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COURT OF INTERNATIONAL TRADE DEFERENCE TO INTERNATIONAL TRADE COMMISSION AND INTERNATIONAL TRADE ADMINISTRATION ANTIDUMPING DETERMINATIONS: AN EMPIRICAL LOOK

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This Article investigates the Court of International Trade's review of International Trade Commission and Department of Commerce International Trade Administration antidumping determinations. Although the relevant statutes make no distinction between the court's standard of review for ITC versus Department of Commerce decisions, this Article concludes, on the basis of an empirical examination of 268 CIT antidumping decisions since 1985, that the CIT gives slightly greater deference to ITC determinations than to Commerce determinations, and offers some thoughts on why this may be so.

I. INTRODUCTION

The United States antidumping law imposes dumping duties on the sale of foreign goods in the United States "at less than its fair value"³ when an industry in the United States is "materially injured or is threatened with material injury"⁴ by reason of those sales. Two government entities, the International Trade Commission (ITC)⁵ and the Department of Commerce International Trade Administration (Commerce),⁶ are responsible for conducting the investigation in antidump-

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3. 19 U.S.C. § 1673(1) (1988).

4. 19 U.S.C. § 1673(2) (1988).

5. The United States International Trade Commission was created by Congress as part of the Revenue Act of 1916, as the "United States Tariff Commission." Ch. 463, § 700, 39 Stat. 756, 795. The current ITC has broadened responsibilities. The Commission is headed by six Commissioners who serve for nine-year terms (or less, if appointed to serve out an unexpired term).

6. The International Trade Administration was created within the Department of Commerce by Reorg. Plan No. 3 of 1979, *reprinted* in 1979 U.S.C.C.A.N. 3396, under the authority granted to the President by § 1109 of the Trade Agreements Act of 1979. Pub. L. No. 96-39, 93 Stat. 144, 314. In addition to administering the antidumping and countervailing duty laws, the International Trade Administration maintains commercial and economic information on foreign countries and gives advice to the President on international economic policy issues.

ing proceedings. The investigation may go through as many as four distinct phases: (1) the ITC preliminary injury investigation, (2) the Commerce preliminary dumping investigation, (3) the Commerce final dumping investigation, and (4) the ITC final injury investigation.⁷

An interested party in an antidumping proceeding may obtain judicial review in the United States Court of International Trade (CIT) of any ITC or Commerce determination which terminates or concludes an investigation or an administrative review.⁸ Regarding this review by the CIT, one sometimes hears the opinion expressed in the trade bar that the CIT gives greater deference to ITC determinations than to Commerce determinations in antidumping and countervailing duty cases. There is no basis in the statute for this perception—in fact, the statute and legislative history do not differentiate between the deference the CIT shall give the two entities—nevertheless, the perception exists.

The purpose of this Article is to examine whether there is a basis for the perception that the CIT gives the ITC greater deference than Commerce, and if so, *why* this different treatment might exist. The Article looks empirically at 268 CIT antidumping decisions over the past seven years⁹ and finds that there is a statistical difference between the rate at which the CIT has upheld ITC determinations and the rate at which it has upheld Commerce determinations. The difference—60.6% of ITC determinations upheld as compared to 53.8% for Commerce—is not huge, but does support the conclusion that, for whatever reason, the CIT has given marginally more deference to ITC than to Commerce determinations.

Section II of the Article provides an overview of the antidumping law as it specifically applies to the Court of International Trade's deference to ITC and Commerce decisions, and discusses the legislative history and scholarly commentary relating to the deference issue. Section III outlines the methodology of the empirical survey and discusses the data. This section also conducts a judge-by-judge breakdown, which yields some interesting results. Finally, Section IV offers thoughts on why the CIT might give greater deference to ITC decisions than to Commerce decisions.

7. 19 U.S.C. §§ 1673b, 1673d (1988). *See infra* notes 10–22 and accompanying text.

8. 19 U.S.C. § 1516a (1988); 28 U.S.C. § 1581(c) (1988). CIT decisions may then be appealed as of right to the Court of Appeals for the Federal Circuit (CAFC). 28 U.S.C. § 1295(a)(5) (1988).

The CAFC was known as the Customs and Claims Court of Patent Appeals (CCPA) until 1982, when the CCPA was abolished and the CAFC was created. Pub. L. No. 97–164 §§ 122, 127, 96 Stat. 25, 36–37, codified as amended at 28 U.S.C. § 1295 (1988).

