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NOTE

A DANGEROUS DISCRETIONARY “DUTY”: U.S. ANTIDUMPING POLICY TOWARD CHINA

I. INTRODUCTION

In an era of flourishing transitions from state controlled policies and economies to democratic governance, the United States foreign trade policy, particularly toward emerging market-oriented countries, may require adjustment to maintain the credibility of the United States as an important player in the trade scene and to prevent alienation of the new markets. Numerous countries that once subscribed to government control of their economies have been edging away from state control in the private sector and have opened their markets to foreign trade and investment. Recognizing the benefits of trading in new markets, the United States has taken measures to encourage these countries to enter into agreements that further liberalize their trade activities.


2. See, e.g., Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, 94 AM. J. INT’L L. 348, 374 (2000). The United States encouraged the World Trade Organization to admit China as a member of the trade organization, arguing that the accession would be a means of opening an enormous market to U.S. exporters, of promoting faster growth in productivity and wages in China (and thus higher demand for U.S. products), and of providing a catalyst for the broad economic and institutional change in China necessary for it to be an open, stable and, prosperous observer of global norms. . . . .

Id.; see also Brad L. Bacon, The People’s Republic of China and the World Trade Organization: Anticipating a United States Congressional Dilemma, 9 MINN. J. GLOBAL TRADE 369, 388-89 (2000) (noting that the new open market would offer a growing export market for American companies in goods and services and increased foreign direct investment possibilities).
At the same time however, such trade agreements and the resulting open movement of goods into the United States may have an injurious effect on U.S. industries. Domestic companies may not be able to compete with the foreign goods where the imports are available to the U.S. consumer at a much lower price than the domestic version. As a result, the United States has maintained certain trade regulations and remedies such as antidumping duties to protect domestic industries against the influx of foreign goods that are injuring that particular industry. If the price at which the foreign producer is selling its product within the United States is much lower than the price charged in the foreign market, or is below the cost of producing the product, the U.S. antidumping regime may apply. In such a case, in order to rectify the injury that domestic producers are suffering from lost sales due to cheaper imports, the U.S. government places a tariff on the import, in order to make the domestic products more competitive with the cheaper foreign imports. The foreign company is responsible for paying the tariff, and the tariff cannot be avoided because the duties assessed by the United States Department of Commerce ("Commerce") are not subject to override by any other government branch.

The tariff imposed by Commerce is determined by the difference in price of the good in its home market and the price for which it sells in the United States. Thus, the greater the difference, as a result of a low calculated foreign market price, the higher the tariff that will be applied. The procedure for calculating the foreign market price of the product under investigation depends on the extent of government control over the economy from which the product originates. For products imported from nonmarket economies ("NME")—countries that maintain a degree of government control over the economy—Commerce must collect and

3. See Bellocchi, supra note 1, at 177 ("The United States administration and Congress have implemented policies to encourage the transformation of NMEs to market economies while still maintaining a safe channel to challenge the access of dumped products into [its] markets.").
8. Nonmarket economies do not operate by the same supply-demand principle of free market economies because they maintain a certain degree of government control within the market. These tend to be the post-communist countries. Alford suggests that the U.S. antidumping law reflects the level of government intervention that the United States deems acceptable, which would not be in accord with communist or post communist countries. See William P. Alford, When is China Paraguay? An Examination of the Application of the Antidumping and Countervailing Duty Laws of the United States to China and Other "Nonmarket Economy" Nations, 61 S. CAL. L. REV. 79, 130.
assess considerably more data than for products from free-market economies because the foreign market price is distorted by nonmarket influences and must be adjusted.

Commerce has wide discretion in choosing the data upon which it will base its calculations of the foreign market price from all of the information collected.9 Where Commerce desires to establish more protection for a particular domestic industry or against goods from a particular region, it can do so by choosing to calculate the tariff based on data that results in a low foreign market price, as long as the choice of data is reasonably explained.10 The danger in the discretion granted arises where Commerce has an incentive to adopt policies that protect its own industries over competing foreign firms. The protection has been particularly targeted against those firms located in the People’s Republic of China, given the recent trend in viewing China as the new superpower, and, therefore, a threat to the United States economically.11 The resulting imposition of antidumping duties is often viewed as a political and commercial weapon for U.S. industries seeking broader protection measures, rather than as a method to prevent dumping.12

Many free market economists maintain that because the laws are intended to protect markets they should be eliminated.13 China, however, is subject to antidumping duties under the NME rubric for the next fifteen years despite its progressive transition toward an economy functioning according to market principles. Given the strong remedy as a result of the administration’s or Congress’s inability to override the duties assessed against a foreign industry, domestic producers injured by foreign imports pressure their government officials to maintain and place

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11. The main concerns underlying U.S. relations with China include a growing trade deficit and fears of Chinese nuclear proliferation. See Bacon, supra note 2, at 370. One way to meet and curb China’s desire for equality with the global economic superpowers was to make it a WTO member, making it more interconnected with other major trading partners. See generally Jeremy Brooks Rosen, Note, China, Emerging Economies, and the World Trade Order, 46 DUKE L.J. 1519, 1547-50 (1997).
12. See Ehrenhaft & Meriwether, supra note 5, at 1112.
13. See Bellocci, supra note 1, at 180 (explaining that many free market economists criticize the antidumping laws because they claim that many of the dumping cases brought for review have little to do with free-market disruption concerns).
more trade remedies under the antidumping or countervailing duty rubric."

The U.S. antidumping rubric is left open to criticism not only due to the protectionist policies it can foster, but also because of its unpredictability and lack of accuracy. Under the antidumping regime for NME countries, Commerce must use the best available information to calculate data used in the tariff determination. The agency has the discretion to use the information supplied by the company or to use data it has accumulated through its own investigation, should it determine that the supplied information is unreliable, withheld, or unverifiable. The statute, however, does not specify the factors that would make the data unreliable and therefore subject to rejection. In addition, while the "facts otherwise available," to which Commerce resorts in such instances must be the best available, neither statute delineates the factors Commerce should consider in choosing alternative data. As a result, Commerce in various investigations has rejected information supplied as insufficient, unrepresentative, or outside of the period of investigation. However, in other circumstances, Commerce has accepted information with the same inadequacies. The investigated company may not know which information it can rely on in valuing its products as it will not know on which information Commerce will depend, propounding the negative results of the calculation's unpredictability.

The "best available information" standard also raises questions of accuracy because where the data chosen by Commerce is significantly removed from the actual value, the assessment becomes more imprecise. This inaccuracy, as a result of the data chosen, leaves the U.S. antidumping policy open to even more criticism than it has already

20. See Sanghan Wang, U.S. Trade Laws Concerning Nonmarket Economies Revisited for Fairness and Consistency, 10 EMORY INT'L L. REV. 593, 620-22 (1996). The regime leads to inaccuracy because the substituted values represent the price of factors in a country which does not share exactly the same environment:

The use of a surrogate's values necessarily will neuter the nonmarket economy's comparative advantage and replace it with the comparative advantage of the surrogate. While this may yield either a lower or higher price than what ought to be the price of the nonmarket economy, it is necessarily a process fraught with inaccuracy.

Id. at 622.
faced, because the purpose of the antidumping statute is to determine margins between the foreign market price and the domestic U.S. price as "accurately as possible." In light of recent market reforms and economic and global trends, the antidumping regime, as part of a framework to liberalize trade, raises questions concerning its adequacy as applied to imports from economies in transition. These questions arise because, in the end, the free flow of imported goods from the emerging countries is hampered.

The Court of International Trade serves as a check on the antidumping decisions of Commerce in its investigations and assessment of duties. Companies unsatisfied with the tariff may appeal Commerce's decision. Nevertheless, the Court's review is limited. If Commerce's decision to reject the supplied information and to rely instead on its own collected data is reasonable, Commerce's decision must stand.

This Note will consider the discretion afforded Commerce with respect to its choice of data upon which its calculations of antidumping duties for products from NME countries are based, particularly the People's Republic of China, given China's industry expansion and abandonment of strict government market controls. While China's trade with numerous partners has grown since it has opened its borders, the liberal policies have led to numerous antidumping complaints filed by China's trading partners. Part II of this Note will discuss the need for antidumping duties and outline the U.S. regulatory scheme. Part II will conclude with the difficulties of calculating and administering


22. Lasko Metal Prods., Inc. v. U.S. Durable Elec. Metal Factory, Ltd., 43 F.3d 1442, 1446 (Fed. Cir. 1994) (citing Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990)).


24. Ehrenhaft & Meriwether, supra note 5, at 1111.

25. See Fair or Foul, supra note 23, at 95.

26. "[M]uch of the litigation and dispute concerning [antidumping] rules has come in cases involving the Peoples Republic of China (PRC) due to its curious status as an NME country in transition ...." Bellocchi, supra note 1, at 177.


