

# 2010 COURT OF INTERNATIONAL TRADE DECISIONS REVIEWING DUMPING OR COUNTERVAILING DUTY ORDERS ON GOODS FROM MARKET ECONOMY COUNTRIES<sup>†</sup>

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*This article reviews some of the more significant 2010 decisions from the Court of International Trade. Focusing solely upon market economy antidumping and countervailing duty issues, the article provides analysis of the decisions. The article uses as a framework the issues that arise chronologically during the normal life of a Court of International Trade case, from injunctions through revocation of an order, and discusses the seismic shifts in zeroing cases and other general trends in the Court’s treatment of the substantive merits issues raised by Department of Commerce determinations.*

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I. INTRODUCTION

Despite being overshadowed by the volume of Court of International Trade decisions reviewing the Department of Commerce’s (“Commerce”) assessment of duties on goods from non-market economy countries, a good amount of noteworthy case law affecting market economies developed in 2010. Indeed, the two cases from 2010 that will continue to have the most impact on one of the most contentious (and longest litigated) topics in trade law—zeroing—are included in this body of case law. Even apart from zeroing, the Court’s 2010 decisions revealed interesting and sometimes conflicting conclusions on a wide range of procedural and substantive issues before the Court.

This article seeks to provide a useful overview of the Court’s 2010 decisions, and approaches the decisions thematically and in the order in which the issues would generally appear in litigation, beginning with an analysis of decisions concerning injunctions, proceeding to procedural/jurisdictional issues such as exhaustion, and concluding with an in-depth review of the more significant merits issues addressed by the Court in 2010.<sup>1</sup>

II. INJUNCTIONS

As they have for the past several years, in 2010 parties continued to challenge the availability and scope of preliminary injunctions. In *Union Steel v. United States*,<sup>2</sup> the Court for the third time since 2008 allowed a plaintiff-intervenor to obtain a preliminary injunction enjoining the liquidation of its entries.<sup>3</sup> Longstanding Supreme Court precedent requires that a plaintiff-intervenor be admitted to the proceeding as it

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1. This article does not attempt to address every calculation issue addressed by the Court in 2010, rather, we have attempted to identify certain emerging trends that have long-term effects on the Court of International Trade’s jurisprudence. That said, the Court considered many important calculation issues in 2010, including Commerce’s departure from the 60/90 day rule and use of quarterly cost averaging in *Seah Steel*, Commerce’s application of the targeted dumping provision in investigations in *Mid-Continent Nails*, and Commerce’s valuation methodology for calculating the normal value of magnesium in *PSC VSMPO-AVISMA* (currently on appeal). See *Seah Steel Corp. v. United States*, 704 F. Supp. 2d 1353, 1356 (Ct. Int’l Trade 2010); *Mid-Continent Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1376 (Ct. Int’l Trade 2010); *PSC VSMPO-AVISMA Corp. v. United States*, 724 F. Supp. 2d 1308, 1313 (Ct. Int’l Trade 2010).

2. 704 F. Supp. 2d 1348 (Ct. Int’l Trade 2010).

3. See *id.* at 1352.

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stands and prohibits a plaintiff from enlarging those issues.<sup>4</sup>

In *Union Steel*, the United States contended that the suspension of liquidation for entries not referenced in the plaintiff's complaint constituted an enlargement of the issues raised in the complaint.<sup>5</sup> In other words, the government argued that the complaint contested the treatment of the *plaintiff's* entries, not the intervenor's entries. As it did in its 2008 decision in *NSK Corp. v. United States*,<sup>6</sup> and the previous administrative review concerning *Union Steel*,<sup>7</sup> the Court rejected the United States' contention, distinguishing substantive issues from an injunction; the latter of which, in the Court's view, merely allows a party to preserve the ability to obtain a meaningful remedy.<sup>8</sup> Although at first glance the decision is just a threshold determination regarding what entries will benefit from or be affected by the Court's decision, on a closer look the decision joins a growing discussion about the scope and intention of injunctions obtained under 19 U.S.C. § 1516a.

For example, in 2010, the Court noted the tension between the Supreme Court's 2008 decision in *Munaf v. Green*<sup>9</sup> and the purpose and role of injunctions under section 1516a. In *Ad-Hoc Shrimp Trade Action Commission v. United States*,<sup>10</sup> the Court restated the Court of Appeals for the Federal Circuit's 2009 discussion in *Qingdao Taifa Group Co. v. United States*<sup>11</sup> that it "takes very seriously the Supreme Court's recent emphasis on the importance of the likelihood of success in the preliminary injunction calculus. But the court also recognizes that 19 U.S.C. § 1516a(c)(2) envisions the use of preliminary injunctions in the antidumping context to preserve proper legal options . . . ."<sup>12</sup> The Court in *Ad-Hoc Shrimp* ultimately held that as long as a party's entries could potentially be affected by the resolution of a pending appeal, there were no changed circumstances warranting modification of a preliminary injunction.<sup>13</sup>

These decisions, as well as the many decisions concerning Com-

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4. See *id.* at 1351 (citing *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944)).

5. See *id.* at 1350-51.

6. See *NSK Corp. v. United States*, 547 F. Supp. 2d 1312, 1318 (Ct. Int'l Trade 2008).

7. See *Union Steel v. United States*, 617 F. Supp. 2d 1373 (Ct. Int'l Trade 2009).

8. *Union Steel*, 704 F. Supp. 2d at 1352.

9. 553 U.S. 674 (2008).

10. 724 F. Supp. 2d 1373 (Ct. Int'l Trade 2010).

11. 581 F.3d 1375, 1382 (Fed. Cir. 2009).

12. *Id.* at 1376 (citing *Qingdao Taifa*, 581 F.3d at 1382).

13. See *id.* at 1381.

merce's fifteen-day liquidation policy,<sup>14</sup> have put the Court at something of a crossroads where it remains to be seen whether the Court will ultimately determine that injunctions in the dumping context are more like typical injunctions—requiring stringent adherence to the requisite, traditional factors—or are wholly unique to the dumping scheme.

### III. EXHAUSTION

The statute directs the court to, “where appropriate, require the exhaustion of administrative remedies.”<sup>15</sup> Although the requirement is discretionary,<sup>16</sup> the Court has nevertheless held that exhaustion is “generally appropriate in the antidumping context”<sup>17</sup> and is “almost always appropriate in the countervailing duty context,”<sup>18</sup> because exhaustion “allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency.”<sup>19</sup> Where the Court has required exhaustion, it has often faulted the party for not complying with Commerce’s regulation that issues be presented in the party’s case brief.<sup>20</sup>

Because the statute requires exhaustion only “where appropriate,” in 2010 the Court recognized that “a party’s failure to exhaust its administrative remedies should not preclude judicial review of its claims where the benefits of exhaustion are inapplicable or outweighed by other concerns.”<sup>21</sup>

However, the Court took a very different approach in another 2010 case, one that has had ripple effects ever since. As discussed in more

14. See, e.g., *SKF USA Inc. v. United States*, 32 I.T.R.D. (BNA) 1550 (Ct. Int’l Trade 2010).

15. 28 U.S.C. § 2637(d) (2006).

16. This exercise is left to the discretion of the Court. See *Corus Staal BV v. United States (Corus II)*, 502 F.3d 1370, 1381 (Fed. Cir. 2007) (holding that “applying exhaustion principles in trade cases is subject to the discretion of the judge of the Court of International Trade.”).

17. *Thai Plastic Bags Indus. Co. v. United States*, 752 F. Supp. 2d 1316, 1329 (Ct. Int’l Trade 2010) (quoting *Carpenter Tech. Corp. v. United States*, 30 Ct. Int’l Trade 1595, 1597 (2006)).

18. *Essar Steel Ltd. v. United States*, 721 F. Supp. 2d 1285, 1296 (Ct. Int’l Trade 2010), *appeal pending*, Nos. 2011-1270, -1271, -1289 (Fed. Cir. Mar. 29, 2011).

19. *Thai Plastic Bags*, 752 F. Supp. 2d at 1329 (quoting *Carpenter Tech.*, 30 Ct. Int’l Trade at 1597), *rev’d on other grounds*, 604 F.3d 1363 (Fed. Cir. 2010).

