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Judicial Review of Commerce Department Antidumping Duty Determinations: Deference or Abdication?

Kevin C. Kennedy*

The Trade Agreements Act of 1979¹ and the Customs Courts Act of 1980² effected a sweeping overhaul of U.S. law governing international trade.³ Among the many procedural changes triggered by the Trade Agreements Act of 1979 (the Act or TAA) was the transfer of responsibility for conducting countervailing and antidumping duty investigations from the Treasury Department to the Commerce Department.⁴ In addition, the TAA was the prime motivating force for enactment of the Customs Courts Act of 1980.⁵ The Customs Courts Act, in tandem with the TAA,⁶ revamped wholesale the judicial review procedures governing international trade matters.⁷ For example, an expanded number of "interested parties"⁸

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¹ Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at scattered sections of titles 5, 7, 13, 19, 26, 28, 31 U.S.C.).

² Pub. L. No. 96-417, 94 Stat. 1771 (1980) (codified at scattered sections of titles 5, 16, 19, 26, 28 U.S.C.).

³ See *Symposium: A Practitioner's Guide to International Trade Law*, 6 N.C.J. INT'L L. & COM. REG. 307 (1981); Barringer & Dunn, *Antidumping and Countervailing Duties Investigations Under the Trade Agreements Act of 1979*, 14 J. INT'L L. & ECON. 1 (1979).

⁴ See 19 U.S.C. § 1677(1) (1982); Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (1979); Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980). See also S. REP. NO. 249, 96th Cong., 1st Sess. 76-77 (1979) (noting the "dismal performance" of the Treasury Department in assessing dumping duties).

⁵ See H.R. REP. NO. 1235, 96th Cong., 2d Sess. 20 (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3731. "H.R. 7540 complements Title X of the Trade Agreements Act of 1979, which provided for judicial review of certain types of agency determinations principally relating to antidumping and countervailing duty determinations." *Id.*

⁶ See 19 U.S.C. § 1516a (1982).

⁷ See H.R. REP. NO. 1235, *supra* note 5, at 27-28.

⁸ An "interested party" is defined in the Trade Agreements Act of 1979 (TAA or the Act) as (1) a foreign manufacturer, producer, or importer of the merchandise under investigation; (2) the government of a country in which such merchandise is manufactured; (3) a domestic manufacturer of a product like the one under investigation; (4) a union representing workers in an industry engaged in the manufacture of such a product; and (5) a trade association a majority of whose members manufactures such a product. 19 U.S.C. § 1677(9) (1982).

were for the first time given access to the U.S. Court of International Trade⁹ as well as to the Court of Appeals for the Federal Circuit ("CAFC" or "Federal Circuit").¹⁰

This article critiques three Federal Circuit decisions¹¹ in which Commerce Department interpretations of the TAA's antidumping duty provisions were reviewed and concludes that the degree to which the Federal Circuit deferred to Commerce Department statutory interpretations has been excessive, tantamount to abdication of the judicial review function.

To better understand the significance of these decisions, a brief discussion of the antidumping duty law, the antidumping administrative process, and the scope of judicial review of this process is necessary.

I. Overview of the Antidumping Duty Law and the Scope of Judicial Review

With the passage of the Trade Agreements Act of 1979, responsibility for the administration of the antidumping duty (AD) law was transferred to the Commerce Department.¹² Commerce, acting through its International Trade Administration (ITA), is the "administering authority"¹³ for the TAA. The *raison d'être* of the AD law is to prevent price discrimination within national markets.¹⁴ To effectuate this goal, U.S. businesses may file petitions with the ITA when it appears that a competing foreign manufacturer or producer is importing merchandise into the United States at prices which are less than fair value.¹⁵ If the ITA finds that foreign merchandise is being sold or may be sold in the United States at less than fair value, it will impose an additional antidumping duty subject to review by the U.S. International Trade Commission.¹⁶

The ITA calculates antidumping duties by determining the amount by which the foreign market value exceeds the United States price for the merchandise, and thus the fair value of the imported

⁹ *Id.* § 1516a (1982); 28 U.S.C. § 1581(c) (1982).

¹⁰ 19 U.S.C. § 1516a(c), (e) (1982); 28 U.S.C. § 1295(a)(5) (1982). See generally Note, *Judicial Review of Antidumping Cases and the Trade Agreements Act of 1979: Towards a Unified System of Review*, 14 J. INT'L L. & ECON. 101 (1979).

¹¹ *Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc.*, 753 F.2d 1033 (Fed. Cir. 1985); *Melamine Chems., Inc. v. United States*, 732 F.2d 924 (Fed. Cir. 1984); *Smith-Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 104 S. Ct. 1274 (1984).

¹² See *supra* note 4.

¹³ 19 U.S.C. § 1677(1) (1982).

¹⁴ Barshefsky & Cunningham, *The Prosecution of Antidumping Actions Under the Trade Agreements Act of 1979*, 6 N.C.J. INT'L L. & COM. REG. 307, 308 (1981).

¹⁵ See 19 U.S.C. §§ 1673-1673a (1982). See also Barshefsky & Cunningham, *supra* note 14, at 318-30; Barcelo, *Subsidies, Countervailing Duties and Antidumping After the Tokyo Round*, 13 CORNELL INT'L L.J. 257 (1980).

¹⁶ 19 U.S.C. § 1673 (1982).

goods.¹⁷ Although "fair value" is not defined in the Act,¹⁸ Congress intended the concept of fair value to be an estimate of foreign market value.¹⁹ "Foreign market value" is defined as the home market price for the merchandise under investigation²⁰ or, in the absence of home market sales, third country prices.²¹ "Home market price," the most commonly used measure of foreign market value, generally represents the wholesale price of imported merchandise in the foreign manufacturer's home market.²² U.S. price, in turn, is the U.S. sales price of the merchandise, computed by one of two alternative methods: purchase price²³ or exporter's sale price.²⁴ The relationship between the importer and foreign manufacturer determines which of these methods will be used. If the merchandise is sold to an unrelated importer in the United States, the "purchase price" formula is used.²⁵ If, on the other hand, the sale is to a related importer, the "exporter's sales price" is employed.²⁶

Through the use of certain price adjustments, a constructed value based on an arm's length transaction is derived.²⁷ If foreign market value exceeds U.S. price for the merchandise in question after adjustment, an antidumping duty equal to that excess may be im-

¹⁷ *Id.*

¹⁸ H.R. REP. NO. 317, 96th Cong., 1st Sess. 59 (1979). "The term fair value is not defined in current law nor in the bill." *Id.*

¹⁹ *Id.*

²⁰ 19 U.S.C. § 1677b(a)(1)(A) (1982).

²¹ *Id.* § 1677b(a)(1)(B) (1982). See S. REP. NO. 249, *supra* note 4, at 94-96.

