from Budd Company.[98]

Budd Company stated that FNV's motion to expand the investigatory period was unnecessary and ill advised because the motion was unsupported by a showing of reasonable cause.[99]

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93. Response of FNV-Veiculos E Equipamentos S.A. at 1, in the matter of Tubeless Steel Disc Wheels from Brazil Before the Int'l Trade Admin., Inv. No. A-351-606 (Aug. 11, 1986) (Non-Confidential Version) [hereinafter Response of FNV].

94. *Id.* at 2.

95. *Id.*

96. *Id.* Expanding the investigatory period to include sales to Canada would result in the following sales being recorded:

Quantity and Value of Sales

Market	*Terms*	*Units*	*Value*
U.S.	CIF	45,000	$ 2,000,000
Canada	CIF	2,000	$ 125,000
Brazil	—	0	$ 0

Id. at 3.

97. *Id.* at 2-3. FNV stated that:

> Several reasons support this conclusion. First, the antidumping statute and the Departments [sic] regulations contain a strong preference for using price-to-price comparisons whenever possible. Section 773 (a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(a); 19 C.F.R. § 353.4 (b). Second, Canadian prices have been consistent since August 1985 and therefore provide a stable and reliable basis for foreign market value to compare with U.S. prices. Third, the Department has used sales outside its chosen period of investigation in other cases. For all these reasons, the Department should use Canadian sales to determine foreign market value is [sic] this investigation.

Id. at 3.

98. Petitioner's Comment on FNV's Response at 1, in the matter of Tubeless Steel Disc Wheels from Brazil Before the Int'l Trade Admin., Inv. No. A-351-606 (Aug. 20, 1986) [hereinafter Comment on FNV Response].

99. *Id.* at 2.

Budd Company disputed FNV's contention that there was a public policy preference favoring expansion of the investigatory period in order to provide price to price comparisons in determining foreign market value.[100] Finally, Budd Company argued that it was especially inappropriate to expand the investigatory period when the foreign manufacturer operates in a hyperinflationary economy.[101] Additionally, Budd Company contended that FNV wanted to use Canadian sales in order to avoid disclosing the cost of production information Commerce required to construct foreign market value.[102] Budd Company believed that the cost of production information would reveal rapidly rising costs due to hyperinflation, creating a greater likelihood that Commerce would conclude FNV was dumping TSDWs in the U.S. market.[103]

In reporting cost information to Commerce, FNV noted that the investigatory period covered three financial statement periods due to the Brazilian government's attempt to end hyperinflation through implementation of the Cruzado Plan[104] on February 28, 1986.[105]

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100. *Id.* at 2. Budd Company further argued that there were only three grounds to expand the investigatory period, and that FNV did not satisfy any of the three grounds. The three grounds for expanding the investigatory period cited by Budd Company were:

> 1) the period is only enlarged at petitioner's suggestion or on the Department's own initiative because of the particular facts of the case (*Tubular Steel Framed Stacking Chairs from Italy*, 50 Fed. Reg. 21,919 (1985) (seasonal nature of the product)); 2) the period will only be expanded to facilitate the calculation of U.S. price, not FMV; and 3) the period of investigation is only extended back to encompass sales prior to the normal period of investigation, not forward. *Id.* at 4.

101. *Id.* at 7. Because of hyperinflation, the costs Borlem and FNV incurred in producing the TSDWs and the value received for the TSDWs were changing too rapidly to permit expanding the period of investigation. The presence of hyperinflation in the Brazilian economy created rapidly changing production costs for FNV giving it an incentive to dump TSDWs in the U.S. market.

102. *Id.* at 7-8.

103. Comment on FNV Response, *supra* note 98, at 7-8.

104. Brazilian inflation was running between 300% and 400% per annum. The Brazilian government adopted the Cruzado Plan in an effort to halt this hyperinflation. The basic components of the plan were: (1) the freezing of all prices, wages, and the exchange rate; (2) de-indexing the economy; (3) the introduction of a new currency, the cruzado, to replace the Cruzeiro, from which three zeros were removed; (4) converting all term contracts (such as wages, debts, rents, school tuition, and mortgage payments) from cruzeiro to cruzados via formulas which would guarantee the recomposition of the average real price of the previous six months. All other stipulations of the Cruzado Plan complimented or established exceptions to these four fundamental guidelines. Luiz Bresser Pereira, *Inertial Inflation and the Cruzado Plan*, 15 WORLD DEV. 1035, 1036 (1987); Eliana A. Cardoso & Rudiger Dornbusch, *Brazil's Tropical Plan*, 77 AM. ECON. REV. 288 (1987) (one of four papers presented during conference and published under the general title *Stopping High*

Brazilian hyperinflation primarily affected FNV's raw material and labor costs.[106] In order to accurately reflect costs, FNV had to index its financial statements during the period of hyperinflation before the Cruzado Plan went into effect.[107] Financial statements in the post-Cruzado Plan period, March 1986 through June 1986, were not subject to adjustments.[108] Like Borlem, FNV endeavored to provide information to Commerce regarding the replacement costs of production in order to determine market value.[109]

As it had with Borlem, Budd Company asserted that FNV was not properly applying replacement cost accounting in its financial

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Inflation). *See* Werner Baer, *The Resurgence of Inflation in Brazil, 1974-1986*, 15 WORLD DEV. 1007 (1987) (providing an examination of factors contributing to the resurgence of inflation, and failure of orthodox austerity programs to control it); Eul-Soo Pang, *The Darker Side of Brazil's Democracy*, 7 CURRENT HIST. 21 (1988) (blaming politics for the ultimate failure of the Cruzado Plan).

105. Response of FNV-Veiculos E Equipamentos S.A. on Costs at 1, in the matter of Tubeless Steel Disc Wheels from Brazil Before the Int'l Trade Admin. (Inv. No. A-351-606) (Sept. 15, 1986) (Confidential Version). The three accounting periods were the annual financial statement for 1985 prepared at calendar year end, a special financial statement covering January and February 1986 required under Brazilian law due to efforts to end hyperinflation, and a semi-annual financial statement from March through June 1986 (excluding January and February). *Id.*

106. *Id.* at 4.

107. *Id.* at 6. FNV summarized the inflation index as follows:

> The official index used as the basis for determining the rate of inflation in Brazil is the 'Obrigacoew Reajustraveis do Tesouro Nacional' or ORTN. This index serves as the basis for adjustments to the balance sheet to reflect inflation. . . . ORTN ceased when the Government adopted the Cruzado Plan in February 1986.

Id.

> FNV summarized the adjustments to the financial statements reflecting inflation as follows: Generally accepted accounting principles in Brazil differ in only one significant respect from those in the United States. Through February 1986, when the Cruzado Plan was put into effect Brazilian companies were required to reflect the effects of inflation on their balance sheet on their statement of income. The effects of inflation are divided into two broad categories: (1) adjustment of permanent assets and shareholder equity to reflect the effects of inflation, by using ORTN; and (2) adjustments to the principal value of loans that are either indexed . . . or subject to devaluation . . . .

Id. at 6-7.

108. *Id.* at 7.

109. Supplemental Response of FNV-Veiculos E Equipamentos S.A. at 1, in the matter of Tubeless Steel Disc Wheels from Brazil Before the Int'l Trade Admin., Inv. No. A-351-606 (Dec. 5, 1986) (Non-Confidential Version). Replacement costs would reflect FNV's costs if during each month of the investigatory period FNV had purchased raw materials, produced a TSDW, and shipped the finished product within a given month. *Id.*

reports to Commerce.[110] Budd Company believed the methodology employed by both Borlem and FNV resulted in erroneous conclusions of fact.[111] Therefore, Budd Company requested that Commerce make a preliminary finding that Borlem and FNV were dumping TSDWs on the U.S. market.

Commerce's preliminary investigation led to the conclusion that TSDWs were being, or were likely to be, sold in the United States for less than fair value.[112] In determining that Borlem and FNV were dumping, Commerce based its findings on the constructed foreign market value of the TSDWs produced by Borlem and FNV.[113] This was the methodology propounded by Budd Company in its comments on the information provided by Borlem and FNV to Commerce.[114]

Commerce used a constructed foreign market value for Borlem because sales in the home market were found to be made at prices which would not allow Borlem to recoup its costs within a reasonable period of time.[115] Because FNV made no Brazilian or third country sales during the investigatory period, Commerce used the constructed foreign market value in determining whether FNV was dumping TSDWs into the United States.[116] In constructing

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110. Comment on Joint Response on Costs, *supra* note 91, at 1. The Budd Company stated that:

> Both FNV and Borlem start from the proposition that replacement cost accounting contemplates that raw material is purchased, an article produced, and shipment to the customer all occur within a single month. Petitioner disagrees with this assessment of replacement cost accounting as well as with most of the adjustments to cost claimed by respondents.
>
> Petitioner understands the concept of replacement cost accounting to describe a system whereby the purchased elements of the cost of production are adjusted to equalize the effects of inflation on such items. *Id.*

111. *Id.*

112. Commerce Preliminary Determination, *supra* note 61, at 49,604. Commerce's Preliminary Determination instructed the U.S. Custom Service to: ". . . suspend the liquidation of all entries of certain tubeless steel disc wheels . . . and to require a cash deposit or bond for each entry in an amount equal to the estimated dumping margin . . . ." *Id.*

113. *Id.*

114. *See supra* notes 88-98 and accompanying text.

115. Commerce Preliminary Determination, *supra* note 61, at 49,604. *See supra* notes 88-90 and accompanying text. This conclusion is consistent with the position taken by Budd Company.

116. Commerce Preliminary Determination, *supra* note 61, at 49,604. *See supra* notes 96-103 and accompanying text (Commerce failed to include the Canadian sales).

the foreign market value, Commerce made adjustments to the financial information submitted by Borlem and FNV.[117]

Initially, the two most important adjustments came in the areas of financial expenses and monetary corrections.[118] The monetary corrections made by Borlem and FNV in their January-February financial statements to compensate for the effects of hyperinflation in Brazil were not included in Commerce's constructed foreign market values.[119]

During the preliminary investigation, Commerce considered the sales date to be the date the TSDWs were shipped to the United States.[120] Therefore, Commerce compared the foreign market value on the shipment date with the U.S. price on the shipment date.[121] Commerce accomplished this comparison by converting Brazilian currency into U.S. dollars at the exchange rate prevailing on the date the TSDWs were shipped to the United States.[122]

Commerce's preliminary investigation showed Borlem and FNV had dumping margins of 24.85% and 5.75% respectively.[123] The administrative record, along with Commerce's findings, was made available to the ITC for review in the ITC's material injury investigation.[124] Commerce stated that its final determination on the dumping allegations against Borlem and FNV would be published in March 1987.[125]

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117. Commerce Preliminary Determination, *supra* note 61, at 49,605.

118. *Id.*

119. *Id.* Commerce stated that:

> Since replacement costs were used for the cost of production and detailed data needed to adjust the monetary correction to account for the effects of the use of replacement costs was not available, the Department did not include the monetary corrections. *Id.*

120. Borlem S.A. Empreedimentos Industriais v. United States, 10 I.T.R.D. (BNA) 1623 (1988) (Slip Op. 88-77). However, upon further investigation Commerce determined that currency conversion should occur at the time of sale. This decision led to an appeal to the CIT by Borlem and FNV. *See infra* notes 242-273 and accompanying text.

121. 10 I.T.R.D. (BNA) 1623 (1988).

122. Commerce Preliminary Determination, *supra* note 61, at 49,905 (in accordance with 19 C.F.R. § 353.56(a), the exchange rate certified by the Federal Reserve Bank).