9. The survey encompasses the period from Jan. 1, 1986, through Mar. 31, 1993.

II. THE ANTIDUMPING LAW

A. *The Statute*

An antidumping duty proceeding begins administratively when Commerce determines that an investigation is warranted, or when an interested party files an antidumping petition.¹⁰ Then, Commerce and the ITC conduct a two-step administrative proceeding (preliminary and final determination) lasting nine months to one year. Within forty-five days of the petition's filing, the ITC must issue its preliminary determination stating whether there is a "reasonable indication" that a domestic industry has been materially injured or threatened with material injury by reason of the subject imports.¹¹ The ITC preliminary investigation includes a hearing at which the importer, exporter, petitioner, and other parties with a stake in the outcome may present evidence. The Commission staff, rather than the Commissioners themselves, usually conducts the hearing, which is typically less formal than a trial.¹² After the Commissioners have had an opportunity to review the staff's findings from the investigation, they vote on the "reasonable indication" issue, with a majority vote of six commissioners controlling. If the ITC finds that there is no reasonable indication of such injury, the investigation ends—there is no antidumping violation.¹³

Commerce is responsible for determining the sufficiency of the petition and whether imports are being sold in the United States at less than fair value (LTFV).¹⁴ At the preliminary stage, Commerce issues detailed questionnaires to the affected foreign producers seeking information about such items as home-market sales, sales to the United States, and all expenses connected with those sales for a six-month period up to and including the month in which the petition was filed.¹⁵ Based on the data it receives from the responses to the questionnaire, Commerce calcu-

10. 19 U.S.C. § 1673a (1988). For purposes of the statute, an "interested party" would include a domestic manufacturer; a producer or wholesaler of a like product; a labor union or other worker group representative of an industry engaged in the manufacture, production or wholesaling of a like product; or a trade association whose members manufacture, produce or wholesale a like product in the United States. A foreign party cannot file an antidumping petition. 19 U.S.C. §§ 1673a(b)(1), 1677(9) (1988).

11. 19 U.S.C. § 1673b(a) (1988).

12. 19 C.F.R. §§ 207.115, 201.13 (1993).

13. 19 U.S.C. § 1673b(a) (1988).

14. 19 U.S.C. §§ 1673(1), 1673b(b) (1988).

15. 19 C.F.R. § 353.31 (1993). This six-month period is known as the "period of investigation" (POI).

lates a “preliminary dumping margin,”¹⁶ which is published in the Federal Register. Commerce’s preliminary determination is due within 160 days of the petition’s filing.¹⁷

Barring an extension of the statutory deadline,¹⁸ Commerce must issue its final dumping determination within seventy-five days after the date of its preliminary determination.¹⁹ Following the preliminary determination, Commerce conducts a “verification,” whereby Commerce employees travel to the foreign producer’s home country facilities to examine the producer’s records.²⁰ The purpose of this procedure is to verify the accuracy of the facts and figures that had been submitted to Commerce in the producer’s questionnaire response.

Finally, the ITC must issue its final injury determination 120 days after the Commerce preliminary determination.²¹ The final determinations of both Commerce and the ITC must be affirmative in order for there to be an antidumping violation and the imposition of an antidumping duty order requiring the assessment of dumping duties.²²

While Commerce’s preliminary and final determinations set the amount of *estimated* duties, *actual* dumping duties are calculated by Commerce in an “annual administrative review” when requested by an “interested party”²³ or when Commerce determines that changed circumstances warrant a review.²⁴ In such a review, Commerce sends a questionnaire to the foreign producer similar to that sent during the

16. Although the proceeding continues regardless of Commerce’s preliminary determination, an affirmative preliminary determination has an immediate impact on the foreign producer against whom it is assessed; *i.e.*, there will be a “suspension of liquidation” of all merchandise covered by the preliminary determination. 19 U.S.C. § 1673b(d) (1988). In such cases, Customs will not make a final determination of duty payable on entered goods covered by the suspension of liquidation until the antidumping case is resolved. Customs will release the goods to the importer only after he posts a bond for the possible duties payable on the goods.

17. 19 U.S.C. § 1673b(b)(1) (1988).

18. 19 U.S.C. § 1673d(a)(2) (1988); 19 C.F.R. §§ 353.15(b)–(e) (1993).

19. 19 U.S.C. § 1673d(a)(1) (1988).

20. 19 U.S.C. § 1677e (1988); 19 C.F.R. § 353.36 (1993). If there are inaccuracies in the questionnaire response, Commerce is authorized to use the “best information available.” 19 C.F.R. § 353.37. Commerce uses such information, which often consists merely of the petitioner’s allegations, on the theory that if the actual facts were better than the allegations, the foreign producer would have submitted those facts. Because the use of “best information available” can have disastrous results for the foreign producer, Commerce can—and does—use its power to compel full compliance with its questionnaires and deadlines.

21. 19 U.S.C. §§ 1673d(b)(2), (3) (1988).

22. 19 U.S.C. § 1673 (1988). Absent good cause shown, the antidumping duty order cannot be revoked for at least two years after imposition. 19 U.S.C. § 1675(b) (1988).

23. 19 C.F.R. § 353.22(a) (1993).