²² 19 U.S.C. § 1677b(a)(1)(A) (1982).

²³ *Id.* § 1677a(b).

²⁴ *Id.* § 1677a(c); see *id.* § 1677(13). See also S. REP. NO. 249, *supra* note 4, at 93-94.

²⁵ S. REP. NO. 249, *supra* note 4, at 94.

²⁶ As explained by the Federal Circuit in *Smith-Corona Group v. United States*:

United States price, as defined in section 1677a, is computed by one of two methods: purchase price or exporter's sales price. The antidumping law attempts to construct value on the basis of arm's length transactions. The arm's length sale takes place at different points in the chain of commerce depending on whether the goods traveled through a related importer or through an independent, unrelated importer. Thus, different methods of computation of United States price are required depending on the relationship of the importer to the foreign producer.

Where the importer is an unrelated, independent party, purchase price is used. Purchase price is the actual agreed-to price between the foreign producer and the independent importer, prior to the time of importation. Where the importer is related, an arm's length transaction does not occur until the goods are resold to a retailer or to the public. In that case, "exporter's sales price" is used. Exporter's sales price is the price at which the goods are eventually transferred in an arm's length transaction, whether from the importer to an independent retailer or directly to the public.

Both purchase price and exporter's sales price are subject to adjustment in order to derive a "fair" United States price for comparison with foreign market value. The adjustments provided in section 1677a(d) are applicable to both purchase price and exporter's sales price. The additional adjustments provided in section 1677a(e) are applicable *only* to exporter's sales price.

713 F.2d 1568, 1572 (footnotes omitted; emphasis in original).

²⁷ *Id.*

posed.²⁸ The U.S. International Trade Commission ultimately determines whether antidumping duties will be imposed. The Commission is authorized to impose duties only if it finds that the petitioning industry is being injured by reason of the less-than-fair-value imports.²⁹ If the Commission either preliminarily³⁰ or finally³¹ determines that domestic industry is not suffering injury by reason of contested imports, or if the ITA concludes that competing merchandise imports are not being sold in the United States at less than fair value,³² the case is closed at the administrative level. If, however, both the ITA and the Commission reach final affirmative determinations, antidumping duties are imposed on the offending merchandise in an amount equal to the dumping margin calculated by the ITA.³³ Affirmative AD determinations are regularly reviewed by the ITA³⁴ and may eventually be revoked if the ITA is satisfied that dumping has ceased.³⁵

Judicial review of ITA administrative determinations is expressly provided for in the TAA.³⁶ Petitioning U.S. manufacturers, importers and foreign manufacturers of the subject merchandise who have participated in the administrative proceedings may contest either the ITA's or the Commission's findings and conclusions³⁷ by filing a summons and complaint with the Court of International Trade ("CIT").³⁸ The Court of International Trade has exclusive jurisdiction over all antidumping actions.³⁹ Subsequently, an appeal of right may be taken to the Federal Circuit from an adverse CIT decision.⁴⁰

The scope of judicial review of final AD determinations is statutorily defined to be whether the determination is "unsupported by substantial evidence of the record, or otherwise not in accordance with law."⁴¹ It is this latter standard—"or otherwise not in accordance with law"—and its application by the Federal Circuit which this article will examine.

²⁸ 19 U.S.C. § 1673 (1982).

²⁹ *Id.*; see Note, *Injury Determinations Under the United States Antidumping Laws Before and After the Trade Agreements Act of 1979*, 33 *RUTGERS L. REV.* 1076, 1096 (1981); Note, *An Analysis of "Material Injury" Under the 1979 Trade Agreements Act*, 4 *LOY. L.A. INT'L & COMP. L.J.* 87, 90 (1981).

³⁰ 19 U.S.C. § 1673b (1982).

³¹ *Id.* § 1673d(c)(2) (1982).

³² *Id.*

³³ *Id.* §§ 1673d(c)(2), 1673e(a).

³⁴ *Id.* § 1675.

³⁵ *Id.* § 1675(c).

³⁶ *Id.* § 1516a.

³⁷ *Id.* §§ 1516a(a)(1), (d); 28 U.S.C. § 2631(c) (1982).

³⁸ 19 U.S.C. § 1516a(a)(1) (1982).

³⁹ 28 U.S.C. § 1581(c) (1982).

⁴⁰ *Id.* § 1295(a)(5).

⁴¹ 19 U.S.C. § 1516a(b)(1)(B) (1982). This standard is essentially that found at 5 U.S.C. § 706 (1982). See *Smith-Corona Group*, 713 F.2d at 1575 n.18.

II. Federal Circuit Antidumping Duty Decisions

In three recent decisions, *Consumer Products Division, SCM Corp. v. Silver Reed America, Inc.*;⁴² *Melamine Chemicals, Inc. v. United States*;⁴³ and *Smith-Corona Group v. United States*,⁴⁴ the Federal Circuit reviewed ITA interpretations of the antidumping duty statute. In all three cases, the CAFC upheld the regulations against challenges that they were not in accordance with law.⁴⁵

In *Smith-Corona Group* Smith-Corona, the last remaining domestic manufacturer of portable electric typewriters,⁴⁶ challenged an ITA antidumping duty determination⁴⁷ in which several adjustments made to the foreign market value of Japanese typewriters⁴⁸ substantially reduced estimated dumping margins.⁴⁹ Smith-Corona specifically challenged the validity of two regulations⁵⁰ promulgated by the Commerce Department under the authority of section 773(a)(4)(B) of the Tariff Act of 1930, as amended by the TAA.⁵¹ The first regu-

⁴² 753 F.2d 1033 (Fed. Cir. 1985).

⁴³ 732 F.2d 924 (Fed. Cir. 1984).

⁴⁴ 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 104 S. Ct. 1274 (1984).

⁴⁵ *Consumer Prods. Div.*, 753 F.2d at 1040; *Melamine Chems., Inc.*, 732 F.2d at 935; *Smith-Corona Group*, 713 F.2d at 1582.

⁴⁶ 713 F.2d at 1570.

⁴⁷ *Id.* at 1570-71.

⁴⁸ *Id.* at 1573 n.12.

⁴⁹ *Id.* at 1571 n.4. In the case of one Japanese typewriter manufacturer, the dumping margin was reduced from 48.7% ad valorem to 5.31% ad valorem. For another Japanese manufacturer, the margin was reduced from 36.53% ad valorem to 14.91% ad valorem. *Id.*

⁵⁰ *Id.* at 1574. Smith-Corona attacked 19 C.F.R. § 353.15(c) and (d). 19 C.F.R. § 353.15(a) and (b) (1985) sets forth specific classes of adjustments, such as advertising and selling expenses, and provides criteria for determining the amount of allowances under 19 U.S.C. § 1677b(a)(4)(B). 19 C.F.R. § 353.15(c) and (d) (1985) provides in part:

(c) *Special rule.* Notwithstanding the criteria for adjustments for differences in circumstances of sale set forth in paragraphs (a) and (b) of this section, reasonable allowances for other selling expenses generally will be made in cases where a reasonable allowance is made for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, the amount of such allowance being limited to the actual other selling expenses incurred in the one market, or the total amount of the commission allowed in such other market, whichever is less. In making comparisons using exporter's sales price, reasonable allowance will be made for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market.