20. See *id.*, citing *Dorbest Ltd. v. United States*, 547 F. Supp. 2d 1321, 1344 (Ct. Int’l Trade 2008); *Carpenter Tech. Corp.*, 30 Ct. Int’l Trade at 1598.

21. *Pakfood Pub. Co. v. United States*, 724 F. Supp. 2d 1327, 1350 (Ct. Int’l Trade 2010) (citing *Timken Co. v. United States*, 10 Ct. Int’l Trade 86, 92-93 (1986)), *appeal pending*, No. 2011-1282 (Fed. Cir. Mar. 30, 2011).

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detail below, *Dongbu Steel v. United States (Dongbu I)*<sup>22</sup> involved a challenge to Commerce’s application of zeroing in administrative reviews in light of Commerce’s change in zeroing policy in investigations using average-to-average comparisons. The respondents in *Dongbu I* did not challenge, in either their case briefs or reply briefs before Commerce, any aspect of Commerce’s application of zeroing in the administrative review at issue because Commerce had not yet issued notice of the change for certain types of investigations.<sup>23</sup> The Court noted that there was “nothing to exhaust” until Commerce issued its final determination, despite the fact that Commerce had already published its *intent* to cease zeroing in certain investigations.<sup>24</sup> The Court noted that at the time *Dongbu* was required to file its case briefs before Commerce, “no official determination had been made” and objections to Commerce’s zeroing practice were, therefore, “not yet ripe at the time case briefs were due.”<sup>25</sup> The Court went on to conclude that, in any event, the issue raised a “pure question of law”<sup>26</sup> and thus should be exempted from the exhaustion requirement.<sup>27</sup> According to the Court, the pure question of law was the proper interpretation of 19 U.S.C. § 1677(35).<sup>28</sup> Despite the total absence of Commerce’s interpretation on the record, and despite the Federal Circuit’s repeated holding that the provision was ambiguous (and therefore subject to the *Chevron* step two analysis),<sup>29</sup> the Court adjudicated the question as a pure question of law, ultimately sustaining Commerce’s use of zero-

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22. 677 F. Supp. 2d 1353, 1360-62 (Ct. Int’l Trade 2010).

23. *Id.* at 1360 n.9.

24. *Id.* at 1361.

25. *Id.*

26. In order to qualify for this exception,

[T]he following non-exhaustive list of requirements is contemplated: (a) in order to qualify for the exception, plaintiff shall raise a new argument; (b) this argument shall be of purely legal nature; (c) the inquiry shall require neither further agency involvement nor additional fact finding or opening up the record; and (d) the inquiry shall neither create undue delay nor cause expenditure of scarce party time and resources.

Consolidated Bearings Co. v. United States, 25 C.I.T. 546, 166 F. Supp. 2d 580, 587 (Ct. Int’l Trade 2001); *see also* *Agro Dutch Indus. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007).

27. *Dongbu I*, 677 F. Supp. 2d at 1362 (quoting *Agro Dutch*, 508 F.3d at 1029) (alteration omitted).

28. *Id.*

29. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), the Supreme Court articulated the framework for reviewing an agency’s interpretation of a statutory term. In step one of the process, the court determines whether Congress has spoken directly on a precise issue. *Id.* If the statute is silent or ambiguous on the issue, the court

ing.<sup>30</sup>

As discussed more fully below, the Federal Circuit vacated and remanded for Commerce to explain, in the first instance, why it was reasonable to continue using zeroing in administrative reviews.<sup>31</sup> The Federal Circuit’s holding, requiring Commerce to present its interpretation of an ambiguous statute, implicitly rejected the Court’s determination that a *Chevron* step two statutory question can present a pure question of law.<sup>32</sup> This is more consistent with the Court’s 2010 invocation of the “pure question of law exception” in *ATAR, S.r.l. v. United States*,<sup>33</sup> in which the Court applied the exception only because the issue could be resolved on the statutory language alone.<sup>34</sup>

The Court took a far more typical approach when it came to applying the other, often-cited exception to exhaustion—“futility.”<sup>35</sup> Unlike in *Dongbu I*, in *Pakfood Public Co. v. United States*<sup>36</sup> and *Asahi Seiko Co. v. United States*<sup>37</sup> the Court required exhaustion even in the face of

determines whether the agency’s interpretation is based on a permissible construction and sustains the interpretation if reasonable. *Id.*

30. *Dongbu I*, 677 F. Supp. 2d at 1366.

31. *See* *Dongbu Steel Corp. v. United States (Dongbu II)*, 635 F.3d 1363, 1373 (Fed. Cir. 2011).

32. *See id.*

33. 703 F. Supp. 2d 1359 (Ct. Int’l Trade 2010).

34. *Id.* at 1366 (applying the “pure question of law” exception as to “[t]he narrow issue of whether Commerce, in all cases in which it applies [19 U.S.C. § 1677b(e)(2)(B)(iii)], must endeavor to comply with the profit cap requirement”). Recently, the Court has disagreed with the holding in *Dongbu I*. In *Fuwei Films*, the Court rejected a plaintiff’s attempt to amend its complaint to challenge zeroing, when the plaintiff did not raise the issue before Commerce. *See Fuwei Films (Shandong) Co. v. United States*, No. 11-00061, 2011 WL 3947551 (Ct. Int’l Trade Sept. 8, 2011). The plaintiff stated that the “pure question of law” exception applied to excuse its failure to exhaust administrative remedies. *Id.* at \*2. The court held, however:

The court cannot on its own resolve the issue. It is a *Chevron* step 2 issue; it requires the input of Commerce. To address the problem, the court would first have to remand the issue to Commerce, an inefficiency occasioned solely by Plaintiff’s inaction. The pure question of law exception, therefore, cannot apply in this instance because its application would undermine the very purposes the exhaustion requirement is designed to promote.

*Id.* (citations omitted).

35. *See Bendure v. United States*, 554 F.2d 427, 431 (Cl. Ct. 1977) (“Courts will, as a general rule, refuse to require administrative exhaustion when resort to the administrative remedy would be futile, including situations where plaintiffs would be ‘required to go through obviously useless motions in order to preserve their rights.’”) (citing *Walsh v. United States*, 151 Ct. Cl. 507, 511 (1960)).

36. 724 F. Supp. 2d 1327, 1351 (Ct. Int’l Trade 2010).

37. 751 F. Supp. 2d 1335, 1342-44 (Ct. Int’l Trade 2010).

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parties' futility arguments. Pursuant to regulation, a party must raise issues in its case brief even if Commerce has previously rejected the issue in the same administrative proceeding.<sup>38</sup> In *Pakfood*, the plaintiff sought to escape administrative exhaustion arguing that it was not required to raise the issue of contractual exchange rates because it would have been futile, given Commerce's rejection of that contention at an earlier stage of the administrative proceeding.<sup>39</sup> The Court rejected plaintiff's argument, insisting that the plaintiff was required to raise in its case briefs "even arguments Commerce ha[d] repeatedly dismissed."<sup>40</sup>

Along similar lines, *Asahi Seiko* established that a would-be mandatory respondent could not raise the futility exception when it withdrew its participation in a review, regardless of whether it was likely that Commerce would individually examine the respondent as a voluntary respondent and provide it an individual dumping margin.<sup>41</sup> In *Asahi Seiko*, after selecting three mandatory respondents for individual review, not including the plaintiff, Commerce indicated that the possibility of selection of voluntary respondents for review, though remote, was not foreclosed.<sup>42</sup> Commerce stated that it may select a voluntary respondent if upon re-examination it determined to do so, or if a mandatory respondent withdrew from the investigation or otherwise failed to cooperate.<sup>43</sup> The Court held that the record "d[id] not support a conclusion that Asahi's seeking voluntary respondent status would have been futile."<sup>44</sup>

### IV. MERITS ISSUES

#### A. *Selecting Mandatory Respondents*

The question of how many mandatory respondents Commerce may choose has also been addressed head on, and not simply in the confines of the exhaustion analysis. Section 1677f-1(c)(2) of Title 19 permits Commerce to limit the number of respondents selected for individual,

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38. 19 C.F.R. § 351.309(c)(2) (2011).