123. *Id.* at 46,906.

124. *Id.* The ITC makes an injury determination within 120 days after Commerce's preliminary determination, or 45 days after Commerce's final determination. The ITC reports its preliminary findings on material injury before Commerce produces a Final Determination.

125. *Id.* at 46,904.

2. *Commerce's Final Determination*

On February 17, 1987, Commerce held a public hearing prior to issuing its Final Determination on whether TSDWs were being dumped into the United States.[126] In its prehearing brief, Budd Company argued that Commerce's use of replacement cost accounted for inflation in the production operations but not in the financial operations of Borlem and FNV.[127] Therefore, Budd Company felt that a monetary correction to the balance sheets of Borlem and FNV was necessary to accurately analyze the impact of inflation on the two companies.[128] Furthermore, Budd Company felt that the manner in which Commerce included short term financial expenses failed to properly account for inflation.[129] In conclusion, Budd Company requested that Commerce make adjustments to Borlem's and FNV's financial statements in order to accurately capture every element of Borlem's and FNV's costs of production.[130]

Borlem and FNV submitted a combined final prehearing brief for Commerce's consideration.[131] Borlem and FNV argued that the most important issue in the investigation was Commerce's

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126. Final Determination of Sales at Less Than Fair Value: Tubeless Steel Disc Wheels From Brazil, 52 Fed. Reg. 8947, 8948 (1987) (Inv. No. A-351-606) [hereinafter Commerce Final Determination].

127. *Id.*

128. Prehearing Brief of Petitioner, The Budd Company Wheel and Brake Division at 4-7, in the matter of Tubeless Steel Disc Wheels from Brazil Before the Int'l Trade Admin., Inv. No. A-351-606 (Feb. 12, 1987) [hereinafter Prehearing Brief of Budd Company].

129. *Id.* at 7.

130. *Id.* Specifically, Budd Company submitted that Commerce should:

> 1) include in cost of production an amount for monetary correction to account for the effects of inflation on those elements not addressed in industrial costs; 2) adjust all cost factors, including short-term expense, to account for the effects of inflation; 3) include in cost of production an amount for semi-finished and finished product inventory; 4) adopt respondents' actual, rather than hypothetical, material costs; 5) employ actual, rather than "normalized", costs; 6) calculate costs of production and constructed value on a monthly basis; 7) carefully examine the books and records of respondents to determine whether, and to what extent, SG&A expenses are understated by the inclusion of interest income and exchange rate gains unrelated to the production or sale of tubeless steel disc wheels; and 8) issue an affirmative final determination of sales at less than fair value. *Id.* at 20-21.

131. Prehearing Brief on Behalf of Borlem S.A. Empreedimentos Industriais and FNV-Veiculos E Equipamentos, in the matter of Tubeless Steel Disc Wheels from Brazil Before the Int'l Trade Admin., Inv. No. A-351-606 (Feb. 12, 1987) [hereinafter Prehearing Brief of Respondents].

treatment of financial expenses and monetary costs under the replacement cost basis of accounting.[132] Borlem and FNV believed that when replacement costs were used, Commerce had to make several adjustments to financial costs in order to reach an accurate result.[133] Borlem and FNV were concerned that the methodology employed by Commerce in constructing the foreign market value overstated the costs of production.[134] Specifically, Borlem and FNV requested that Commerce alter its methodology of computing financial costs by: (1) eliminating monetary correction as a cost of production; (2) eliminating monetary correction of loan values, and substituting instead the use of real interest costs; and (3) using real gains in inventory value on the income statement.[135] Additionally, in its final investigation, Commerce changed the date in calculating foreign market value for comparison with U.S. prices to the sales date rather than the shipment date.[136] Borlem and FNV argued that Commerce should convert the constructed values as of the date of the shipment of the

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132. *Id.* at 1.

133. *Id.* at 1. As Borlem and FNV explained:

> Brazilian accounting principles prior to February 28, 1986 required that the profit and loss statements carry over from the balance sheet as an expense item so-called monetary correction of the balance sheet and monetary correction/devaluation of the principal amount of loans subject to correction or devaluation. . . . Use of monetary correction as an expense item reduces profits (or increases losses) to reflect the extent to which the profit on operations measured at historical cost do not cover the maintenance of working capital in real terms. . . . Since Brazilian accounting forbids use of "replacement" or LIFO cost and instead applies monetary correction of the balance sheet (with inventory valued at historical cost) and of loan principal, use of "replacement" costs requires significant adjustments to the accounting principles used by respondents in their normal financial statements. *Id.* at 3-4.

134. *Id.* Any calculations increasing Borlem and FNV's costs of production would make it more likely that they were selling TSDWs for less than the cost of production and thus dumping TSDWs into the U.S. market.

135. *Id.* at 7-8.

136. Commerce Final Determination, *supra* note 126, at 8950. As Commerce stated:

> At the time of our preliminary determination, a pattern of long time periods between reported dates of sale and shipment indicated the likelihood that date of shipment reflected the actual date of sale. However, verification has established that all elements necessary to constitute a sale were present at the sale dates reported. Therefore, for our final determination we have converted foreign market values to U.S. dollars at the rates in effect on the verified dates of sale, in accordance with § 353.56(a) of our regulations. *Id.*

TSDWs, rather than the date of sale.[137] Borlem and FNV felt that these adjustments were necessary in order to accurately calculate their foreign market values under U.S. antidumping laws.[138] Conversely, Budd Company felt that Commerce's methodology was understating Borlem's and FNV's costs of production.

Borlem and FNV believed that in constructing the foreign market value, cruzeiros should have been converted into dollars as of the date of shipment rather than the date of sale.[139] Because of Brazil's hyperinflation, Borlem and FNV felt that the dumping analysis would yield a significantly lower foreign market value if cruzeiros were converted into dollars on the later shipment date rather than the earlier sales.[140] Commerce acknowledged that a "pattern of long time periods" existed between the date of sale and the shipment date.[141] However, Commerce felt all the elements constituting a sale were present on the sale dates.[142] Therefore, Commerce decided to calculate the foreign market value on the sales date rather than the shipment date.[143] Despite Commerce's decision, Borlem and FNV continued to claim that Commerce was mistaken in converting Brazilian currency into dollars on the date of sale rather than the shipment date.[144]

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137. Prehearing Brief of Respondents, *supra* note 131, at 29. *See* Commerce Final Determination, *supra* note 126, at 8950 (conversion at Federal Reserve rates in effect) Commerce originally used the date of shipment as the date to convert currency. *See also infra* notes 231-37 and accompanying text.

138. Prehearing Brief of Respondents, *supra* note 131, at 30. In their conclusion, Borlem and FNV asked Commerce to:

> (1) eliminate monetary correction of the balance sheet and of loan principal values as costs of production; (2) adjust the costs of production to reflect the unrealized inventory gains; (3) adjust raw material costs to reflect the benefit of financing at below market rates; (4) adjust selling and administrative expenses and financial expenses to reflect the use of replacement costs as the basis for the cost of production; (5) use "real" short term financing costs; (6) not use an imputed credit cost in calculating cost of production; and (7) correct errors in the comparison between price and constructed value in the preliminary determination. *Id.* at 29-30.

139. Commerce Final Determination, *supra* note 126, at 8950.

140. *See generally*, DYNAMICS OF HYPERINFLATION, *supra* note 86, at 25-117 (this is due to the decreased value of currency in hyperinflationary economies).

141. Commerce Final Determination, *supra* note 126, at 8950.

142. *Id.*

143. *Id.*

144. *See infra* notes 145-149 and accompanying text.

After the February 17, 1987 public hearing, but prior to Commerce's publishing its Final Determination, Borlem and FNV wrote a letter to Commerce explaining how Commerce miscalculated the dumping margins.[145] Borlem and FNV requested that Commerce correct its method for determining the foreign market value before the ITC's final hearing on material injury scheduled for March 24, 1987. Borlem and FNV contended that Commerce's methodology resulted in inaccuracies in the cost price and constructed value comparisons, and that use of replacement costs on the shipment date resulted in reported costs being 25% higher than reported under the Brazilian historical cost method of accounting.[146] In calculating the constructed foreign market value for TSDWs, Commerce deviated from its customary practice of comparing prices and costs within the same time frame.[147] Finally, Borlem and FNV felt that if Commerce continued to compare prices and costs from different months, a

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145. Letter on Behalf of Borlem and FNV to the Secretary of Commerce, in the matter of Tubeless Steel Disc Wheels from Brazil Before the Int'l Trade Admin., Inv. No. A-351-606 (Mar. 18, 1987).

146. *Id.* at 2. The Letter stated that:

> In the investigation, Commerce rejected use of historical costs which represented the actual cost of producing the merchandise under investigation and used instead "replacement" cost at the time of shipment. . . .
>
> The cost used both for the cost-price and constructed value-price comparisons was not, therefore, actual cost either on the date of sale or date of export. Instead, the cost used was replacement cost reflecting both the effects of inflation between sale and shipment and the inflated cost of replacing the product shipped rather than the actual historical cost of that product. . . . Thus, Commerce's methodology used costs which were 25 percent above the costs reported according to generally accepted accounting principles in Brazil. . . . Thus, for example, the sale price in December (date of sale) was compared with the replacement cost in February (date of export).
>
> This extraordinary methodology increased cruzeiro costs by approximately 40 percent (*i.e.* the difference between historical costs and replacement costs) in recognition of the hyperinflation in Brazil. *Commerce ignored, however, the effects of hyperinflation and parallel devaluation of the cruzeiro on the conversion of cruzeiro costs to dollars. This failure created a dumping margin that bears no relationship to the revenues received from an export and the cost of producing that export. Id.*

147. *Id.* at 3-4. It was argued that Commerce varied from its own guidelines established in OCTG from Argentina, 50 Fed. Reg. 12,595 (March 29, 1985) ("Current costs represent those required to produce product in month of sale . . . ."). Additionally, section 773(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(e) states that the constructed value of costs must be set at the time preceding exportation of the product. *Id.*

circumstance of sale adjustment was warranted.[148] Eventually, the issue of when to convert Brazilian currency into dollars was the subject of an appeal to the CIT.[149] However, the dispute over when to convert Brazilian currency into dollars did not prevent Commerce from issuing its Final Determination.

On March 20, 1987 Commerce issued its Final Determination that Borlem and FNV were dumping TSDWs into the United States.[150] Commerce concluded that Borlem and FNV had dumping margins of 15.25% and 19.93% respectively.[151] Commerce notified the ITC of its Final Determination that Borlem and FNV were dumping TSDWs into the United States.[152] After Commerce issued its Final Determination, the ITC was required to reach a final ruling on whether there was a threat of material injury to the U.S. TSDW industry. An affirmative finding by the ITC would result in Commerce issuing a final dumping duty order to the U.S. Customs Service.

In practice, Commerce first publishes its preliminary determination. Then, if Commerce finds dumping, the ITC conducts an investigation and reaches its preliminary findings. Next, if the ITC finds injury, Commerce conducts further review leading to the final determination. If Commerce's final determination is that

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148. *Id.* at 5. Borlem and FNV asserted that:

> An adjustment for the difference in this circumstance of sale -- *i.e.* the devaluation effect on the U.S. sale and the absence of such an effect on the domestic [Brazilian] side -- must be made to reflect the appreciated value of the U.S. sale in cruzeiros between the date of sale and date of shipment. . . .
>
> Failure by Commerce to correct their error will have the following absurd result. A sale in December shipped in February would have an enormous margin, whereas a sale at the identical dollar price made and shipped in January would have no margin. . . . the cost and price of both sales would be identical . . . but one would have a margin equal to the rate of devaluation [of the cruzeiros] between December and February while the other would have no margin. *Id.*

149. *See infra* notes 242-73 and accompanying text.