(d) *Determination of allowances.* In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the cost of such differences to the seller, but, where appropriate, he may also consider the effect of such differences upon the market value of the merchandise.

Id. In addition to its challenge to the regulations, Smith-Corona attacked the validity of the amounts of three specific adjustments to foreign market value granted the Japanese manufacturers. See 713 F.2d at 1574-75.

⁵¹ 713 F.2d at 1574. 19 U.S.C. § 1677b(a)(4)(B) (1982) provides:

(4) Other adjustments

In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the

lation permitted differences in circumstances of sale to be computed on the basis of cost.⁵² Smith-Corona argued that the regulation's preference for cost, rather than price or value, was inconsistent with the Act.⁵³ The second regulation challenged by Smith-Corona established an "exporter's sales price offset" (ESP),⁵⁴ which permitted "reasonable allowances" for all actual selling expenses incurred in the home market up to the amount of comparable selling expenses incurred in the United States market.⁵⁵ Because this rule effectively raised the U.S. price for imported typewriters, it substantially reduced dumping margins.⁵⁶ Smith-Corona contended that no statutory support for such an adjustment existed,⁵⁷ and that this regulatory adjustment was entirely inconsistent with the adjustments the TAA expressly permitted.⁵⁸

In addressing Smith-Corona's arguments, the Federal Circuit stated that the contested regulations must satisfy two criteria to be sustained. First, they must be a proper exercise of the Secretary's authority.⁵⁹ Second, they must be reasonable.⁶⁰ The court elaborated that the reasonableness of the regulations would be determined by statutory language, legislative history, and legislative purpose.⁶¹

With this analytical backdrop as a guide, the court reviewed Smith-Corona's cost-based criterion argument.⁶² The court first considered whether the regulations were a proper exercise of agency authority. Although the CAFC found that the regulation lacked congressional acquiescence⁶³ and was not entitled to deferential review,⁶⁴ the court concluded the ITA's broad discretionary authority permitted it to issue the regulation.⁶⁵ In addition, the CAFC held

United States price is the same as the foreign market value) is wholly or partly due to—

.....
 (B) other differences in circumstances of sale, . . .

.....
 then due allowance shall be made therefor.

Id.

⁵² 19 C.F.R. § 353.15(d) (1985); *see supra* note 50.

⁵³ 713 F.2d at 1574.

⁵⁴ *Id.*

⁵⁵ 19 C.F.R. § 353.15(c) (1985); *see supra* note 50.

⁵⁶ 713 F.2d at 1571 n.4.

⁵⁷ *Id.* at 1574, 1577.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1575.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* The court found that neither the TAA's legislative history nor its purpose were illuminating. *See id.* at 1576.

⁶³ *Id.*

⁶⁴ The court rejected the Government's argument that heightened deference was necessary because the regulation was longstanding. *Id.*

⁶⁵ *Id.* at 1577.

that the regulation was not promulgated *ultra vires* because "the statute does not explicitly forbid reliance on cost."⁶⁶ Paradoxically, the court acknowledged that Congress has recognized the "inherent unreliability" of cost criteria, but nonetheless upheld the regulation.⁶⁷

Although the Federal Circuit found no support for the regulation in the TAA's legislative history, it concluded that the regulation was reasonable. Because of the stringent statutory deadlines within which AD investigations and determinations must be completed, the court reasoned that cost data may be the only readily available, reliable indicia of value, and sustained the regulation.⁶⁸

In analyzing the ESP offset, the Federal Circuit first considered the Government's contention that this offset was designed to redress a "perceived unfairness" in the calculation of foreign market value.⁶⁹ The Act provides that specific adjustments may be made to the exporter's sales price of merchandise⁷⁰—the "United States price" in related purchaser import transactions—including downward adjustment for certain "indirect costs," such as selling expenses.⁷¹ The ITA argued that the ESP offset regulation was necessary to counterbalance the indirect selling cost adjustment for U.S. concerns because comparable downward adjustments were not permitted for foreign market indirect costs.⁷² Smith-Corona countered that the ESP offset rendered section 772(e)(2) of the Tariff Act of 1930 void⁷³ because it permitted two different foreign market value computa-

⁶⁶ *Id.* As an example, the CAFC noted that pursuant to 19 U.S.C. § 1677b(3) constructed value based on cost criteria may be used to determine foreign market value when home market price or third country price are not available. *Id.* at 1575-76 & n.20. The TAA states a preference for the use of home market price over third country price. 19 U.S.C. § 1677b(a)(1)-(2) (1982). The legislative history of the Act shows a preference for the use of third country price over constructed value. S. REP. NO. 249, *supra* note 4, at 96 ("third country prices will normally be preferred over constructed value if presented in a timely manner and if adequate to establish foreign market value.") *Id.* Commerce Department regulations likewise reflect this preference for the use of third country prices. 19 C.F.R. § 353.4(b) (1985). See Hemmendinger & Barringer, *The Defense of Antidumping and Countervailing Duty Investigations Under the Trade Agreements Act of 1979*, 6 N.C.J. INT'L L. & COM. REG. 427, 432-33 (1981).

⁶⁷ The court remarked: "Dumping is a prime example of unfair competition in which a foreign manufacturer ignores the normal relationship of cost to price. Hence, cost is subject to manipulation and Congress has recognized its inherent unreliability." 713 F.2d at 1576. (emphasis added).

⁶⁸ 713 F.2d at 1577 & n.27.

⁶⁹ *Id.* at 1577. The ESP offset allows for adjustments to foreign market value which in turn reduce the dumping margin. *Id.*

⁷⁰ 19 U.S.C. § 1677a(d)-(e) (1982). These adjustments include additions to exporter's sales price (*e.g.*, costs of containers and packing, rebated duties by the country of exportation) and subtractions from that price (*e.g.*, export taxes or duties). *Id.* § 1677a(d). Indirect costs, such as selling expenses, may also be subtracted from the exporter's sales price. *Id.* § 1677a(e). See *Smith-Corona Group*, 713 F.2d at 1577-78.

⁷¹ 19 U.S.C. § 1677a(e)(2) (1982).

⁷² *Smith-Corona Group*, 713 F.2d at 1578. As a consequence, the ITA promulgated 19 C.F.R. § 353.15(c) (1985). This regulation permits a comparable adjustment to foreign market value for selling expenses incurred in the home market. See *supra* note 50.