39. *See Pakfood*, 724 F. Supp. 2d at 1351.

40. *Id.* at 1352 (citing *Carpenter Tech. Corp. v. United States*, 30 Ct. Int'l Trade 1595, 1598 (2006)).

41. *See Asahi Seiko*, 751 F. Supp. 2d at 1342-44.

42. *Id.* at 1342-43.

43. *Id.* at 1343.

44. *Id.*

mandatory review.<sup>45</sup> In *Pakfood*, Commerce relied upon information from U.S. Customs and Border Protection (CBP) to determine which companies were the largest producers/exporters of frozen warmwater shrimp from Thailand.<sup>46</sup> The Court found Commerce's reliance to be reasonable but nevertheless arbitrary, noting that Commerce's reliance on CBP entry data in some proceedings, and reliance on quality and value questionnaires in other proceedings, was arbitrary, in the absence of adequate explanation for the disparate reliance.<sup>47</sup> This decision adds to the growing body of case law concerning Commerce's discretion to select a limited number of companies for individual review when its resources are constrained.<sup>48</sup>

### B. *Zeroing*

No review of 2010 decisions would be complete without addressing the Court's review of Commerce's current zeroing practice.<sup>49</sup> Much litigation has revolved and continues to revolve around a growing number of adverse World Trade Organization (WTO) appellate body reports,<sup>50</sup> as well as an adverse North American Free Trade Agreement (NAFTA) binational panel decision,<sup>51</sup> condemning Commerce's use of zeroing in various contexts. In 2006, in response to one such adverse WTO report regarding Commerce's use of zeroing in investigations, the political branches of the United States government decided to implement<sup>52</sup> the adverse report by ceasing the practice of zeroing in

45. 19 U.S.C. § 1677f-1(c)(2) (2006).

46. *See* *Pakfood Pub. Co. v. United States*, 724 F. Supp. 2d 1327, 1335 (Ct. Int'l Trade 2010).

47. *See id.* at 1335-37.

48. *See, e.g., Asahi Seiko*, 751 F. Supp. 2d at 1342-43.

49. When Commerce applies zeroing in the comparison of normal value to export price, it does not consider a nondumped sale. Instead, Commerce treats a nondumped sale as having a value of zero rather than a negative value that could be offset from a positive value, which could, in turn, lower a dumping margin. Commerce currently uses zeroing in administrative reviews, but does not use zeroing in investigations using average-to-average comparisons.

50. *See, e.g.,* Appellate Body Report, *United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (Apr. 18, 2006); *see also* Appellate Body Report, *United States - Measures Relating to Zeroing and Sunset Reviews*, ¶¶ 137, 156, 165, 185, WT/DS322/AB/R (Jan. 9, 2007).

51. Decision of the Panel, *Stainless Steel Sheet and Strip in Coils From Mexico: Final Results of 2004/2005 Antidumping Review*, USA-MEX-2007-1904-01, at 24 (Apr. 14, 2010).

52. The Uruguay Round Agreements Act, in sections 123 and 129, established two procedures for implementing adverse WTO reports in U.S. law. *See* 19 U.S.C. §§ 3533(g), 3538 (2006). In this instance, the United States responded to the report by complying with the requirements of 19 U.S.C. § 3533(g) (colloquially referred to as "Section 123" of the Uruguay Round Agreements

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investigations using average-to-average comparisons.<sup>53</sup> Commerce was clear in its Section 123 determination that the implementation did not address zeroing in any other context but average-to-average comparisons made during investigations.<sup>54</sup> Commerce also issued a Section 129 determination, applying the change in methodology to specific proceedings.<sup>55</sup> In very late 2009, the Court sustained this determination as reasonable, and the Federal Circuit affirmed.<sup>56</sup>

However, Commerce continues to use zeroing in administrative reviews, and this continued use resulted in several decisions in 2010 that have created havoc in the case law.<sup>57</sup> Over the past decade, the Federal Circuit has repeatedly rejected challenges to zeroing based upon the existence of the WTO panel report, or based upon Commerce's intention to change its practice.<sup>58</sup> This is because WTO decisions do not bind the United States and thus do not constitute binding legal authority in U.S. courts.<sup>59</sup> In 2010, the Court followed suit and, bound by this precedent, refused to reconsider the legality of zeroing

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Act). Section 123 contains six specific requirements that must be met to implement an adverse WTO decision such that the implementation renders the United States compliant with its international obligations. *Id.* § 3533(g)(1)(A)-(F). 19 U.S.C. § 3538 was implemented as section 129 and provides for a more limited procedure for the implementation of an adverse WTO decision that concerns a particular proceeding, as opposed to a general practice.

53. Antidumping Duty Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 77,722 (Dep't of Commerce Dec. 27, 2006) (final modification).

54. *See id.*

55. *See* Implementation of the Findings of the WTO Panel in US-Zeroing (EC), 72 Fed. Reg. 25,261 (Dep't of Commerce May 4, 2007) (notice of determinations under section 129 of the Uruguay Round Agreement Acts).

56. *U.S. Steel Corp. v. United States*, 637 F. Supp. 2d 1199 (Ct. Int'l Trade 2010), *aff'd*, 621 F.3d 1351 (Fed. Cir. 2010) (cert. denied).

57. In December 2010, Commerce announced its proposal to cease zeroing in administrative reviews and requested comments on the proposal. *See* Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 Fed. Reg. 81,533, 81,534 (Dep't of Commerce Dec. 28, 2010) [hereinafter Zeroing Review].

58. *See, e.g., Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1291 (Fed. Cir. 2008); *Corus Staal BV v. Dep't of Commerce (Corus I)*, 395 F.3d 1343, 1349 (Fed. Cir. 2005); *NSK Ltd. v. United States (NSK III)*, 510 F.3d 1375, 1380 (Fed. Cir. 2007).

59. *Timken Co. v. United States*, 354 F.3d 1334, 1344 (Fed. Cir. 2004) (finding that WTO decisions are "not binding on the United States, much less this court."). *See also* *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1362 (Fed. Cir. 2003) (citing *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 244 (1984)) (finding that a non-self-executing cannot "become legally binding domestically unless Congress implemented it through domestic legislation . . .").

in administrative reviews.<sup>60</sup> The Court repeatedly refused even to grant plaintiffs' motions for preliminary injunctions when such plaintiffs challenged only Commerce's zeroing practice based upon alleged WTO-inconsistency,<sup>61</sup> or based upon the NAFTA panel decision.<sup>62</sup> In such cases, the Court determined, given the overwhelming Federal Circuit precedent, that plaintiffs failed to meet the "likelihood of success on the merits" factor of the standard for entry of a preliminary injunction.<sup>63</sup> These decisions suggested that the Court considered this particular issue resolved.<sup>64</sup> However, recent events call that apparent resolution into question.

The focus of much discussion in 2010 (and continuing into 2011) was Commerce's continued application of zeroing in administrative reviews in the face of its decision to cease zeroing in investigations involving average-to-average comparisons. The Court has addressed this issue in two cases that have since generated conflicting Federal Circuit precedent.

First, the Court rejected the argument that Commerce should stop zeroing in administrative reviews simply because it ceased zeroing in certain investigations.<sup>65</sup> In *JTEKT Corp. v. United States*, the Court considered itself bound by *NSK III*<sup>66</sup> and *Corus Staal BV v. Department of Commerce (Corus I)*,<sup>67</sup> and held that Commerce's continued application

60. See, e.g., *JTEKT Corp. v. United States*, 717 F. Supp. 2d 1322, 1327 (Ct. Int'l Trade 2010), vacated, 642 F.3d 1378 (Fed. Cir. 2011).

61. See *NTN Corp. v. United States*, 744 F. Supp. 2d 1370, 1375-76 (Ct. Int'l Trade 2010) (denying a preliminary injunction to plaintiff-intervenors based upon a claim that the WTO panel report determined that Commerce's use of zeroing failed to comply with U.S. international obligations); see generally *NSK Bearings Europe Ltd. v. United States (NSK I)*, 32 I.T.R.D. (BNA) 2083 (Ct. Int'l Trade 2010); *NSK Ltd. v. United States (NSK II)*, 32 I.T.R.D. (BNA) 2078, (Ct. Int'l Trade 2010).

