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NOTES


I. Introduction

Dumping is defined as price discrimination between national markets. A foreign exporter dumps its merchandise in another market by selling it at a lower price than it sells the same merchandise in its home market or other foreign markets. A foreign exporter might dump its merchandise to maximize profits when faced with an oversupply or to gain a competitive advantage and possible achieve monopoly status in the market.

In the United States, concern over dumping from foreign nations arose around the turn of the twentieth century. Much of the dissatisfaction centered on German industry. An early attempt to regulate dumping under the Sherman Antitrust Act of 1890 failed when the Supreme Court declared that the Act could not reach a sales contract entered into in a foreign country. The Wilson Tariff Act suffered from the same weakness. If legislation was to succeed in regulating dumping by foreign exporters, it needed an express provision conferring jurisdiction over acts committed outside the United States. But Congress’s next attempt, the Revenue Act of

2 Barshefsky & Cunningham, supra note 1, at 308. For a detailed discussion of the types of dumping and the motives for the exporter, see Viner, supra note 1, at 110-31.
3 Viner, supra note 1, at 51. The development of export dumping was natural in a nation like Germany which featured large-scale machine industry, syndicated control, and a protected domestic market. Id. at 66. For a complete discussion of German dumping in this time period, see id. at 51-66.
4 Ch. 647, 26 Stat. 209 (current version at 15 U.S.C. §§ 1-7 (1988)).
5 In American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909), Justice Holmes stated for the Court: “[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.” Id.
7 Viner, supra note 1, at 241.
8 Id. at 240, 240 n.2 (quoting American Banana, 213 U.S. at 359) (“A conspiracy in
1916, suffered from other defects. The Act prohibited the systematic importation or sale of dumped merchandise in the United States with the intent to injure American industry or to restrain fair competition, and provided for criminal penalties as well as civil remedies with treble damages. But the Act created no special duties or monetary penalties collectable by Customs, nor was there capacity for any other government agency to enforce the new law. Enforcement fell upon the Department of Justice, which did not have the facilities to enforce the criminal sanctions. Private parties did not have the resources to bring the civil suits, and both parties were restricted by the difficulty in proving "systematic" dumping, as well as predatory intent.

Not until the Antidumping Act of 1921 did Congress succeed in enacting legislation which could effectively combat foreign dumping in the United States. The new law encompassed imports sold not only at prices lower than in home and third nation markets, but it also reached exports sold at less than the foreign producer's cost of production. The Tariff Act of 1930 added provisions governing protest and judicial review of decisions by the Treasury Department, then the administering authority for antidumping law. Of all the U.S. trade law remedies against unfair foreign competition, the antidumping law as formed by these two acts ranks among the most powerful.

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9 Ch. 463, 39 Stat. 756.
10 VINER, supra note 1 at 243.
11 Id. at 244.
12 Id. "
13 Id. at 245.
14 Id. at 244-45.
16 See Barshefsky & Cunningham, supra note 1, at 308-09.
20 See Barshefsky & Zucker, supra note 19, at 251.
In spite of and, perhaps, because of its strength, the antidumping law is often a target for change. Following the Tokyo Round of Multilateral Trade Agreements and pursuant to lobbying influence from U.S. business, Congress made significant procedural reforms in the antidumping protest and judicial review process when it enacted the Trade Agreements Act of 1979.

In Nichimen America, Inc. v. United States, a case of first impression, the Federal Circuit untangled the complicated statutory framework governing protest and judicial review of antidumping proceedings. This Note examines the holding of Nichimen and considers the background law and the subsequent effect of Nichimen. This Note concludes that the court correctly interpreted the statutes and properly determined which acts of Customs are directly appealable and which must first be reviewed in an administrative hearing.

II. Statement of the Case

A. Factual Background

On March 10, 1971, the Treasury Department issued Treasury Determination 71-76 (T.D. 71-76), an antidumping order subjecting all televisions imported from Japan to possible assessment of antidumping duties. In 1971, the elements of an antidumping order were a finding by the Secretary of the Treasury that certain imports were being sold or were likely to be sold at less than fair value, and a finding by the United States Tariff Commission that such sales were likely to cause injury to a United States industry.

