

## CURRENT DEVELOPMENTS

# *Import Law and Policy Series:* **Fair “Apples to Apples” Comparisons in Dumping Cases**

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The Court of Appeals for the Federal Circuit recently reversed a decision of the Court of International Trade and upheld a Department of Commerce dumping regulation favored by U.S. producers and opposed by foreign producers and exporters. This note describes these court decisions and explains their significance regarding: (1) the fairness of price comparisons in Commerce's determination whether sales are less than “fair value” (LTFV); and (2) Commerce's discretion in administering the dumping law.

### **I. Commerce's Regulation Establishing the ESP Offset Cap**

In an investigation under the antidumping (AD) law,<sup>1</sup> the Department of Commerce (Commerce)<sup>2</sup> determines whether imports have been sold at less than their “fair value”<sup>3</sup> by comparing the United States price with the

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The views expressed in this article are solely those of the authors.

1. §§ 731-778 of the Tariff Act of 1930, as amended [hereinafter cited as the Act], 19 U.S.C. §§ 1673-1677g (1982).

2. Commerce is the “administering authority” under the AD law. Reorg. Plan No. 3 of 1979, § 2(a), 44 Fed. Reg. 69,273, 69,274 (1979), *reprinted in* 5 U.S.C. app. at 1170 (1982); Exec. Order No. 12,188, 3 C.F.R. §§ 131, 135 (1983). The International Trade Commission (ITC) determines whether LTFV imports cause or threaten material injury to a U.S. industry, or materially retard the establishment of such an industry. 19 U.S.C. §§ 1673b(a), 1673d(b) (1982). If Commerce finds LTFV sales and the ITC finds injury, then importers must deposit in cash estimated antidumping duties until antidumping duties are subsequently assessed and entries liquidated. The Act, *supra* note 1, at § 736, 19 U.S.C. § 1673e (1982).

3. The Act uses but does not define the term “fair value.” The Act, *supra* note 1, at §§ 731, 733, 735, 19 U.S.C. §§ 1673, 1673b, 1673d (1982).

foreign market value.<sup>4</sup> Commerce determines foreign market value using, in order of general preference, the prices at which such or similar merchandise is sold in the home market or in third country markets, or a constructed value of the merchandise based on the cost of materials and fabrication, general expenses and profit.<sup>5</sup> Commerce determines United States price using purchase price when the foreign exporter sells to an unrelated party in the U.S., and exporter's sales price (ESP) when the exporter sells to a related party. The ESP is the price charged to the first unrelated buyer in the U.S.<sup>6</sup> As the Court of Appeals explained in *Smith-Corona Group, Consumer Products Div., SCM Corp. v. United States* (hereinafter cited as *SCM*),<sup>7</sup> the AD law "attempts to construct value on the basis of arm's length transactions." ESP is used rather than purchase price where the exporter and importer are related and thus do not set prices at arm's length.

The statute subjects foreign market value, however derived, to adjustment for certain differences in quantities, physical characteristics, and other circumstances of sale.<sup>8</sup> By regulation, the adjustment for differences in circumstances of sale is "limited, in general, to those circumstances which bear a *direct* relationship to the sales which are under consideration" (emphasis added).<sup>9</sup> It also provides adjustment for certain specified "direct costs" to United States prices, whether based on purchase price or ESP. However, under the statute ESP is uniquely adjusted downward by the amount of certain "*indirect costs*"; that is, "expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise."<sup>10</sup> By lowering ESP, this adjustment increases dumping margins (i.e., the amount by which foreign market value exceeds United States price).

The Department of the Treasury, which made LTFV determinations until 1980, perceived that this increase in margins was unfair.<sup>11</sup> In 1976, it changed its regulation on circumstances of sale "to reflect long existing Treasury practice" to reduce, but not necessarily eliminate, this unfairness.<sup>12</sup> When Commerce became the administering authority charged

4. The Act, *supra* note 1, at §§ 772, 773, 19 U.S.C. §§ 1677a, 1677b (1982).

5. The Act, *supra* note 1, at §§ 773(a)(1)(A), (B), (a)(2), (e), 19 U.S.C. §§ 1677b(a)(1)(A), (B), (a)(2), (e) (1982).

6. The Act, *supra* note 1, at § 772, 19 U.S.C. § 1677a (1982).

7. 713 F.2d 1568, 1572 (Fed. Cir. 1983), *cert. denied*, 104 S. Ct. 1274 (1984).

8. The Act, *supra* note 1, at § 773(a)(4), 19 U.S.C. § 1677(a)(4) (1982). Commerce's AD regulations add a fourth adjustment for differences in level of trade. 19 C.F.R. § 353.19 (1984).

9. 19 C.F.R. § 353.15(a) (1984).

10. The Act, *supra* note 1, at § 772(e)(2), 19 U.S.C. § 1677a(e) (1982).

11. 713 F.2d at 1577-79.