62. *NSK I*, 32 I.T.R.D. (BNA), at \*2086 (holding that, despite the NAFTA panel decision, Commerce was neither obligated by law or deemed to have abused its discretion by zeroing in the administrative review); *NSK II*, 32 I.T.R.D. (BNA), at 2082 (same).

63. *NSK I*, 32 I.T.R.D. (BNA), at 2086; *NSK II*, 32 I.T.R.D. (BNA), at 2082.

64. Also of note, the Court has denied preliminary injunctions to plaintiffs challenging Commerce's zeroing practice in administrative reviews despite the Government's public expression of intent to stop this practice. *NSK I*, 32 I.T.R.D. (BNA), at 2085 (rejecting plaintiffs' allusion to a September 2010 press release in which the Government stated that it would "begin the process of complying with the WTO's zeroing ruling before the end of the year[.]" because the Government in fact had not yet begun the Section 123 process and any change in U.S. law to comply with the ruling would not apply retroactively); *NSK II*, 32 I.T.R.D. (BNA), at 2081 (same); see also *NTN*, 744 F. Supp. 2d at 1376.

65. *JTEKT*, 717 F. Supp. 2d at 1327.

66. 510 F.3d at 1380.

67. 395 F.3d 1343, 1349 (Fed. Cir. 2005).

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of zeroing even after Commerce's decision to cease zeroing in investigations using average-to-average comparisons was reasonable.<sup>68</sup> Before *JTEKT* reached the Federal Circuit, in *SKF USA Inc. v. United States*,<sup>69</sup> the Federal Circuit addressed Commerce's continued use of zeroing, in light of Commerce's decision to cease zeroing in some investigations, and held Commerce's use of zeroing to be reasonable in administrative reviews despite the change.<sup>70</sup> Specifically, that Court of Appeals sustained Commerce's continued use of zeroing in administrative reviews, even in light of Commerce's change in methodology for some types of investigations.<sup>71</sup>

In the meantime, the Court of International Trade tackled head-on the discrepancy between Commerce's use of zeroing in reviews and investigations in *Dongbu I*, and held that Commerce's interpretation of the statutory definition of "weighted average dumping margin" reasonably allowed for the continued use of zeroing in some contexts, and the cessation of zeroing in others.<sup>72</sup> Specifically at issue is section 1677(35)(B) of Title 19, which states that "[t]he term 'weighted average dumping margin' is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer."<sup>73</sup> The plaintiffs in *Dongbu I* claimed that it was unreasonable, under *Chevron* step two,<sup>74</sup> for Commerce to "interpret [ ] [19 U.S.C. § 1677(35)] to mean one thing with respect to antidumping investigations ([i.e.,] that weighted average dumping margins should be calculated without zeroing negative dumping mar-

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68. *JTEKT*, 717 F. Supp. 2d at 1327.

69. 630 F.3d 1365 (Fed. Cir. 2011).

70. *Id.* at 1375 (sustaining as reasonable Commerce's use of zeroing in administrative reviews and stating, "Commerce changed its practice for original investigations and no longer uses zeroing for calculation of weighted average dumping margins, but it continues to use zeroing during administrative reviews . . . . Even after Commerce changed its policy with respect to original investigations, we have held that Commerce's application of zeroing to administrative reviews is not inconsistent with the statute. . . ." (citations omitted)); see also *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1360-62 (Fed. Cir. 2010) (sustaining Commerce's cessation of zeroing in investigations using average-to-average comparisons, and noting Commerce's interpretation of the statute to allow it to use zeroing for some types of comparisons made during investigations, but not others); *Corus II*, 502 F.3d 1370, 1373-74 (Fed. Cir. 2007).

71. See *SKF USA Inc.*, 630 F.3d at 1375.

72. *Dongbu I*, 677 F. Supp. 2d 1353, 1364 (Ct. Int'l Trade 2010).

73. *Id.* at 1356; 19 U.S.C. § 1677(35)(B) (2006).

74. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) ("[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.").

gins), and to mean the exact opposite with respect to antidumping administrative reviews ([*i.e.*,] that weighted average dumping margins should be calculated by zeroing negative dumping margins).<sup>75</sup>

The Court determined that “the Court of Appeals ha[d] not squarely confronted the precise arguments” that plaintiffs raised.<sup>76</sup> However, following an earlier decision of the Court<sup>77</sup> and in light of Federal Circuit precedent,<sup>78</sup> the Court rejected plaintiffs’ arguments, holding that “the thrust of the Court of Appeals’ jurisprudence is clear: Commerce’s use of zeroing in administrative reviews (or, for that matter, any antidumping proceeding) will be sustained as reasonable— ‘[u]nless and until’ Commerce officially abandons the practice.”<sup>79</sup> We note that Commerce has not abandoned the practice in administrative reviews (and in fact, at the time of this publication, the WTO proceeding regarding administrative reviews has not yet been implemented by the United States).<sup>80</sup>

The Court’s decision in *Dongbu I* was vacated and remanded by the Federal Circuit in 2011.<sup>81</sup> The Federal Circuit determined that it was not bound by prior zeroing cases, stating “[a]lthough [the Federal Circuit] ha[s] considered Commerce’s zeroing policy in administrative reviews on numerous occasions . . . [the Federal Circuit] has never addressed the reasonableness of Commerce’s interpretation of 19 U.S.C. § 1677(35) with respect to administrative reviews now that Commerce is no longer using a consistent interpretation.”<sup>82</sup> The Federal Circuit went on to find Commerce’s application of section 1677(35) unreasonable given that Commerce had not provided any explanation of its practice.<sup>83</sup> Because of the unique procedural posture of the plaintiff in *Dongbu I*, the Federal Circuit’s decision appeared to

75. *Dongbu I*, 677 F. Supp. 2d at 1363 (citation omitted).

76. *Id.* at 1365.

77. *Union Steel v. United States*, 645 F. Supp. 2d 1298, 1305-09 (Ct. Int’l Trade 2009).

78. The Court followed *Koyo Seiko v. United States*, 551 F.3d 1286 (Fed. Cir. 2008) *SKF USA Inc. v. United States*, 537 F.3d 1373 (Fed. Cir. 2008), *Corus II*, 502 F.3d 1370 (Fed. Cir. 2007), and *NSK III*, 510 F.3d 1375 (Fed. Cir. 2008).

79. *Dongbu I*, 677 F. Supp. 2d at 1365 (citations omitted).

80. *See Zeroing Review*, *supra* note 57, at 81,534.

81. *Dongbu II*, 635 F.3d 1363, 1373 (Fed. Cir. 2011).

82. *Id.* at 1371. In *Dongbu I*, Commerce announced the cessation of zeroing in investigations using average-to-average comparisons after the deadline for administrative comments. The plaintiff filed a letter asking Commerce to consider its argument that the announcement rendered the continued use of zeroing unreasonable. Commerce declined to consider the untimely argument. *See Dongbu I*, 677 F. Supp. 2d at 1360 n.9.

83. *Dongbu II*, 635 F.3d at 1372-73.

be limited to the unusual situation where a plaintiff is unable to timely challenge a Commerce interpretation.

However, since issuing *Dongbu I*, the Federal Circuit issued its decision in *JTEKT*. The Court remanded Commerce’s explanation of its continued use of zeroing for a *Dongbu*-consistent new explanation.<sup>84</sup> Unlike *Dongbu*, in *JTEKT*, Commerce provided an explanation for its continued use of zeroing.<sup>85</sup> *JTEKT* therefore calls into question the seemingly limited application of *Dongbu* and conflicts with *SKF* directly, making the future of zeroing law unpredictable.