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22 Barshefsky & Zucker, supra note 19, at 251-52.


24 938 F.2d 1286 (Fed. Cir. 1991).


26 The underlying determinations today are essentially the same as they were in 1971. See statutes cited infra notes 27-28.

27 19 U.S.C. § 160(a) (1970) (current version at 19 U.S.C. § 1673 (1988)). In 1971, the sales price could be determined in either of two ways. A purchase price (PP) formula used the price agreed to for sale prior to exportation with adjustments for costs necessary to bring the merchandise to condition ready for shipment. 19 U.S.C. § 162 (1970) (current version at 19 U.S.C. § 1677a(b), (d) (1988)). An exporter’s sales price (ESP) formula used the price agreed to for sale in the United States with similar adjustments. 19 U.S.C. § 163 (1970) (current version at 19 U.S.C. § 1677a(c), (d) (1988)). The exporter’s sales price formula was used in limited circumstances where the exporter and the purchaser or importer were related parties. Barshefsky & Cunningham, supra note 1, at 324 n.82.

In 1971, the fair value could be determined in any of three ways. Price in the exporting country was used if there was a sufficient quantity of home market sales. 19 U.S.C. § 164 (1970) (current version at 19 U.S.C. § 1677b(a)(1)(B) (1988)). If no such quantity existed, but a sufficient quantity was exported to third countries, then the fair value equalled the price of those sales. Id. (current version at 19 U.S.C. § 1677b(a)(1)(B) (1988)). In the alternative, a constructed value of costs plus an ordinary profit was used. 19 U.S.C. § 165 (1970) (current version at 19 U.S.C. § 1677b(a)(2) (1988)).

28 The Tariff Commission “shall determine ... whether an industry in the United
Both findings were duly made, and order T.D. 71-76 imposed antidumping duties collectable by Customs whenever a Japanese television set with a sales price less than fair value was imported into the United States. The amount of the antidumping duty would be the difference between the sales price and the fair value, equal to the difference between the United States price and the fair value, so as to negate the importer's ability to sell the merchandise at less than its fair value.

Between May and November of 1976, with the antidumping order still in effect, plaintiff Nichimen America, Inc. (Nichimen) imported television sets from Japan into the United States. To obtain immediate release into commerce, Nichimen posted an immediate entry and consumption bond and agreed to pay all duties ultimately found due.

On August 30, 1985, the Department of Commerce (Commerce) notified Nichimen that all televisions imported prior to March 31, 1979 would be assessed an additional 3.37% ad valorem. States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States." 19 U.S.C. § 160(a) (1970) (current version at 19 U.S.C. § 1673b(a) (1988)). Pursuant to the Trade Act of 1974, Pub. L. No. 93-618, sec. 171 (a), 88 Stat. 1978, 2009, the Tariff Commission was renamed the International Trade Commission.

Television Receiving Sets, Monochrome and Color, from Japan, 35 Fed. Reg. 18,549 (Dep't Treas. 1970) (determination of dumping); Television Receivers from Japan Causing Injury, 36 Fed. Reg. 4576 (Tariff Comm'n 1971). The Secretary of the Treasury found that, after appropriate deductions, both the pre-import prices (PP) and, in the case of related importers, the sales prices to United States distributors (ESP) of Japanese televisions were less than corresponding home market prices. 35 Fed. Reg. at 18,549.

The Tariff Commission found that Japanese market share of color and monochrome televisions in the United States increased from ten percent in 1965 to twenty-eight percent in 1970. 36 Fed. Reg. at 4577. It also found a twenty-five percent decrease in the price of the fiercely competitive middle range (televisions with greater than nine-inch but less than twenty-inch diagonals). Id. The Commission unanimously concluded these injuries were caused by Japanese imports sold at less than fair value. Id. at 4577-78.