⁷³ *Smith-Corona Group*, 713 F.2d at 1577.

tions and *two* different fair value comparisons to be used when the TAA only permits the use of *one* fair value.⁷⁴

The Federal Circuit sustained the regulation, accepting the ITA's argument that the ESP offset was necessary to prevent the higher dumping margins that would otherwise result from the calculation of foreign market value in some situations.⁷⁵ The CAFC found little guidance in the legislative history to support the ESP offset,⁷⁶ and was forced to retreat to language of the statute itself.⁷⁷ The court refused to accept Smith-Corona's contentions because the statute did not expressly foreclose the use of two different U.S. price-foreign market value comparisons.⁷⁸ The CAFC conceded that the regulation negated the specific statutory adjustment to exporter's sales price concerning selling expenses,⁷⁹ but rationalized the agency's repeal of this statute by observing that the broader statutory purpose of constructing fair comparisons was realized.⁸⁰ Again deferring to agency discretion, the court concluded that the ESP offset was a proper and reasonable exercise of the agency's authority.⁸¹

*Consumer Products Division, SCM Corp.*⁸² provides a sequel to *Smith-Corona Group*. In *Smith-Corona* the CAFC approved the ITA's ESP offset, which allowed deduction of indirect costs from foreign market value.⁸³ In *Consumer Products* the court considered the validity of the regulatory cap, denominated the "ESP offset cap," which the ITA had placed on cost deductions.⁸⁴ The ESP offset cap set a numerical ceiling on these deductions equal to the amount of indirect costs deducted from the U.S. price side of the equation.⁸⁵

Silver Seiko, a Japanese manufacturer of imported typewriters,

⁷⁴ *Id.* at 1578; 19 U.S.C. § 1673 (1982). Smith-Corona also argued that the antidumping duty statute establishes the fair value comparison on an "f.o.b. foreign port" price basis. 713 F.2d at 1578; see 19 U.S.C. § 1677b (1982). According to Smith-Corona the ITA's regulation distorted this result. 713 F.2d at 1578.

⁷⁵ 713 F.2d at 1578. The court reasoned that because certain downward adjustments could be made in calculating exporter's sales price, but comparable downward adjustments could not be made in calculating "purchase price," an anomaly would result—higher dumping margins in the case of ESP transactions as compared to purchase price transactions. Consequently, the CAFC concluded that the ESP offset was created to smooth out this statutory rough spot. *Id.*

⁷⁶ *Id.* at 1578-79.

⁷⁷ *Id.* at 1579. "The statutory language . . . is the only compelling evidence of record regarding the validity of the offset." *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* "The offset does permit negation of one specific statutory adjustment to exporter's sales price" *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Consumer Prods. Div.*, 753 F.2d at 1033.

⁸³ See *supra* notes 75-80 and accompanying text.

⁸⁴ *Consumer Prods. Div.*, 753 F.2d at 1035-36.

⁸⁵ 19 C.F.R. § 353.15(c) (1985). See *Consumer Prods. Div.*, 753 F.2d at 1035-36. The sole question presented for the Federal Circuit's review was the validity of this regulatory cap. *Id.* at 1037.

challenged this regulation, arguing that section 773(a)(4)(B) of the 1930 Tariff Act, as amended,⁸⁶ required deduction of *all* selling expenses, both direct *and* indirect, from foreign market value.⁸⁷ Because the ESP offset cap limited foreign market selling expense deductions, Silver Seiko contended the fundamental goal of the AD law, a fair comparison of prices in U.S. and Japanese markets, was frustrated.⁸⁸

The Federal Circuit refused to adopt Silver Seiko's position, pointing out that Congress ratified the long-standing administrative practice of limiting deductions for differences in circumstances of sale to *direct* expenses such as credit terms, warranties, and differences in the level of trade, in the statute's legislative history.⁸⁹ Consequently, the court concluded that the ITA could not be required to make foreign market value adjustments attributable to indirect selling expenses.⁹⁰

After determining that the offset cap was consistent with the statute, the CAFC considered whether the regulation establishing the ESP offset cap was "a reasonable exercise of the Secretary's discretion."⁹¹ The court determined that the agency's construction of the statute was entitled to great weight because it was charged with administering the statute.⁹² The court added that the ITA's interpretation of the statute need not be the only reasonable interpretation, but must be upheld if it has a reasonable basis in the statutory history.⁹³ The Federal Circuit found that limiting the foreign market

⁸⁶ 19 U.S.C. § 1677b(a)(4)(B) (1982).

⁸⁷ *Id.*

⁸⁸ 753 F.2d at 1037. Silver Seiko based its argument that the statute requires deduction of all expenses of sale, direct as well as indirect, from foreign market value on the language of § 773(a)(4)(B).

⁸⁹ *Id.* at 1038. The court noted only one exception to this rule: when exporter's sales price was used as the U.S. price, indirect expenses were allowed to be deducted as well. *Id.*

⁹⁰ *Id.*

⁹¹ *See id.* at 1038-39.

⁹² The court noted the following:

As this court recently stated in *Melamine Chemicals, Inc. v. United States*, 732 F.2d 924, 928 (Fed. Cir. 1984):

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

Id. at 1039 (citations omitted).

The court added that in determining whether a regulation is reasonable, considerable deference is to be accorded agency expertise, "the masters of the subject." *Id.* (quoting *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979)).

⁹³ The court stated:

Further, it is a cardinal principle that the Secretary's interpretation of the statute need not be the *only* reasonable interpretation or the one which the court views as the most reasonable. *See, e.g., Fulman v. United States*, 434 U.S. 528, 534-36 . . . (1978) (regulation which had a "reasonable basis" in

value adjustment for indirect selling expenses to the amount of such expenses in the United States was not arbitrary.⁹⁴ It reasoned that "any greater allowance could distort the computations in favor of foreign manufacturers"⁹⁵ and the cap permitted a more efficient and expedited administrative process by shortening the investigation.⁹⁶ The Commerce Department, the court suggested, need only be convinced that "valid" expenses meet or exceed the level of the cap.⁹⁷ Therefore, the CAFC concluded the regulation must be upheld because it was reasonable "[u]nder the limited standard of judicial review applicable to this case."⁹⁸

A third case, *Melamine Chemicals, Inc. v. United States*,⁹⁹ concerned the ITA's method of using currency exchange rates to calculate dumping margins.¹⁰⁰ Melamine Chemicals challenged the ITA's practice of using exchange rates from the quarter preceding an antidumping duty investigation,¹⁰¹ arguing that 31 U.S.C. section 372¹⁰² requires use of exchange rates for the quarter in which the merchandise was exported.¹⁰³

The ITA's rationale for using the prior quarter's exchange rates was that, because the entire period under investigation was marked by significant exchange rate fluctuations, an exporter pricing its goods could not possibly predict the volatile exchange rate fluctuations occurring within that quarter.¹⁰⁴ The ITA contended that fairness to the hapless exporter dictated use of exchange rates applicable to the quarter in which the export sale occurred to determine whether a dumping margin existed.¹⁰⁵ The ITA preliminarily found a 2.18 percent dumping margin.¹⁰⁶ It then applied the exchange rates in effect for the quarter in which the exporter set its prices, that being the quarter preceding the quarter in which the sale for exportation was made, to provide "a reasonable period of time to

the statutory history upheld, even though taxpayer's challenge had "logical force").