28. Id.
antidumping duties for products imported from NMEs. Part III will discuss the statutory standard Commerce must use in choosing data to calculate values and the resulting duties, and will also analyze the standard as applied in several recent antidumping actions. In turn, Part III will address the effects of the standard and Commerce's adoption of protectionist policies in light of viewing China as a new threat to the U.S. economy and will conclude with an exploration into the validity of such predictions. Last, Part IV will touch upon the effects and implications of moving toward a protectionist policy and possible solutions to address concerns of NME exporters.

II. DUMPING REASONS, EFFECTS, AND PROTECTIONS

Where merchandise is sold at a price below that for which it sells in its own country, the merchandise is dumped in a foreign market.29 Thus, fences produced and then sold in China for 5 dollars, but sold in the United States for only two dollars, may be considered "dumped" on the U.S. market. The lower price may be explained by the exporter's desire to monopolize the receiving markets by selling its merchandise at a lower price in those markets.30 The lower priced imports, more competitive than their domestic counterparts, result in injured domestic industries.31 To prevent imported products from dilapidating the domestic industries that manufacture the same products, countries have devised rules against dumping.32 These rules, intended to offset the effect of dumped merchandise on the domestic market,33 vary depending on the country from which the product originates and consider the various production factors and production costs of the merchandise.34

A. Purpose and Effect of Dumping

Dumping occurs where merchandise is sold at less than its fair market value. Comparing the normal value of the merchandise and its export price, the merchandise is dumped on the United States if the price at which the merchandise is sold is less than the product's normal

30. See Bellocci, supra note 1, at 180.
31. See Ehrenhaft & Meriwether, supra note 5, at 1116-17; see also Lantz, supra note 1, at 998.
33. See Ehrenhaft & Meriwether, supra note 5, at 1117.
34. See 19 U.S.C. § 1677b(c) (2005).
There are numerous reasons companies sell their merchandise abroad at a lower price. Certain reasons are acceptable to the receiving country, for example, taking "advantage of a protected home market to increase profits by unloading excess capacity abroad above marginal costs; and profit maximization through cross-product subsidization." However, other motives for dumping merchandise, such as market domination and predatory pricing, are intolerable and the offending action becomes subject to the receiving market's antidumping regime.

Expansion and domination of market share are not merely side-effects of dumping, but are often the result of a planned export-oriented policy. Setting predatory prices, foreign firms and exporters enter markets by shipping and selling at unfairly low prices in an attempt to drive local competitors out of business or to gain a large market share. Thus, the company can accumulate monopoly or oligopoly power by selling goods at a low price, gaining market share, and then raising the price. To counteract predatory price discrimination by exporters, antidumping rules and penalties are necessary to thwart monopolies.

Due to its injurious effects upon domestic business and production, dumping is a major aspect of unfair trading practice in trade relations. "Since the early 1900's, the United States has acted to prevent the dumping of goods on the U.S. market." Given the increasing liberalization of trade, domestic producers have been increasingly forced to compete with foreign producers in American markets. This competition has long been scrutinized in the United States.

35. 19 U.S.C. §§ 1673, 1677b(a) (2005). This price discrimination is a result of the manufacturer, operating under conditions where markets are separable, selling comparable products in different markets at different prices. Lantz, supra note 1, at 997.
36. Such selling of the product below its manufacturing cost may be supported, either directly or indirectly, by the "producers' governments in an effort to develop an industrial infrastructure [in its own country] through growth in exported goods." Stewart, supra note 32, at 698.
37. Id. at 697.
38. Id.
39. See id. at 698.
41. Id.
42. Id. However, the antitrust rules are also in effect to stop monopolies.
44. Id.
Antidumping laws, statutorily based under Title VII of the Tariff Act of 1930, resulted from this scrutiny, requiring that trade practices be conducted in a fair and equitable manner.

In addition to monopolistic effects, dumping also distorts resource allocation, resulting in weakened companies and job loss for reasons other than comparative advantage. Dumping sends false market signals regarding the competitiveness of a business and whether others should "enter, exit, or expand in business." Where imports are sold for less than that which the domestic producers can sell comparable products, those seeking to enter the industry will conclude that they cannot enter the market and compete effectively, and those already in the industry may decide to exit.

Notwithstanding the damage to domestic industry, the individual domestic consumer benefits as a result of the lower export prices. While consumers of the importing country realize a gain in the form of lower prices, the gain, however, is at the expense of the consumers of the exporting country who pay inflated prices. Moreover, the benefit to consumers in the importing country, arguably, will likely be short lived due to an increase in prices as a result of the company monopolizing the industry, company inefficiency, or antitrust investigations. Thus, despite potential consumer benefits of low prices, the antidumping laws "reflect an international political judgment that sustained transnational price discrimination ought to be deterred" and remedied. Antidumping provisions permit the government, where industries are harmed by international price discrimination, "to restore rational market signals by

The controversies over what does and does not constitute anti-competitive behavior in international trade presents, at least to the business and labor communities, one of the most impassioned manifestations of the "fairness" debates. The fundamental concern is that low-priced products from domestic or foreign sources have the potential to drive incumbent producers out of business.

Id.
47. Stewart, supra note 32, at 696.
48. Id. at 694-97.
49. Id. at 694.
50. Id. at 695-96. Domestic producers can, however, remedy such bad business decisions by carefully evaluating "market conditions to be sure that corporate decisions flow from underlying economic realities and not from false market signals." Id. at 697.
51. Id. at 696.
52. See id.
neutralizing the price discrimination," and permit the imported and domestic goods to compete at a fair price.

B. Preventing Dumping Through Antidumping Regime

Given the monopolistic, injurious, and distortive effects of dumping, the United States has implemented statutes consistent with international agreements regulating dumping. "The specific provisions of United States AD [antidumping] statutes reflect Congress' intent to enforce the AD statutes through a [dual agency] system in which Commerce determines the amount of dumping, if any, and the ITC [International Trade Commission] determines whether the dumping harms a United States industry." Generally, a domestic firm or industry proposes that the U.S. government initiate a dumping investigation against a foreign firm whose low priced imports are injuring the domestic industry. Initially, ITC investigation determines whether the dumping caused, or threatens to cause, material injury to the U.S. industry. If the product is sold below normal value and such sales were the cause of injury to a domestic industry, Commerce places a tax—an antidumping duty—on the imported product. Commerce establishes the duty based on the dumping margin by calculating the average amount by which the fair market value of the product exceeds the price of the product in the United States.

1. Fair Market Value Calculations for Market Economy Products

To determine the dumping margin, the fair market value of the product must first be calculated. The calculation of the fair market value of a product depends on the categorization of the country from which the product is exported. The exporting countries are categorized as having either a market economy or an NME. The main difference between the treatment of countries with market economies and NMEs is the method for determining whether dumping exists and the calculation of the

54. Stewart, supra note 32, at 696.
55. See Restani, supra note 43, at 1088.
57. See Lantz, supra note 1, at 1000-01.
58. 19 U.S.C. § 1673a(a)(1) (2005). Commerce can also initiate an investigation to determine whether dumping is occurring. Id.
62. See id.
duty. For a product originating from a market economy, Commerce employs a standard methodology for determining a product's fair market value. The fair market value is equal to the price at which the product is sold in the firm's domestic market, after accounting for differences in sales conditions and merchandise characteristics. If the product is not sold in the foreign firm's domestic market, the fair market value becomes the price at which the product is sold in countries other than the United States.

2. Fair Market Value Calculation for Products from NMEs

For NME countries, the process of calculating the fair market value of the product is more difficult. The price at which the product sells is not the product's value because the resources used in the production of the good are not allocated according to market concepts of supply and demand, but rather by some other criteria set by the government. The set prices usually reflect political, economic, or bureaucratic factors because of the intervention of the government. The intervention, Commerce presumes, may lead to wholesale subsidization of various sectors of the economy. As a result of intervening nonmarket principles, prices of goods are subject to discrepancies that distort their value. While the normal value of goods from a market economy is the price at which the foreign product is sold in the exporting country, the value of the good from a NME country is equal to the manufacturer's cost of producing the product. To account for the distortion in prices of factors entailed in production, the producer's costs reflect the values that would prevail if such prices were determined by market forces. Therefore, the normal value is not based on the home market prices of

63. See id.
65. See id.
67. Lantz, supra note 1, at 1002.
69. Bellocchi, supra note 1, at 185.
production factors, but on the market values of such factors within a surrogate country.\textsuperscript{74}

\textbf{a. Determining NMEs}

The statute guiding Commerce's determination of whether a country is considered an NME country, or its decision as to the proper country from which to obtain surrogate prices and surrogate factors of production, affords wide discretion to the administration.\textsuperscript{75} Commerce determines whether a country has a NME by utilizing several factors.\textsuperscript{76} The administration considers the extent to which the country's currency is convertible, whether its wage rates are determined by free bargaining between labor and management, whether investments are permitted, and the extent of government ownership and control over resources and prices.\textsuperscript{77} China has been considered an NME for a long time, and as a result is subjected to "various treatments using surrogates under antidumping laws in the United States."\textsuperscript{78} Under the 2001 Agreement underlying China's ascension to the World Trade Organization ("WTO"), the ITC may treat China as a NME for fifteen years for the purpose of establishing whether exporters are dumping goods.\textsuperscript{79}

\textbf{b. Determining Surrogate Countries and Values}

If the product under investigation originates from a NME country, and fair market value cannot be based on home market price, then the calculation of fair market value must be calculated based on a surrogate country's value of the factors of production utilized in producing the


\textsuperscript{75} Bellocchi, \textit{supra} note 1, at 186.