150. Commerce Final Determination, *supra* note 126.

151. *Id.* at 8951 (preliminary investigation found the dumping margins to be Borlem 24.85% and FNV 5.57%).

152. Commerce Final Determination, *supra* note 126, at 8951.

dumping is occurring, then the ITC has hearings leading to final findings regarding injury.[153]

B. The ITC's Investigation of Borlem and FNV

After Budd Company filed its petition initiating this investigation, the ITC held a conference where Budd Company, Borlem, and FNV presented evidence for the ITC's consideration in its preliminary investigation.[154] At issue was whether imports of TSDWs caused material injury, threatened material injury to, or retardation of, the U.S. TSDW industry.[155] After the hearing, Budd Company filed a post conference brief recapping its arguments for the ITC.[156] Borlem and FNV filed a joint post conference brief in opposition to the allegations made by Budd Company.[157]

1. The ITC's Preliminary Investigation

As with Commerce's investigation, Budd Company was acting on behalf of the other U.S. TSDW manufacturers before the ITC.[158] Budd Company claimed that the domestic TSDW industry had suffered declining production, shipments, employment, capacity utilization, and market share, while imports of Brazilian TSDWs increased.[159] According to Budd Company, the losses suffered by

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153. For purposes of this article, Commerce's preliminary and final determinations have been placed in one section and all of the ITC's preliminary and final findings placed in a separate section.

154. Post-Conference Brief of The Budd Company Wheel & Brake Division, in the matter of Tubeless Steel Disc Wheels from Brazil Before the U.S.I.T.C., Inv. No. 731-TA-335 (June 18, 1986) (preliminary) [hereinafter Post-Conference Brief of Budd Company].

155. *See supra* notes 20-25 and accompanying text (explanation of ITC's role in determining injury to domestic industry).

156. Post-Conference Brief of Budd Company, *supra* note 154.

157. Respondents' Brief in Opposition to the Petition, in the matter of Tubeless Steel Disc Wheels from Brazil Before the U.S.I.T.C., Inv. No. 731-TA-335 (June 18, 1986) (Non-Confidential Version) (Preliminary) [hereinafter Respondents' Brief in Opposition].

158. *See* Post-Conference Brief of Budd Company, *supra* note 154; *see also*, Petition, *supra* note 61.

159. Post-Conference Brief of Budd Company, *supra* note 154, at 2. Imports of Brazilian TSDW increased in both absolute and relative terms in relation to domestic production and consumption.

U.S. manufacturers were the direct result of systematic underpricing by Borlem and FNV.[160] According to Budd Company, the production and sales practices of Borlem and FNV constituted a continuing threat to U.S. TSDW manufacturers.

Specifically, Budd Company gave four reasons why Brazilian TSDWs constituted a clear and imminent threat of material injury to U.S. manufacturers.[161] First, Brazilian production capacity for TSDWs was increasing.[162] Second, Budd Company cited the rise in Brazilian imports—from a negligible level in 1984 to approximately 125,000 units in 1985—as indicative of future trends in the TSDW industry.[163] Third, Budd Company pointed to evidence that Brazilian TSDWs entering the United States suppressed the market price.[164] Finally, the fact that there was an under utilization of production capacity in Brazil led Budd Company to believe that Borlem and FNV would continue to dump TSDWs into the U.S. market, thereby harming U.S. manufacturers.[165] Therefore, Budd Company requested that the ITC determine that Brazilian TSDWs imported into the U.S. had materially injured, and threatened to materially injure, the U.S. TSDW industry.[166] Naturally, Borlem and FNV believed that imports of TSDWs from Brazil did not constitute an imminent threat of material injury to the U.S. TSDW industry.

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160. *Id.* Budd Company countered claims by Borlem and FNV that TSDWs imported from Japan were the cause of the decline in TSDW prices. TSDWs from Japan were available in limited supply in the United States. Additionally, a recall and repair of Japanese manufactured TSDWs resulted in them being sold at a deep discount. *Id.* at 7-8.

161. *Id.* at 10 (imminent threat of material injury is defined in 19 U.S.C. § 1677(f)).

162. *Id.* at 10. Borlem and Fumagalli, another Brazilian firm not involved in the investigation, were expanding production capacity. Additionally, Budd Company alleged that both Borlem and FNV could swiftly and cheaply convert tubed steel disc wheel production facilities into TSDW facilities. By contrast, U.S. TSDW manufacturers could not convert tubed steel disc wheel production to TSDW production without considerable expense in time and money. *Id.* at 2-3.

163. *Id.* at 10.

164. Post-Conference Brief of Budd Company, supra note 154, at 10. Budd also argued that the rapid increase in Brazilian production capacity coupled with Brazil's need to obtain dollars in international trade made it likely that Borlem and FNV would continue to dump TSDWs in the United States. *Id.*

165. *Id.*

166. *Id.* at 11-12.

Borlem and FNV felt Budd Company's petition was motivated by fear that increased Brazilian manufacturing capacity would cause increasing competition in the OEM market for TSDWs.[167] Although Brazilian capacity was expanding, Borlem and FNV asserted that the increased production of TSDWs was not targeted for the U.S. market.[168] Actually, Borlem and FNV estimated that imports of Brazilian TSDWs into the U.S. market for 1986 would actually decline from 1985 levels.[169] Borlem and FNV asserted that other foreign producers of TSDWs were responsible for the injury, if any, suffered by U.S. manufacturers.[170]

Borlem and FNV cited evidence that from the first time TSDWs from Brazil were imported into the United States until the last quarter of 1985, no U.S. manufacturer lowered its price.[171] According to the Brazilian companies, it was a Japanese TSDW importer, Minebea/NMB who first cut prices, forcing U.S. manufacturers to follow suit.[172] Borlem and FNV noted that the price reduction by Minebea/NMB coincided with the only price

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167. Respondents' Brief in Opposition, *supra* note 157, at 2. According to respondents, there were three customers of Brazilian produced TSDWs. Two customers made single purchases of an insubstantial quantities. The third customer purchased small quantities of Brazilian TSDWs as protection against disruption of U.S. produced TSDWs as had occurred in 1984 and 1985. *Id.*

168. *Id.* at 3. Borlem and FNV claimed that they were both operating above full capacity to meet Brazilian domestic and non-U.S. export demand and that increased production capacity was required to meet that demand. *Id.*

169. *Id.* at 4. Through May 1986 the volume of imports of Brazilian TSDWs into the United States indicated that the yearly total of Brazilian TSDWs would be 33% below 1985 levels, or less than half of the 175,000 units projected by Budd Company.

Budd Company noted the overall demand in the TSDW market declined approximately 20% through May 1985. Borlem and FNV argued that if Brazilian TSDWs were the low cost alternative, Brazilian market share would have increased or held steady rather than decline by a greater amount than the overall market. *Id.* at 4, 10.

170. *Id.* at 4-6. When Brazilian TSDWs were first introduced into the U.S. market they were sold at lower prices than U.S. TSDWs, Borlem and FNV advanced two reasons why this did not adversely affect U.S. manufacturers: (1) the price difference was partly attributable to the necessity to compensate the buyer for the eight to ten weeks delay in receiving an order of Brazilian TSDWs; and (2) as newcomers to the U.S. market Borlem and FNV lacked an established record for quality and reliability and a price discount was necessary to compensate buyers for the added risk of purchasing from untested suppliers. *Id.*

171. *Id.* at 4. Borlem and FNV stated that two U.S. manufacturers actually increased prices. Additionally, Firestone and Motor Wheel were importing TSDWs from Germany at CIF prices nearly identical to that charged by Borlem and FNV. *Id.*

172. Respondents' Brief in Opposition, *supra* note 157, at 4. In late 1985, Minebea/NMB lowered the price of 24.5-inch and 22.5-inch TSDWs sold at $42 and $40 respectively. *Id.*

decrease recorded in 1984-1985 by U.S. manufacturers.[173] Additionally, imports of Brazilian TSDWs began declining during this period of lowering prices.[174] Borlem and FNV argued to the ITC that Budd Company's petition ignored the fact the Minebea/NMB caused the TSDW price reduction of 1985, and that the price decrease corresponded with the reduction of Brazilian TSDW imports.[175] Borlem and FNV requested that the ITC find that Brazilian TSDWs had not materially injured or threatened material injury to U.S. TSDW manufacturers.[176] After a review of all the evidence presented, the ITC issued its preliminary findings.

The ITC issued its preliminary findings in July 1986.[177] The ITC's investigation revealed that the TSDW industry in the United States experienced a sharp increase in demand from 1.20 million units in 1983 to 2.25 million in 1984.[178] Because of the extraordinary surge in demand in 1984, U.S. industrial output of TSDWs reached 107.2% of capacity.[179] Domestic producers of TSDWs sought overseas suppliers in an effort to meet U.S. demand.[180] Borlem and FNV began producing TSDWs for export to the U.S. market near the end of 1984.[181] Unfortunately for U.S. manufacturers, the TSDWs from Brazil gained a strong share of the U.S. market.

While demand for TSDWs remained strong, sales figures for 1985 and 1986 indicated a moderate decline in TSDW consumption.[182] Although there was only a moderate decline in

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173. *Id.* at 5.

174. *Id.*

175. *Id.* at 5-6 (Budd also ignored imports of German TSDWs).

176. *Id.* at 17-19.

177. ITC Preliminary Investigation, *supra* note 60.

178. *Id.* This 87.5% increase was attributed to the enactment of new governmental regulations and the strong economic recovery releasing "pent-up" demand. Consumers had postponed purchases of SDWs in anticipation of the new regulations. *Id.*

179. *Id.* The figure for U.S. industrial utilization was amended from 107.2% to 106.1% in the final report. Final Investigative Report, Tubeless Steel Disc Wheels from Brazil, 731-TA-335 USITC Pub. 1971, (Apr. 1987) (final) [hereinafter ITC Final Investigation].

180. ITC Preliminary Investigation, *supra* note 60.

181. *Id.*

182. *Id.* The Final Investigation placed the decline in demand at 9.2% and 4.3% for 1985 and 1986 respectively. ITC Final Investigation, *supra* note 179.

demand, U.S. manufacturers experienced a dramatic decline in market share.[183] U.S. plants manufacturing TSDWs experienced a drop in plant utilization.[184] Not surprisingly, there was a corresponding reduction in income for U.S. manufacturers.[185]

Meanwhile, Brazil's capacity to produce TSDWs tripled between 1984 and 1986.[186] Brazilian production capacity increased at the same time utilization of existing capacity in U.S. manufacturing plants decreased. Borlem and FNV became fierce competitors in the U.S. market. The ITC noted that the performance of U.S. manufacturers of TSDWs had "shown consistent declines in almost all major indicators even though the market for TSDWs [remained] quite strong."[187] Therefore, the ITC determined that the evidence provided a reasonable indication that the U.S. TSDW industry was materially injured.[188]

2. *The ITC's Final Investigation*

After receiving notification that Commerce had made a final determination that Brazilian TSDWs were sold in the United States at less than fair value, the ITC continued its investigation.[189] On March 24, 1987, the ITC held a hearing giving all interested parties an opportunity to present information to the ITC before it issued its final investigative report.[190] Budd Company submitted a prehearing brief on behalf of U.S. manufacturers.[191] Borlem and

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183. *Id.* From 84.2% market share in 1983 to 50.8% in 1984. A comparison of January through March 1985 to January through March of 1986 showed a drop from 79.2% to 48.9%. *Id.*

184. ITC Final Investigation, *supra* note 179. Capacity dropped to 85.8% and 66.1% in 1985 and 1986 respectively. *Id.*

185. ITC Preliminary Investigation, *supra* note 60. (net income for the industry dropped from $3.5 million in 1984 to $3.1 million in 1985 and net losses in the industry for 1986 totalled $992,000 according to the ITC Final Investigation).