Id.

⁹⁴ *Id.* at 1040.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ 732 F.2d at 924.

¹⁰⁰ *Id.* at 925. See Comment, *Antidumping—Application of Preceding Quarter's Foreign Exchange Rates to Fair Value Determination*, 20 TEX. INT'L L.J. 425 (1985).

¹⁰¹ 732 F.2d at 925.

¹⁰² This statute is now codified at 31 U.S.C. § 5151 (1982).

¹⁰³ 732 F.2d at 925-26.

¹⁰⁴ *Id.* at 931-32. See 19 C.F.R. § 353.56(b) (1985); Amendment of Final Determination, 45 Fed. Reg. 29,619, 29,620 (1980).

¹⁰⁵ 732 F.2d at 933. The applicable quarter for export sales is determined by 31 U.S.C. § 5151 (1982).

¹⁰⁶ *Id.*

take into account" the exchange rate fluctuation.¹⁰⁷ Using this methodology, no dumping margin existed because the initial 2.18 percent margin was solely attributable to a volatile exchange rate.¹⁰⁸

The CAFC applied the guidelines it used in its *Smith-Corona Group* and *Consumer Products Division* decisions to analyze the ITA's regulation.¹⁰⁹ First, the court noted that because the issue before it was the validity of a regulation issued pursuant to a statute which an agency administered, the agency's interpretation of the statute was entitled to great weight.¹¹⁰ Second, the court held that such a regulation must be sustained unless unreasonable and plainly inconsistent with the enabling statute.¹¹¹ The CAFC acknowledged that no express authority for the ITA's "90-day lag" rule existed. It found, however, that "Commerce's duty to enforce fairly the antidumping laws by determining whether LTFV [less-than-fair-value] sales are or are *not* occurring" constituted implicit authority and that "[a] finding of LTFV sales based on a margin resulting *solely* from a factor beyond the control of the exporter would be unreal, unreasonable, and unfair."¹¹² In analyzing the 90-day lag rule, the court deferred entirely to the agency, deeming itself an "inappropriate institution . . . to determine whether a 'reasonable period' would entail a lag of 45 days, or 60 days, or 90 days."¹¹³ The Federal Circuit deemed it sufficient that the ITA determined that the 90-day lag rule was reasonable because there was no showing that the rule was unreasonable.¹¹⁴

III. Judicial Deference to Agency Statutory Interpretation

The courts have frequently pronounced that interpretations of statutes that agencies are charged with administering are entitled to great deference.¹¹⁵ The Supreme Court has endorsed this position, stating that to sustain an agency's interpretation of a statute, a court need not find an agency's interpretation to be the only reasonable one, nor need its interpretation be the result which the court itself

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 928.

¹¹⁰ *Id.*

¹¹¹ *Id.* The court also noted the "'tremendous deference to the expertise of . . . Commerce in administering the antidumping law.'" *Id.* at 930 (quoting *Smith-Corona Group*, 713 F.2d at 1582).

¹¹² *Id.* at 933 (emphasis in original).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See, e.g.*, *United States v. Clark*, 454 U.S. 555, 565 (1982) ("Although not determinative, the construction of a statute by those charged with its administration is entitled to great deference, particularly when that interpretation has been followed consistently over a long period of time."); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 451 (1978); *Udall v. Tallman*, 380 U.S. 1 (1965); 5 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29.16, at 400 (1978).

would have reached had the question first been presented in a judicial proceeding.¹¹⁶ According to the Court, all that a reviewing court must find is that the agency's interpretation be "sufficiently reasonable" to be accepted.¹¹⁷

Chevron, U.S.A., Inc. v. Natural Resources Defense Council provides one of the more recent and most exhaustive treatments of this question by the Supreme Court.¹¹⁸ In *Chevron* the Court applied a two-step analysis.¹¹⁹ The first inquiry is whether Congress has directly addressed the precise question at issue.¹²⁰ If it has, the regulation stands.¹²¹ If, however, a court determines that Congress has not directly addressed the question, a second inquiry, whether the agency's regulation is based on a permissible construction of the statute, is necessary.¹²² In making this determination, the Court added that an agency's construction of a statute it administers deserves controlling weight.¹²³ The Court elaborated that two situations warrant further judicial deference. First, deference is heightened if a "full understanding of the force of the statutory policy in the given situation . . . depended upon more than ordinary knowledge respecting the matters subject to agency regulations."¹²⁴ Second, deference is heightened if the agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives.¹²⁵

Despite the substantial deference that the Supreme Court has established for agency interpretations of statutes, it has qualified its rather sweeping statements with the caveat that the agency's construction is "not determinative."¹²⁶ Although the shibboleth of "agency expertise" has been often invoked to bolster an agency's interpretation of statutes, the Court has warned that so-called "expert

¹¹⁶ See, e.g., *Zenith Radio*, 437 U.S. at 450.

¹¹⁷ *Id.*; *Train v. Colorado Pub. Interest Research Group*, 426 U.S. 1, 10 (1976).

¹¹⁸ 104 S. Ct. 2778 (1984).

¹¹⁹ *Id.* at 2781 ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions.") *Id.* See R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* § 7.7, at 405-07 (1985) [hereinafter cited as PIERCE, SHAPIRO & VERKUIL].

¹²⁰ 104 S. Ct. at 2781-82. "First, always, is the question whether Congress had directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* (footnote omitted).

¹²¹ *Id.* at 2782 n.9.

¹²² *Id.* at 2782. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* (footnote omitted).

¹²³ *Id.* at 2782.

¹²⁴ *Id.* See *CBS, Inc. v. FCC*, 453 U.S. 367, 382 (1980); *United States v. Rutherford*, 442 U.S. 544, 553-54 (1978).

¹²⁵ 104 S. Ct. at 2782-83.