\textsuperscript{76} "While, as a practical matter, NME countries have traditionally been equated with Communist countries, this bright line is fading, demanding a harder look at the economic characteristics displayed by these nations." Barshefsky, \textit{supra} note 21, at 376.


\textsuperscript{78} Bellocchi, \textit{supra} note 1, at 186. As early as 1986, Commerce has acknowledged that China has undergone substantial economic reform, including a rise in industries where inputs and outputs were not subject to government control. Petroleum Wax Candles from the People's Republic of China, 51 Fed. Reg. 25,085 (Dep't of Commerce July 10, 1986). In 1989, Commerce determined that while national trading companies and factories had become autonomous, China was not sufficiently market oriented to justify different treatment. Headwear from People's Republic of China, 54 Fed. Reg. 11,983 (Dep't of Commerce Mar. 23, 1989).

Factors of production include labor hours, raw materials, energy and other utilities, and representative capital costs including depreciations. General expenses, profit amount, and the cost of containers, coverings, and other expenses are added to the surrogate.

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80. 19 U.S.C. § 1677b(c)(2). If Commerce finds that information is inadequate to base fair market value on value of factors of production then it calculates the fair market value on the basis of price at which comparable merchandise produced in a market economy country is sold in other countries. Id. Another methodology Commerce may apply in determining a product's fair market value is a "countrywide NME antidumping rate[ ] unless individual exporters [can] demonstrate legal, financial, and economic independence from the NME government." Janzen, supra note 74, at 1104. "The rationale for this single dumping margin is that, in a centrally planned economy, the state may redirect goods and production through a company that has received the lowest antidumping margin." Joseph A. Laroski, Jr., NMEs: A Love Story Nonmarket and Market Economy Status Under U.S. Antidumping Law, 30 LAW & POL'Y INT'L BUS. 369, 376 (1999).

The NME presumption begins with the assumption that the producers are part of the NME entity until they prove otherwise. See Transcom, Inc. v. United States, 24 Ct. Int'l. Trade 1253, 1266 n.11 (2000). The country must prove that government interference in setting the price and volume of the merchandise in question to be produced must be nearly nonexistent. Chrome-Plated Lug Nuts From the People's Republic of China, 57 Fed. Reg. 15,052 (Dep't of Commerce Apr. 24, 1992). Also, private or collective ownership must characterize the entire industry in question, rather than just the producer. Id. Finally, market determined prices must be paid for all material and non-material inputs. Id. "A manufacturer operating in an industry failing to meet these conditions will have [fair market value] calculated under the factors of production approach utilizing surrogate country costs." Lantz, supra note 1, at 1043. Even if Commerce finds that these factors have been met and that the normal method of determining fair market value should be used, it will only do so if there is enough available information to allow the calculation of fair market value. See 19 U.S.C. § 1677b(c)(1)(B)-(2) (2005). The market oriented industry approach is difficult to attain because a manufacturer must rebut Commerce's presumption by proving a negative; that no government control exists. Lantz, supra note 1, at 1042. The difficulty lies in insulating the industrial sectors in a NME from the macroeconomic effects of government control. Lawrence J. Bogard & Linda C. Menghetti, The Treatment of Non-Market Economies Under U.S. Antidumping and Countervailing Duty Law: A Petitioner's Perspective, 789 PLI/CORP. 217, 244 (1992). Thus "Commerce will likely never find that such significant production inputs as labor, rent, utilities, and elements of factory overhead are acquired at market-driven prices." Id.

Commerce relies on the Chinese Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") to identify all exporters of the merchandise and to submit a consolidated questionnaire response for those exporters. See, e.g., Sebacic Acid From the People's Republic of China, 59 Fed. Reg. 565, 567 (Dep't of Commerce Jan. 5, 1994). If any of the Chinese exporters fail to respond, the response is considered incomplete resulting in nationwide margins based on best available information. See id. Because it is difficult for the Chinese government to persuade all the exporters of the same merchandise to respond, Chinese exporters often receive nationwide margins based on the best available information. See Leonard E. Santos & Thomas Vakerics, Chinese Imports Face Tough Anti-Dumping Rules, NAT'L L.J., Sept. 19, 1994, at C13. Furthermore, unilateral duties may be assessed against each exporter of the goods within the industry even if such individual exporters were not specifically listed in Commerce's findings. See Transcom, 24 Ct. Int'l. Trade at 1257-65. Suppliers within the industry have an affirmative duty to prove that their products should receive a lower rate than the unilateral assessed rate. Id. at 1266 n.11. Thus companies that import goods subject to an antidumping duty will have to monitor notices of reviews for those goods in order to try to receive a lower antidumping rate for those goods. See id. at 1257-65.

81. 19 U.S.C. § 1677b(c)(3).
values for the factors of production. The factors of production used to manufacture the goods and their prices reflect the values of such factors in a market economy country or countries considered appropriate. The Secretary of Commerce chooses a surrogate country that is comparable to that of the home market country in per capita gross national product and infrastructure development. To the extent possible, the surrogate country is at a level of economic development comparable to the NME country and has significant producers of comparable merchandise. If there is no surrogate market economy country with comparable development producing the same product, Commerce bases its analysis on a surrogate country that produces a product that is comparable and substantially similar to the subject merchandise. While the statute gives equal weight to economic comparability and merchandise comparability, Commerce weighs economic comparability more heavily. Otherwise, Commerce calculates the value of the product by using factors of production from market economy surrogate countries of comparable development on a case-by-case basis. And as a last resort, where complete data is unavailable from a single country, Commerce fills in data missing from a primary surrogate with data from other surrogates.

The choice of a surrogate in an antidumping investigation is easily justified when both per capita gross national product ("GNP") and infrastructure development are similar among the NME and the surrogate country. "Similar per capita GNP indicates that the surrogate country production capacity and wage rates reflect what the market rate

82. 19 U.S.C. § 1677b(c)(1)(B).
87. Bellocci, supra note 1, at 201.
88. See Sparklers From the People's Republic of China, 56 Fed. Reg. 20,588, 20,590 (Dep't of Commerce May 6, 1991). Procedural obstacles exist which make it difficult to receive complete data from one surrogate country. Not only must the United States first receive the approval of the foreign government to seek information of the foreign producers' confidential business, but the producers themselves must be willing to provide the data requested. See Horlick & Shuman, supra note 68, at 821. Producers are often unwilling, however, to provide such information because producers then "expose themselves to high risk and expense and receive little benefit in return for their cooperation. The risk is that Commerce may use the surrogate producer's information against it in a later antidumping proceeding." Grace M. Kang, Solving the Nonmarket EconomyDumping Dilemma, 1987 COLUM. BUS. L. REV. 705, 714 (1987).
89. Bellocci, supra note 1, at 202.
in [an NME] would be if it were a market economy." The law and regulations, however, do not indicate how to measure gross national product. As a result, Commerce relies on World Bank figures, despite warnings from the organization that the data is not reliable for such comparisons. Likewise, while the "similarity in infrastructure indicates the production capacity of the country and the capacity to engage in external trade," the regulations do not indicate what aspects of economic structure are important. Commerce is thus left to decide each case anew when the NME country and its surrogate share certain characteristics but not others.

Despite attempts to use costs from similarly situated economies, the costs are usually not transferable from one country to another, because the surrogate country is likely to be "at a substantially higher level of economic development than the non-market economy" in question. Using a surrogate produces a determination based on data of an inflated normal value, resulting in a higher cost of production value and in turn a larger duty margin. In addition, calculating the surrogate values of factors of production requires comparing material and labor between two countries, relying upon prices that are economically meaningless in the NME country. Propounding the resulting inaccuracy even further is the NME exchange rates preventing the conversion of prices to a meaningful dollar value.