24. 19 C.F.R. § 353.22(f) (1993).

initial investigation in order to solicit sales information for U.S. and home-market sales for the particular period covered. To the extent the actual dumping duty calculated in the review differs from the estimated duty deposit collected pursuant to the antidumping duty order,²⁵ the difference, with interest, is refunded or charged to the importer.²⁶

In the event an annual administrative review for a given period is not requested, the Customs Service simply keeps the duty deposits, treating them as though they are the actual dumping duties due.²⁷ Producers that receive high dumping margins in an investigation very often take advantage of the annual reviews to attempt to get their dumping duty rates revised. If, for example, a company is able to reduce a dumping rate from twenty percent to one percent or zero in an antidumping review, the antidumping duty order will be an irritant, but not necessarily a barrier, to its making sales to the United States.

B. *Judicial Review*

The antidumping statute permits an interested party who participates in an antidumping or countervailing duty proceeding to obtain judicial review of any determination which terminates or concludes an investigation or an administrative review.²⁸ A party may seek review in the CIT,²⁹ whose decisions may be appealed to the Court of Appeals for the Federal Circuit (CAFC).³⁰ The standard of judicial review in antidumping duty cases is identical for the ITC and Commerce. For certain appealable determinations, the standard is whether the determination is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.”³¹ For certain other appealable determinations, the standard is whether the determination is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”³²

25. 19 C.F.R. § 353.21 (1993).

26. 19 U.S.C. § 1677g (1988); 19 C.F.R. § 353.24 (1993). If the goods are entered before the antidumping duty order issues, however, the importer will not be required to pay the difference if the final estimated rate is higher than the preliminary rate. 19 U.S.C. § 1673f(a) (1988); 19 C.F.R. § 353.23 (1993).

27. 19 C.F.R. § 353.22(e) (1993).

28. 19 U.S.C. § 1516a (1988).

29. 19 U.S.C. § 1516a; 28 U.S.C. § 1581(c) (1988).

30. 28 U.S.C. § 1295(a)(5). *See supra* note 8 and accompanying text.

31. 19 U.S.C. § 1516a(b)(1)(B) (1988). Such determinations include, among others, affirmative or negative final determinations by either Commerce or the ITC. 19 U.S.C. § 1516a(a)(2) (1988).

32. 19 U.S.C. § 1516a(b)(1)(A) (1988). Such determinations include Commerce determinations not to initiate an investigation and negative preliminary determinations by either the ITC or Commerce. 19 U.S.C. § 1516a(a)(1) (1988).

As noted, the statutory standard of review is the same whether the action is against the ITC or Commerce. The statute simply makes no distinction—the language effectively lumps the ITC and Commerce together when it specifies how the court shall review the actions brought against Commerce or the Commission.³³

The legislative history of the Trade Agreements Act of 1979 gives no indication that Congress intended that the Court of International Trade should give more deference to ITC determinations. In its report on the Trade Agreements Act of 1979, the House Ways & Means Committee stated that “[a] final affirmative determination by the *Authority or the ITC* may not be reviewed until after the publication. . . . The record before the court . . . will consist of all information presented to, or obtained by, the *Authority or the ITC*. . . .”³⁴ The Senate Finance Committee’s report on the Trade Agreements Act of 1979 explicitly states that one of the reasons for the bill is to

remove all doubt on whether *de novo review is appropriate by excluding de novo review* from consideration as a standard in antidumping and countervailing duty determinations. . . . The amendments . . . provide all parties with greater rights of participation at the administrative level and increased access to information upon which the decision of *the administering authority and the International Trade Commission are based* . . . [and] have eliminated any need for *de novo review*.³⁵

Nor do the legislative histories of subsequent trade acts, such as the 1984 Trade and Tariff Act³⁶ or the 1988 Trade and Competitiveness Act,³⁷ distinguish between the deference to be given by the reviewing court to ITC and Commerce determinations. The 1984 House Ways & Means Committee report simply says that the purpose of the changes to the statute is to “clarify the treatment of certain types of final determinations and to clarify when judicial review of these determinations should occur,”³⁸ and the 1988 Act did not address judicial review.

33. See 19 U.S.C. § 1516a(a), (b) (1988).

34. H.R. DOC. NO. 153 pt.2, 96th Cong., 1st Sess. 538 (1979), *reprinted in* 1979 U.S.C.C.A.N. 784 (emphasis added).

35. S. REP. NO. 249, 96th Cong., 1st Sess. 251–52 (1979), *reprinted in* 1979 U.S.C.C.A.N. 637 (emphasis added).

36. Pub. L. No. 98–573, 98 Stat. 2948 (codified in scattered sections of 18–19 U.S.C., 26 U.S.C., and 28 U.S.C.).

37. Pub. L. No. 100–418, 102 Stat. 1107.

38. H.R. REP. NO. 267, 98th Cong., 1st Sess. 47, *reprinted in* 1984 U.S.C.C.A.N. 5174.

In short, neither the statute nor the legislative history give any indication that Congress intended that the reviewing court should give more deference to the ITC over Commerce, or vice-versa. We are left to the literature and a review of the cases to attempt to discern whether there is a *de facto* distinction between judicial deference given the ITC versus Commerce.