¹²⁶ *Clark*, 454 U.S. at 565 (emphasis added). See *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856, 2869 (1983); 5 K. DAVIS, *supra* note 115, § 29.16, at 399.

discretion" has its limits: "Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion."¹²⁷ Nonetheless, it would probably be an error to conclude that these quotations are "the law."¹²⁸ The Supreme Court has vacillated in its deferential stance towards agency expertise. As Professor Kenneth Culp Davis aptly observes: "The accurate statement is that such quotations are sometimes the law and sometimes not. In each case, the Supreme Court has discretion to adopt or to reject the quotations, and the choice it makes usually depends on which way it wants to resolve the substantive question."¹²⁹

Matters are also complicated, in Davis' view, by the fact that deference to an agency's interpretation of law is not generally mentioned in Supreme Court opinions which reject agency interpretations.¹³⁰ Although Davis suggests that "[d]eference' . . . [is] useful when the Court is in doubt about the interpretation but is satisfied to let the agency's decision stand,"¹³¹ he concludes that the Court substitutes its own judgment for agency judgment more frequently than it defers, even in cases when "the question of interpretation involves policymaking within the agency's specialized area."¹³²

Matters are further complicated because several areas of administrative regulation have developed their own specialized body of decisional authority regarding judicial deference.¹³³ As one commentator noted, "the intensity and character of judicial review will vary from one field to the next, depending on the court's perceptions about the specific legislative mandate, the makeup of the agency, [and] the nature of the challenged program."¹³⁴

Given the vagaries of judicial review in the administrative context, a cynic would conclude that judges are result oriented, deciding

¹²⁷ *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962) (quoting *New York v. United States*, 342 U.S. 882, 884 (1951) (Douglas, J., dissenting)).

¹²⁸ 5 K. DAVIS, *supra* note 115, § 29.16, at 403. See PIERCE, SHAPIRO & VERKUIL, *supra* note 119, at §§ 7.4, 7.6, 7.8.

¹²⁹ 5 K. DAVIS, *supra* note 115, § 29.16, at 403.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Levin, *Federal Scope-of-Review Standards: A Preliminary Restatement*, 37 AD. L. REV. 95, 97 (1985) "[E]very substantive field of regulation develops its own body of case law articulating the degree of deference to be afforded to various administrative determinations in that area." *Id.* at 97. See, e.g., Boudreau, *To Defer or Not To Defer: The Question for the D.C. Circuit in Reviewing FCC Decisions*, 36 FED. COM. L.J. 293 (1984) (using the FCC as an example of administrative regulation and review of agency decisionmaking). See generally Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587 (1984).

¹³⁴ Levin, *supra* note 133, at 97.

cases primarily on their individual policy predilections. Cynics notwithstanding, however, "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia."¹³⁵ Judges unquestionably take their roles seriously. This is not to deny that judges enter the arena carrying their own set of political and ideological baggage. While their review may be highly subjective, courts still possess legitimate independence when reviewing agency statutory interpretations.¹³⁶ The Supreme Court has endorsed this independent judgment principle: "When an agency's decision is premised on its understanding of a specific congressional intent . . . it engages in the quintessential judicial function of deciding what a statute means. In that case, the agency's interpretation may be influential, but it cannot bind a court."¹³⁷

How does section 516A of the Act¹³⁸ measure up against this analytical framework? This question is addressed in the following part of this article.

IV. Judicial Review Under the TAA

In the author's view, the scope of judicial review provided in section 516A(a)(2)¹³⁹ is so vague as to be devoid of any meaningful standards. The statute's proviso that an agency's decision must be upheld unless it is unsupported by substantial evidence, or is otherwise not in accordance with law,¹⁴⁰ tells reviewing courts nothing of the process to be followed; it merely states conclusions.

Although the scope of review standards in section 516A(a)(2) may be inadequate, increasing the intensity of review might yield a more meaningful judicial review process.¹⁴¹ Three levels of intensity of review have been identified.¹⁴² The first has been termed a "kid

¹³⁵ Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261, 271 (1968).

¹³⁶ As noted by Justice Frankfurter in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951):

A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry.

Id. at 488-89.

¹³⁷ *BATF v. FLRA*, 104 S. Ct. 439, 445 n.8 (1983). See *SEC v. Sloan*, 436 U.S. 103, 118 (1978) (the courts are "final authorities on issues of statutory construction").

¹³⁸ 19 U.S.C. § 1516a (1982). See Note, *supra* note 10.

¹³⁹ 19 U.S.C. § 1561a(a)(2) (1982).

¹⁴⁰ *Id.*

¹⁴¹ See Comment, *Administrative Law-Judicial Review of Agency Action: Motor Vehicle Manufacturers Association v. State Farm Automobile Insurance Co.*, 32 U. KAN. L. REV. 884, 898 (1984).

¹⁴² *Pierce & Shapiro, Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1186-91 (1981).

gloves" approach.¹⁴³ As the name implies, this standard is highly deferential to agency action.¹⁴⁴ A second, more intense level of review is the "adequate consideration" test.¹⁴⁵ Under this test, a court will invalidate an agency's action when it fails to follow or fully consider factors and goals set out in the enabling legislation.¹⁴⁶ The third and most intensive level of judicial scrutiny is the "hard look" test.¹⁴⁷ Under this test, the court's review is more probing and the degree of deference is at its lowest.¹⁴⁸ Judges most often employ the "hard look" test when the agency's action appears inconsistent with its statutory mandate.¹⁴⁹ In addition, this test may be employed when the issue before the reviewing court is of great public importance.¹⁵⁰ As the following discussion demonstrates, little justification exists for any but the lowest degree of judicial deference in cases involving Federal Circuit review of ITA interpretations of the antidumping duty law.¹⁵¹

The judicially vigilant "hard look" test is the most appropriate standard for Federal Circuit review of ITA antidumping law determinations for two reasons. First, Congress referred repeatedly to the "specialized expertise" of the Court of International Trade and the Court of Appeals for the Federal Circuit in the 1980 Customs Courts Act's legislative history.¹⁵² This judicial expertise extends to all civil actions arising from import transactions.¹⁵³ Given Congress' explicit acknowledgement of the CAFC's special expertise in international trade matters, it is questionable whether the CAFC should *ever* defer

¹⁴³ *Id.* at 1188-89; *Shell Oil Co. v. FPC*, 520 F.2d 1061, 1072 (5th Cir. 1975), *cert. denied sub nom. California Co. v. FPC*, 426 U.S. 941 (1976).

¹⁴⁴ *Pierce & Shapiro*, *supra* note 142, at 1188-89.

¹⁴⁵ *Id.* at 1190-91.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1187-88.

¹⁴⁸ *Id.* This level of review has been described as review "with vigilance." *Greater Boston Television Co. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

¹⁴⁹ *Pierce & Shapiro*, *supra* note 142, at 1187-88 & n.76.

¹⁵⁰ *Id.* at 1188 n.76.

¹⁵¹ As commentators have pointed out, no matter how much deference is shown, a court never actually affirms an agency interpretation of a statutory provision without first independently analyzing it and its legislative history. If the court finds a conflict, it reverses under any standard of review. Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 *AD. L. REV.* 329, 332-35 (1979); *PIERCE, SHAPIRO & VERKUIL*, *supra* note 119, at 376-77.