Under the Antidumping Act of 1921 and the Tariff Act of 1930, antidumping orders remained in effect until a successful protest or successful review of a denied protest contesting the underlying determinations of the Treasury Department or the International Trade Commission. Only the assessment of antidumping duties was directly protestable; challenge to the underlying determinations required an assessment of duties to serve as the basis for the protest. See 19 U.S.C. § 1514 (1988); 28 U.S.C. § 2632 (1976). See also S. REP. No. 249, 96th Cong., 1st Sess. 255-56 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 641-42. This procedure was changed in 1979. See infra notes 77-84 and accompanying text.


Id. at 1287.


An ad valorem tax takes the form of a percentage of the value of what is assessed. BLACK'S LAW DICTIONARY 51 (6th ed. 1990).
in antidumping duties unless Nichimen requested a “section 751” administrative review.\textsuperscript{36} Nichimen made no such request, and on August 15, 1986, the entries were liquidated with the additional 3.37\% \textit{ad valorem} in antidumping duties included in the assessment.\textsuperscript{37}

Nichimen paid these duties\textsuperscript{38} and filed a seven-part protest with Customs, alleging that: (a) a 1980 agreement with the Attorney General and the Commerce and Treasury Departments released Nichimen from any additional duties, (b) Customs did not follow proper procedures in that the receivers were not before the appraiser when they were appraised, (c) Customs never determined the foreign market value or a constructed value for the receivers, (d) the entries were not liquidated in a timely fashion as required by Customs law, (e) the dumping determination was “arbitrary, capricious and an abuse of discretion,”\textsuperscript{39} (f) the price of the entries was not less than fair value, and (g) the dumping findings did not apply to Nichimen “inasmuch as the true ‘manufacturer/exporter’ was Hitachi, Ltd./Nichimen Co., Inc.”\textsuperscript{39}

\begin{enumerate}
\item \textit{In the Court of International Trade}
\end{enumerate}

In filing this protest, Nichimen relied on Title 19, section 1514(a) of the United States Code.\textsuperscript{40} Section 1514 sets forth procedure and lists the orders and findings which may be protested to Customs.\textsuperscript{41} After Customs denied Nichimen’s protest, Nichimen filed suit in the Court of International Trade.\textsuperscript{42} Jurisdiction for review of protests denied by Customs is available in that court under Chapter 28 of the United States Code.\textsuperscript{43} The Court of International Trade denied the summary judgment motions of both sides and a motion for judgment on the pleadings by Nichimen.\textsuperscript{44} At the same time, the court denied the government’s challenge to jurisdiction.

\begin{footnotes}
\item \textsuperscript{36} Nichimen America, Inc. v. United States, 938 F.2d 1286, 1287 (Fed. Cir. 1991). Section 751(a), 19 U.S.C. § 1675(a) (1982) (enacted as part of Trade Agreements Act of 1979, § 101, § 751, 93 Stat. 144, 175), governed review of Treasury Department or Commerce Department findings under the Antidumping Act of 1921. For a discussion of section 751(a), see infra notes 78-84 and accompanying text.
\item \textsuperscript{37} \textit{Nichimen}, 938 F.2d at 1287.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Id. at 1287-88 & n.1 (quoting Protest, ¶¶ 3(a)-(g)).
\item \textsuperscript{40} Id. at 1287.
\item \textsuperscript{41} 19 U.S.C. § 1514(a), (c) (1982).
\item \textsuperscript{42} Nichimen America, Inc. v. United States, 938 F.2d 1286, 1288 (Fed. Cir. 1991).
\item \textsuperscript{43} “The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515].” 28 U.S.C. § 1581(a) (1982). Section 1515 pertains to review of protests to Commerce Department findings under the Antidumping Act of 1921. For a discussion of section 751(a), see infra notes 78-84 and accompanying text.
\item \textsuperscript{44} Nichimen America, Inc. v. United States, Nos. 88-128, 87-01-00047, 1988 WL 98472, at *2 (Ct. Int’l Trade Sept. 22, 1988). The court found that Nichimen’s protest raised material questions of fact, making summary judgement inappropriate.
\end{footnotes}
but granted leave to renew.\textsuperscript{45}