### C. Consideration and Rejection of International Agreements

In the zeroing cases, respondents’ first line of attack years ago was to argue that Commerce must interpret the dumping statute in a manner consistent with the United States’ international obligations. In *Corus I*, the Federal Circuit held that the *Charming Betsy*<sup>86</sup> doctrine did not require Commerce to stop zeroing regardless of WTO panel and appellate body reports finding the practice to be inconsistent with the United States’ obligations under the Antidumping Agreement.<sup>87</sup> The Court of International Trade and Federal Circuit have since then rejected similar *Charming Betsy* challenges in light of the adverse WTO panel report addressing the United States’ zeroing practice.<sup>88</sup>

In 2010, in *Andaman Seafood v. United States*,<sup>89</sup> the Court addressed *Charming Betsy*’s application to the scope of a Section 129 determination revoking an antidumping duty order in order to comply with an

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84. See *JTEKT Corp. v. United States*, 642 F.3d 1378, 1384-85 (Fed. Cir. 2011).

85. See *id.* at 1384. Specifically, Commerce argued that antidumping investigations focus on determining “whether an antidumping duty order will be imposed on the subject imports” and use “average-to-average comparisons,” while administrative reviews focus on assessing the level of “antidumping duties on entries of subject merchandise ” and use “average-to-transaction comparisons.” *Id.*

86. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

87. See *Corus I*, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005).

88. See, e.g., *SKF USA Inc. v. United States*, 675 F. Supp. 2d 1264, 1279 (Ct. Int’l Trade 2009); *JTEKT Corp. v. United States*, 675 F. Supp. 2d 1206, 1215 (Ct. Int’l Trade 2009); *Corus v. United States (Corus IV)*, 593 F. Supp. 2d 1373, 1385 (Ct. Int’l Trade 2008).

89. 675 F. Supp. 2d 1363 (Ct. Int’l Trade 2010), *appeal dismissed*, No. 2010-1299 (Fed. Cir. June 14, 2010).

adverse WTO report.<sup>90</sup> *Andaman Seafood* involved the implementation of an adverse WTO report involving frozen warmwater shrimp from Thailand<sup>91</sup> and Commerce’s subsequent prospective revocation of the order in a Section 129 determination. Plaintiffs contended that the revocation should have applied retroactively to entries that predated the effective date of the revocation.<sup>92</sup> However, the Court declined to require Commerce to apply the Section 129 determination retroactively, determining that *Charming Betsy* provided no basis for such a requirement, particularly in light of the statutory directive.<sup>93</sup> The Court recognized that the Uruguay Round Agreements Act was “expressly designed so as to preserve the independence of U.S. law from adverse decisions” of WTO dispute settlement panels.<sup>94</sup> This holding is consistent with *Corus I’s* holding that WTO decisions are “not binding on the United States, much less this court.”<sup>95</sup>

In contrast, in 2010 the Court addressed language from a self-executing treaty in a substantial evidence analysis. In *Pasta Zara SpA v. United States*,<sup>96</sup> Commerce determined a respondent’s sales to constitute constructed export price sales.<sup>97</sup> In making this determination,

90. Section 129 of the Uruguay Round Agreements Act allows the United States Trade Representative to direct Commerce to implement a new determination when Commerce’s old determination has been found by the WTO to be inconsistent with the United States international obligations under the WTO agreements. See 19 U.S.C. § 3538 (2006).

91. Commerce published its compliance with this particular WTO report in 2009. See Implementation of the Findings of the WTO Panel in the United States—Antidumping Measure on Shrimp from Thailand, 74 Fed. Reg. 5,638 (Dep’t of Commerce Jan. 30, 2009) (final modification).

92. See *Andaman Seafood*, 675 F. Supp. 2d at 1373-74.

93. See *id.*; see also STATEMENT OF ADMINISTRATIVE ACTION TO THE URUGUAY ROUND AGREEMENTS ACT, H.R. REP. NO. 103-316, at 1026 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4313 (“[S]ubsection 129(c)(1) provides that where determinations by . . . Commerce are implemented under subsection [129(b)], such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative [USTR] directs implementation.”); 19 U.S.C. § 3538(c)(1) (2006) (Section 129 “shall apply with respect to unliquidated entries of the subject merchandise . . . that are entered, or withdrawn from warehouse, for consumption on or after . . . the date on which the Trade Representative directs [Commerce] . . . to implement that determination.”).

94. *Andaman Seafood*, 675 F. Supp. 2d at 1373.

95. *Corus I*, 395 F.3d 1343, 1348-49 (Fed. Cir. 2005).

96. 703 F. Supp. 2d 1317 (Ct. Int’l Trade 2010).

97. An export price is, according to 19 U.S.C. § 1677a(a):

[T]he price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside

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Commerce rejected the respondent's argument that "mutual assent" existed, and therefore that the contracts for sale were "binding" in Italy when the respondent received a customer's purchase order and began to produce the subject merchandise pursuant to that purchase order.<sup>98</sup> The plaintiff argued that Commerce's determination was unsupported by substantial evidence because language from the United Nations Convention on Contracts for the International Sale of Goods (CISG)<sup>99</sup> indicated that production against the purchase orders created binding sales contracts.<sup>100</sup>

The CISG is a self-executing agreement between the United States and other signatories,<sup>101</sup> such as Italy,<sup>102</sup> and provides applicable

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of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States.

In contrast, a "constructed export price sale" is:

[T]he price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter[.]

19 U.S.C. § 1677a(b) (2006).

98. *Pasta Zara*, 703 F. Supp. 2d at 1320-21.

99. The CISG states:

[I]f, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided the act is performed within the period of time laid down in the preceding paragraph."

United Nations Convention on Contracts for the International Sale of Goods art. 18.3, Apr. 11, 1980, S. Treaty Doc. 98-9 (1983), 1489 U.N.T.S. 3 [hereinafter CISG]. The CISG is reprinted at 15 U.S.C. App. Because the CISG is a treaty, it "is a source of federal law." *See, e.g., Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426, at 430 (S.D.N.Y. 2011) (citing 28 U.S.C. § 1331(a)). The CISG provides "a private right of action in federal court under federal law." *Riccitelli v. Elemar N. Eng. Marble & Granite, LLC*, No. 08 Civ. 1783, 2010 WL 3767111, at \*4 (D. Conn. Sept. 11, 2010) (citing *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027-28 (2d Cir. 1995)).

100. *Pasta Zara*, 703 F. Supp. 2d at 1321.

101. *See Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894, 897 (7th Cir. 2005).

102. *Status: 1980 - United Nations Convention on Contracts for the International Sale of Goods*, U.N. COMMISSION ON INT'L TRADE L. [UNCITRAL], [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) (last visited Sept. 11, 2011); *United Nations Convention on Contracts for the International Sale of Goods*, U.N. TREATY COLLECTION, <http://treaties.un.org/pages/>

commercial law for international contracts for the sale of goods between United States parties and foreign parties.<sup>103</sup> Thus, the CISG serves as an international analog to the Uniform Commercial Code (which the Federal Circuit has applied to hold unreasonable, as a matter of law, Commerce’s interpretation of the term “affiliated parties” under 19 U.S.C. § 1677(33) and 19 C.F.R. § 351.102(b)).<sup>104</sup> Though the CISG may influence Commerce’s statutory interpretation, it is unclear whether the CISG and the Uniform Commercial Code (U.C.C.) have any, or should have any effect upon the Court’s analysis. Although the Court has found that the U.C.C. “does not control Commerce’s methodology in determining what constitutes a sale,”<sup>105</sup> it has looked to language from the CISG<sup>106</sup> or U.C.C.<sup>107</sup> as evidence to instead *support* Commerce’s dumping determinations. This seems to be consistent with previous case law from the Court that, “[w]hile Commerce is not precluded from referring to state contract law or general contract principles, it is not required to do so.”<sup>108</sup>

The Court’s decision in *Pasta Zara* did not depart dramatically from this tradition, but does represent at least a minor shift toward reliance upon the CISG. In that case, plaintiff argued that language of the CISG demonstrated that Commerce’s determination as to the nature of plaintiff’s sales was not supported by substantial evidence; in other words, the plaintiff contended that the CISG itself dictated the binding nature of purchase orders and therefore the location of sale in Italy.<sup>109</sup>

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[ViewDetails.aspx?src=TREATY&mtdsg\\_no=X-10&chapter=10&lang=en](#) (last updated October 10, 2011).