Furthermore, because each nation has a comparative advantage in some factor of production, using a surrogate for NME fails to account for the possibility that the NME producer possesses significant advantages in production and sales that the surrogate producer does not. "Manufacturers tend to use more of the factors of production they

90. Id.
92. THE WORLD BANK, 1980 WORLD BANK ATLAS 16 n.3 (1980).
94. Alford, supra note 8, at 91.
95. Id.
96. Lantz, supra note 1, at 1007.
98. Id.
100. Id. at 1657.
101. Vermulst, supra note 97, at 789-90.
have in abundance, with a relatively lower cost, and less of [the] scarce factors carrying a relatively higher cost."\(^{102}\) Thus, factors of production used by the manufacturer from a NME country, combined with the costs for the factors from a surrogate market country that has a different cost structure, produces higher dumping margins than would be assessed for a manufacturer from a market economy country.\(^{103}\) While constructing a normal value for a producer in a NME country is a "difficult" and "imprecise" process,\(^{104}\) Congress is willing to tolerate a level of inaccuracy in order to impose a free-market principle on NME countries.\(^{105}\)

III. CONGRESS'S DISCRETIONARY SELECTION OF DATA AND EXTERNAL EFFECTS

In order to calculate the dumping margin, not only must Commerce choose the country that will serve as the surrogate, but it must also determine the factors used by the producer in manufacturing the good as well as the value of those factors.\(^{106}\) The values, and hence the margin, must be calculated as accurately as possible to assess an antidumping duty.\(^{107}\) Accuracy is necessary because the "duty is not intended to punish the foreign firm; rather, it is intended to deter the foreign firm from continuing its dumping practices."\(^{108}\) Since the purpose of antidumping provisions is to restore market signals and calculate accurate margins, the best available information is used to value the factors utilized by the producer of the good.

The information provided in the party's questionnaire responses serves as the basis for best available information where Commerce determines that the information provided is in fact the best available and the information relates to prices and values in the surrogate country.\(^{109}\) In order to calculate margins as accurately as possible, interested parties must provide Commerce with "accurate, credible, and verifiable

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102. Lantz, supra note 1, at 1007.
103. Id. at 1008.
104. Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States, 268 F.3d 1376, 1381 (Fed. Cir. 2001) (sustaining Commerce's methodology for valuing steel wire rod, based on certain actual purchases of steel wire rod made by PRC producer from a British company).
106. Shakeproof Assembly Components, 268 F.3d at 1376.
107. Stewart, supra note 32, at 696; see also Lantz, supra note 1, at 998.
108. Lantz, supra note 1, at 998-99.
The respondents, particularly, have a responsibility to provide the information as they incur any assessed duties. The requirements for the initial information that a petitioning party must provide are lenient in order not to place undue burden on the party bringing the action, usually an interested domestic party on behalf of the U.S. industry injured by the foreign good. On the other hand, Commerce can demand unlimited quantities of documents from the accused companies with a short turnaround time and impose heavy penalties for failure to comply.

"The average antidumping questionnaire is more than seventy pages long," must usually be translated first, and then distributed to numerous employees. It gathers information pertaining to the company's factors of production, by requesting a description of the company's production process for the merchandise under consideration, including "specific types of raw materials, labor, energy, subcontractor services, research, and development . . . ." After Commerce receives the list of factors of production, Commerce issues a supplemental questionnaire, conducts a verification of the factors of production, and requests interested parties to submit any information pertaining to the values of the factors that they believe Commerce should consider. Thus, the plaintiff carries the burden of showing that the data presented by the plaintiff should be the data upon which Commerce relies to value the factors of production in its calculations.

If a party cannot provide the information that Commerce requested in a timely manner, in the required form, or if the party refuses to do so, then Commerce uses "other available information." Commerce can in

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111. Transcom, 24 Ct. Int'l Trade at 1267.
115. Id. at 561.
116. Id.
such instances also rely on adverse facts—data provided by the petitioners—which may have been manipulated by the petitioners.\textsuperscript{122} While Commerce corroborates any information received,\textsuperscript{123} if the respondents do not provide requested information for an investigation, Commerce may employ the adverse inferences in selecting from the facts available, provided by either party.\textsuperscript{124} Thus, Commerce takes into account the respondent’s degree of cooperation.\textsuperscript{125} Those respondents who substantially cooperate, but nonetheless fail to provide the requested information receive a rate that is an adverse margin of the possible choices.\textsuperscript{126}

\textbf{A. Results of Congress’s Discretion}

Valuing the factors of production of the manufacturer, Commerce does not need to rely on data and information submitted by the producer, but can move to information that it determines more appropriately represents the company’s costs.\textsuperscript{127} Commerce’s discretion in choosing its data is limited by the statute’s ultimate goal “to construct the product’s normal value as it would have been if the NME country were a market economy country”\textsuperscript{128} by using the best available information.\textsuperscript{129} “Where there exists on the record ‘alternative sources of data that would be equally or more reliable . . . it is within Commerce’s discretion to use either set of data.’”\textsuperscript{130} While “best available information” is not statutorily defined, in choosing the data upon which valuation of factors of production will be based, Commerce, from publicly available information, prefers to select values that are an average, non-export, non-affiliated, non-privileged, and non-affiliated.

\textsuperscript{122} See 19 U.S.C. § 1677e(b) (2005); Bolander, supra note 112, at 1041, 1046.
\textsuperscript{125} Allied-Signal Aerospace Co. v. United States, 996 F.2d 1185, 1188 (Fed. Cir. 1993).
\textsuperscript{126} Id.
\textsuperscript{127} The information, because it is supplied by interested parties, is subject to various inaccuracies. Commerce has relied on annual reports in determining costs of production for market exporters where other information received was unclear. See, e.g., Timkin Co. v. United States, 16 Ct. Int’l Trade 142, 144-45 (Ct. Int’l Trade 1992). However, “annual reports issued by companies are created [by company executives] to inform investors of their company’s financial position,” which will usually be portrayed in a positive light. Bolander, supra note 112, at 1046. “If [such] reports [from one company] are instrumental in a Commission injury investigation, the resulting determination may [also] be skewed.” Id.
representative of a range of prices within period of review, product-
specific, tax-exclusive, reflective of product similar to that valued, and
from a single country.\textsuperscript{131} The broad discretion bestowed to Commerce
permits it to determine the selected values on a case-by-case basis.\textsuperscript{132}
However, this afforded discretion results not only in a lack of
predictability in the information chosen, but also in a lack of accuracy in
the final dumping margin.

1. Representativeness of Country-wide Prices

While in one case Commerce has rejected information supplied by
a manufacturer for lack of representativeness, it has in another rejected
data that was fully representative of countrywide prices. Commerce
prefers "industry-wide values, rather than the values of a single
producer, wherever possible, because industry-wide values are more
representative of prices/costs of all producers in the surrogate
country."\textsuperscript{133} In \textit{Zhejiang Native Produce \& Animal By-Products Import
\& Export Corp. v. United States}, Commerce rejected financial
statements of an Indian honey cooperative because the data represented
prices of a single processor in a particular region of the surrogate
country, India, despite the cooperative buying honey from several
sources.\textsuperscript{134}

However, even data supplied that is industry wide within the
surrogate country may still be rejected if it appears influenced by non-
economic factors.\textsuperscript{135} In \textit{Crawfish Processors Alliance v. United States},
Hontex Enterprises ("Hontex"), a Chinese exporter of crawfish,
submitted to Commerce information based upon a Spanish study for
valuing live whole crawfish, which Hontex used in the production of tail
meat.\textsuperscript{136} Hontex maintained that the study was an official government
report sanctioned, formulated, and financed by the Andulician
government, decreasing the risk of data contamination by interested
private parties. Despite traditional reliance on similarly broad, industry-

\textsuperscript{131} Kaiyuan Group Corp. v. United States, 343 F. Supp. 2d 1289, 132 (Fed. Cir. 2004);
Shandong Huarong Mach. Co. v. United States, No. 03-00676, 2005 WL 1105110 (Ct. Int'l Trade
May 2, 2005).
\textsuperscript{132} \textit{Wuhan Bee Healthy Co.}, 374 F. Supp. 2d at 1308 (citing Peer Bearing Co. v. United
States, 25 Ct. Int'l Trade 1199, 1208 (2001)).
\textsuperscript{134} Id.
\textsuperscript{135} \textit{See generally} Crawfish Processors Alliance v. United States, 343 F. Supp. 2d 1242 (Ct.
Int'l Trade 2004).
\textsuperscript{136} \textit{Id.} at 1246, 1248.
wide averages and estimates as surrogate values.\textsuperscript{137} Commerce rejected the Spanish study because it was not a government report, but paid for by an Andulician crawfish processor, and because it did not contain complete price data, but was based on estimates rather than actual transactions.\textsuperscript{138} Because some of the crawfish companies to which the questionnaires were sent provided full information and some provided only partial responses, varying in degree of completeness, Commerce maintained that it could not confirm that the information was comprised of averages or that it was representative of a wide range of prices and not distorted by special interests of a private sector party.\textsuperscript{139}