In a later proceeding, the government renewed its challenge to Court of International Trade jurisdiction, and on August 29, 1989, the court granted its motion.\textsuperscript{46} The court rejected Nichimen's claim that the antidumping law prior to the 1979 amendments governed judicial review of its protest to Customs.\textsuperscript{47} The Transitional Rules of the 1979 Act state that:

The amendments . . . shall apply with respect to the review of the assessment of . . . antidumping duties on entries subject to . . . [an] antidumping finding if the assessment is made after the effective date. If no assessment of such duty had been made before the effective date that could serve the party seeking review as the basis of a review of the underlying determination, made by the Secretary of the Treasury or the International Trade Commission before the effective date, . . . then the underlying determination shall be subject to review in accordance with the law in effect on the day before the effective date.\textsuperscript{48}

Nichimen contended that the second sentence of this rule made its protest judicially reviewable under the pre-amendment law.\textsuperscript{49} The court held that the subject matter of Nichimen's complaint was the actual assessment and not either of the underlying determinations of T.D. 71-76. Thus, the second sentence of this Transitional Rule could not apply to Nichimen's complaint.\textsuperscript{50}

The Court of International Trade next applied the 1979 antidumping amendments which supplied jurisdiction over Nichimen's protest.\textsuperscript{51} Jurisdiction was established only after a section 751 administrative review was conducted before Commerce.\textsuperscript{52} Since Nichimen did not request section 751 review, it could not obtain jurisdiction in the Court of International Trade.\textsuperscript{53}

\textsuperscript{45} \textit{Id.} The court stated no reason for its denial of the government's challenge to jurisdiction.

\textsuperscript{46} Nichimen America, Inc. v. United States, 719 F. Supp. 1106, 1110 (Ct. Int'l Trade 1989).

\textsuperscript{47} \textit{Id.} at 1109.


\textsuperscript{49} \textit{Nichimen}, 719 F. Supp. at 1109.

\textsuperscript{50} \textit{Id.} The actual purpose of the second sentence of section 1002(b)(3) of the Trade Agreements Act was to close a loophole which, in the case of a pre-amendment antidumping order and a post-amendment assessment, would have made the underlying determinations unprotestable. \textit{Id.} at 1108 n.1 (citing H.R. REP. No. 317, 96th Cong., 1st Sess. 182-83 (1979)). \textit{See infra} notes 102-03 and accompanying text.


\textsuperscript{52} \textit{Id.} The court stated the only avenue of appeal available for the charges of Nichimen's complaint was through 28 U.S.C. § 1581(c) as provided in 19 U.S.C. § 1516a. Per 19 U.S.C. § 1514(b), any matter governed by section 1516a could not be judicially reviewed if there had been no section 751 review. \textit{Nichimen}, 719 F. Supp. at 1109.

\textsuperscript{53} \textit{Nichimen}, 719 F. Supp. at 1109.
C. In the Federal Circuit

The Federal Circuit heard Nichimen's appeal, and on July 10, 1991, affirmed in part and reversed and remanded in part the lower court's ruling. The court held jurisdiction is a matter of law and, as such, is reviewable de novo. The Federal Circuit affirmed the lower court's analysis of the applicability of the 1979 amendments, noting that Nichimen's complaint referred only generally to the underlying determinations of T.D. 71-76 and never specifically alleged that either determination was erroneous. Thus, Nichimen was only contesting post-amendment assessments and could not rely on the exception contained in the Transitional Rules.

The Federal Circuit next turned to the difficult matter of interpreting the antidumping review process after the Trade Agreements Act of 1979. The court noted that the 1979 Act amended Title 19, section 1514 to exclude antidumping decisions, as well as actions of Customs in implementing those decisions, from the matters protestable to Customs. Instead, review would be the responsibility of Commerce, now the administering authority, as part of the newly created "section 751" administrative review. The 1979 Act required an automatic annual review of the duty amount and a review of the underlying determinations whenever new information warranted subsequent analysis. A 1984 amendment modified the earlier law and conditioned that annual review only be conducted after a request from an interested party.