103. See *Orbisphere Corp. v. United States*, 13 Ct. Int’l Trade 866, 882 n.7 (1989).

104. See *Crawfish Processors Alliance v. United States*, 477 F.3d 1375, 1382 (Fed. Cir. 2007).

105. *Toho Titanium Co. v. United States*, 14 Ct. Int’l Trade 500, 501 (1990) (citing *Atlantic Steel Co. v. United States*, 10 Ct. Int’l Trade 340, 341 (1986)) (refusing to overturn Commerce’s determination as to date of sale as contrary to U.C.C. principles); see also *Orbisphere Corp.*, 13 Ct. Int’l Trade at 882 n.7 (noting that the Court may rely on the U.C.C. as evidence, but is not bound by it).

106. See, e.g., *Valkia Ltd. v. United States*, 28 Ct. Int’l Trade 907, 924 n.7 (2004) (using U.S.C. and CISG language as evidence to support Commerce’s determination applying adverse inferences by imputing a respondent with responsibility for the previous non-responsiveness and misstatements of the company respondent purchased).

107. See, e.g., *Nucor Corp. v. United States*, 612 F. Supp. 2d 1264, 1282 & n.21 (Ct. Int’l Trade 2009) (relying on U.C.C. to sustain Commerce’s factual determination that respondent’s sales were export price sales); *Valkia Ltd.*, 28 Ct. Int’l Trade at 924 n.7; cf. *Orbisphere Corp.*, 13 Ct. Int’l Trade at 883 (finding unpersuasive Commerce’s allusion to the U.C.C. as evidence supporting its factual determination that sales contracts were concluded in Switzerland).

108. *Toho Titanium*, 14 Ct. Int’l Trade at 504.

109. See *Pasta Zara SpA v. United States*, 703 F. Supp. 2d 1317, 1322-23 (Ct. Int’l Trade 2010).

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The Court noted CISG language defining “assent” by an offeree creating a binding contract to include “performing an act, such as one relating to the dispatch of goods,” which arguably would have supported the plaintiff’s position.<sup>110</sup> However, the Court held that the CISG language did not require Commerce to apply the CISG “in isolation and without also considering the evidence revealing the entire circumstances in which the . . . parties arranged the transactions,” nor did the CISG require “the court to ignore the significance of the substantial record evidence supporting Commerce’s factual findings.”<sup>111</sup> The Court considered the record evidence to be primary in determining whether to sustain Commerce’s determination.<sup>112</sup> To the extent that the CISG may or may not have required a different conclusion in isolation, the Court’s analysis suggests that the record evidence trumps consideration of an agreement such as the CISG and suggests that Commerce is primarily obligated to evaluate all of the evidence before it, and if that evidence supports the determination, the determination must be sustained.

### D. *Reaching Issues not Raised by the Parties*

The Federal Circuit “has consistently held that a party waives an argument not raised in its opening brief.”<sup>113</sup> Yet, in 2010, the Court of International Trade reached issues not raised in the parties’ briefs. For example, in *Thai Plastic Bags Industries Co. v. United States*,<sup>114</sup> the Court reached the issue of judicial estoppel regardless of the fact that neither party had raised it in their briefing.<sup>115</sup> Similarly, in *Asahi Seiko*, the Court ultimately dismissed for failure to exhaust administrative remedies, but in dictum, stated that Commerce’s respondent selection methodology reflected an unreasonable interpretation of 19 U.S.C. § 1677f-1(c)(2).<sup>116</sup>

But the Court has gone even further, and has approached issues *sua sponte* neither raised before Commerce nor before the Court. In *Atar*,

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110. *Id.* at 1322 (quoting CISG, *supra* note 99, art. 18.3).

111. *Id.* at 1323.

112. *See id.* at 1321.

113. *Advanced Magnetic Closures, Inc. v. Rome Fastener Corp.*, 607 F.3d 817, 833 (Fed. Cir. 2010) (citing *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006); *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990)).

114. 752 F. Supp. 2d 1316 (Ct. Int’l Trade 2010).

115. *Id.* at 1326 n.26.

116. *See Asahi Seiko Co. v. United States* 751 F. Supp. 2d 1335, 1342–44 (Ct. Int’l Trade 2010).

*S.r.l. v. United States*,<sup>117</sup> the plaintiff argued that Commerce, in calculating constructed value profit, in reality created a minimum profit requirement when Commerce excluded data from four unprofitable respondents.<sup>118</sup> The Court addressed the issue of whether Commerce had complied with the “profit cap” requirement found in 19 U.S.C. § 1677b(e)(2)(B)(iii)<sup>119</sup> and held that Commerce had not done so.<sup>120</sup> The Court noted that plaintiffs did not “raise expressly” the question of a profit cap—and stated that “[i]t can be argued, therefore, that plaintiff has waived any such objection”<sup>121</sup>—but the Court reached the issue nonetheless, concluding that “[e]ven had [plaintiff] failed to allude to the profit cap requirement in any respect . . . a court may consider an issue antecedent to . . . and ultimately dispositive of the dispute before it, even an issue the parties fail to identify and brief.”<sup>122</sup> In other words, despite a party’s failure to raise an issue either before the Court (which should constitute waiver) or before Commerce (which should constitute a failure to exhaust), the Court declined to require exhaustion, or to adhere to the normal waiver principles, concluding instead that the question of a profit cap requirement was so central that consideration was justified.

E. *Consideration of Previous or Subsequent Administrative Reviews*

Pursuant to statute, for purposes of judicial review, the record associated with Commerce determinations is limited to the information that was before Commerce in the particular review at issue at the time Commerce issued its determination.<sup>123</sup> However, the Court has also held that Commerce may not act arbitrarily by failing to treat like cases alike, that is, to treat issues differently in separate administrative proceedings without providing an adequate explanation for the differ-

117. 703 F. Supp. 2d 1359 (Ct. Int’l Trade 2010).

118. *Id.* at 1363.

119. 19 U.S.C. § 1677b(e)(2)(B)(iii) (2006) allows Commerce to develop a “reasonable method” for calculating constructed value profit, but requires that constructed value profit “may not exceed the amount normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.”

120. *Atar*, 703 F. Supp. 2d at 1362.

121. *Id.* at 1365.

122. *Id.* at 1366 (quoting *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993)).

123. *See* 19 U.S.C. § 1516a(a)(2); 28 U.S.C. § 2635 (2006); *see also* *Beker Indus. v. United States*, 7 Ct. Int’l Trade 313, 315 (1984) (“[T]he scope of the record for judicial review here is confined to the immediate administrative review in dispute.”).

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ence in treatment.<sup>124</sup>

The latter principle does not conflict with the former. Indeed, the Court has held that a methodology Commerce uses does not bind the agency so long as it explains the reason for its change in methodology,<sup>125</sup> even within the context of different stages of the very same administrative proceeding.<sup>126</sup> As a general matter, during 2010, the Court continued to refrain from consideration of facts from prior reviews in evaluating the reasonableness of Commerce's determination in the review subject to judicial review.

In *MTZ Polyfilms, Ltd. v. United States*, Commerce determined that two Indian government programs conferred a benefit to plaintiff warranting the imposition of countervailing duties.<sup>127</sup> When calculating the amount of benefit received, Commerce included the Indian special additional duty to India's export promotion capital goods scheme, and applied adverse facts available in its calculation of the Indian export financing program.<sup>128</sup> Upon judicial review of this determination, the Court rejected plaintiff's invitation to review Commerce's factual conclusions reached during the verification stage of a previous review of

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124. See, e.g., *Huvis Corp. v. United States*, 31 Ct. Int'l Trade 1803, 1810 n.5 (2007) ("Commerce is not free to treat [a party to the proceeding] differently than [Commerce] has in past administrative reviews without justification."); *Hussey Copper, Ltd. v. United States*, 17 Ct. Int'l Trade 993, 997 (1993) (quoting *Citrosuco Paulista, S.A. v. United States*, 12 Ct. Int'l Trade 1196, 1209 (1988) (citations omitted)) (stating that generally "an agency must either conform itself to its prior decisions or explain the reasons for its departure . . . This rule is not designed to restrict an agency's consideration of the facts from one case to the next, but rather it is to insure consistency in an agency's administration of a statute.").