C. *Scholarly Commentary*

The literature has given scant coverage to the perception that the reviewing courts may give ITC determinations greater deference than Commerce determinations. Articles that *do* touch upon the issue imply that such a perception is justified. A recent *Fordham International Law Journal* article asserts, for example, that “the ITC has rarely been overturned by the Court of International Trade.”³⁹ Another commentator states that “the ITC is probably more deserving of judicial deference given its superior resources.”⁴⁰ Although neither of these articles provided authority for their suggestions, they are useful nonetheless in demonstrating that there is a belief “out there” that the ITC deserves or receives greater deference from the CIT and CAFC than does Commerce.

In a pair of articles published in the mid-1980s, one commentator went so far as to advocate that the CIT and then-CCPA formally adopt a *no* deference standard of review for both Commerce and ITC determinations.⁴¹ The author, stating that such a change was necessary to firmly establish the courts (particularly the Federal Circuit) as expert tribunals in the field of international trade law,⁴² wondered if ITC and ITA

39. David A. Hartquist *et al.*, *Toward a Fuller Appreciation of Nonacquiescence, Collateral Estoppel and Stare Decisis in the U.S. Court of International Trade*, 14 *FORDHAM INT'L L.J.* 112, 130 (1990-91). *See infra* notes 86-88 and accompanying text for a discussion of this article.

40. Kevin C. Kennedy, *Abandoning the Deference Rule in ITC Interpretations of the Antidumping Duty Law*, 14 *SYRACUSE J. INT'L L. & COM.* 21, 22 (1987) [hereinafter *Abandoning the Deference Rule*].

This author opined, however, that the CAFC actually subjected the ITC's interpretations to stricter scrutiny than to those of Commerce, and that this outcome was counterintuitive given the ITC's superior resources. *Id.*

41. *Id.* at 21-22; Kevin C. Kennedy, *Judicial Review of Commerce Department Antidumping Duty Determinations: Deference or Abdication?*, 11 *N.C.J. INT'L L. & COMM. REG.* 19 (1986).

42. Further justification offered by the author for the no deference rule included consideration of the effect such an explicit standard would have on Commerce and the ITC “should they become emboldened by the deference rule to stray far afield of congressional intent. Adoption of a no deference standard of review would send a message to those agencies that they are not superior to courts in the interpretation of the antidumping duty statute while reaffirming that statutory interpretation is quintessentially and ultimately a judicial, not an administrative function.”

(Commerce) determinations are “entitled to great judicial deference, why [would Congress] expose such determinations twice to the gauntlet of judicial review?”⁴³ Moreover, the author asserted that the legislative history of the Customs Court Act of 1980⁴⁴ supported his argument that Congress intended that the reviewing courts give little or no deference to ITC or Commerce determinations.⁴⁵ However, the Senate Financing Committee’s report on the Trade Agreement Act of 1979, quoted above,⁴⁶ negates this argument. The report stated that one of the reasons for the bill was to “remove all doubt on whether *de novo* review is appropriate by excluding *de novo* review from consideration as a standard in antidumping and countervailing duty determinations.”⁴⁷

III. COURT OF INTERNATIONAL TRADE DECISIONS

A. *The Methodology*

One way to discern whether the Court of International Trade gives greater *de facto* deference to ITC than to Commerce determinations is to examine empirically CIT decisions over the last several years. By tabulating the number of times the court upheld ITC decisions versus the number of times it remanded them, and then comparing that data to similar data for Commerce, it is possible to get an idea whether there is a statistical basis for the proposition that the court gives greater deference to the ITC.⁴⁸

Abandoning the Deference Rule, *supra* note 40, at 37 (quoting *SEC v. Sloan*, 436 U.S. 103, 118 (1978) (courts are “final authorities on issues of statutory construction”).

43. *Abandoning the Deference Rule*, *supra* note 40 at 33. The twin gauntlet to which the author refers is the Federal Circuit’s practice of reviewing ITC or Commerce determinations “as if no review had taken place at the Court of International Trade.” *Id.* at 32 (quoting *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984) (“We review that court’s review of an ITC determination by applying anew the statute’s express judicial review standard.”)).

44. Pub. L. No. 96-417, 94 Stat. 1727 (1980).

45. The House Report on the 1980 Act stated: “The Customs Courts Act of 1980 creates a comprehensive system of judicial review of civil actions arising from import transaction, utilizing the specialized expertise of the [Court of International Trade] and the [Court of Appeals for the Federal Circuit].” H.R. REP. NO. 1235, 96th Cong., 2d Sess. 1, 20, *reprinted in* 1980 U.S.C.C.A.N. 3729.

46. *See supra* note 35 and accompanying text.