The Federal Circuit next examined each part of Nichimen's complaint and determined which parts were and were not covered by section 751 administrative review. It found parts (c) and (f), that Customs never determined foreign or constructed market value, and that the price of its entries was not less than fair value, to be "squarely within the purview of section 751." The court found

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54 Nichimen America, Inc. v. United States, 938 F.2d 1286 (Fed. Cir. 1991).
55 Id. at 1288-89 (citing Zumerling v. Marsh, 783 F.2d 1032, 1034 (Fed. Cir. 1986)).
56 To try a matter de novo means to try it anew, as if it had not been tried before. BLACK'S LAW DICTIONARY 435 (6th ed. 1990).
57 Id.
58 Id. The court and section 1514(b) use the word "determinations" and not "decisions." Id.; 19 U.S.C. § 1514(b) (1982). It is clear from the context of the entire statute that more than underlying determinations is intended by "determinations." For instance, the amount of the duty is not an underlying determination, but is among the matters no longer protestable to Customs. See 19 U.S.C. §§ 1514(a), (b), 1516a(a)(2)(B)(iii), 1675(a) (1982).
62 Id. at 1291-92.
63 Id. at 1291. Section 751 states that Commerce shall determine "the foreign market
parts (e) and (g), that the underlying determination was "arbitrary, capricious, and an abuse of discretion" and that Nichimen was not the true importer, not squarely within section 751, but answerable in a section 751 review.\textsuperscript{64} Since the 1979 amendment made section 751 administrative review a prerequisite to judicial review in the Court of International Trade, Nichimen could not obtain jurisdiction for these four parts of its complaint without having first requested a section 751 review.\textsuperscript{65}

The Federal Circuit did not find section 751 applicable to the other three parts of Nichimen's complaint.\textsuperscript{66} Part (a), that Nichimen was released by a 1980 settlement agreement, involved representatives of the Department of Justice and the Treasury Department and was not within section 751's limited scope.\textsuperscript{67} Instead, it fell within the general category of Title 19, section 1514(a)(1).\textsuperscript{68} Parts (b) and (d), that Customs did not follow its appraisal procedures and that the merchandise did not receive a timely liquidation, fell squarely within other subparagraphs of section 1514(a).\textsuperscript{69} Decisions of Customs covered by section 1514(a) are protestable directly to Customs without a section 751 review; a denied protest may be appealed to the Court of International Trade.\textsuperscript{70} Thus Nichimen's failure to request a section 751 review did not prejudice its right to judicial review as to these parts of its complaint in the Court of International Trade.\textsuperscript{71}

The Court of International Trade improperly denied jurisdiction as to these three parts of Nichimen's complaint.

\textsuperscript{64} Nichimen America, Inc. v. United States, 938 F.2d 1286, 1291-92 (Fed. Cir. 1991).

\textsuperscript{65} Id. at 1291 (citing the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1001(b)(3), 93 Stat. 144, 305 (codified at 19 U.S.C. § 1514(b) (1988)). Section 1514(b) reads that "[w]ith respect to determinations . . . reviewable under section 1516a of this title, determinations of the appropriate customs officer are final and conclusive . . . unless a civil action contesting a determination listed in section 1516a of this title is commenced in the United States Court of International Trade." Per section 1516a, judicial review of a section 751 administrative review is the only path for these issues to Court of International Trade jurisdiction. 19 U.S.C. § 1516a (1988).

\textsuperscript{66} Nichimen, 938 F.2d at 1292.

\textsuperscript{67} Id.

\textsuperscript{68} Id. Section 1514(a)(3) includes "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." 19 U.S.C. § 1514(a)(3) (1988).

\textsuperscript{69} Nichimen America, Inc. v. United States, 938 F.2d 1286, 1292 (Fed. Cir. 1991). Part (b) falls within subparagraph (1)—"the appraised value of merchandise"—and part (d) falls within subparagraph (5)—"the liquidation or reliquidation of an entry." 19 U.S.C. § 1514(a)(1), (5) (1988).