186. *Id.*

187. *Id.*

188. *Id.*

189. *See supra* notes 126-53 and accompanying text (discussion of Commerce's Final Determination).

190. ITC Final Investigation, *supra* note 179.

191. Prehearing Brief of Petitioner, The Budd Company Wheel and Brake Division, in the matter of Tubeless Steel Disc Wheels from Brazil Before the U.S.I.T.C., Inv. No. 731-TA-335 (Mar. 19, 1987) (final) [hereinafter ITC Prehearing Brief of Budd Company].

FNV submitted a joint prehearing brief to the ITC detailing their position.[192]

In its brief, Budd Company reiterated its claim that imports of Brazilian TSDWs were increasing relative to U.S. production, and that the U.S. TSDW market was suppressed due to sales of Brazilian TSDWs at below market prices.[193] Budd Company alleged that the selling practices of Borlem and FNV negatively affected U.S. manufacturers as shown by declining performance in production, shipments, capacity utilization, and market share.[194] Budd Company claimed that under the criteria established by 19 U.S.C. § 1677(7)(b), the ITC was required to find that Brazilian TSDWs had caused material injury to the U.S. TSDW industry.[195] Additionally, Budd Company contended that further imports of Brazilian TSDWs constituted an imminent threat of material injury to U.S. manufacturers.[196]

Budd Company argued that under all the relevant criteria, the threat of actual injury to the U.S. TSDW industry was

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192. Respondents' Prehearing Brief in Opposition to the Petition, in the matter of Tubeless Steel Disc Wheels from Brazil Before the U.S.I.T.C., Inv. No. 731-TA-335 (Mar. 19, 1987) (Non-Confidential Version) (final) [hereinafter ITC Respondents' Prehearing Brief].

193. ITC Prehearing Brief of Budd Company, *supra* note 191, at 2. Budd Company asserted that:

> During the period of review in this investigation competitive imports from other sources, Germany and Japan, have either ceased altogether or been substantially curtailed. . . . During 1985 and 1986 as other imports retreated from the market and overall demand declined, low priced Brazilian T/LSDW imports captured an increasing market share. *Id.*

194. *Id.*

195. *Id.* at 9. 19 U.S.C. § 1677(7)(B) states:

> In making its determinations . . . the Commission, in each case-
>
> (i) shall consider-
>
> (I) the volume of imports of the merchandise which is the subject of the investigation,
>
> (II) the effect of imports of that merchandise on prices in the United States for like products, and
>
> (III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States; and
>
> (ii) may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.

§ 1677(7)(B).

196. *Id.* at 29-36.

imminent.[197] First, Brazilian production capacity was expanding, and the only market sufficiently large enough to absorb the additional capacity was the United States.[198] As Brazilian production capacity increased, there would be a continuing threat that increased imports of Brazilian TSDWs would further depress the U.S. market.[199] In addition, the domestic situation in Brazil indicated that Borlem and FNV would continue exporting TSDWs to the United States.

The Cruzado Plan,[200] designed to eliminate Brazil's hyperinflation had recently failed, and hyperinflation had returned to the Brazilian economy.[201] The failure of the Cruzado Plan was expected to curb economic growth in Brazil, thereby reducing Brazilian demand for both tube-type or tubeless-type wheels.[202] Coupled with the return of hyperinflation to Brazil, the Brazilian government had just announced a moratorium on its foreign debt payments.[203] The suspension of debt payments made it necessary for Brazil to maintain a trade surplus so that it could obtain the western currency it needed to resume debt payments.[204]

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197. *Id.* at 29.

198. ITC Prehearing Brief of Budd Company, *supra* note 191, at 29-30. Budd Company set out to counter the assertion by Borlem and FNV that the increased production was headed for markets other than the United States, and that Brazilian demand required them to shift production from tubeless to tube-type wheels:

> Respondents' have suggested that market opportunities exist for them in third countries such as South Africa and Australia. Based on petitioner's calculations of total truck and trailer demand, the maximum demand for tubeless steel disc wheels in such markets, in the unlikely event that every truck built ran on tubeless Brazilian wheels, would be 170,000 per year. Because tube-type wheels are preferred in most of the world outside Europe and North America, and because Europe possesses substantial captive capacity for the production of tubeless steel disc wheels, the additional capacity being added in Brazil can have no outlet other than the United States. In addition, Borlem, one of the two producers covered by the investigation, is owned, in part, by Lemmerz, a West German wheel producer who is unlikely to permit Borlem's new capacity to be directed towards its European market. *Id.* at 30.

199. *Id.* at 33.

200. *See supra* note 104 and accompanying text.

201. ITC Prehearing Brief of Budd Company, *supra* note 191, at 35.

202. *Id.* at 31 (No expectation of short-term increase in demand).

203. *Id.* at 35 (announced Feb. 20, 1987).

204. *Id.* As Budd Company argued, "Given the return of hyperinflation to Brazil and the need for it to obtain foreign capital in order to resume payments on its debt, Brazil has no option other than to increase exports to its principal debtors [sic], including, most important, the United States."

Therefore, every incentive existed for Borlem and FNV to continue increasing their exports to the United States regardless of the impact on U.S. prices or U.S. manufacturers.[205] Budd believed that the evidence clearly showed that due to increased capacity, and the situation in the Brazilian economy, Borlem and FNV constituted an imminent threat of material injury to the U.S. TSDW market.[206] Conversely, in their brief filed with the ITC, Borlem and FNV attempted to show the ITC that they did not pose an imminent threat of material injury to U.S. TSDW manufacturers.

The brief filed by Borlem and FNV attacked the accuracy of Budd Company's findings that Brazilian sales were increasing, while the U.S. TSDW market was experiencing reduced demand.[207] Borlem and FNV stated that the volume of Brazilian TSDWs exported to the United States was less than one-half the 175,000 units projected by Budd Company.[208] In fact, Borlem and FNV found that when U.S. demand for TSDWs declined in late 1985 through 1986, sales of Brazilian TSDWs into the U.S. market declined by a greater proportion than other manufacturers.[209] According to Borlem and FNV, price suppression and injury in the U.S. market, if any,[210] resulted from low prices charged by Japanese importers and Firestone, but not

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Id.

205. *Id.*

206. ITC Prehearing Brief of Budd Company, *supra* note 191, at 37.

207. ITC Respondents' Prehearing Brief, *supra* note 192, at 3. Borlem and FNV renewed their arguments that Budd Company's petition was motivated primarily out of fear that Brazilian TSDWs were going to penetrate the OEM market. Also, they reasserted their claim that none of their increased production capacity was targeted for the U.S. market. *Id.*

208. *Id.* at 4.

209. *Id.* at 8, 11-15.

210. Borlem and FNV questioned whether the U.S. TSDW industry had suffered any harm at all. *Id.* at 20-22. The TSDW industry had slumped from the record high years of 1984 ($4.6 million in profits) and 1985 ($3.5 million in profits). However, Budd and FNV stated that there was no injury from Brazilian imports because "[a]lthough the industry showed a profit of only $289,000 in 1986, U.S. tubeless steel disc wheel production was still more profitable than the general operations of these [U.S. manufacturers] companies, which incurred a loss from overall operations of $1.9 million in 1986." *Id.* at 20-21.

from Brazilian TSDWs.[211] Once again, Borlem and FNV requested that the ITC find that Brazilian TSDWs did not constitute a material threat to the U.S. TSDW industry.[212]

The ITC's final investigation resulted in some economic revisions of its preliminary investigation.[213] However, these revisions did not affect the ITC's determination that U.S. manufacturers suffered significant losses, while Borlem and FNV continued to undersell domestic producers.[214] Therefore, the ITC in its final investigation found that the U.S. TSDW industry was threatened with material injury because of the Brazilian imports.[215]

On May 28, 1987, Commerce issued its final antidumping order to the U.S. Customs Service covering imports of Brazilian TSDWs into the United States.[216] The antidumping order lowered the dumping margin for FNV from 19.93% to 11.71%.[217] Not surprisingly, the decisions of Commerce and the ITC were appealed to the CIT.

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211. *Id.* at 18. Borlem and FNV pointed out that:

> The present selling price for 24.5-inch Japanese tubeless steel disc wheels is believed to be between $51.00 and $53.00. At the same time, Japanese wheel producers are understood to be selling comparable wheels in Canada at between $54.00 and $56.00 per unit.
>
> Firestone, the largest of the U.S. producers, also appears to be a price leader when judged on actual transaction rather than list prices. List prices in the industry are for spot sales only; for contract orders Firestone is believed to be selling 24.5-inch wheels for $48.00, with payment due forty-five days from pick-up, against a list price of $55.00.

Id. at 19-20.

212. ITC Respondents' Prehearing Brief, *supra* note 192, at 24.

213. *See supra* notes 158-88 and accompanying text.

214. ITC Final Investigation, *supra* note 179 (no indication that Brazilian pricing practices would change in foreseeable future).

215. *Id.* (19 U.S.C. § 1673d(b)(4)(B) requires the ITC to make final affirmative determinations on the basis of threat of material injury).

216. Amendment to Final Determination of Sales at Less than Fair Value; Tubeless Steel Disc Wheels from Brazil, and Antidumping Order, 52 Fed. Reg. 19,903 (May 28, 1987) [hereinafter Final Antidumping Order].

217. *Id.* Apparently, Commerce was still evaluating its methods for determining FNV's dumping margin. FNV's dumping margin had fluctuated from 5.75% (Commerce Preliminary Determination, *supra* note 61, at 46,906) to 19.93% (Commerce Final Determination, *supra* note 126, at 8951) to 11.71% (Final Antidumping Order, *supra* note 216, at 19,903).

IV. COMMERCE'S DETERMINATIONS: APPEALS TO THE CIT

A. Borlem and FNV Appeal Commerce's Final Determination

Borlem and FNV appealed Commerce's final determination of dumping to the CIT.[218] Pursuant to a directive from the CIT during oral argument, the parties stipulated to the facts of the cases.[219] The parties stipulated that in Commerce's preliminary determination, it considered the shipment date of Brazilian TSDWs to the United States as the date of sale.[220] Therefore, when comparing prices between Brazil and the United States, Commerce compared the foreign market value on the shipment date with the U.S. price on the shipment date.[221] This resulted in Commerce converting the foreign market value from cruzeiros or cruzados into U.S. dollars at the exchange rate in effect on the shipment date.[222] However, in Commerce's final determination the methodology changed, as Commerce compared foreign market value on the shipment date with U.S. prices on the date of sale.[223] Additionally, Commerce's final determination calculated foreign market value based on the constructed value on the shipment date to the United States.[224] Foreign market values in cruzeiros or cruzados were converted into U.S. dollars at the exchange rate in effect on the sales date rather than the shipment date as had been the case in the preliminary investigation.[225] Because of Brazilian hyperinflation and the devaluation of Brazilian currency, the lapse

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218. Borlem S.A. Empreedimentos Industriais v. United States, 10 I.T.R.D (BNA) 1623 (CIT June 15, 1988) (Slip Op. 88-77).

219. *Id.* at 1623.

220. *Id.*

221. *Id.*

222. 10 I.T.R.D. (BNA) 1623 (1988) (pursuant to 19 C.F.R. § 353.53(a)).