47. S. REP. NO. 249, 96th Cong., 1st Sess. 251-52 (1979), *reprinted in* 1979 U.S.C.C.A.N. 637.

48. It is important to understand at the outset that any empirical study contains inherent biases and potential for manipulation. In this case, the main potential for bias lies in the fundamentally different nature of the Department of Commerce and ITC determinations, as described in Part IV below. For example, Commerce determinations generally involve more factual questions than do ITC determinations, which leads to a situation where the CIT might

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For each separate antidumping case⁴⁹ the court reviewed since 1985, the survey simply asked whether the court affirmed the ITC or Commerce determination in its entirety. If this question was answered in the affirmative, a check mark was placed in the “affirmed/upheld” column. If, on the other hand, the court overturned or remanded any part of the determination,⁵⁰ the surveyor placed a check mark in the “overturned/remanded” column. Subsequently, the numbers were totaled and the percentages calculated to arrive at the final figures.⁵¹

B. *The Results*

The Court of International Trade reviewed 268 antidumping cases from January 1986 through March 1993. Of the 197 reviews of Commerce decisions, the court upheld the Commerce determination in 106 instances (53.8%). By contrast, the court reviewed seventy-one ITC decisions,⁵² and upheld the Commission’s determination in forty-three of those decisions (60.6%). The difference between the two figures (53.8% versus 60.6%) is not great, but it is sufficient to provide support for the perception that the Court of International Trade as a whole defers slightly more to the ITC than to Commerce.

It is useful in understanding the court’s interpretation of its standard of review in antidumping cases to examine several of the surveyed cases in greater detail. Therefore, this article will consider four different situations: an occasion when the court upheld an ITC determination,

remand just one of many aspects of a Commerce determination while upholding all the rest. This is in contrast to the ITC, whose determinations typically involve more judgment questions and hence do not lend themselves to as many “potentially appealable issues.”

Potential distortions notwithstanding, a survey such as this that examines the Court of International Trade’s tendencies over time to uphold determinations in their entirety or remand/overturn them for *any* reason gives some indication of the court’s propensity to defer to the entities making the determinations.

49. In the interest of keeping the survey’s focus narrow enough so as to provide meaningful information, the survey excluded CIT cases involving review of countervailing duty investigations.

50. Determinations that were remanded for the sole purpose of correcting a clerical error or computer error were not classified as remands.

51. It is very possible that the survey would have produced different results had it studied only decisions from the last year, or only from the period from 1988 to 1990, or only from any number of possible time parameters. The authors examined as many decisions as was manageable, investigating as far back in time as feasible given the available resources. Accordingly, the survey analyzes all CIT antidumping cases from 1986 (inclusive) through March 1993, with the intention that such a sample would include anywhere from 200 to 300 cases.

52. The greater number of Commerce cases is, at least in part, attributable to the fact that Commerce has a statutory obligation to conduct annual compliance reviews at the request of an interested party. *See supra* note 23 and accompanying text.

upheld a Commerce determination, remanded an ITC determination, and remanded a Commerce determination.

In *Calabrian Corp. v. United States*,⁵³ decided by Judge Carman, the court upheld an ITC negative preliminary injury determination. The court concluded that the petitioner failed to carry its burden⁵⁴ of establishing that the Commission's determination was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."⁵⁵ The court held that the ITC did not abuse its discretion in any of four respects:

(1) in applying the proper legal standard, (2) in finding . . . [two distinct chemical compounds] to be single like products, (3) in declining to take into account the conditions of individual firms operating within the domestic industry, and (4) in concluding there was no reasonable indication of material injury or threat of material injury to the domestic market.⁵⁶

In so finding, the court noted that

Congress has emphasized that review of Commission determinations under the arbitrary and capricious standard is not a *de novo* review. . . . [The court's task in review is to] ascertain whether there was a rational basis in fact for the determination by the administrative decision-maker.⁵⁷

While the "inquiry into the facts is to be searching and careful"⁵⁸ under the arbitrary and capricious standard, the court acknowledged that "the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."⁵⁹ Accordingly, on the facts of the case, the court upheld the ITC.

53. *Calabrian Corp. v. United States Int'l Trade Comm'n*, 794 F. Supp. 377 (Ct. Int'l Trade 1992).

54. The court noted that "the decision of . . . the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision." *Id.* at 381 (quoting 28 U.S.C. § 2639(a)(1)(1988)).

55. *Id.* at 380 (citing 19 U.S.C. § 1516a(a)(1)(C) and (b)(1)(A) (1988)). As noted above, *supra* note 32 and accompanying text, the proper standard of review for negative preliminary determinations is the arbitrary and capricious standard.

56. *Id.* at 379.

57. *Id.* at 381 (quoting S. REP. NO. 249, 96th Cong., 1st Sess. 252 (1979))(citing *American Lamb Co. v. United States*, 785 F.2d 994, 1004 (Fed. Cir. 1986)).

58. *Id.* at 380 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)).