¹⁵² H.R. REP. NO. 1235, *supra* note 5, at 20. "The Customs Courts Act of 1980 creates a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise of the United States Customs Court [the predecessor court of the Court of International Trade] and the United States Court of Customs and Patent Appeals [one of the two courts which were merged to form the CAFC]." *Id.* The House Report also referred to the major goals of the Customs Courts Act, one of which was "[t]he re-emphasis and clarification of Congress' intent that the expertise [of the CIT and CAFC] be exclusively utilized in the resolution of conflicts and disputes arising out of the tariff and international trade laws" *Id.* at 28.

¹⁵³ *Id.* at 20.

to the ITA in cases involving statutory construction of the antidumping duty law. While the Federal Circuit has referred to the ITA as the "master" of the AD law¹⁵⁴ and has deferred to the agency on that basis,¹⁵⁵ this deference is arguably an instance of the tail wagging the dog because of the role the Federal Circuit has been assigned by the Customs Courts Act. Second, the "hard look" test should be employed because every AD determination reached by the ITA touches upon a question of public importance to international trade involving the world's largest economic power.¹⁵⁶

V. CAFC Deference to the ITA

In *Smith-Corona Group* the Federal Circuit had before it a paradigmatic case of an agency interpreting the statute which it was entrusted with administering.¹⁵⁷ The case did not involve any fact findings or other evidentiary matters which informed the ITA's interpretation of the statute.¹⁵⁸ The CAFC applied a two-step inquiry: "whether the regulations are a proper exercise of the [Commerce] Secretary's authority and [whether the regulations] are reasonable."¹⁵⁹ It steered clear of the "hard look" test, applying instead a standard of review more akin to the "adequate consideration" test.¹⁶⁰ The CAFC should have applied the "hard look" test employed by reviewing courts when the issue is either technical or of critical importance, or when the agency's action appears inconsistent with its statutory mandate.¹⁶¹ International trade issues meet these two criteria,¹⁶² and the CAFC is as well positioned as the ITA to interpret the TAA because of its specialized expertise in international trade matters,¹⁶³ and given the exclusivity of its appellate jurisdiction over TAA cases.¹⁶⁴

The court conceded that the ITA's interpretation of the TAA was somewhat inconsistent with the Act and its legislative history,¹⁶⁵ noting that Congress had expressed dissatisfaction with the use of

¹⁵⁴ *Consumer Prods. Div.*, 753 F.2d at 1039.

¹⁵⁵ *Id.* at 1039-40.

¹⁵⁶ As stated by the court in this connection in *Smith-Corona Group*: "The number of factors involved, complicated by the difficulty in quantification of these factors and the foreign policy repercussions of a dumping determination, makes the enforcement of the antidumping law a difficult and supremely delicate endeavor." 713 F.2d at 1571.

¹⁵⁷ *Id.* at 1575.

¹⁵⁸ *See id.* at 1575-77.

¹⁵⁹ *Id.* at 1575. The court also relied upon the Administrative Procedures Act, 5 U.S.C. § 706 (1982), and the Supreme Court's opinion in *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450-51 (1978). *Id.* at 1575 n.18.

¹⁶⁰ 713 F.2d at 1575. *See supra* notes 141-48 and accompanying text.

¹⁶¹ *See supra* notes 147-50 and accompanying text.

¹⁶² *See supra* notes 149-50 and accompanying text.

¹⁶³ *See supra* notes 152-53 and accompanying text.

¹⁶⁴ 28 U.S.C. § 1295(a)(5) (1982).

¹⁶⁵ 713 F.2d at 1575-76.

cost, as opposed to value and price, in determining foreign market value.¹⁶⁶ The CAFC nevertheless upheld the ITA's regulation employing cost criteria to compute allowances for differences in circumstances of sale.¹⁶⁷ The court also conceded that the ESP offset was "inconsistent with the general [statutory] requirement of a direct relation"¹⁶⁸ between circumstances of sale and the transaction under investigation, noting that the statute repeatedly refers to "foreign market value, as if there were only one foreign market value under consideration."¹⁶⁹ The court nonetheless sanctioned the ITA's use of criteria that negated the express adjustment to exporters' sales price authorized by the TAA.¹⁷⁰

Had the "hard look" test been employed in this case, the CAFC should not have upheld either regulation. Because the statute and legislative history clearly reject the use of cost criteria in determining differences in circumstances of sale,¹⁷¹ the court should have invalidated this regulation under a "hard look" test. The ESP offset, which the ITA clearly fashioned out of whole cloth in contravention of the Act, should also have been invalidated. The TAA does not authorize use of two different foreign market value computations depending on whether U.S. price was based on purchase price or exporter's sales price.¹⁷² To the contrary, Congress expressly provided that adjustments to foreign market value be based solely on *direct* costs.¹⁷³ Because the ESP offset¹⁷⁴ flouts this explicit congressional directive by allowing an offset to foreign market value based on indirect costs or expenses,¹⁷⁵ the ITA's regulation would have been unacceptable under the close scrutiny of "hard look" analysis.

In *Consumer Products Division, SCM Corp.* the court held that the

¹⁶⁶ *Id.* at 1576.

¹⁶⁷ *Id.* at 1577.

¹⁶⁸ *Id.* at 1578.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1579. The court stated:

Although the statute expressly requires a direct relationship between the differences in circumstances of sale and adjustments to foreign market value, we cannot conclude that the administering authority acted either beyond its authority or unreasonably in promulgating the offset. The offset does permit negation of one specific statutory adjustment to exporter's sales price, but does so to achieve a broader statutory purpose otherwise frustrated because of the alternative statutory methods of computing United States price.

Id.

¹⁷¹ See 19 U.S.C. §§ 1673, 1677a, 1677b(a)(4) (1982); S. REP. No. 249, *supra* note 4, at 60, 93-96. To the contrary, the Act and its legislative history indicate that price or value criteria should be used. *Id.*; *Smith-Corona Group*, 713 F.2d at 1577.

¹⁷² See 19 U.S.C. §§ 1673, 1677b (1982).

¹⁷³ *Id.* § 1677b(a)(4).

¹⁷⁴ See 19 C.F.R. § 353.15(c) (1985). See *Smith-Corona Group*, 713 F.2d at 1578.

¹⁷⁵ See H.R. REP. No. 317, 96th Cong., 1st Sess. 76 (1979). "[T]he Committee intends that adjustments [to foreign market value] should be permitted if they are reasonably identifiable, quantifiable, and *directly* related to the sales under consideration . . ." *Id.* (emphasis added).