Commerce has also rejected non country-wide data for one purpose, but used the same decidedly delinquent information for another.\textsuperscript{140} In \textit{Wuhan Bee Healthy Co. v. United States}, Commerce refused to use pricing series submitted by Wuhan to value honey production factors because it did not represent country-wide prices.\textsuperscript{141} The pricing information, the agency argued, was generated by only two farms located in a particular region.\textsuperscript{142} Nevertheless, Commerce maintained that while the information was not appropriate to calculate values, it was appropriate to calculate a necessary inflator.\textsuperscript{143} According to the agency, the information submitted by the two farms indicated that prices increased during the period of review\textsuperscript{144} and that it had no other information upon which it could rely to calculate the inflation for the real value of raw honey.\textsuperscript{145} Thus, in the absence of other pertinent information, Commerce can reasonably use specific rather than country-wide data.\textsuperscript{146}

2. Domestic Price Over Import Price Preference

Even though Commerce generally seeks to use the actual prices paid for imports from market economy countries when valuing an NME
producer's factors of production, it has rejected such data.\textsuperscript{147} It has valued some of the NME producer's production factors based on their value in a surrogate country, but other factors on the basis of the NME producer's actual acquisition process.\textsuperscript{148} In Wuhan, Wuhan submitted data published in the TERI Energy Data Directory and Yearbook, for the year at issue, to determine Indian surrogate value of coal, a factor in Wuhan's honey production.\textsuperscript{149} Commerce rejected the TERI data, which reflected Indian domestic coal prices, maintaining that Indian import data for coal valuation was more representative of competitive prices.\textsuperscript{150} The court maintained that because Commerce prefers to use domestic surrogate data over import surrogate data, it must be clearer as to the reason for rejecting the data than merely maintaining that the import price was the best available information.\textsuperscript{151}

3. Context of Data Compilation

Commerce has even rejected corroborated data, maintaining that the data was prepared for purposes which would cast doubt upon the applicability of the study for valuation purposes.\textsuperscript{152} In Zhejiang Native Produce, the plaintiff's study, published by the Agriculture and Processed Food Products Export Development Authority, was offered to establish the price of raw honey and was rejected.\textsuperscript{153} Commerce disqualified the data because the data reflected an average value of honey appearing in context of a discussion concerning the development of a model for "doubling the number of bee colonies every two years," rather than for the purpose of valuing honey.\textsuperscript{154} In Wuhan, Commerce rejected the producer's suggested values that were based on a study, maintaining that while three Spanish companies stated that the prices in the Spanish study were accurate, the study still failed to be considered as the best available information because there was no information regarding the study's structure, methodology, and verification.\textsuperscript{155}

\begin{itemize}
\item \textsuperscript{147} Bogard & Menghetti, supra note 80, at 231.
\item \textsuperscript{148} \textit{Id.} at 230.
\item \textsuperscript{149} \textit{Wuhan Bee Healthy Co.}, 374 F. Supp. 2d at 1309.
\item \textsuperscript{150} \textit{Id.} at 1309-10.
\item \textsuperscript{151} \textit{Id.} at 1310-11.
\item \textsuperscript{152} Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States, 26 I.T.R.D. (BNA) 2320, 2323 (Ct. Int'l. Trade 2004).
\item \textsuperscript{153} \textit{Id.}
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{See Wuhan Bee Healthy Co.}, 374 F. Supp. 2d at 1302-03.
\end{itemize}
4. Contemporaneity with the Period of Review

While Commerce prizes specific data, it has rejected it for more general data that is more contemporaneous with the period of investigation. In valuing overhead and profit in *Hangzhou Spring Washer Co. v. United States*, Commerce rejected specific data submitted by the producers because it was not contemporaneous with the period of investigation, an important factor given the quickly transforming Indian economy. However, Commerce may again reject such information in another case, with contemporaneity giving way, where the contemporaneous data does not refer to a product substantially similar to the factor being valued.

In *Shandong Huarong Machinery*, Huarong exported heavy forged tools from China, such as bars and wedges. Commerce rejected Huarong's information pertaining to the valuation of brokerage and handling factors because the information related to a product that was not similar to the bars and wedges Huarong produced. Commerce maintained that the bars and wedges that Huarong produced were more similar to stainless steel wire rod rather than hot-rolled steel flat products because both steel wire rod and bars and wedges are small in diameter and both are shipped in containers. As a result, Commerce rejected the brokerage and handling surrogate values pertaining to hot-rolled steel flat products submitted by Huarong even though it was more contemporaneous than the brokerage and handling costs for steel wire rod.

5. Quantity of Imports

According to Commerce, small-quantity import information is more reliable where per-unit value is approximately the same for the per-unit values of the larger quantity imports of that product from other countries. In *Kaiyuan Group Corp. v. United States*, the volume of pencil cores imported into Indonesia was substantially greater than that

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157. *Id.* at *11.*
159. *See id.* at *7.*
160. *Id.*
161. *Id.*
162. *See id.*
imported into India. Nevertheless, Indian imports from seven different countries were considered substantial. Commerce used Indian import data because the weighted-average Indian import price did not substantially vary from the weighted-average Indonesian import price.

6. Similarity of Products

Commerce must also determine, even before the determination as to the surrogate value of a particular factor, which factor in the surrogate country is most similar to the factor the company under investigation utilized. In Raoping Xingyu Foods Co. v. United States, the court maintained that the surrogate factor for oil used in canning differed substantially in quality, which was indicated first by its large price discrepancy, adjusted from NME costs. As a result, Commerce could not use surrogate price of heavy oil to calculate the company's cheap heavy fuel cost. In Hebei Metals v. United States, Commerce found that surrogate value submitted by Hebei for coal was aberrational, because it had a larger percent variation between the highest and lowest prices over its own data variation. However, the Court of International Trade remanded the case to Commerce because it failed to provide that the data was insufficient to demonstrate why imported coal yielded a more accurate surrogate value than domestic coal.

7. Inconsistent Data

Data submitted by a producer was also rejected where different information submitted by third parties contradicted the information. In Wuhan, a Chinese producer and exporter of raw honey, submitted an article appearing in an Indian newspaper on which Commerce refused to rely in valuing the factors of production of raw honey because the prices in the article were contradicted by information submitted by petitioners. Commerce rejected the prices in the article, relying on import prices from Germany and China. According to other data, no

164. Id.
165. Id.
166. Id.
168. Id.
170. Id.
honey was imported into India from Argentina, China, and Germany. While Wuhan submitted official export statistics for raw honey from China and Germany for the same period, it was "not sufficient to overcome the totality of the evidence cited by Commerce of the proffered article's lack of utility." This reasoning poses perhaps the most dangerous risk because petitions from injured parties will most likely contain data contradictory to the data presented by the investigated company.

8. Anomalies in Data

Considering a wide range of values for a particular factor, Commerce often excludes anomalies to ensure the reliability of the calculation; however, it has in circumstances included such data in its calculations. In Zhejiang, "the weighted-average of the honey unit import values from all other countries was approximately $69.74 less than Commerce's calculation of the normal value of honey sold by Zhejiang." The anomaly was the result of the large volume of lower priced honey imported from Argentina. To remedy the wide discrepancy and distorted results, Commerce removed the data from Argentina and used a simple average to value raw honey, an average of the highest and lowest values. However, in Hebei Metals, Commerce chose not to exclude Swedish import value from the surrogate value for steel pallets even though it was 1,134% greater than the average of other countries' import values. Commerce argued that it excluded only those Indian imports sourced from "NME countries and countries maintaining non-industry specific export subsidies, which might distort export prices. Because Swedish steel tube value did not fall into either category, Commerce found no reason to exclude it." The Court of International Trade remanded the decision for Commerce to provide a reasonable explanation for the failure to exclude the aberrational data.