59. *Id.*

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In *Midland Export Ltd. v. United States*,⁶⁰ decided by Judge Goldberg, the CIT considered several issues and found that substantial evidence⁶¹ existed to uphold Commerce's final determination *in toto*. The court considered Commerce's decision to use the highest calculated dumping margin as the "best information available,"⁶² and its decision to use the best information available in finding that India was a significant producer of silicon metal. The court asserted that

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁶³ [Furthermore,] Commerce is given "considerable deference in its interpretation of its statutory authority and the methodology employed in the administration of the antidumping law."⁶⁴ [Commerce's] determination will not be overturned merely because the plaintiff can produce evidence in support of its own contentions and in opposition to the evidence supporting the agency's determination.⁶⁵

On this basis, with respect to the issue of whether India was a significant producer of silicon metal, the court found that the "best information available" narrowly met the substantial evidence standard:

[W]hether the record contains substantial evidence . . . is a close question. The court notes that the record is devoid of the type of extensive, and vastly preferable, material available that supports . . . [other affirmed issues in this case]. Nevertheless, the court finds that information included in the record shows that India was a significant producer. . . .⁶⁶

On the other hand, in *NSK Ltd. v. United States*,⁶⁷ decided by Judge

60. No. 92-53 (Ct. Int'l Trade Apr. 8, 1992).

61. As noted above, *supra* note 31 and accompanying text, the substantial evidence standard is the standard to be used for, among other things, Commerce and ITC final determinations. 19 U.S.C. § 1516a(b)(1)(B) (1988).

62. *See supra* note 20.

63. *Midland Export*, slip op. at 6 (quoting *N.A.R., S.p.A. v. United States*, 741 F. Supp. 936, 939 (1990) (quoting *Gold Star Co. v. United States*, 692 F. Supp. 1382, 1383-84 (1988), *aff'd*, 873 F.2d 1427 (Fed. Cir. 1989)).

64. *Id.*, slip op. at 7 (quoting *Tehnoimportexport v. United States*, 766 F. Supp. 1169, 1173 (1991)).

65. *Id.* (citing *Tehnoimportexport*, 766 F. Supp. at 1173.)

66. *Id.* slip op. at 10.

67. *NSK Ltd. v. United States*, 809 F. Supp. 115 (Ct. Int'l Trade 1992).

Tsoucalas, the CIT found there was *not* substantial evidence supporting Commerce's final determination of an annual administrative review on three of the four issues before the court, and remanded those issues to the agency. One of the remanded issues involved Commerce's determination to exclude the plaintiff foreign producer's below-cost sales in its calculations of foreign market sales.⁶⁸ The CIT asserted that, in order to satisfy the substantial evidence standard of review on this issue, Commerce must include "some discussion on the record as to why the prices charged on sales . . . will not allow recovery of [the company's] costs in a reasonable period of time."⁶⁹ Because Commerce only justified why the plaintiff's prices would not permit recovery of costs within a reasonable period of time in the normal course of trade with a statement that plaintiff "did not demonstrate that it would recover the costs of selling [its product] below cost within a reasonable period of time,"⁷⁰ the court found that Commerce's determination was not supported by substantial evidence on the record. Accordingly, the court remanded the issue to Commerce to "either reconsider the sales made at below-cost or to specifically substantiate on the record its determination that costs of below-cost sales would not be recovered in the normal course of trade within a reasonable period of time."⁷¹

Finally, in *Holmes Prods. Corp. v. United States*,⁷² decided by Judge Restani, the CIT remanded the ITC's final affirmative injury determination, directing the ITC to further explain "the evidence of the nexus between imports and injury."⁷³ The court implied that, in order to satisfy the substantial evidence standard of review in an affirmative determination regarding injury to domestic industry, the ITC must

68. When Commerce determines that the foreign producer's "home market sales have been made at or below the cost of production, such sales are disregarded in the calculation of foreign market value if the sales '(1) have been made over an extended period of time and in substantial quantities, and (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade.'" *Id.* at 118 (quoting 19 U.S.C. § 1677b(b) (1988 & Supp. IV 1992)).

Generally, the foreign producer will prefer that Commerce use home market sales in determining foreign market value, since the alternative is for Commerce to use "constructed value," a value which typically is more damaging to the producer's case than is a value derived from actual home market sales.

69. *Id.* at 118-19 (quoting *Toho Titanium Co. v. United States*, 657 F. Supp. 1280, 1286 (1987)).

70. *Id.* at 119 (quoting *Tapered Roller Bearings Four Inches or Less in Outside Diameter and Certain Components Thereof from Japan*, 55 Fed. Reg. 38,720, 38,725 (1990) (final admin. review)).

71. *Id.* at 119.

72. *Holmes Prods. Corp. v. United States*, No. 92-230 (Ct. Int'l Trade Dec. 30, 1992).

73. *Id.* slip op. at 2.

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demonstrate causation between the imports and the injury.⁷⁴ In its final determination, “the only evidence [the ITC] found of the nexus between imports and injury to the domestic industry was ‘mixed overselling and underselling.’ ”⁷⁵ Stating the ITC must demonstrate that mixed trends are sufficient to show causation, and noting that the ITC “discussed [pricing information] only in the most general terms,”⁷⁶ the court determined that the ITC’s determination on this issue was not supported by substantial evidence on the record, and remanded the case for a more substantive explanation of the nexus between pricing and injury to the domestic industry.