125. See *MTZ Polyfilms, Ltd. v. United States*, 717 F. Supp. 2d 1346, 1365 (Ct. Int'l Trade 2010) (quoting *Save Domestic Oil, Inc. v. United States*, 26 Ct. Int'l Trade 1380, 1395 (2002)) ("Commerce may adapt its views and practices to the particular circumstances of the case at hand, so long as the agency's decisions are explained and supported by substantial evidence . . .").

126. See *U.S. Steel Corp. v. United States*, 712 F. Supp. 2d 1330, 1354-55 (Ct. Int'l Trade 2010). The court noted:

[T]he mere fact of Commerce's use of the relative sales value methodology in prior administrative reviews did not obligate the agency to continue to use that methodology for all future reviews . . . Moreover, there is no requirement that Commerce use the same methodologies in every segment . . . It has long been recognized that Commerce is not bound by the positions taken or the methodologies employed in its preliminary determinations.

*Id.* (citations omitted).

127. See *MTZ*, 717 F. Supp. 2d at 1351-53.

128. *Id.*

the same countervailing duty order.<sup>129</sup> The Court held that “MTZ’s reliance on the previous CVD Order review is misplaced. Even assuming Commerce’s determinations at issue are factually identical, as a matter of law a prior administrative determination is not binding on other reviews before this Court.”<sup>130</sup>

Similarly, in *U.S. Steel Corp. v. United States*,<sup>131</sup> the plaintiffs argued that Commerce was required to deduct certain expenses from the constructed export price calculation in the thirteenth review of an antidumping order, because Commerce had deducted those same expenses for the same activities in the previous two administrative reviews.<sup>132</sup> Again, the Court rejected this argument, stating that “[u]nder the substantial evidence component of the applicable standard of review, the court must review the findings and determinations that Commerce made in reaching the final results of the thirteenth review, and it must do so according to the evidence on the administrative record before it. Commerce’s factual findings in the eleventh and twelfth administrative reviews, whether correct or not, are not before the court for review.”<sup>133</sup>

These decisions notwithstanding, the Court in 2010 ignored the statutory limitations on the scope of its review in *Essar Steel Ltd. v. United States*.<sup>134</sup> *Essar Steel* involved Commerce’s application of adverse facts available to find that the plaintiff received a benefit from a government program, where the plaintiff had provided misleading responses to Commerce regarding the existence of an iron ore beneficiation plant in Chhattisgarh.<sup>135</sup> The plaintiffs appealed to the Court at the same time that the Court was adjudicating the final results from the previous review. The results of the previous review were remanded, where Commerce determined that the plaintiffs did not receive the benefit

129. *Id.* at 1365.

130. *Id.* (quoting *Alloy Piping Prods., Inc. v. United States*, 31 I.T.R.D. (BNA) 1312 (Ct. Int’l Trade 2009)).

131. 675 F. Supp. 2d 1313 (Ct. Int’l Trade 2010).

132. *See id.* at 1319.

133. *Id.* (citation omitted). Thus, the Court held that “even were the court to accept [plaintiffs’] premise [that the expenses were the same], it would not follow that the court must set aside Commerce’s decision in the thirteenth review not to make an adjustment in CEP to account for the indirect selling expenses in question.” *Id.*

134. 721 F. Supp. 2d 1285 (Ct. Int’l Trade 2010) *aff’d*, 33 ITRD 1118 (Ct. Int’l Trade 2011). The Court’s judgment is currently on appeal.

135. *See id.* at 1295; *see also* 19 U.S.C. § 1677e(b) (2006) (stating that Commerce may draw an adverse factual inference from an interested party’s failure to comply with a request for information).

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found in the subsequent review.<sup>136</sup>

The Court determined, regardless of the fact that Commerce's benefit determination was made in another review with a separate administrative record, that "in this specific circumstance" consideration of non-record facts was warranted.<sup>137</sup> In so doing, the Court cited the Federal Circuit's decision in *Borlem S.A.-Empreedimentos Industriais v. United States*<sup>138</sup> that "deference is not owed to a determination that is based on data that the agency [knows to be] incorrect."<sup>139</sup> Thus, because "Commerce previously recognized the validity of evidence supplied by the State Government of Chhattisgarh that Essar is not eligible to participate in the Chhattisgarh Industrial Program from 2004 to 2009," Commerce "may not now ignore this evidence and claim that Essar benefitted from the program in 2007."<sup>140</sup>

This is certainly not the first time that the Court has disregarded the statutory scope of its review. For example, the Court has, during review of an agency proceeding, taken judicial notice of facts in subsequent administrative proceedings.<sup>141</sup> However, in *Essar Steel*, rather than taking note of a fact in its appellate review, the Court remanded to Commerce with instructions to place specific documents from a previous review in the record of the administrative proceedings at issue in the case, thus undermining Commerce's administration of the statute, and in particular, Commerce's ability to use the only enforcement tool it has at its disposal in the administration of the dumping scheme.<sup>142</sup>

It remains to be seen how this increasing reliance on extra-record material will influence the Court's intention to change its own rules regarding Commerce's filing of administrative records. Currently, the Court's Rule 73.2 requires Commerce to file its administrative record for a particular proceeding within forty days of service of the complaint, and *allows* Commerce under certain circumstances to file only an index of the contents of the record.<sup>143</sup> The Court may change the rule so that Commerce would be required to file only an index. Putting aside the statutory directive to file the entire record and not just an

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136. *Essar Steel*, 721 F. Supp. 2d at 1300.

137. *Id.*

138. 913 F.2d 933 (Fed. Cir. 1990).

139. *Essar Steel*, 721 F. Supp. 2d at 1300-01 (quoting *Borlem*, 913 F.2d at 937) (alteration in original).

140. *Id.* at 1301 (citation omitted).

141. *See, e.g.*, *Anshan Iron & Steel Co. v. United States*, 27 Ct. Int'l Trade 1234, 1244 n.4 (2003); *Union Camp Corp. v. United States*, 23 Ct. Int'l Trade 264, 278 (1999).

142. *Essar Steel*, 721 F. Supp. 2d at 1301.

143. *See* U.S. CT. INT'L TRADE R. 73.2.

index,<sup>144</sup> and assuming that the Court continues to look to other proceedings other than the proceeding before it, the rule, once changed, would have a strange effect whereby the Court could potentially look to other reviews' full records for guidance even where it has no immediate access to the record on review in the action before it.

F. *Judicial Findings of Fact*

In 2010, the Court was occasionally willing to make findings of fact for Commerce when analyzing Commerce's decisions for substantial evidence.

One notable example is *KYD, Inc. v. United States*.<sup>145</sup> There, the two mandatory respondents in the administrative review did not participate, but another importer—a plaintiff—provided information to Commerce, arguing that its information should be used to calculate an importer-specific rate.<sup>146</sup> However, Commerce rejected plaintiff's data and instead applied adverse inferences to determine the dumping margin.<sup>147</sup>

The Court determined that Commerce violated its statutory obligations under 19 U.S.C. § 1677m(e), which requires Commerce to consider information from an interested party that: (1) is submitted by the deadline established for its submission; (2) can be verified; (3) is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; and (4) can be used without undue difficulties. In addition, (5) the interested party must demonstrate that it acted to the best of its ability in providing the information and meeting the requirements established by Commerce.<sup>148</sup> The Court held that "Commerce should have either considered KYD's information or explained why it could decline to do so pursuant to 19 U.S.C. § 1677m(e)."<sup>149</sup> But despite this holding, the Court went on to make its own findings regarding the validity of the information:

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144. 28 U.S.C. § 2635(b)(1) (2006).

145. 704 F. Supp. 2d 1323 (Ct. Int'l Trade 2010).

146. *Id.* at 1326.

147. *Id.* at 1327.

148. 19 U.S.C. § 1677m(e)(1)-(5) (2006).