172. Id. at 1304.
173. Id.
175. Id. at 2326.
176. Id.
177. Id.
179. Id. at *11.
180. Id. at *25.
9. Producer’s Cooperation

Not only can Commerce choose to reject the producer’s information pertaining to values of factors of production in the calculation, but Commerce can also apply adverse facts available.\(^{181}\) In *Tianjin Machine Import and Export Corp. v. United States*, Commerce applied adverse facts on the record because upon Commerce’s arrival at Tianjin’s factory to verify packing factors reported in the review, it discovered that the factory had been closed ten months prior to the visit.\(^{182}\) Moreover, the company failed to maintain factory and packing material records which were used in compiling the data in the questionnaire response.\(^{183}\) On the other hand, in *Globe Metallurgical, Inc. v. United States*, Commerce declined to use adverse facts because the company, Bratsk, acted in good faith to provide valuation of factors of production information.\(^{184}\) Bratsk reported that it reused silicon metal to produce more silicon metal.\(^{185}\) However, Bratsk did not include information regarding the amount of the metal fines reused in production.\(^{186}\) Despite the lack of information provided, Commerce did not apply adverse facts available because Bratsk had been “cooperative and acted to the best of its ability to provide information during the proceeding.”\(^{187}\) Instead of using adverse facts available, Commerce determined the amount of metal fines used based on the difference between the amount of metal silicon produced and the amount reported as sold using the company’s information.\(^{188}\)

Commerce may also apply partial facts available instead of adverse facts even if the partial facts are not complete.\(^{189}\) In *Luoyang*, Commerce declined to apply adverse facts available, which were submitted by an injured company and encouraged to be used, because plaintiff acted “to the best of its ability to obtain factors of production . . . information.”\(^{190}\) The plaintiff supplied Commerce with “documentation of its efforts to


\(^{182}\) *But cf Globe Metallurgical, Inc. v. United States*, No. 03-00202, 2005 WL 1799891, at *2 (Ct. Int’l Trade 2005) (noting that Commerce chose not to apply adverse facts because the petitioners cooperated with the agency).

\(^{183}\) *Id.* at 1298-99.

\(^{184}\) *Globe Metallurgical, Inc.*, 2005 WL 1799891 at *2.

\(^{185}\) *Id.*

\(^{186}\) *Id.*

\(^{187}\) *Id.*

\(^{188}\) *Id.*


\(^{190}\) *Id.* at 1304.
obtain the information from its suppliers," where it could not obtain the information.\textsuperscript{191} As a result of the plaintiff's good faith effort to supply Commerce with the requested information, Commerce rejected the defendant's urging to apply adverse affects.\textsuperscript{192}

\textbf{B. Effects of the Discretion}

"While Commerce enjoys broad discretion in determining what constitutes the best information available to calculate [normal value], Commerce may not act arbitrarily in reaching its decision."\textsuperscript{193} Nevertheless, the reasonableness standard in the case-by-case approach for choosing the best available information, as illustrated above, leaves Commerce wide leeway in choosing the data for valuing the factors of production.\textsuperscript{194} This discretion, permitting Commerce to move further and further away from the actual values, leads to inaccurate dumping margins contravening the statute's intention of calculating the dumping margins as accurately as possible.\textsuperscript{195}

In addition, in certain cases Commerce rejects information supplied on the basis that it is unspecific or not contemporaneous, but may accept such data in other cases. Moreover, Commerce can even use a blend of sources and surrogates to determine foreign market value of goods from a NME country.\textsuperscript{196} Thus, Commerce's discretion also results in producers' and exporters' inability to predict which submitted data Commerce will accept for valuing its factors of production and which it will reject.

Last, foreign producers from NME countries, whose exports have grown substantially in the United States, may become cautious because Commerce may be persuaded to choose data resulting in a high antidumping duty to protect its domestic industry. This may discourage foreign producers from exporting their products. Curtailing export

\textsuperscript{191} Id. at 1305.

\textsuperscript{192} Id. Commerce maintained that the plaintiff would not benefit from submitting incomplete factors of production data, that the plaintiff's competitors would understandably be reluctant to provide proprietary information, and prior higher antidumping duties in previous reviews provided an incentive for the plaintiff to cooperate. Id. at n.7.


\textsuperscript{194} See supra Part III.A; see also Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States, 268 F.3d 1376, 1381 (Fed. Cir. 2001) (citing Nation Ford Chem. Co. v. United States, 166 F.3d 1373, 1377 (Fed. Cir. 1999)).

\textsuperscript{195} Commerce must determine margins as accurately as possible, and use the best information available to it in doing so. See id. at 1382.

activities may lead to less foreign currency for that country, and in turn lower compliance with international trade norms.

1. Inaccuracy
Calculating the normal value of the good produced, Commerce at its discretion may choose information that it deems best available, which may prove different than that submitted by the producer, to serve as the values of the factors of production. Based on information for values Commerce deemed as best available, the calculated normal value of the product may be far from the manufacturer’s actual cost of producing the good. As a result, the final dumping margin is inaccurate because the further one moves from the product’s normal value, the more inaccurate the outcome. The resulting inaccuracy contradicts the statute’s intention that the dumping margin be calculated as accurately as possible. “[T]he accuracy of an antidumping [investigation and] determination is extremely important because it increases the credibility of the determination and it creates an equitable result.”197

2. Predictability
The outcome of an antidumping investigation is also unpredictable because a NME country has no advance knowledge of which surrogate will be used to determine its prices.198 Furthermore, Commerce has insisted that it can only decide on a case-by-case basis which countries will be considered to have an economy that is state controlled for purposes of certain industries, and which surrogate values will be accepted or rejected.199 A producer cannot “know before an export is made whether the question of fair value will be determined on the basis of the exporting nation’s home market price or data from an as yet unidentified surrogate.”200 Thus, the producer in China would have no means of finding out at the time of its export that it should, in effect, have been pricing as a producer in the surrogate country which was chosen in the end.201 Importers are thus unable to plan ahead and set their prices to assure compliance with the dumping laws.202

197. Bolander, supra note 112, at 1046.
198. Alford, supra note 8, at 92.
200. Alford, supra note 8, at 92.
201. See Wang, supra note 20, at 620-21.
3. Decreased Transformations

Furthermore, Commerce's determination may impose prohibitive company-specific import duties, placing the exporting company at a competitive disadvantage in relation to domestic producers. Where unnaturally high duties are imposed on goods from NME countries, the manufacturers' ability to sell and export their products into the United States is decreased. "Reducing the access of NME in transition manufacturers to the United States market will harm the process of market reform, because successful implementation of many of the market reforms requires economy in transition countries to export products to earn Western currency." In addition to the inaccurate margins, unpredictability and decreased cooperation in international norms, antidumping calculations toward NMEs have also been criticized as a "bureaucrat's Nirvana," often occurring "as a result of American bureaucrat's manipulation of numbers, rather than actual foreign business practices." The low threshold requirement can increase the risk of manipulation by private petitioners by allowing them to easily instigate antidumping investigations to harass competing importers. While a party attempting to exert political influence in a case will usually be identified in the public record, a foreign government will likewise intercede without always being identified because of the wide array of entry points.

C. Effects of the U.S. Antidumping Regime with Respect to China

Due to their low prices, U.S. imports from China have grown substantially to the detriment of U.S. industries. "U.S. industries thus have an increasing interest in effective implementation of the unfair trade remedy laws as applied to NMEs." Of the petitions filed with

204. Lantz, supra note 1, at 1008.
205. Id.
208. Stewart, supra note 32, at 727.
209. See id.
210. Bogard & Menghetti, supra note 80, at 221.
211. Id.
Commerce by domestic industries alleging dumping against foreign firms, ninety-six percent were deemed to be dumping.\textsuperscript{212} High duties have damaged several Chinese industries and led to their loss of market share on the European market.\textsuperscript{213} Compared to all its trading partners, China has the greatest number of antidumping suits against it with more than 450 antidumping cases initiated by the end of 2001 against more than 4,000 categories of Chinese products.\textsuperscript{214} Of these suits, almost half were brought by the United States,\textsuperscript{215} with low import prices as the main reason for the accusation.\textsuperscript{216} In the last three years, the United States “initiated . . . more anti-dumping orders against China than against any other country, and more than twice as many [as initiated] against the next leading country.”\textsuperscript{217}

The European Commission and the Council of the European Union also consider China a NME country. They have applied arguably discriminatory and unfair policy in determining the margin of dumping and injury to alleged Chinese exporters, allowing an artificially high dumping/injury margin to be established.\textsuperscript{218} Thus, China has not only become a target of U.S. antidumping practice but of the EU as well. By the end of 1999, the EU had 151 antidumping and five anti-subsidy actions commenced.\textsuperscript{219} China was involved in 21% of these measures; 35% of the measures were commenced against firms from NMEs.\textsuperscript{220}