\textsuperscript{70} Nichimen, 938 F.2d at 1292 (interpreting 19 U.S.C. § 1514(a) (1988)).

\textsuperscript{71} Id. at 1292.
III. Background Law

Congress enacted the "Judicial Review" amendments to provide "increased opportunities for appeal of certain interlocutory and all final determinations by the administering authority [presently Commerce] and the International Trade Commission [ITC]." Prior to the 1979 Act, there were several delays in the opportunity for review which could cause hardship to affected parties. For instance, a foreign producer or American importer could not challenge affirmative determinations of the Treasury Department and the ITC until after Customs imposed a duty on entering merchandise. An American competitor could not contest the administration of a lagging antidumping investigation because such investigations could only be challenged after they were completed. This requirement not only slowed the process of obtaining relief, but when the investigation proceeded too slowly to combat the effects of foreign dumping, it precluded relief entirely.

To expedite relief for those adversely affected by an antidumping order, Congress created Title 19, section 1516a, and amended Title 19, section 1514, to take certain matters formerly not protestable until duties were assessed, and placed them within Court of International Trade jurisdiction immediately after publication of notice in the Federal Register. Among the matters immediately reviewable under the new section 1516a are the decisions rendered in an other of the Trade Agreements Act's creations—section 751 administrative review.

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77 Section 1001(b)(3) of the Trade Agreements Act of 1979, 93 Stat. 305, inserted subsection (b) in section 1514 of title 19. Subsection (b) provides that "[w]ith respect to determinations . . . reviewable under section 1516a of this title, determinations of the appropriate customs officer are final and conclusive . . . unless a civil action contesting a determination listed in section 1516a of this title is commenced in the United States Court of International Trade." 19 U.S.C. § 1514(b) (1988). Section 1516a provides for immediate review. 19 U.S.C. § 1516a (1988).
As originally enacted in 1979, section 751 mandated yearly review by Commerce of all antidumping determinations. As amended in 1984, the section now conditions review upon request by an interested party. Section 751 review requires a hearing by Commerce to consider the antidumping duty amount and the antidumping order itself. The interested parties potentially requesting or attending section 751 hearings are: affected foreign producers and exporters, their foreign governments, affected U.S. producers and wholesalers, and affected U.S. trade and labor groups. Upon proper determination at such a hearing, Commerce may alter the amount of the duty or revoke the antidumping order altogether. The same parties with standing to appear at the hearing may contest a section 751 decision in the Court of International Trade.

The Trade Agreements Act of 1979 provided timely judicial review for a host of different antidumping proceedings. These opportunities are opened to the same interested parties who can participate in a section 751 review. The number and types of judicially reviewable determinations create a “very real potential for procedural chaos.” What complicates section 751 review most is its overlap with the Customs decisions protestable straight to Customs and judicially reviewable under Title 19, section 1514(a), without a prior section 751 review. This overlap is the focus of the second aspect of the Nichimen holding.

Nichimen is a case of first impression. Neither the Federal Circuit nor the Court of International Trade previously heard a case with facts similar to Nichimen. The two courts have decided cases involv-

85 19 U.S.C. § 1516a (1988); Barshefsky & Cunningham, supra note 1, at 361. Also included in section 1516a are opportunities to review: failures to initiate proceedings, Commerce determinations to suspend based on acceptance of an agreement, ITC determinations on the elimination of injurious effects by an agreement, and Commerce or ITC decisions not to review suspension agreements or previous determinations based upon changed circumstances. Barshefsky & Cunningham, supra note 1, at 361.
86 Barshefsky & Cunningham, supra note 1, at 361. See supra text accompanying note 82.
87 Barshefsky & Cunningham, supra note 1, at 362.
89 See supra notes 58-71 and accompanying text; see infra notes 104-111 and accompanying text.
ANTIDUMPING REVIEW

ing: the timing of judicial review with respect to section 751 review, the judicial review of ITC determinations prior to section 751 applicability, the right to intervene in judicial review, and who qualifies as an interested party. The closest these courts have come to either aspect of Nichimen was in American Manufacturers of Castor Oil Producers v. United States. Third party defendant Sanbra moved to dismiss for lack of subject matter jurisdiction, but the court dismissed plaintiff's complaint for failure to state a claim. None of these cases addressed the essential dispute of Nichimen: whether a party affected by an antidumping order loses all rights to judicial review for failing to request a section 751 review.