ESP offset cap was a reasonable exercise of the Secretary's discretion,¹⁷⁶ exhibiting its deference to agency expertise with such phrases as "great weight"¹⁷⁷ and "considerable deference"¹⁷⁸ to the "'masters of the subject.'"¹⁷⁹ In the most cursory of analyses, the CAFC held that limiting the adjustment for indirect selling expenses on the Japanese foreign market value side of the antidumping duty equation to the amount allowed against the exporter's sales price, the U.S. price, was not arbitrary. The court stated that "any greater allowance could distort the computations in favor of foreign manufacturers."¹⁸⁰ The court justified validating the ESP offset cap because it aided in efficient administration of the law.¹⁸¹ The cap achieved this result by freeing the agency from the task of calculating and investigating indirect expenses on the foreign market side of the ledger as soon as those expenses equalled comparable expenses on the U.S. price side of the ledger.

While administrative efficiency may be promoted under the ESP offset cap, rational agency action clearly is not. It makes no more sense to place a ceiling on indirect selling expenses on the U.S. price side of the equation than it does to place the ceiling on the foreign market value side. Indeed, the ESP offset cap will skew the calculations in favor of higher dumping margins in cases in which indirect expenses connected with foreign market value exceed the expenses associated with U.S. price.

The analysis the CAFC employed in the preceding two cases is virtually identical to that utilized in *Melamine Chemicals, Inc.*¹⁸² The CAFC stated that agency regulations must be sustained unless "plainly inconsistent with the statute"¹⁸³ or "weighty reasons require otherwise."¹⁸⁴ In upholding the 90-day lag rule, the Federal Circuit emphasized the regulation's salutary purpose of enabling the ITA to disregard temporary exchange rate fluctuations.¹⁸⁵ While it is difficult to quarrel with this goal, the source of ITA authority for promulgating the regulation is unclear. The CAFC essentially implied agency authority to issue the exchange rate regulation from the

¹⁷⁶ *Consumer Prods. Div.*, 753 F.2d at 1039.

¹⁷⁷ *Id.* (quoting *Melamine Chems., Inc.*, 732 F.2d at 928).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (quoting *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979)). In addition, the court observed: "it is a cardinal principle that the Secretary's interpretation of the statute need not be the *only* reasonable interpretation or the one which the court views as the most reasonable." 753 F.2d at 1039 (emphasis in original).

¹⁸⁰ *Id.* at 1040.

¹⁸¹ *Id.* "[T]he cap does aid in efficient administration and assists the agency in meeting the exigencies of times and staff limitations." *Id.*

¹⁸² *Compare Smith-Corona Group*, 713 F.2d at 1575; and *Consumer Prods. Div.*, 753 F.2d at 1036; with *Melamine Chems., Inc.*, 732 F.2d at 928.

¹⁸³ *Melamine Chems., Inc.*, 732 F.2d at 928.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

TAA's legislative history.¹⁸⁶ The court's conclusion is highly suspect. Although there are broad statements within the legislative history suggesting that the ITA should have some flexibility in administering the law,¹⁸⁷ there is absolutely no indication that Congress knew of or acquiesced in this regulation when it enacted the TAA. In spite of the absence of clear Congressional support for this regulation, however, its appeal is undeniable. It is arguably a fair solution to the problem of apparent price differences between national markets created by floating exchange rates and not by dumping.

When Congress has not addressed a particular issue, it is incumbent upon an agency to discern as nearly as possible what Congress would have done had it considered the problem.¹⁸⁸ Under this latter analysis, it is difficult to conclude that the CAFC was far off the mark in upholding the exchange rate regulation. If the Federal Circuit is to be faulted in *Melamine Chemicals, Inc.*, it is for its lack of candor in acknowledging that Congress simply had not addressed the issue. Using this admission as the starting point for analysis, the administering agency was certainly no better placed than the court to "flesh out" the statute. Filling in the interstices—"fleshing out"—is quintessentially, and ultimately, a judicial function.¹⁸⁹

VI. The CAFC and Deference—Conclusion

In each of the three cases discussed in this article, the Federal Circuit deferred too much to the ITA. In *Smith-Corona Group and Consumer Products Division, SCM Corp.* Congress had enacted a statutory provision covering the subject matter, supplemented by legislative history. In light of these Congressional guidelines, the overriding importance of international trade, and the CAFC's exclusive, specialized jurisdiction over antidumping duty appeals, the Federal Circuit should have closely scrutinized the ITA's determinations, rather than deferring to the agency as the purported "master" of the antidumping duty law.

In *Melamine Chemicals, Inc.* Congress was silent on the question of exchange rates in fair value investigations. Nevertheless, it was the CAFC's prerogative as the responsible reviewing court for all antidumping duty appeals to fill in this gap.

¹⁸⁶ *Id.* at 930-31.

¹⁸⁷ See, e.g., H.R. REP. NO. 317, 96th Cong., 1st Sess. 59 (1979); S. REP. NO. 249, *supra* note 4, at 49, 96.

¹⁸⁸ See, e.g., *Montana Power Co. v. FPC*, 445 F.2d at 739, 746-47 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 1013 (1971); *District of Columbia v. Orleans*, 406 F.2d 957, 958 (D.C. Cir. 1968).

¹⁸⁹ *FTC v. Texaco Inc.*, 393 U.S. 223, 226 (1968); *Aero Mayflower Transit Co. v. ICC*, 686 F.2d 1, 5-6 (D.C. Cir. 1982); *Hiatt Grain & Feed, Inc. v. Bergland*, 602 F.2d 929, 934 (10th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980); *supra* note 137.

It must be stressed that the Federal Circuit is a special federal court. No other appellate court hears antidumping duty appeals. Given the CAFC's exclusive appellate jurisdiction, it can be fairly assumed that the judges of the Federal Circuit have acquired a level of expertise on a par with the ITA, at least when statutory construction and interpretation are involved. Any claim of "agency expertise" as a basis for heightening judicial deference to ITA statutory interpretations should be viewed skeptically.

In the final analysis, and in fairness to the Federal Circuit, the judiciary is called upon to "steer a course between the Scylla of undue deference and the Charybdis of too broad review."¹⁹⁰ Nevertheless, while "[j]udicial review is not to be exercised with the zeal of a pedantic schoolmaster who grades papers for a single correct answer,"¹⁹¹ neither is a court to be a judicial "rubber stamp."¹⁹² The Federal Circuit should take special notice of this admonition because Congress has identified the court as possessing special expertise in the field of international trade law.

¹⁹⁰ Schwartz, *Administrative Law Cases During 1983*, 36 AD. L. REV. 91, 111 (1984).

¹⁹¹ *Western Coal Traffic League v. United States*, 694 F.2d 378, 383 (5th Cir. 1982), cert. denied, 104 S. Ct. 2160 (1984).

¹⁹² *United States v. Garner*, 767 F.2d 104, 116 (5th Cir. 1985).