\section{1. China’s Emerging Economy and Commerce’s Incentive}

Focus upon China’s achievements may lead one to think that China will “tilt global trade and technology balances in its favor, ultimately becoming an economic, technological, and military threat to the United States.”\textsuperscript{221} Through its transition from a centrally planned economy
toward a market oriented economy, China's rate of economic growth over the past twenty years has yielded increases in wealth, contributing to almost one-third of global GDP growth.\textsuperscript{222} The volume of trade conducted between China and other countries between 1999 and 2000 rose by 31.5\%.\textsuperscript{223} "China's total exports grew eightfold—to over $380 billion—between 1990 and 2003; and its exports in the electronics industry" accounted for 30\% of Asia's total exports in 2002.\textsuperscript{224} In 2002, imports from China totaled nearly $147 billion, beating out Japan and Mexico as the United States' second largest source of imports\textsuperscript{225} and in 2004, China together with America accounted for close to half of global growth.\textsuperscript{226} China's economic expansion has also benefited Brazil, ending as Brazil's third-largest importer at the end of 2003.\textsuperscript{227}

The increase in wealth and economic expansion has fueled U.S. policy analysts' speculation about China's future intentions.\textsuperscript{228} Conservative commentators maintain that China has hegemonic aspirations signified through its military build-up and that it will not be pacified by moves to bring it into the international trading order.\textsuperscript{229} It is feared that "China will [become] more, not less, resistant to international pressure, and that, far from being bound in by trading interdependence, China will seek to exploit its economic power for political purposes by threatening to cut out individual companies or countries from its market unless they prove compliant with Beijing's demands."\textsuperscript{230}

Moreover, concern has been mounting over the United States' considerable and growing trade deficit with China.\textsuperscript{231} The deficit was

\begin{itemize}

\item \textsuperscript{223} The Dragon and the Eagle: China's Economy is Larger than It Looks, Economist, Oct. 2, 2004, at 8 [hereinafter Larger than It Looks].

\item \textsuperscript{224} Mike Smith & Nicholas Khoo, China and US Foreign Policy in the Asia-Pacific: Living with American Dominance 22 Royal Inst. of Int'l Affs. 1, 4 (2001).

\item \textsuperscript{225} David Hale & Lyric Hughes Hale, China Takes Off, Foreign Aff., Nov.-Dec. 2003, at 36.

\item \textsuperscript{226} Fair or Foul, supra note 23, at 10.

\item \textsuperscript{227} Larger Than it Looks, supra note 223, at 3.

\item \textsuperscript{228} Brazil: China Appeal, Bus. Latin Am., May 17, 2004, at 2.

\item \textsuperscript{229} See generally Rosen, supra note 11, at 1549-50. One of the reasons the United States promoted Chinese accession to the WTO was to maintain Chinese compliance with international norms. Id. It will be more difficult (i.e. costly) for China to break off economic ties by violating international trade agreements and norms with China, a member of the WTO. Id.

\item \textsuperscript{230} Smith & Khoo, supra note 224, at 4.

\item \textsuperscript{231} Id. at 4; Haass and Lardy, supra note 221, at 1 (speculating that "the United States might one day find itself in the position of having to contain an expansionist, hostile China").

\item \textsuperscript{232} Hale & Hale, supra note 225 at 37.
\end{itemize}
exceeding $1 billion per week in China's favor while American exports to China have totaled $9 billion since it received Most Favored Nation ("MFN") status in 1980.\textsuperscript{233} In fact, the growing number of imports originate from China.\textsuperscript{234} These speculations pose a dangerous incentive for the United States to adopt more protectionist policies\textsuperscript{235} toward Chinese imports through high antidumping duties.

2. Validity of China's Threat

While Chinese imports in the U.S. market have grown, China is not in a position to disregard U.S. or international norms. "Even if China can make everything more cheaply than America, it will enjoy a much bigger cost advantage in labour-intensive industries . . . ."\textsuperscript{236} However, China will not be able to continue to compete on price because as it becomes more capable it becomes more expensive.\textsuperscript{237} China also not only lacks foreign direct investment necessary to isolate a country from needing to rely on other markets, but it also lacks a strong middle class. In addition, monopoly motivated dumping does not occur as often as espoused and even if it did, it can be curtailed through measures such as the antitrust regime.\textsuperscript{238}

a. Direct Foreign Investment Weakness

Even though China has maintained a strong rate of economic growth in recent years, U.S. fears of China's possible "go it alone" aspirations are misplaced because China's economy depends on direct foreign investment.\textsuperscript{239} In fact, most of China's exporters are foreign-investment enterprises.\textsuperscript{240} China has pursued export led growth based on competition for foreign direct investment, setting itself up "as [a] low-cost offshore manufacturing centre[] for multinational corporations in

\textsuperscript{233} Id. at 36; see, e.g., Charlene Barshefsky, Remarks at the Asia Society, Toward the Pacific Community: American Trade Policy in Asia (Jan. 21, 1999), available at http://www.asiasociety.org/speeches/barshefsky2.html.

\textsuperscript{234} Id.

\textsuperscript{235} See Gilboy, supra note 221, at 33.


\textsuperscript{237} See Neil King, Jr., A Whole New World, WALL ST. J., Sept. 27, 2004, at R1, R3.

\textsuperscript{238} STEPHEN D. COHEN ET AL., FUNDAMENTALS OF U.S. FOREIGN TRADE POLICY 169 (2d ed. 2003).

\textsuperscript{239} "[Foreign direct investment], exports and fixed-asset investment have been the important pillars of China's economic growth during the past decade." Phelim Kyne, Foreign Investment in China Remains Strong, WALL ST. J., Sept. 16, 2004, at A15.

\textsuperscript{240} Gong, supra note 203, at 595.
which growth was characterized by the export of cheap, labour-intensive products mainly to the North American market.\textsuperscript{241} Foreign direct investment in total domestic investment was calculated at slightly more than eight percent.\textsuperscript{242} The domestic private sector cannot compete with these dominant foreign firms nor can it compete with the strong state owned enterprises. Therefore, "China's growth [is] highly dependent on continued access to the U.S. market (where much of the manufacturing output is exported)\ldots.\textsuperscript{243} With antidumping actions against China increasing and profits decreasing, foreign investors may stop investing in the Chinese industries affected by the investigations.\textsuperscript{244}

Furthermore, the investment is not necessarily balanced between basic industries and other sectors.\textsuperscript{245} "Decentralization has also eliminated a number of avenues (e.g., price controls, foreign exchange controls, and market protection) through which the government can subsidize the state actor and reduce[] its capacity to subsidize the sector through fiscal systems."\textsuperscript{246} The government remained dedicated to supporting the state sector, which required continuous control over financial decisions.\textsuperscript{247} As a result, there has been a weakening in the commitment to the state sector.\textsuperscript{248} "Faced with supporting the state sector at its current level and suffering the prospect of a sustained slowdown in growth, the government appears to have chosen to reduce its support for the state sector."\textsuperscript{249}

b. Middle Class Unemployment

China has undergone substantial economic decentralization that has allowed the entry and rapid growth of non-state enterprises and has increased the incentives to allocate resources to more profitable enterprises and sectors.\textsuperscript{250} Focusing on becoming a regional leader, China has faced problems such as a "widening gap between its urban

\begin{thebibliography}{9}
\bibitem{241} Smith & Khoo, \emph{supra} note 224, at 4.
\bibitem{243} Smith & Khoo, \emph{supra} note 224, at 4.
\bibitem{244} Gong, \emph{supra} note 203, at 595.
\bibitem{245} See King Jr., \emph{supra} note 237, at R1. China's apparel and technology exports have boomed largely thanks to foreign investment. \emph{Id.}
\bibitem{247} \emph{Id.} at 438.
\bibitem{248} \emph{Id.}
\bibitem{249} \emph{Id.}
\bibitem{250} \emph{Id.} at 425.
\end{thebibliography}
and rural populations, growing unemployment, and the increased challenges posed by its aging population. Before China can become a viable threat, China must create a true middle class for social stability by creating an environment for developing a broad services sector, “ranging from high-end telecommunications and financial and legal services to retail, entertainment, and personal services . . . .”

c. Monopoly Incentive

Last, if China is actually pursuing monopoly motivated export policies, antitrust laws exist to curtail such effects. Antitrust statutes are designed to deter aggressive low prices. The laws recognize that price discrimination is a commercially legitimate activity, and antidumping laws are often really just a manifestation of special interest pleading by a few industries in the manufacturing sector that have utilized the emotionally charged phrase “fair trade” for their own unfair use. A U.S. Congressional Budget Office study has maintained that the oligopoly or monopoly in whose name the laws are implemented rarely occurs, and that predatory pricing “is substantially less common than price discrimination and selling below cost . . . .”