12. 41 Fed. Reg. 26,203, 26,206 (1976), codified at 19 C.F.R. § 153.10(b) (1976). The amended regulation provided: "In making comparisons using exporter's sales price, reasonable allowance will be made for actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market."

with making LTFV determinations in 1980, it published its own AD regulations, including this one, without significant change.<sup>13</sup> Pursuant to the “ESP offset,” foreign market value is reduced for *indirect* selling expenses incurred in the home market. However, this offset is limited or capped—and therefore referred to as the “ESP offset cap”—by the amount of all selling expenses in the U.S. market for which a circumstance of sale adjustment is allowed.<sup>14</sup> By specially reducing foreign market value in ESP situations, the ESP offset decreases dumping margins and is supported by foreign producers and exporters and opposed by U.S. producers. By limiting this reduction, the ESP offset cap maintains higher margins and therefore is opposed by foreign producers and exporters and supported by U.S. producers.

## II. The SCM Case: A U.S. Producer Challenges the ESP Offset

In the *SCM* case, “the last remaining domestic manufacturer of portable electric typewriters”<sup>15</sup> appealed a Commerce AD order covering such products from Japan<sup>16</sup> (and a Court of International Trade order sustaining that decision<sup>17</sup>). *SCM* (Smith–Corona) challenged Commerce’s regulation providing for the ESP offset. The Court of Appeals for the Federal Circuit upheld the validity of the regulation. As the court explained:

One of the goals of the statute is to guarantee that the administering authority makes the fair value comparison on a fair basis—comparing apples with apples. The offset appears to generate two fair value comparisons, apples with apples (purchase price) and oranges with oranges (exporter’s sales price). . . . Were it not for the exporter’s sales price offset, comparisons based on purchase price would be fair, yet comparisons based on exporter’s sales price would be skewed in favor of a higher dumping margin. We do not believe that the statute requires the Secretary to compare both apples and oranges with only apples. Rather, it expressly requires a fair comparison. The offset is an attempt to achieve such a comparison.<sup>18</sup>

Accordingly the court held:

If the statute is skewed by the offset it is because the Secretary, in constructing a fair comparison, has erected the offset on a foundation that was already slightly askew. In view of the discretion accorded the Secretary under the statute to make adjustments to foreign market value, we conclude that the exporter’s sales price offset, 19 C.F.R. § 353.15(c), is a proper and reasonable exercise of the Secre-

13. 19 C.F.R. § 353.15(c) (1980).

14. 19 C.F.R. § 353.15(c) (1984).

15. 713 F.2d at 1570.

16. Portable Electric Typewriters from Japan, 45 Fed. Reg. 53,853 (1980) (final), a review under § 736(c) of the Act (19 U.S.C. § 1673e (1982)) of its earlier AD order, Portable Electric Typewriters from Japan, 45 Fed. Reg. 30,618 (1980) (order).

17. *Brother Indus. U.S., Ltd. v. United States*, 540 F. Supp. 1341 (Ct. Int’l Trade 1982) (Newman, J.).

18. 713 F.2d at 1578.

tary's authority to administer the statute fairly. Thus, insofar as it is challenged here, 19 C.F.R. § 353.15(c), is valid.<sup>19</sup>

### III. The Silver Reed Cases: Foreign Producers/Exporters and U.S. Importers Challenge the ESP Offset Cap

The broad "apples with apples . . . and oranges with oranges" language of the court in *SCM*<sup>20</sup> apparently inspired a foreign producer and its related U.S. importer in the same initial Commerce AD investigation of portable electric typewriters from Japan to challenge the same regulation, 19 C.F.R. § 353.15(c). Whereas *SCM* had complained unsuccessfully about the ESP offset, a Japanese producer and its related U.S. importer later complained about the cap to that offset.

Applying the logic of *Brother Industries* and *SCM*, in *Silver Reed America, Inc. v. United States* (hereinafter cited as *Silver Reed I*),<sup>21</sup> the Court of International Trade (again Judge Newman) concluded that the ESP offset cap was invalid because it contravenes the law's scheme for an efficient and fair comparison between foreign market value and United States price. The court held that since all indirect expenses are subtracted from ESP, *all* indirect expenses should be subtracted from foreign market value to reconstruct prices at a specific "common" point. Judge Newman supported his decision with *SCM* and his own opinion in *Brother Industries*.<sup>22</sup> Both those cases supported the ESP offset regulation because it eliminated an unfair comparison. Since in Judge Newman's opinion the cap "thwarts" a fair comparison, he held it to be contrary to the statutory purpose of facilitating fair comparisons. Therefore, he ruled that Commerce lacked discretion to promulgate such a regulation.