223. *Id.* at 1624. *See supra* notes 145-49 and accompanying text (Borlem and Budd Company challenge the change in Commerce's methodology prior to issuance of the Final Determination).

224. 10 I.T.R.D. (BNA) 1623 (1988). The court stated that "[c]onstructed value was calculated based upon the replacement costs of merchandise sold to the United States in the month of shipment to the United States." *Id. See supra* notes 91-92 and accompanying text. (stating the debate over use of replacement cost or historical cost accounting).

225. *Id.* (pursuant to 19 C.F.R. § 353.56(a)).

of time between the sales date and shipment date resulted in a lower price for Brazilian TSDWs when converted into U.S. dollars.

The issue on appeal was whether Commerce used the correct methodology for comparing constructed foreign market value with the U.S. price in its dumping determination.[226] Borlem and FNV alleged Commerce's conversion of foreign market value into dollars at an exchange rate other than the one in effect on the date foreign market value was computed, resulted in Commerce reaching dumping margin calculations that were not supported by substantial evidence and not in accordance with law.[227] Ultimately, Borlem, FNV, and Commerce requested the court remand the case to Commerce to recalculate the dumping margins.[228] However, the Budd Company as defendant-intervenor opposed the motion for remand.[229] The CIT granted the motion for remand, and ordered Commerce to recalculate the dumping margins of Borlem and FNV and publish a new determination within sixty days.[230] The court's ruling resulted in another investigation by Commerce in an attempt to find the correct methodology for determining whether Borlem or FNV were actually dumping TSDWs into the United States.

On remand from the CIT, Commerce reopened its investigation and subsequently published an Amended Final Determination.[231] Commerce reiterated that the methodology employed in the investigation was consistent with Commerce's standard procedure for determining dumping margins for firms operating in hyperinflationary economies.[232] By statute and regulation,

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226. *Id.* at 1623-24.

227. *Id.* at 1624.

228. *Id.* Commerce disagreed with the reasoning of Borlem and FNV, but nevertheless supported their motion for remand. Borlem, FNV, and Commerce also agreed to the dismissal of several counts of the complaint without prejudice. *Id.*

229. 10 I.T.R.D. (BNA) 1624 (1988).

230. *Id.*

231. Amended Final Determination of Sales at Less than Fair Value and Amended Antidumping Order; Tubeless Steel Disc Wheels from Brazil, 53 Fed. Reg. 34,566 (1988) [hereinafter Commerce Amended Final Determination].

232. *Id.* As Commerce stated:

> Our usual methodology dictates that we calculate a single constructed value for the period of investigation, but when a country's economy is hyperinflationary, . . . we calculate

Commerce was required to determine foreign market value at the shipment date, and convert Brazilian currency into U.S. dollars on the sales date.[233] However, Commerce conceded that a circumstances of sale adjustment was warranted in this case due to the lag time between the date TSDWs were sold and the shipment date.[234] Commerce agreed with the prior argument of Borlem and FNV that calculating price at the sales date, while calculating cost at the shipment date, resulted in comparing costs at different points in the chain of distribution.[235] Because of Brazil's hyperinflationary economy, Commerce determined that a circumstances of sale adjustment was necessary to eliminate the distortion in prices and costs resulting from the rapid depreciation of Brazil's currency.[236] However, Commerce stated that this adjustment was limited to situations where there was a significant lag time between the sales date and shipment date.[237]

After recalculating the dumping margins for Borlem and FNV utilizing the circumstances of sale adjustment, Commerce reduced

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> foreign market value on a monthly basis. [citations omitted] Foreign market value constructed for six different one month periods [December 1985 through May 1986] thus allows us to account for, in part, the dramatic changes that occur to price and cost variables because of inflation over the six-month period of investigation.
>
> We also calculate constructed value under our usual methodology by using a company's historic cost. *However, when a country's economy experiences hyperinflation, we use replacement costs.* [emphasis added] [citations omitted] This practice allows the Department to view costs and prices contemporaneously in order to avoid distortions caused by hyperinflation and achieve a fairer comparison. *Id.*

233. *Id.* 19 U.S.C. § 1677b(e)(1)(A) (foreign market value constructed upon exportation); 19 C.F.R. § 353.56(a)(1) (currency conversion at exchange rate applicable on sales date).

234. *Id.* (circumstances of sale adjustment regulations 19 C.F.R. § 353.56).

235. *Id. See supra* notes 145-49 and accompanying text (The argument by Borlem and FNV that Commerce's methodology was erroneous).

236. Commerce stated that:

> When date of sale occurs in a month preceding the date of shipment... application of the earlier date of sale exchange rate results in a non-contemporaneous comparison [of costs and price]. In effect, the comparison suffers because all the nominal increases in cost between date of sale and date of shipment due to hyperinflation are accounted for by the method in which we constructed foreign market value while the decreased value of the currency in which those costs are expressed is not.

Commerce Amended Final Determination, *supra* note 231, at 35,566.

237. *Id.* Commerce stated, "We consider this [circumstances of sale] adjustment as being applicable only in cases where foreign market value is based upon monthly constructed values because of hyperinflation during the investigation and the date of sale occurs in a calendar month preceding the date of exportation." *Id.*

the dumping margin for Borlem to 10.64% and for FNV to .04%.[238] FNV's .04% margin was considered *de minimis* by Commerce.[239] Therefore, Commerce ordered Customs to suspend collection of further duties and to issue FNV a refund for any antidumping duty previously collected.[240] For Borlem, Commerce directed Customs to assess the antidumping duty at the new rate of 10.64%.[241] Now it was Budd Company's turn to object to Commerce's methodology for calculating the dumping margins for Borlem and FNV.

B. Budd Company Appeals Commerce's Amended Final Determination

Budd Company was dissatisfied with Commerce's amended calculations because they resulted in lower dumping margins for Borlem and FNV. Budd Company, as plaintiff, appealed Commerce's Amended Final Determination to the CIT.[242] The CIT considered appeals of Commerce's Final Determination at the same time the ITCs findings were being appealed in the CIT and CAFC.[243]

First, Budd Company contended that the adjustments to the constructed foreign market value to offset the devaluation in the cruzeiro against the U.S. dollar from the sales date to shipment date was an improper use of the circumstances of sale adjustment

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238. *Id.* at 34,569.

239. 19 C.F.R. § 353.24 (margin below .5% considered *de minimis*).

240. Commerce Amended Final Determination, *supra* note 231, at 34,569.

241. *Id.*

242. Budd Company, Wheel & Brake Div. v. United States, 746 F. Supp. 1093, 1096-97 (Ct. Int'l Trade 1990). Interestingly, the parties' roles have switched; Budd Company is plaintiff and FNV is defendant-intervenor.

Initially, Budd Company sought to enjoin Commerce from issuing an order to Customs based on the Amended Final Determination. The CIT held that Budd Company failed to meet the burden of proof for issuance of a preliminary injunction. Therefore, the CIT refused to prevent Commerce from issuing an order consistent with its Amended Final Determination. Budd Company, Wheel and Brake Div. v. United States, 700 F. Supp. 35 (Ct. Int'l Trade 1988) (The opinion of October 31, 1988 followed CIT's September 28, 1988 order vacating the TRO and denying preliminary injunction) (FNV participated as defendant-intervenor).

243. *See infra* note 274 and accompanying text.

procedure.[244] Furthermore, Commerce's reliance on the circumstances of sale adjustment to nullify the effects of hyperinflation in Brazil altered the rules for currency conversion.[245]

Therefore, Commerce's actions were not in accordance with law.[246] The CIT found Commerce had broad discretion in implementing the circumstances of sale adjustments.[247] The purpose of adjusting the foreign market values and U.S. prices was to measure the value of merchandise at a common point in the distribution chain.[248] Accordingly, to the extent the circumstances of sale adjustment conflicted with currency conversion regulations, Commerce's decision was warranted.[249] The court felt Commerce's overriding duty was to provide fair comparisons.[250]

Second, Budd Company asserted that absent amending the statute, Commerce could not unilaterally alter the method for applying a circumstances of sale adjustment without violating procedural due process.[251] The CIT found that Commerce had the necessary discretion under U.S. antidumping statutes to apply the circumstances of sales adjustment in this case.[252] The court stated that Commerce was merely attempting to use the most accurate

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244. 746 F. Supp. at 1097. Defendant FNV contended that Commerce's adjustments to reflect the effects of hyperinflation between the sales date and shipment date were in accordance with 19 U.S.C. § 1677b(a)(4)(B) and 19 C.F.R. § 353.15 because the adjustment sought to compare prices and costs at a common point in the distribution chain. *Id.* at 1097.

245. *Id.*; 19 C.F.R. § 353.56(a) (rules for currency conversion).

246. *Id.* Defendant FNV argued that since the adjustment to constructed foreign market value properly compensated for the effects of hyperinflation in this case, Commerce's decision was based on substantial evidence and was therefore in accordance with the law. *Id.* at 1097.

247. *Id.* at 1098. 19 U.S.C. § 1677b(a)(4) provides for allowances to be made to the satisfaction of the Secretary of Commerce.

248. *Id.* at 1099 (quoting Washington Red Raspberry Comm'n v. United States, 859 F.2d 898, 904 n.36 (1988)).

249. 746 F. Supp. at 1100 (Primary statutory purpose of fairness outweighed limitations of currency regulations).

250. *Id.*

251. *Id.* at 1097 (Plaintiff contends this violates the Administrative Procedure Act). Defendant FNV argued that since Commerce fully explained its methodology in the Final Amended Determination and that the adjustment complied with existing statutes and regulations, Commerce was not engaged in improper rule making. *Id.*

252. *Id.* at 1100.

methodology in calculating foreign market value.[253] Specifically, Commerce was attempting to resolve a conflict in the statutory and regulatory scheme which caused a comparison of price and costs at noncontemporaneous points in the distribution process.[254] The CIT noted that the CAFC had emphasized that fairness was the fundamental goal of Commerce in administering the antidumping laws.[255] The CIT found that Budd Company was not deprived of procedural due process, because Commerce fully explained its reasoning in the Amended Final Determination.[256]

Finally, Budd Company contended hyperinflation is a general economic condition not "directly related" to the circumstances of sale.[257] Therefore, if adjustment for hyperinflation was required, it was improper for Commerce to use the circumstances of sales adjustment.[258] Commerce conceded that circumstances of sales adjustments usually involve differences directly related to the sale of the specific goods under investigation, rather than adjusting for broader economic factors within the foreign economy.[259] However, Commerce argued that, under the circumstances, Brazil's hyperinflation made the adjustments directly related to the sale of TSDWs.[260] The CIT held that Commerce violated no statutory provisions, regulations, or legislative intent underlying the antidumping laws in this case.[261] The CIT concluded that Commerce's decision to use a circumstances of sale adjustment

253. *Id.* (Commerce attempting to resolve conflict between date of sale and date of shipment calculations of foreign market value).

254. 746 F. Supp. at 1100 (adjust for currency calculation as of sales date and constructed foreign market value as of shipment date).

255. *Id.* at 1099.

256. *Id.*

257. *Id.* at 1100. The "directly related" language comes from Commerce regulation 19 C.F.R. § 353.15 implementing 19 U.S.C. § 1677b(a)(4).

258. *Id.*

259. 746 F. Supp. at 1101 (circumstances of sale are used to account for different selling practices in the home and U.S. markets).