C. The Individual CIT Judges

It is also interesting to look at the tendencies of the individual CIT judges.⁷⁷ Six judges—Judges Tsoucalas, Carman, Restani, DiCarlo, Aquilino, and Musgrave—decided the great majority of the cases. Judge Tsoucalas upheld Commerce in twenty-three of the forty-three cases he

TABLE A

Judge	Commerce Determinations Upheld	ITC Determinations Upheld
Tsoucalas	53.5% (23/43)	75.0% (3/4)
Carman	65.0% (13/20)	61.1% (11/81)
Restani	55.6% (30/54)	68.8% (11/16)
DiCarlo	58.6% (17/29)	66.7% (10/15)
Aquilino	42.9% (9/21)	14.3% (1/7)
Musgrave	66.7% (6/9)	100% (2/2)
Others ^a	38.1% (8/21)	55.6% (5/9)

^aIncluded in these judges are former Chief Judge Re, Judge Goldberg, Senior Judge Watson, and Senior Judge Newman.

74. *Id.* slip op. at 8–9.

75. *Id.* slip op. at 8.

76. *Id.* slip op. at 9.

77. For ease of reference, the results by individual judge are shown in Table A.

heard (53.5%) and upheld three of the four ITC cases he heard (75.0%), a differential of 21.5% and the highest among the judges who decided more than thirty cases. Judge Carman upheld thirteen of his twenty Commerce cases (65.0%) and eleven of the eighteen ITC cases he heard (61.1%). Judge Restani, who heard the most antidumping cases of any of the judges (seventy cases), upheld the agency's decision in thirty of the fifty-four Commerce cases she heard (55.6%), while upholding the ITC in eleven of sixteen cases (68.8%). Judge DiCarlo upheld Commerce in seventeen of the twenty-nine cases he heard (58.6%) and the ITC in ten of fifteen cases (66.7%). Judge Aquilino upheld the lowest percentage of cases overall and individually. He upheld nine of twenty-one Commerce cases (42.9%) and only one of seven ITC cases (14.3%). Finally, Judge Musgrave upheld six of the nine Commerce cases he heard (66.7%) and both of his ITC cases. Others (including former Chief Judge Re, Judge Goldberg, Senior Judge Watson, and Senior Judge Newman) accounted for the remaining twenty-one Commerce cases, of which they upheld eight (38.1%), and the remaining nine ITC cases, of which they upheld five (55.6%). The data for the individual judges shows four of the judges—Judges Tsoucalas, Restani, DiCarlo, and Musgrave—and the combined “others” upheld ITC determinations a higher percentage of the time than Commerce decisions. Only Judges Carman and Aquilino did not fit this pattern.

IV. POSSIBLE REASONS FOR THE GREATER DEFERENCE GIVEN THE ITC

What might explain the discrepancy between the Court of International Trade's treatment of the ITC and Commerce determinations? One answer lies in the composition of the ITC as compared to that of Commerce. The ITC is an independent quasi-judicial body comprised of six Commissioners who, although appointed by the President, do not answer to the executive branch. The Commissioners serve nine-year terms, and not more than three of the Commissioners may be of the same political party.⁷⁸ Besides the Commissioners, the ITC consists of a staff of commodity specialists, accountants, economists, and attorneys who gather relevant facts and prepare reports for the Commissioners' use in their decisionmaking.⁷⁹ The Commissioners review the evidence

78. 19 U.S.C. § 1330 (1988).

79. THOMAS V. VAKERICS ET AL., *ANTIDUMPING, COUNTERVAILING DUTY, AND OTHER TRADE ACTIONS* 7 (1987).

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and reports prepared by the staff and hear whatever questions and views are expressed by the other Commissioners, but each Commissioner ultimately makes his or her own decision independent of the other five.⁸⁰ A majority in favor of or in opposition to a particular complaint is enough for a positive or negative determination, with a tie vote resulting in a positive determination.

The very nature of the ITC, with its quasi-judicial procedure and independence from the political branches of government, could explain why the CIT judges might consciously or unconsciously give a greater measure of deference to ITC determinations. The notion that the ITC's independence is a factor in creating the perception that the ITC makes its determinations more objectively than Commerce was well expressed in a paper presented at the 1992 Judicial Conference of the U.S. Court of International Trade by James Toupin, Assistant General Counsel for Litigation for the ITC:

If such determinations were made by an Executive Branch decisionmaker, decisions about whether an industry was injured by reason of imports would be in danger of being perceived as decisions on whether the Executive regarded a specific industry as worthy of protection. The Commission scheme isolates injury determination from this perception of political considerations.⁸¹

By contrast, Commerce *does* answer to the executive branch. Commerce is structured as a typical executive branch agency, with case analysts and program managers in the Office of Investigations and Office of Compliance,⁸² two Division Directors in each office, one Office Director in each office, a Deputy Assistant Secretary for Compliance and a Deputy Assistant Secretary for Investigations, and finally, the Assistant Secretary of Commerce. Typically, once the investigative team comes up with a determination after completing its antidumping investigation or review, the determination is reviewed in turn through Commerce's various levels. In hierarchical organizations, the quality of any decision or determination is highly dependent on the capabilities of

80. See H.R. REP. No. 317, 96th Cong., 1st Sess. 46 (1979).

81. James A. Toupin, *Siblings Before the Bench: The International Trade Commission and the Department of Commerce Before the Court of International Trade*, 25 LAW & POL'Y INT'L BUS. 137 (1993).