149. *KYD*, 704 F. Supp. 2d at 1332, 1334. The court found:

[T]he record in the instant action contains no evidence that Commerce evaluated any 19 U.S.C. § 1677m(e) criteria with respect to KYD's information, Commerce's disregard of this information is 'unsupported by substantial evidence on the record.' On remand, Commerce must either consider this information in determining an assessment rate for KYD's entries or explain why it can decline to do so pursuant to 19 U.S.C. § 1677m(e).

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KYD's information is timely and susceptible to verification. It appears to provide a "reliable basis" for determining export price, even if supplementation is necessary to account for the adjustments specified in 19 U.S.C. § 1677a(c). Its use presents no obvious difficulties, as Commerce can resort to the facts otherwise available in determining the normal value of KYD's relevant entries. Finally, the record suggests that, in the context of the administrative review, KYD "acted to the best of its ability in providing the information" consistent with Commerce's requirements. By attempting to "produce[ ] current information showing the margin to be less" than "the highest prior margin," KYD tried to act exactly as the Federal Circuit anticipated that an importer in KYD's position would.<sup>150</sup>

### V. REVOCATION

Following an administrative review, a changed circumstances review,<sup>151</sup> or an adverse WTO report,<sup>152</sup> Commerce may revoke a dumping order under certain circumstances. According to the statutes governing revocation, revocations apply prospectively to entries entered on or after the effective date of the revocation, or to entries entered on or after the date on which the United States Trade Representative (USTR) directs implementation of a Section 129 determination (in the case of an adverse WTO report).<sup>153</sup> In 2010, the Court addressed the treatment of entries liquidated after the effective date of the revocation, but entered before the date of the revocation, in two

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*Id.* at 1334 (citations omitted).

150. *Id.* at 1331-32 (citations and footnote omitted) (quoting *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990)).

151. "[Commerce] may revoke, in whole or in part, a countervailing duty order or an antidumping duty order or finding, or terminate a suspended investigation[ ]" after a periodic review or a changed circumstances review. 19 U.S.C. § 1675(d)(1).

152. A section 129 determination in effect revokes a previous dumping order. *Id.* § 3538(b)-(c).

153. *Id.* § 1675(d)(3) ("A determination . . . to revoke an order or finding or terminate a suspended investigation shall apply with respect to unliquidated entries of the subject merchandise which are entered, or withdrawn from warehouse, for consumption on or after the date determined by [Commerce]."); *id.* § 3538(c)(1)(B) (Section 129 determinations "shall apply with respect to unliquidated entries of the subject merchandise . . . that are entered, or withdrawn from warehouse, for consumption on or after . . . the date on which the Trade Representative directs [Commerce] . . . to implement that determination.").

decisions.<sup>154</sup>

As to Section 129, in *Andaman Seafood* the Court distinguished a prospective revocation undertaken in order to come into compliance with a WTO report from a revocation void *ab initio* that could involve the interpretation of United States law.<sup>155</sup> The Court held that the statute “permits” Commerce to apply the revocation prospectively and that “[t]here is nothing on the face of the law to suggest that its effect is to invalidate the original determination in so far as that original determination applies to entries not explicitly covered by the terms of Section 129.”<sup>156</sup>

*Sahaviriya Steel Industries Public Co. v. United States* involved a revocation of a dumping order pursuant to 19 U.S.C. § 1675(d)(1). The Court addressed whether Commerce, using a changed circumstances review,<sup>157</sup> could reinstate a previously revoked dumping order as to a certain respondent.<sup>158</sup> That is, the question presented was whether Commerce could condition revocation subject to reinstatement. At the request of Sahaviriya Steel Industries (SSI), Commerce partially revoked its dumping order on SSI’s hot-rolled carbon steel flat products from Thailand because SSI had not sold its merchandise for less than fair value for three consecutive years.<sup>159</sup> The order remained in place for the rest of imports of the subject merchandise. Almost one year later, Commerce initiated a changed circumstances review as to SSI and subsequently reinstated the order as to SSI based upon a finding

154. See *Andaman Seafood v. United States*, 657 F. Supp. 2d 1363 (Ct. Int’l Trade 2010), *appeal dismissed*, No. 2010-1299 (Fed. Cir. June 14, 2010); *Sahaviriya Steel Indus. Pub. Co. v. United States*, 714 F. Supp. 2d 1263 (Ct. Int’l Trade 2010), *aff’d*, 649 F.3d 1371 (Fed. Cir. 2011).

155. See *Andaman Seafood*, 657 F. Supp. 2d at 1369-71.

156. *Id.*

157. 19 U.S.C. § 1675(b) states:

Whenever [Commerce] receives information concerning, or a request from an interested party for a review of . . . a final affirmative determination that resulted in an antidumping duty order . . . which shows changed circumstances sufficient to warrant a review of such determination or agreement, [Commerce] shall conduct a review of the determination or agreement after publishing notice of the review in the Federal Register.

*Id.*

158. See *Sahaviriya Steel*, 714 F. Supp. 2d at 1274.

159. *Id.* at 1268. As a condition to the revocation, SSI agreed “to immediate reinstatement of the order, so long as any Thai exporter or producer subject to it, should the Department determine that SSI, subsequent to the requested revocation, sold the subject merchandise at less than fair value.” *Id.* at 1267-68.

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that SSI had resumed dumping subject merchandise.<sup>160</sup> SSI challenged Commerce's determination, arguing that Commerce exceeded its authority in initiating a changed circumstances review to reinstate the order and that Commerce was required to conduct a new investigation as to SSI in order to assess further antidumping duties against it. In essence, SSI argued that once the antidumping duty order as to SSI was revoked, it "cease[d] to exist and could not be reinstated."<sup>161</sup> According to SSI, Commerce could not condition revocation subject to reinstatement because a revocation is a revocation, period.

The Court rejected this argument, reasoning that the dumping order remained in place as to other Thai imports of subject merchandise, including the International Trade Commission's determination that the domestic industry was threatened with material injury as a result of the subject imports.<sup>162</sup> The revocation served only as "a revocation of the finding that SSI was dumping," and, therefore, the reinstatement was merely "a reinstatement of the finding that SSI was dumping."<sup>163</sup> No new investigation was needed. Thus, the Court found that Commerce's regulation, 19 C.F.R. § 351.222, providing for exporters or producers to agree to "immediate reinstatement in the [dumping] order" prior to a revocation, was reasonable.<sup>164</sup>

On June 17, 2011, the Federal Circuit affirmed the Court's decision, holding that 19 U.S.C. § 1675(d)(1), the statutory provision allowing for revocation of dumping orders, was ambiguous and that Commerce could reasonably interpret that section to allow for partial revocations subject to reinstatement.<sup>165</sup>

These two cases confirm that Commerce has considerable discretion to determine the extent to which it revokes dumping orders. A revocation does not necessarily apply *ab initio*, particularly where Commerce has the express authority to partially revoke an order.

## VI. CONCLUSION

At the end of 2010, many of the decisions discussed in this article seemed uncontroversial. Since early 2011, however, particularly with respect to zeroing, the Court of International Trade is once again at the

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160. *See id.* at 1268.

161. *See id.* at 1276.

162. *See id.* at 1276-77.

163. *Id.*

164. *Id.*

165. *See Sahaviriya Steel Indus. v. United States*, 649 F.3d 1371 (Fed. Cir. 2011).

forefront of the debate. It remains to be seen how the Court will make sense of the Federal Circuit's conflicting decisions, but whatever the resolution, it will no doubt give rise to continued litigation of this important issue that speaks not just to a central calculation in the dumping margin, but also to the way in which the Court will treat and defer to the United States' political implementation decisions. Even beyond zeroing, the Court's jurisprudence in 2010 revealed various trends the ultimate effects of which are as yet, unpredictable. The increased interference with Commerce's role as the agency tasked with enforcing the antidumping scheme may reflect a different, emerging view of the Court's own view of its role in dumping proceedings. In any event, although the number of market economy cases was dwarfed by the sheer volume of non-market economy cases, the issues regarding deference and scope of review discussed in this article are sure to have lasting and widespread effects throughout the Court's entire jurisprudence, market and non-market economy alike.