260. *Id.*

261. *Id.* at 1103. The court quoted from the legislative history: "[Circumstances of Sale Adjustments] should be permitted if they are reasonably identifiable, quantifiable, and directly related to the sales under consideration and if there is clear and reasonable evidence of their existence and amount." *Id.* (quoting H.R. REP. No. 317, 96th Cong., 1st Sess. 76 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381).

was supported by substantial evidence and in accordance with the law, and upheld Commerce's Amended Final Determination.[262] Although Budd Company lost its appeal to the CIT on the issue of the propriety of Commerce's circumstances of sale adjustment, it continued to press the court to overturn the Amended Final Determination. Therefore, Budd Company initiated a second appeal to the CIT seeking to reverse Commerce's Amended Final Determination on other grounds. While the second appeal was pending, there was no reason for the ITC to reconsider its findings of material injury to the U.S. TSDW industry because Commerce's finding that FNV's dumping margins were *de minimis* might be overturned.[263]

Budd Company filed a second appeal to the CIT on the grounds that the administrative record failed to show that Commerce properly accounted for the inflation in calculating the constructed foreign values.[264] Budd Company asserted that the record did not show that Commerce properly accounted for some costs, and that other costs were excluded altogether.[265] Having failed to overturn the Amended Final Determination on the circumstances of sales issue, Budd Company sought to attack the underlying factual assumptions forming the basis of the Amended Final Determination.[266] Budd Company requested that the CIT remand the case to Commerce so that it could modify its methodology to

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262. *Id.* (Because FNV's dumping margin of .04% was considered *de minimis*, no antidumping duty would be assessed against FNV).

263. *See infra* note 322 and accompanying text. The filing of the second appeal resulted in a stay of the CAFC's remand to the ITC to reconsider the threat of material injury determination pending the outcome of the second appeal of Commerce's Amended Final Determination.

264. Budd Company, Wheel & Brake Div. v. United States, 773 F. Supp. 1549, 1551 (Ct. Int'l Trade 1991) (FNV defendant-intervenor).

265. *Id.* at 1551-52. The costs not properly accounted for included general and administrative expenses, selling and packing expenses, quarterly labor rates, factory overhead, and short-term financial expenses. Additionally, the record failed to show Commerce included expenses such as research and development, long-term financial expenses, and taxes on steel imports. *Id.*

266. *Id.* at 1551. Commerce and FNV, defendant-intervenor, contested Budd Company's allegations on two grounds: (1) that Budd's argument concerning failure to fully account for inflation was without merit; and (2) that Budd Company had ample opportunity to raise these issues at the administrative level and failure to do so prevented Budd Company from raising them on appeal. *Id.* at 1552.

account for the full inflationary effects on all costs.[267] Additionally, Budd Company wanted Commerce to supplement the administrative record in order to more completely detail its findings.[268] However, the CIT was disinclined to remand the case after previously holding that Commerce's methodology was proper.[269]

The CIT held that there was substantial evidence to support Commerce's accounting of FNV's costs.[270] The court questioned whether a full accounting of the impact of inflation on costs was necessary or even possible.[271] Additionally, the court concluded that because Budd Company failed to raise these concerns at the administrative level, they were prevented from raising them for the first time before the CIT.[272] Commerce's Amended Final Determination was once again upheld in its entirety by the Court.[273]

While Budd Company was appealing Commerce's Amended Final Determination, Borlem and FNV were attempting to have the ITC reconsider the threat of material injury determination. Borlem and FNV appealed the ITC's findings at the same time they were involved in defending Commerce's Amended Final Determination. Borlem was especially interested in having the injury determination reversed because Customs was still assessing the antidumping duty

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267. *Id.* at 1552.

268. *Id.*

269. 773 F. Supp. at 1554. The court stated:

> A review of Commerce's methodology yields the conclusion that the amended final determination is fair, consistent with statutorily prescribed procedures, and substantiated by the administrative record. This Court reached the same conclusion in its opinion dated September 5, 1990, dismissing Plaintiff's motion for partial judgment upon the agency record and sustaining the determination as amended through a circumstances of sale adjustment. *Id.*

270. *Id.* at 1554.

271. *Id.* The court stated:

> The glaring deficiency in Plaintiff's argument is the underlying premise that full accounting for inflation is necessary or even possible. Plaintiff has never explained how this is so or why Commerce's replacement cost/constructed value methodology does not adequately account for the effects of inflation on the costs of producing TSDWs in Brazil. . . . Again, the Court defers to the findings of the Commerce Department. *Id.*

272. *Id.* at 1555.

273. *Id.* at 1556.

on Borlem's imports to the United States.[274] Although the two appeals of Commerce's Amended Final Determination stayed execution of court orders regarding the ITC's findings, the parties nevertheless litigated the threat of material injury findings before the CIT and CAFC.

V. BORLEM AND FNV APPEAL THE ITC'S FINAL INVESTIGATION

A. First Appeal to the CIT

The first appeal of the ITC's Final Investigation was made to the CIT after Commerce produced its Amended Final Determination.[275] Borlem and FNV requested that the ITC reconsider its finding that there was an imminent threat of material injury to the U.S. TSDW industry in light of Commerce's Amended Final Determination that FNV's dumping margin was *de minimis*.[276] The ITC supported the motion for remand, provided the court remanded on jurisdictional grounds rather than based on the merits of the case.[277] Budd Company opposed the motion for remand on several grounds.[278]

Borlem and FNV's theory on remand was proper in this case based, in part, on an extension of the ITC's customary practice.[279] The ITC had a long standing practice of excluding from an *original*

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274. If the ITC found that there was no injury to a U.S. industry, Customs would stop assessing an antidumping duty against Borlem. Borlem hoped that Commerce's finding that FNV's dumping margin was *de minimis* would force the ITC to conclude that no injury was occurring. Then, even though Borlem still had a dumping margin of 10.64% it would escape an antidumping duty because both dumping and injury are required to assess an antidumping duty.

275. Borlem S.A.-Empreedimentos Industriais v. United States, 710 F. Supp. 797 (Ct. Int'l Trade 1989) (Budd Company was defendant-intervenor).

276. *Id.* at 798. Reconsideration by the ITC was especially important to Borlem. If the ITC felt that, by itself, Borlem's dumping did not constitute an imminent threat of material injury to U.S. manufacturers, then Borlem would not be assessed an antidumping duty. The court stated that "[the case] raises questions of law and administrative policy and practice related to the Commission's role in the bifurcated scheme established by Congress for administration of the antidumping . . . laws. *Id.* at 800.

277. *See infra* notes 284-86 and accompanying text.

278. *See infra* notes 287-90 and accompanying text.

279. 710 F. Supp. at 800.

final injury determination data on a firm that Commerce had excluded from its analysis in completing Commerce's *original* Final Determination.[280] Borlem and FNV were asking the CIT to remand the case to the ITC so that it could consider whether a reconsideration of its findings was necessary and proper in light of Commerce's exclusion of FNV from its *Amended* Final Determination.[281] Borlem and FNV believed that because the ITC would have excluded FNV from its injury analysis if Commerce had excluded it from its *original* Final Determination, the ITC should exclude FNV in view of Commerce's *Amended* Final Determination that FNV's dumping margins were *de minimis*.[282] Borlem and FNV felt that the ITC should have an opportunity to determine if it should extend its long standing practice to the facts of this case.[283]

The ITC did not oppose the motion for remand, provided the remand order did not go to the substance of whether the ITC should reconsider its decision.[284] The ITC listed some of the issues affecting its decision to reconsider its findings: the timing and finality of agency decisions; the possibility of undue disruption of international trade; the efficient use of scarce administrative resources; and the probability of similar issues arising in the future.[285] Therefore, the ITC argued that due to its specialized expertise on issues of material injury, it was in the best position to judge whether the results of the Amended Final Determination should affect the ITC's findings.[286]

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280. *Id.*; *see, e.g.*, Certain Granite from Italy and Spain, USITC Pub. 2110, Inv. Nos. 731-TA-381, 382, at 23 n.88 (Aug. 1988) (final); Frozen Concentrated Orange Juice from Brazil, USITC Pub. 1970, Inv. No. 731-TA-326, at 24 n.89 (Apr. 1987) (final); Top-of-the Stove Stainless Steel Cooking Ware from Korea and Taiwan, USITC Pub. 1936, Inv. Nos. 701-TA-267, 268, at 10 n.25 (Jan. 1987) (final); Certain Red Raspberries from Canada, USITC Pub. 1707, Inv. No. 731-TA-196, at 8 n.30 (June 1985) (final). *Id.*

281. 710 F. Supp. at 800.

282. *Id.* at 800-01.

283. *Id.*

284. *Id.* at 801 n.6. The ITC stated in its brief to the CIT that "[t]he Commission's non-opposition to the current motion entails that it has not yet deliberated on and decided whether reconsideration should occur. Defendant's Response at 14-15." *Id.*

285. *Id.* at 801 n.7. *See supra* notes 26-41 and accompanying text (statutory time frame for rapidly deciding dumping cases).

286. 710 F. Supp. 797, 801 (Ct. Int'l Trade 1989).

Budd Company, as defendant-intervenor, raised three arguments in opposition to the motion for remand.[287] First, Budd Company challenged the CIT's power to remand the case by arguing that the court's scope of review was limited to judgment on the agency record.[288] Second, Budd Company asserted that there was no reason to remand the case to the ITC to reconsider its findings based on the specialized expertise of the ITC.[289] Third, Budd Company felt that the extraordinary remedy of remand was not warranted by the facts of this case.[290]

The issue before the CIT was whether, under the doctrine of primary jurisdiction,[291] the court should remand a case involving hybrid legal and policy questions of first impression to the ITC.[292] Specifically, did the CIT have the discretionary power to defer to the ITC, allowing the ITC to make the first determination of whether it could reconsider its findings in light of Commerce's Amended Final Determination?[293] The court began by stating that the standard of review was whether the agency's

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287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* The court noted,

> Budd also argues that the proper mechanism for plaintiffs to obtain relief in this case is a review under section 751(b) of the Tariff Act of 1930, 19 U.S.C. § 1675(b) (1982 Supp. V 1987), and that Borlem's motion should be treated as a request that the ITC be permitted to make a new determination due to "changed circumstances." *Id.*

291. The CIT explained the doctrine of primary jurisdiction as follows:

> 'Primary jurisdiction is a doctrine of common law, wholly court-made, that is designed to guide a court in determining whether and when it should refrain from or postpone the exercise of its own jurisdiction so that an agency may first answer some question presented.' Davis, *Administrative Law Treatise* 81 (2nd Ed., Vol 4, 1983). The central purpose of the doctrine is to give effect to legislative intent underlying the established regulatory scheme by referring matters involving agency expertise back to the agency so that it may, in the first instance, pass upon the issue from its unique administrative perspective.

710 F. Supp. at 799-800; *see* United States v. Western Pacific R.R., 352 U.S. 59 (1956) (where the Supreme Court outlined the doctrine's parameters).

292. 710 F. Supp. at 799. In discussing its remand powers the court stated, "[T]his Court has significant powers in law and equity to remand to the administrative agency when circumstances require. Congress specifically granted this Court the power to remand in the Customs Courts Act of 1980." *Id.* (citation omitted) The court's remand authority is co-extensive to that of other federal district courts. *Id.*

293. *Id.* at 802.

findings were unsupported by substantial evidence on the record, or otherwise not in accordance with the law.[294] The CIT felt that by sending the issue back for the ITC's review, it was neither extending nor abdicating its jurisdiction.[295] The court stated that after the ITC had concluded its analysis upon remand, they would review the ITC's actions to ensure they were made in accordance with law.[296] Therefore, the court remanded the case to the ITC for further consideration in light of Commerce's Amended Final Determination.[297]

B. The ITC's Decision on Remand from CIT

On remand from the CIT, the ITC held that it could not address the issue of reconsidering its finding that imports of TSDWs posed a threat of material injury to a U.S. industry.[298] The ITC framed the question before remand as whether anything explicit in the statutes, or implicit in the administration of antidumping investigations, led to the conclusion that Congress intended subsequent amendments in Commerce's determinations to affect the ITC's findings.[299] The ITC opined that the failure to authorize the ITC to reconsider final investigations reflected Congress' intent that the ITC administer injury determinations in a timely fashion.[300]

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294. *Id.* at 799 (19 U.S.C. § 1516a(b)(1)(B)). The CIT further stated, "The Court must give substantial weight to an agency's interpretation of a statute it administers." *Id.* (citing American Lamb Co. v. United States, 785 F.2d 992, 1001 (Fed. Cir. 1986).