82. The Office of Investigation is responsible for conducting antidumping and countervailing duty investigations. The Office of Compliance is responsible for ensuring that antidumping and countervailing duty orders are properly administered and for conducting administrative review of outstanding antidumping and countervailing duty orders. VAKERICS ET AL., *supra* note 79, at 4-5.

the people at each step of the process. Some in the trade bar believe that Commerce case analysts, “who must shoulder the bulk of the investigative burden, are often ill-trained and stay too short a time in their positions. . . . As a result, important decisions are in fact made at only one of the many review levels, causing delay and redundant analysis.”⁸³ Trade attorney Peter O. Suchman, Esq. of the law firm of Powell, Goldstein, Frazer & Murphy, in an outline presented at the 1992 Court of International Trade Conference, suggested that:

[Commerce] should consider upgrading the case analyst position and doing away with much of the vertical review chain. This would require recruiting and retaining better qualified personnel to actually handle investigations and reviews. In part this would be accomplished by assigning “supervisors” to line responsibility.⁸⁴

Furthermore, included in Commerce is an office “responsible for evaluating public policy considerations and the agency’s consistency in resolving matters delegated to its discretion.”⁸⁵ It is not surprising, given this political mission, that the perception exists that Commerce antidumping determinations are something less than totally neutral in their objectivity. Given this, it is plausible that the CIT judges might consider the ITC more capable of objective decisionmaking than Commerce.

A recent article discusses another reason the CIT may give the ITC greater deference.⁸⁶ The article takes an interesting look at how Commerce is becoming increasingly nonacquiescent in Court of International Trade decisions. The authors argue that the CIT should bring pressure to bear on Commerce to force it to curtail this practice “so that the judiciary’s power ‘to say what the law is’ will remain separate from exercises of power by the legislative and executive branches of government.”⁸⁷ The authors also note that the ITC, by contrast, “has been deferential to CIT decisions and has attempted to incorporate in

83. Peter O. Suchman, *A Cost-Benefit Examination of Trade Cases in an Era of Austerity: An Outline of the Problem and Some Suggestions*, Presentation to the 1992 Judicial Conference of the U.S. Court of International Trade 5 (Oct. 28, 1992) (on file with authors).

84. *Id.*

85. Toupin, *supra* note 81, at 138.

86. David A. Hartquist et al., *Toward a Fuller Appreciation of Nonacquiescence, Collateral Estoppel, and Stare Decisis in the U.S. Court of International Trade*, 14 FORDHAM INT’L L.J. 112 (1990-91).

87. *Id.* at 113.

subsequent cases the holdings of the CIT on issues of basic statutory interpretation.”⁸⁸ It is plausible that the CIT judges, reacting to Commerce’s nonacquiescence in the court’s decisions, either consciously or subconsciously “retaliate” by remanding Commerce’s determinations more willingly.

A final reason the CIT may give greater deference to the ITC involves the practical matter of what happens to the determination when it is remanded. In short, a limited remand of an ITC determination may in some instances require the Commissioners to reconsider *all* issues, even those which were not identified by the court as in error, and to conduct an entirely new vote on all issues.⁸⁹ This is in contrast to a Commerce remand, which does *not* require that Commerce reconsider the affirmed portions of the determination. It is conceivable that the CIT judges, seeking to avoid the situation where a remand of an ITC determination may change the outcome for reasons unrelated to correcting the error that the court has identified, and to avoid running afoul of the statute’s policy for expedited review,⁹⁰ are subconsciously more lenient with the ITC than with Commerce.

V. CONCLUSION

While the relevant statutes and legislative history provide no basis for the Court of International Trade to give greater deference to International Trade Commission antidumping determinations than to Department of Commerce International Trade Administration determinations, an empirical survey of the court’s 268 antidumping decisions since 1985 concludes that the court in fact gives slightly greater deference to the ITC. This article describes the survey and suggests that the court’s differing treatment of the ITC and Commerce may be due to any number of reasons, among them the possibility the court perceives that the politically independent ITC renders its decisions more objectively than does the politically dependent Commerce.

88. *Id.* at 130 (emphasis added).

89. This occurs when the Commissioner or Commissioners who committed error are no longer at the Commission. See *Toupin*, *supra* note 81, at 152 & n. 110 (citing *SCM Corp. v. United States*, 2 Ct. Int’l Trade 1, 7, 519 F. Supp. 911, 916 (1981)).

90. See *supra* notes 10–22 and accompanying text for statutory deadlines.