IV. Significance of the Case

At first glance, the holding of this case is quite confusing. The Federal Circuit holds that Nichimen may not obtain judicial review of its protest under the pre-1979 antidumping law because it was not contesting the underlying determinations made by the Treasury Department and the Tariff Commission, then the bodies in charge of those determinations. Then, the court holds that certain parts of Nichimen's protest cannot be reviewed at all because they involve antidumping determinations subject to administrative review by Commerce as a prerequisite to judicial review. Upon a closer look, there are two distinct aspects of the holding, and one is of considerable importance.

A. The Transitional Rules

The court holds that under the Transitional Rules, the post-

[91] Asociacion Colombiana de Exportadores de Flores v. United States, 916 F.2d 1571, 1576 (Fed. Cir. 1990) (party appealing original antidumping order to Court of International Trade need not request a section 751 review while appeal is pending); Smith Corona v. United States, 507 F. Supp. 1015, 1021 (Ct. Int'l Trade 1980) (Court of International Trade may review International Trade Commission's determination within one year because section 751 review not available in first year), aff'd on other grounds, 713 F.2d 1568 (Fed. Cir. 1983).
[95] Id. at *4.
[97] Id. at 1290-91.
1979 review procedure governs Nichimen’s complaint. The 1979 Act expanded the opportunity for an American importer or a foreign producer to object to an antidumping order. Previously, antidumping law required these parties to wait until after Customs assessed antidumping duties on entering merchandise before they could obtain judicial review, regardless of whether the party objected to acts of Customs in levying the duties or to the underlying determinations made possibly years earlier by the administering authority and the ITC. After the 1979 amendments, an American importer or a foreign producer can obtain administrative review of underlying determinations prior to assessment of duties.

The change in the law created one hitch. If the pre-amendment law were to apply to antidumping orders and assessments issued or levied before the effective date and the post-amendment law was to govern antidumping orders and assessments after the effective date, then certain underlying determinations would escape judicial review altogether. Where the underlying determinations were made prior to the effective date, but no assessment was made until after the effective date, the old law would exclude review because no assessment was made while the old law was in effect, while the new law would exclude review because it only applies to underlying determinations made after the effective date. To close this gap, Congress provided that such underlying determinations were judicially reviewable immediately under the terms of the old law.

In finding that no part of Nichimen's complaint was judicially reviewable under the old law, the Federal Circuit holds that the Transitional Rules of the 1979 Act do not create jurisdiction for review of antidumping duty assessments made after the effective date and thus, is in accordance with the law as it stood prior to the effective date. If a party actually objects to an underlying determination made before the effective date, judicial review will always be available, but no parts of a complaint which, in reality, address a post-

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98 Id. at 1290.
101 Under the new law, underlying determinations are immediately reviewable, in different forms. See supra notes 77-78 and accompanying text. Since no section 751 review can be held inside twelve months of the underlying duty determinations, 19 U.S.C. § 1675(a)(1) (1988), the prerequisite of section 751 review to judicial review does not apply in the first twelve months after an antidumping order. Smith Corona v. United States, 507 F. Supp. 1015, 1021 (Ct. Int'l Trade 1980), aff'd on other grounds, 713 F.2d 1568 (Fed. Cir. 1983).
amendment assessment can be reviewable under the old law. The subject of this first aspect of the holding limits its importance. Transitional Rules are just that—transitional. As time passes, their reach and the reach of this holding will diminish.