295. *Id.*

296. 710 F. Supp. at 799. As the court stated earlier in the opinion, "The standard of review in antidumping cases is whether on the basis of the administrative record before the Court the agency action is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.' 19 U.S.C. § 1516a(b)(1)(B) (1982)." *Id.*

297. *Id.* at 802.

298. Tubeless Steel Disc Wheels from Brazil: Views on Remand, USITC Pub. 2179, Inv. No. 731-TA-335 (1989) (final) [hereinafter ITC on Remand].

299. *Id.* (discussing whether amendments by Commerce would make the ITC's findings unsupported by substantial evidence when reviewed by the CIT).

300. *Id.* (except in cases involving fraud during the investigation). The ITC stated:

> We conclude that Congress did not intend for such matters to be the basis for a reconsideration by the Commission. We base this conclusion on the relevant statutes, taking into consideration the nature and structure of the statutory process for the conduct of antidumping investigations, and the interests of finality and equity, as well as the consequences for the efficient administration of antidumping investigations if matters such

Noting that Congress expressly granted Commerce the authority to reconsider final determinations, the ITC found that the absence of such authority prohibited it from reconsidering final investigations.[301]

The ITC bolstered its opinion with the argument that the strict time deadlines for concluding investigations supported its statutory interpretation.[302] The ITC believed reconsideration of its final investigation would run counter to the statutory language and legislative intent of Congress.[303] Finally, the ITC stated concern over the burden on administrative resources and expenses to parties involved in the investigation should the ITC begin reconsidering final investigations.[304] The ITC concluded it lacked authority to reconsider its final investigations. Therefore, the ITC refused to address the question of whether a reconsideration of its threat of material injury finding was necessary in light of Commerce's Amended Final Determination. However, the ITC's determination was not the final word on this issue as Borlem and FNV had the right to appeal this finding to the CIT.

C. The Second Appeal to the CIT of the ITC's Decision

The ITC's determination that it lacked the authorization to reconsider its injury findings forced Borlem and FNV to again appeal to the CIT, asking the court to set aside the ITC's remand determination.[305] The CIT began its analysis by reiterating that it

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as these are remanded to the Commission. *Id.*

301. ITC on Remand, *supra* note 298 (19 U.S.C. § 1673d(e) provides Commerce reasonable time to correct errors in final determinations).

302. *Id. See* 19 U.S.C. § 1673d(b)(2) (providing the deadlines for ITC findings after Commerce's final determinations). The ITC stated:

> Congress created a complex, but rapid, system for the administration of antidumping and countervailing duty laws. The system imposes strict time limits and bifurcates the decisions necessary for the imposition of duties between the Commission and Commerce. The structure requires each agency to rely on the peculiar competence of the other.

ITC on Remand, *supra* note 298.

303. *Id.* (The ITC felt Congress wanted antidumping duty cases decided quickly).

304. *Id.* (The ITC also felt finality in its decisions was intended by Congress).

305. Borlem S.A.-Empreedimentos Industriais v. United States, 718 F. Supp. 41, 42 (Ct. Int'l Trade 1989) (the ITC and defendant-intervenor Budd Company opposed the motion) (This was the second CIT opinion on this subject in three months).

had broad powers in equity to remand a case when required to achieve fundamental fairness.[306] Although limited to reviewing the administrative record before it, the court was also required to take judicial notice of other administrative decisions such as Commerce's Amended Final Determination.[307] Borlem and FNV requested that the CIT take judicial notice of Amended Final Determination that FNV's dumping margin was *de minimis*.[308] After taking judicial notice of Commerce's Amended Final Determination, the CIT found that if the ITC had been aware of that FNV's dumping margin was *de minimis*, it might have reached a different finding on the threat of material injury.[309] The court then had to establish the legal basis for allowing the ITC to reconsider its final decision.

The first question before the CIT was whether the ITC, on remand from the court, *could* reconsider its threat of material injury determination.[310] The CIT found the ITC's administrative findings on remand to be unreasonable and not a permissible construction of the antidumping statutes.[311] Therefore, the CIT held that the

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306. *Id.* at 46 (CIT's remand authority coextensive with other federal district courts).

307. *Id.* (CIT's authority to take judicial notice of other agency's decisions) (citing FED. R. EVID. 201; Caha v. United States, 152 U.S. 211, 221-22 (1894); 10 MOORE'S FEDERAL PRACTICE § 201.02(1) (2d ed. 1988)). CIT is limited to reviewing administrative record. 19 U.S.C. § 1516a(b)(1)(B)).

308. 718 F. Supp. at 46.

309. *Id.* The CIT stated:

> Hence it seems clear that had the ITC known at the time it made its affirmative threat of injury determination that FNV, the major manufacturer of TSDWs imported from Brazil, was not dumping or had *de minimis* dumping margins, there is a very strong possibility the ITC would have found no injury . . . based upon material and significant inaccurate facts. *Id.*

310. *Id.* at 42.

311. *Id.* at 48 (exceptional holding given the great deference usually shown agency determinations). The CIT stated:

> While the ITC majority [in its reconsideration proceedings] properly pointed out that Congress wanted dumping and countervailing duty cases to be handled speedily and was willing to accept as a trade off for speed less than complete records, there has been no showing that Congress had no concern for accuracy. The mere fact that Congress was willing to grant the ITC authority to make determinations on the 'best information' available, should not be interpreted as authorizing proceedings that are so flawed with inaccurate facts that different results would obtain if accurate facts were used. Congress although providing no explicit administrative procedure in the Act for the ITC to review its final determinations . . . did, nevertheless, make specific provisions for judicial review.

ITC had the authority to reconsider a final decision when directed to do so by the court on remand.[312] The court stated that despite the lack of statutory authorization to reconsider final decisions, remand from the CIT provided a vehicle for both the ITC and Commerce to reconsider final decisions.[313] However, the court stated that the exercise of the ITC's power to reconsider final decisions was within the ITC's discretion.[314] Having decided that the ITC had authorization to reconsider its final material threat of injury decision, the court had to provide a framework for the ITC's reconsideration.

The second question was whether the ITC *should* reconsider its findings based on Commerce's Amended Final Determination in this case.[315] The CIT felt it vital for the ITC to address the issue of whether a reconsideration of the injury finding was warranted in light of FNV's *de minimis* dumping margin.[316] However, the CIT stated that the ITC's decision whether to reconsider its final decision was within the ITC's discretion.[317] The court stated that if the ITC determined that it should reconsider its final decision, then the CIT's remand authority provided the mechanism for the ITC.[318] However, if the ITC determined that it should not reconsider its final decision, then it was directed to set forth the reasons why reconsideration of its final decision was not warranted.[319]

The CIT's ruling raised the possibility that on remand the ITC would reconsider its final decision, and find that TSDWs from Brazil posed no threat of material injury. The ITC was concerned about the impact of this decision on future dumping cases. Budd Company had the more immediate concern that a reconsideration

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Id.; *see* 19 U.S.C. § 1516(a).

312. 718 F. Supp. at 49.

313. *Id.* at 48.; *see* 28 U.S.C. § 2643(c)(1).

314. 718 F. Supp. at 48.

315. *Id.*

316. *Id.* (ITC maintains discretion in actually changing its injury determination after reconsideration).

317. *Id.* at 49.

318. *Id.*

319. 718 F. Supp. at 49.

by the ITC would lead to the elimination of the antidumping duty still being charged against Borlem.[320] Therefore, both the ITC and Budd Company had reason to appeal the CIT's ruling to the Court of Appeals for the Federal Circuit.[321]

D. The ITC and Budd Company Appeal to the CAFC

The ITC and Budd Company filed an interlocutory appeal of the CIT's decision to the CAFC.[322] Therefore, pending the outcome of the appeal, the ITC made no decision regarding reconsideration of its injury findings. The CAFC certified two issues to be heard on appeal from the CIT.

The first question presented to the CAFC was whether the CIT's remand authority provided a sufficient basis for the ITC to reconsider whether imports of TSDWs from Brazil pose a material threat of injury to the U.S. TSDW industry in light of Commerce's Amended Final Determination.[323] The ITC argued that the CIT failed to show the proper deference to the Commission's findings of material injury.[324] The CAFC noted that the CIT showed the proper deference to the ITC's administrative agency ruling, but that the CIT must not defer to an agency where the agency's interpretation is unreasonable.[325] Additionally, the CAFC

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320. Without a finding of imminent threat of material injury, there would be no grounds on which to assess a duty against Borlem even though Commerce had found Borlem was dumping TSDWs into the U.S. market. Additionally, a finding of material injury would make it possible to reassess an antidumping duty on FNV if Commerce's Amended Final Determination was overturned.

321. *See supra* notes 37-41 and accompanying text (explaining the appeals process for dumping and countervailing duty cases).

322. Borlem S.A.-Empreedimentos Industriais v. United States, 913 F.2d 933, 936 (Fed. Cir. 1990) (interlocutory appeal pursuant to 28 U.S.C. § 1292(d)(1) (1982)).

323. *Id.* at 936 (remand authority based on 28 U.S.C. § 2643(c)(1) and warranted because of the Amended Final Determination that FNV's dumping margins were *de minimis*).

324. *Id.* at 937 (citing Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978) (the ITC's finding will be upheld if "sufficiently reasonable").

325. *Id.* at 937. The CAFC expressly noted that 28 U.S.C. § 2643(b) (1980),

> [E]xpressly provides that when, 'the Court of International Trade is unable to determine the correct decision on the basis of the evidence in any civil action, the court . . . may order such further administrative or adjudicative procedures as the court considers necessary . . . .' Since the trial court did not premise its authority on this provision, we will comment on it no further other than to indicate its possible applicability to this case. *See* Jarvis Clark Co. v. United States, 739 F.2d 628, 629 (Fed. Cir. 1984) (omissions in

reasoned that Congress' policy of timely determinations in dumping cases was not an authorization for the ITC to reach conclusions premised on inaccurate data.[326] As the court noted, the law does not require, nor should it require, the reliance by ITC on erroneous data leading to an erroneous result.[327] Finally, the CAFC stated that deference to an administrative agency's findings should not apply when the issue is the scope of the agency's authority.[328] Because the CIT acted within the scope of its powers and did not impose the court's views into the administrative process, the CIT's remand to the ITC was proper.[329]

The ITC asserted several other arguments before the CAFC in support of its view that the CIT should not remand cases to the ITC after a final threat of material injury finding had been reached. First, the ITC interpreted the governing statutes as requiring that all findings be reached within the timetables provided by statute.[330] The CAFC found that the statutes did not address reconsideration of final decisions, and that it would be inconsistent with the role of judicial review to prohibit reconsideration.[331] Second, the ITC argued that Congress had expressly authorized Commerce to correct ministerial errors while failing to authorize the ITC to do so.[332] The CAFC stated that congressional authorization for Commerce to correct ministerial errors was not tantamount to prohibiting the ITC from correcting substantive errors based on inaccurate data.[333] Third, both the ITC and Budd Company

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original). *Id.* at n.4.