As underscored above, unfairness is eliminated only "in part" by the capped ESP offset. Obviously, the application of the cap thwarts a fair comparison of "apples with apples" to the extent that fixed selling expenses must be deducted from the United States price. . . . but deduction of similar selling expenses in the home market is arbitrarily limited. Inasmuch as Congress stipulated the deduction of all selling expenses from the United States price, undoubtedly the intent was

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19. *Id.* at 1579. In *Zenith Radio Corp. v. United States*, 81-06-00734 (Ct. Int'l Trade, Mar. 13, 1985) (Watson, J.), the court rejected plaintiff's claim that the ESP offset is invalid—an issue that plaintiff had acknowledged was decided in the *SCM* case. Yet in five full pages of *dicta*, the court disparaged the Court of Appeal's reasoning in *SCM* upholding the ESP offset. The *Zenith* court characterized the offset as "a thwarting of Congressional intention" (at 19) and a "nullification of the step specifically provided by law" (*id.*) that "does violence to this carefully worked-out statutory method" (*id.* at 20). In summary, the court decried *SCM*'s giving Commerce "discretion to promulgate rules which alter this statutory method of valuation. . . ." (*id.* at 22). Yet "with these comments in mind" (*id.*), it conformed to the *SCM* ruling and rejected plaintiff's challenge to the ESP offset.

20. 713 F.2d at 1578.

21. 581 F. Supp. 1290 (Ct. Int'l Trade 1984).

22. *See supra* note 17.

that the same treatment be accorded foreign market value to achieve the objective of a fair comparison of “apples with apples.” In view of that clear statutory objective, the administering authority acted arbitrarily and beyond its authority in capping the offset as prescribed by 19 C.F.R. § 353.15(c).<sup>23</sup>

Intervenor SCM requested that the issue be certified for immediate appeal, and the United States government supported this motion. The government supported SCM’s appeal and defended its regulation.<sup>24</sup> The government feared that Judge Newman’s decision would lead to unjustifiable (in its view) differentiation of purchase price and ESP comparisons: with respect to the former, Commerce would adjust only for directly related expenses; whereas with respect to the latter, it would adjust for *all* selling expenses, direct and indirect, if the cap were not applied.

In *Consumer Products, Div., SCMi Corp. v. Silver Reed America, Inc.* (hereinafter cited as SCM II), the Court of Appeals reversed the Court of International Trade, and upheld the ESP offset cap.<sup>25</sup> The Court of Appeals did not analyze whether the ESP offset cap facilitates or thwarts a fair “apples with apples” comparison of prices. Instead, it framed its inquiry in terms of the reasonableness of Commerce’s regulation establishing the cap. The court reasoned that: “In determining whether a regulation is reasonable, we must give considerable deference to the expertise of the agency, i.e., the ‘masters of the subject.’”<sup>26</sup> The court added that Commerce’s interpretation of the statute “need not be the *only* reasonable interpretation or the one which the court views as the most reasonable.”<sup>27</sup> In conclusion, the court found

no arbitrariness in limiting the adjustment for indirect selling expenses allowed against the Japanese market prices to the amount of such expenses in the United States. The decision to do no more than nullify the amount by which the price comparison would have been skewed in favor of a higher dumping margin is not irrational. Indeed, any greater allowance could distort the computations in favor of foreign manufacturers.<sup>28</sup>

Moreover, the court seemed to place significant weight on Commerce’s administrative convenience. The government had argued that the ESP offset is valid and has been upheld by the Court of Appeals for the Federal Circuit based upon the broad discretion granted the Secretary of Commerce in administering the antidumping law.<sup>29</sup> The court agreed that “the cap does

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23. *Silver Reed I*, 581 F. Supp. at 1295.

24. *Silver Reed America, Inc. v. United States*, No. 83-10-01522 (Ct. Int’l Trade, Jan. 4, 1985).

25. 753 F.2d at 1033 (Fed. Cir. 1985).

26. *Id.* at 1039.

27. *Id.*

28. *Id.* at 1040.

29. *Id.*

aid in efficient administration and assist the agency in meeting the exigencies of time and staff limitations.”<sup>30</sup> The court continued:

The ESP offset cap undoubtedly furthers this valid goal. In accordance with the ESP offset cap, Commerce need only be convinced that *valid* expenses meet or exceed the level of the cap. In a very practical sense, the extent of scrutiny is reduced. The result is a more efficient and expedited administrative process.<sup>31</sup>

#### IV. Significance of ESP Offset and ESP Offset Cap Litigation

As a result of the related *SCM* and *Silver Reed* litigation, Commerce of course continues to apply both the ESP offset and its cap. More broadly, the sweeping “apples with apples” fairness language in *SCM* will be seen by some as having been somewhat restricted by the court. In applying the AD law, Commerce need not take what either a party or the Court might consider to be *the* fairest action, so long as the action it takes is a reasonable application of the AD law, its regulations and its discretion. Effectively, the Court of Appeals has recognized that applying the AD law is more an art than a science, and that mathematical precision is neither expected nor required.

The other significance is the court’s deference to Commerce’s administrative convenience. This rationale upholds Commerce’s position that in AD and countervailing duty (CVD) cases, which are increasing in number and complexity and governed by stringent statutory deadlines, its administrative convenience is a reasonable basis for choosing one possible method over another. *SCM II* will therefore prove a powerful precedent for the government in future challenges to Commerce’s AD and CVD determinations.

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30. *Id.*

31. *Id.*