B. Section 751 Review

The second aspect of the court’s holding is far more important. The key language added by the 1979 Act appears in section 1514 of Title 19. Section 1514(a), which grants the Court of International Trade jurisdiction over protests denied by Customs, begins: “Except as provided in subsection (b) of this section ...”104 subsection (b) reads that “[w]ith respect to determinations ... reviewable under section 1516a of this title, determinations of the appropriate customs officer are final and conclusive ... unless a civil action contesting a determination listed in section 1516a of this title is commenced in the United States Court of International Trade.”105 Judicial appeal of section 751 reviews is listed in section 1516a.106

The Federal Circuit holds that subsection (b) forbids an importer from protesting to the Court of International Trade any act or decision of Customs which implements any decision or determination reviewable within the scope of section 751 administrative review if a section 751 review was not conducted.107 Even if section 1514(a) lists a matter as protestable directly to Customs,108 if it is also determinable in a section 751 review, such review must be conducted before the matter can be heard in the Court of International Trade.

The court’s application of the second aspect of its holding underscores section 751’s importance. The court rules that of the seven parts of Nichimen’s complaint, only the two express claims of violations by Customs and the claim involving the settlement agreement signed by the Attorney General, Commerce, and the Treasury Department are beyond the scope of section 751 review.109 It even found Nichimen’s claim that it was not the true importer of the television receivers within the scope of section 751,110 though this matter is not expressly listed in section 751.111

After Nichimen, section 751 reviews are of paramount importance. Not only is a request a prerequisite for judicial review, but both the Federal Circuit and, in the lower court opinion, the Court of

109 See supra notes 66-71 and accompanying text.
110 See supra note 64 and accompanying text.
International Trade demonstrate a reluctance to find various matters not within the scope of section 751 review.

Antidumping proceedings are very fact-oriented, and thus not easily overturned on appeal. To the extent they are fact-oriented, it appears that Commerce, in the forum of section 751 review, now is the chief factfinder and arbiter of antidumping disputes. The Federal Circuit has become increasingly non-deferential on the subject of interpretation of antidumping laws, but this trend does not extend to fact-oriented disputes.

V. Conclusion

Both aspects of the Federal Circuit's holding are correct applications of the law. The statutory language and legislative history support the court's interpretation of the Transitional Rules. Furthermore, five years passed between the time the underlying determinations became judicially reviewable and the time Commerce notified Nichimen of the additional 3.37% ad valorem duties on the televisions. In light of this time lapse, and the $72,000 additional assessment cost to Nichimen, it appears that Nichimen did, in fact, contest the additional duties, and not the underlying determinations.

Legislative history and good policy support the second aspect of the court's holding, which respects statutory construction of section 751 reviews and Title 19, section 1514. In enacting the Trade Agreements Act of 1979, Congress expressed a preference for yearly review, upon request, of antidumping determinations then in effect. Such an all-encompassing review process, involving the entire antidumping order and all parties affected can proceed far more expeditiously than a haphazard series of protests of individual

112 Barshefsky & Cunningham, supra note 1, at 362.
113 On appeal, the Court of International Trade may overturn a section 751 review decision concerning an antidumping determination where it is "unsupported by substantial evidence on the record, or otherwise not in accordance with the law." 19 U.S.C. § 1516a(b)(1)(B), (a)(2)(B)(iii) (1988). One commentator cautions that judicial review of a section 751 ruling might often be "a fruitless exercise." Barshefsky & Cunningham, supra note 1, at 362.
assessments. Administrative review is also possible without the complicated procedures regarding joinder and third party intervention that would apply in the federal Court of International Trade.

A unified process like section 751 review before a single body—the Department of Commerce—affords consistency and makes possible a coherent policy on antidumping regulation. Court of International Trade decisions are rendered by either one judge or a panel of three judges. There are a total of nine judges on the court, no more than five of which may be appointed from the same political party. In the highly politicized area of enforcing laws against unfair foreign trade practices, there is great potential for disparity of results when fact-oriented rulings are made in the Court of International Trade. Placing review of antidumping proceedings before Commerce, a single administrative agency, contributes to a unified, coherent antidumping policy for the United States.

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119 Id.
121 Id. at 151.