326. *Id.* at 937 (Threat of injury determination made on faulty premise that Commerce found both Borlem and FNV to be dumping, when in fact FNV's dumping was *de minimis*).

327. 913 F.2d at 937.

328. *Id.* (citing Social Sec. Bd. v. Nierotko, 327 U.S. 358, 369 (1946)).

329. 913 F.2d at 937-38.

330. *Id.* at 938 (citing 19 U.S.C. §§ 1673b(b)(1), 1673d(a) (1980)).

331. *Id.* (citing 19 U.S.C. § 1516a (1988)).

332. 913 F.2d at 938 (citing Commerce's authorization under 19 U.S.C. §§ 1671d(e), 1673d(e)).

333. *Id.* Furthermore, the ITC objected to the CIT's citation of an ITC regulation 19 C.F.R. § 207.46 (1989) which stated that the ITC shall have inherent authority to issue modifications, clarifications, or correction of a determination within a reasonable time from the date of issuance. The ITC argued that the regulation was meant to apply only to non-substantive errors. The CAFC agreed with the CIT that the regulation need not be read so narrowly. However, the CAFC found it unnecessary to interpret the regulation as the issue before the Court was the authority of the CIT to require reconsideration on remand. *Id.*

argued that the CIT should not base its remand on information contained in Commerce's Amended Final Determination that was itself the subject of a separate appeal.[334] The CAFC stated that the CIT was apprised of the status of Commerce's Amended Final Determination, and it was not legal error for the CIT to require the ITC to reconsider its findings on remand.[335]

The CAFC agreed with the CIT's interpretation of the statute and legislative history giving the CIT broad remand authority co-extensive with other federal district courts.[336] Therefore, the CIT properly utilized its remand authority by having the ITC reconsider, as a question of first impression, whether the ITC's final material injury findings should be reviewed because of Commerce's Amended Final Determination. Having disposed of the main issue, the CAFC addressed the second question involving the amount of discretion the ITC could exercise in determining whether to reconsider the threat of material injury determination.

The second issue before the CAFC was whether the CIT properly left the decision of whether or not to reconsider the ITC's material injury findings within the discretion of the ITC.[337] Interestingly, it was Borlem and FNV who argued that the CIT erred in ordering the ITC to use its discretion in determining whether the material injury determination should be reconsidered.[338] The CAFC noted that the CIT's order was non-discretionary to the extent it required the ITC to reconsider whether, in its discretion, the injury determinations should be

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334. *Id.* at 939-41 (ITC concerned about the possibility of "endless *renvoi*") (Budd Company concerned over status of its appeal of Commerce's Amended Final Determination. That appeal was decided by the CIT on September 5, 1990, one day prior to the CAFC decision on this appeal).

Additionally, the ITC was concerned by the CIT's reliance on Commerce's Amended Final Determination which was outside the ITC's administrative record. The ITC cited the fact that the court was not to conduct a trial *de novo*. But the CAFC ruled that, "a reviewing court is not precluded under this standard from considering events which have occurred between the date of an agency (or trial court) decision and the date of decision on appeal." *Id.* at 939.

335. *Id.* at 941.

336. *Id.* at 936-37 (citing 28 U.S.C. § 2643; H.R. REP. No. 1235, 96th Cong., 2d Sess. 44, 61, *reprinted in* 1980 U.S.C.C.A.N. 7088, 7114).

337. 913 F.2d at 936, 941.

338. *Id.* at 942 (Obviously Borlem and FNV did not wish to win the remand battle only to lose the injury determination war by having the ITC in its discretion decide reconsideration was unnecessary).

amended.[339] However, the CAFC reasoned that if the CIT had remand authority to order the ITC to reconsider, the CIT had the authority to allow the ITC discretion upon remand.[340] Therefore, the CIT's order granting the ITC discretion in determining whether reconsideration of the threat of injury finding was upheld.[341]

The CAFC ordered the ITC to reconsider whether the final determination that imports into the United States by Borlem and FNV materially threatened U.S. industry. However, the court stayed execution of its order pending the outcome of the second appeal to the CIT of Commerce's Amended Final Determination.[342] After the ruling on the second appeal of the Amended Final Determination was announced, the ITC published a notice that it was reopening its investigation as ordered by the CAFC.[343] To date, the ITC has not completed and published the results of its court ordered review. Nevertheless, the importance of this case lies not in the final outcome, but in the legal precedent established regarding Commerce's application of the circumstances of sales adjustment and the CIT's remand authority.

VI. LEGAL RAMIFICATIONS

A. Legal Ramifications of Cases Relating to Commerce

The facts of this case required Commerce and the courts to examine whether Commerce's replacement accounting for costs accurately captured all of Borlem's and FNV's costs. Additionally, this case brought into question the rules regarding calculation of foreign market value. Finally, the circumstances of sales adjustment

339. *Id.* at 941.

340. *Id.* (ITC did argue the discretion issue maintaining only that the CIT had no power to remand).

341. *Id.* at 942 (CAFC remanded for proceedings consistent with its holding).

342. Notices of Remand Proceedings, Tubeless Steel Disc Wheels from Brazil, 56 Fed. Reg. 49,904-01 (Oct. 2, 1991) (Inv. No. 731-TA-335) (court remand); *see supra* notes 242-74 and accompanying text (providing details of second appeal of Amended Final Determination).

343. *Id.* (briefs due October 9, 1991). The notice stated that, "No new factual material may be submitted to the Commission other than that relating to the impact of the exclusion of imports of tubeless steel disc wheels from the Brazilian supplier, FNV." *Id.*

utilized by Commerce to accurately compare Brazilian foreign market value and costs with U.S. price and costs was questioned on the grounds that Commerce was engaged in making new rules without proper authorization from Congress. These issues were fundamental to properly assessing the dumping margins, if any, of Borlem and FNV. The answer to these questions had a direct impact on Brazilian and U.S. manufacturers as well as U.S. consumers of TSDWs.

Commerce's replacement cost method for calculating costs in a hyperinflationary economy was found to be a fundamentally sound policy. The determination that the sales date rather than the shipment date would be used to convert Brazilian currency into dollars in order to compare foreign market value with U.S. price was also found to be the proper interpretation of the governing statutes and regulations. However, due to the long delays between the sales date and shipment date for TSDWs, Commerce felt it necessary to employ a circumstances of sale adjustment to offset the effects of hyperinflation and devaluation of the Brazilian currency. On appeal to the CIT, the fundamental question for the court was the propriety of this circumstances of sale adjustment. Was Commerce engaged in rule making when it implemented the adjustment, or was Commerce empowered to utilize an adjustment in this case to reach an accurate result?

The CIT held that it was within Commerce's discretion to adjust the normal procedure for converting foreign currency into U.S. dollars. Normally, the circumstances of sale adjustment is designed to compensate for factors directly related to the sale of products to the United States. However, the CIT stated that Commerce's primary function was to compare costs and prices at a common point along the distribution chain. The delay between the sales date and shipment date distorted Commerce's calculation of Borlem's and FNV's foreign market value. Because reverberations from Brazil's hyperinflation affected the sale of TSDWs to the United States, a circumstances of sale adjustment was proper under these circumstances. The adjustment resulted in a finding that FNV's dumping margin was *de minimis.*

The circumstances of sales adjustment used in this case can be utilized by other importers from countries experiencing hyperinflation.[344] When foreign firms can show that hyperinflation affected the calculation of foreign market value, other firms can benefit in the same fashion as FNV. If dumping margins are reduced due to a circumstances of sale adjustment, the possibility exists that the ITC will not find a threat of material injury to a U.S. industry.

This case also introduced the broader concept that any general economic condition may trigger a circumstances of sale adjustment if that condition impacts the goods under investigation. Although the CIT attempted to narrow the case's holding to the particular facts, exporters from countries experiencing systemic economic difficulties could argue that the general conditions in their economies justify a circumstances of sale adjustment as well. Potentially, Commerce or the CIT could broaden the scope of the circumstances of sale adjustment to offset general economic conditions in exporting countries.

B. Legal Ramifications of Cases Relating to the ITC

The cases involving the ITC raised legal and policy issues of first impression concerning the remand authority of the CIT. The CAFC found that the CIT was an Article III court possessing the same remand authority in law and equity as any other Article III court. Therefore, based upon the doctrine of primary jurisdiction, the CIT had the authority to remand this case to the ITC so that it could determine whether a reconsideration of its final injury finding was warranted. Based upon the remand authority of the CIT, the ITC was required to consider reviewing the threat of material injury finding despite a lack of statutory authorization.

Commerce's dumping determinations and the ITC's material injury findings are interrelated. If Commerce alters an amended final dumping determination, the CIT will require the ITC to consider reviewing the injury finding. Commerce's finding of a *de*

344. *E.g.*, Argentina, Israel, and Bolivia.

minimis dumping margin by FNV opened the door to a reexamination of the material injury determination for all TSDWs imported into the United States. The CIT and CAFC agreed that Congress' desire to have prompt administrative resolution of dumping cases did not override the congressional policy of reaching just results.

Borlem v. United States[345] established that the CIT does have the authority to remand cases to the ITC and Commerce. However, in this case, the CIT's order on remand left the final substantive decisions within the discretion of the ITC. The CAFC upheld the CIT's decision to leave substantive matters within the purview of the ITC. The CIT is understandably hesitant to substitute the court's judgment for that of one of the administrative agencies charged by Congress to administer U.S. antidumping laws. A party must assert that the administrative agency's findings are based on some extrinsic mistake or misunderstanding in order to have the CIT order a new investigation based on its remand authority. Nevertheless, the CIT's remand authority is a new tool available to parties seeking to correct errors by either the ITC or Commerce.[346]

Counsel representing foreign manufacturers should cite this case for the proposition that any reduction in the dumping margin calculation by Commerce mandates that the ITC consider reviewing the threat of material injury determination. All parties before the ITC should argue that there are no cut-off points in the injury determination process because the goal of the proceedings is to reach fair and accurate results. Therefore, the ITC should consider reopening an investigation whenever Commerce reports *any* amended findings. If the ITC fails to adopt new procedures for reopening investigations in light of new findings by Commerce, counsel should appeal to the CIT seeking an order to force the ITC to reconsider its threat of material injury finding.

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345. 718 F. Supp. 41 (1989), *aff'd*, 913 F.2d 933 (Fed. Cir. 1990) (upholding CIT's remand authority).

346. However, in the only case citing *Borlem* the CIT sought to limit the holding to the "peculiar" facts of the case. Trent Tube Div. v. United States, 752 F. Supp. 468, 476 (Ct. Int'l Trade 1990) (no allegations of ITC mistake as in *Borlem*).

VII. CONCLUSION

The series of administrative proceedings and court appeals involving Borlem, FNV, and the Budd Company are illustrative of the complex legal, economic, and policy issues associated with dumping cases. The determinations made in every dumping case are based on the distinct circumstances of the foreign and domestic manufacturers, the foreign and domestic markets, and the general economic conditions in the countries involved. Because the cases involve foreign manufacturers operating in a foreign economy, it is often difficult to gather and analyze all the data necessary to reach a correct decision. In the case of TSDWs from Brazil, it was especially difficult for Commerce and the CIT to accurately assess the impact of hyperinflation in Brazil on Borlem and FNV. However, through the use of CIT's remand authority, the parties will have an opportunity to have their case decided on the most accurate data available. In the future, the CIT's remand authority should be utilized whenever necessary to reach a fair and accurate result.