Monopolizing dumping made up less than ten percent of antidumping cases. With “increasing competition among a variety of export suppliers from different countries, predatory pricing practices arguably are futile because market domination and monopolistic pricing are not attainable.” “[N]o rational, unsubsidized company would undertake the risk of pursuing predatory pricing in a foreign market,” because the company would not have enough time to recoup its losses through monopoly power. By the time a monopoly is acquired,

251. Hale & Hale, supra note 225; at 36.
253. See COHEN, supra note 238, at 168-69.
254. See id. at 169.
257. Id.
258. Id.
259. Id.
260. Bellocci, supra note 1, at 180-81.
another firm will enter the market where there is a profit to be made by underpricing the company maintaining a monopoly in the market.\textsuperscript{261}

Chinese corporations in practice do not have the leisure to wait for the benefits from monopolizing the U.S. market.\textsuperscript{262} Chinese officials maintain that China is a developing country and that it does not have the "economic strength necessary to dump its commodities overseas."\textsuperscript{263} “They emphasize that the low prices of Chinese export commodities were simply the result of the ‘relatively cheap labor’ and ‘low production costs’ in China.”\textsuperscript{264} Furthermore, the differential can be caused by a variety of factors unrelated to dumping. The manufacturer may enjoy a “real” competitive advantage resulting from a labor-intensive production policy\textsuperscript{265} or an economy of scale.\textsuperscript{266} Furthermore, the choice of the surrogate country may have been misguided, or the surrogate country may be subsidizing its producers.\textsuperscript{267}

IV. U.S. INTERNAL IMPLICATIONS AND SOLUTIONS

A. Protectionism

U.S. antidumping rules may certainly be viewed as protectionist measures. Protectionist policies adopted toward China due to the fear of China becoming the next “superpower” will subject U.S. antidumping policies to more criticism and less credibility within trade relations. The purpose of antidumping laws—to protect domestic industry from the effects of foreign firms dumping their products—is subject to abuse, having the potential result of punishing foreign firms.\textsuperscript{268} While the case

\textsuperscript{261} Id. at 181.

\textsuperscript{262} See id. at 180-81.

\textsuperscript{263} Yu, supra note 27, at 301.

\textsuperscript{264} Id.

\textsuperscript{265} Bellocchi, supra note 1, at 187. “The Gross National Product has grown from RMB 506.24 billion in 1978 to RMB 1,902 billion in 1993 . . . China’s trade with the United States alone has increased from US $2.663 billion in 1986 to US $8.590 billion in 1992. In addition, the United States takes in 25.6% of China’s exports directly through Hong Kong.” Id.

\textsuperscript{266} Hoyt, supra note 99, at 1657.

\textsuperscript{267} Id.

\textsuperscript{268} Policies that protect domestic firms at the expense of restricting imports from a certain country may also be instituted because of U.S. disapproval of the importing country’s human rights policies or an attempt to change those policies. The U.S.-China WTO agreement was expected to strengthen the rule of law in China by promoting the basic rules of transparency, nondiscrimination, judicial review, and administrative independence, all of which are considered critical to the functioning of a modern economy. See Press Release, USTR, U.S., China Sign Historic Trade Agreement (Nov. 15, 1999), available at http://www.usconsulate.org.hk/uscn/trade/general/ustr/1999/1115a.htm. However, the U.S. expectations were disappointed in 2000 when
against protectionism is strong, political leaders continue to advocate the policies, protecting only one special interest, even though these policies have failed in the past. 269 In addition, many critics argue that predatory pricing either does not exist, or that it exists only in isolated cases, and only then for a short period of time. 270 "[S]uch behavior is irrational and would reduce profits,... [and] drive a 'predator' out of business." 271 Moreover, "the actual net effect of protectionism is a reduction in the total number of jobs," inefficient government subsidization, slowed economic growth and standard of living, reduction in entrepreneurial initiative, lower product quality, and "loss of individual rights since consumers and producers—buyers and sellers—are less free to enter into contracts." 272 Costs are also involved in administering the various protectionist schemes, which must be paid for by taxpayers, consumers, and those whose livelihood depends on importing products. 273

On the receiving end of the policy, the United States has more and more become an object of resentment because official U.S. government policies are widely received among ordinary Chinese people as "incomprehensible, hostile, bullying, and even paranoid." 274 "The U.S. antidumping laws are criticized by foreign governments and corporations and by pro-import domestic groups as arbitrary, capricious, and protectionist." 275 Nevertheless, the U.S.-China relationship is one of the most important bilateral relationships today, with economics being very much part of the picture. 276 As a result, "the positions that the U.S. Congress received the U.S. human rights report criticizing China for its deteriorating human rights record throughout 1999 due to intensified government efforts to suppress dissent. BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2000), available at http://www.state.gov/www/global/human_rights/1999_hrp_report/china.html.

269. McGee, supra note 114, at 539. One of the reasons protectionism succeeds is because special interests—auto manufacturers, steel companies, the textile industry, and others—have much to gain by enlisting the aid of government to protect them from foreign competition. On the other hand, the large majority of the population, comprised of unorganized consumers, has little to lose by any particular protectionist legislation, and may not even know that the measure is costing it money in the form of higher prices. Id. at 541.

270. Id. at 544.

271. Id.

272. Id. at 545, 554.

273. Id. at 554.


275. COHEN, supra note 238, at 167.

276. See Fair or Foul, supra note 23, at 60. While U.S. exports to China have expanded, Chinese exports to the United States have grown at a much quicker rate, with a rapidly growing deficit. Id.
Commerce Department is likely to take in administrative proceedings have become more predictable” over the last several years as it has adopted various antidumping factors and methodologies, which it considers in valuing factors of production.\textsuperscript{277} “[W]here parties fully participate in the administrative review process and take advantage of the opportunity to raise and argue issues before a final determination is made, there is a degree of predictability in regard to what adjustments the Commerce Department will allow in the calculation of dumping margins.”\textsuperscript{278} However, those foreign producers who are unsatisfied with the determination process will avoid marketing goods in the United States, “thus impeding the goal of a global economy.”\textsuperscript{279} Not only are consumers affected by making foreign goods unavailable, but foreign relations are also adversely impacted.\textsuperscript{280} Additional, new markets which U.S. businesses may want to enter may also hesitate to commence trade relations with the United States, as they may be discouraged as a result of decreased U.S. credibility,\textsuperscript{281} in the end decreasing opportunities at international cooperation.\textsuperscript{282}

\section*{B. Solutions}

U.S. policy should attempt to move from a strict comparable country method for assessing anti-dumping duties to an analysis treating NME countries similarly to market economy countries—a move taken by the E.U.—or by setting a standard for when Commerce can move to best available information. In the E.U., normal value concerning imports from China will be determined similarly as for market economy countries if the producer can show that the market economy conditions prevail for this producer with respect to the manufacture and sale of the like product concerned, a lower standard than that required under the U.S. antidumping law.\textsuperscript{283}

“Commerce, using its administrative discretion, has addressed [the high standard] by devising new methods to determine the point at which NME in transition sourced factor input prices sufficiently reflect market forces for inclusion in the FMV calculation.”\textsuperscript{284} Two possible

\begin{itemize}
\item \textsuperscript{277} Stewart, supra note 32, at 725.
\item \textsuperscript{278} Id.
\item \textsuperscript{279} Bolander, supra note 112, at 1042.
\item \textsuperscript{280} Id.
\item \textsuperscript{281} Id.
\item \textsuperscript{282} McGee, supra note 114, at 551.
\item \textsuperscript{283} Gong, supra note 203, at 585.
\item \textsuperscript{284} Lantz, supra note 1, at 1008.
\end{itemize}
suggestions were rejected during the Uruguay Round Agreements.  

The first included a review of markets in question over a five year period. At the end of the review, “countries would either ‘graduate’ to market economy status or return to the NME category.” Under the second proposal, Commerce could suspend antidumping investigations in circumstances where the foreign manufacturer agreed to stop sales at less than FMV or to eliminate the injurious activity. While Commerce has the ability to suspend a pending antidumping investigation currently, the proposal provided Commerce with a broader range of options in negotiating suspension agreements.

While the proposals were rejected, increased transparency and equity has been attempted in Commerce’s NME treatment under the antidumping regime. To further the statute’s goal, Commerce should use NME sourced input prices where possible because this preserves the comparative advantage enjoyed by manufacturers in the input factors they use most, so long as they are subject to market-driven pricing. Additionally, “using market driven input costs promotes the deregulation of prices and wages within an economy in transition country.” Thus, the approach would assist in “integrating the economy with international markets and help maintain a freely convertible currency . . . because free trade requires that a country’s currency reflect the true value of the products produced by economy in transition manufacturers, a value determined in large part by input and wage prices.”

Another possible solution is to afford the Court of International Trade (“CIT”) a heightened standard of review. Currently, the CIT has a limited standard of review in Commerce decisions. The CIT must sustain Commerce’s determination unless it is unsupported by substantial evidence on the record, or the decision is not in accordance with the law. The reasonableness standard is a deferential standard

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285. Id. at 1050.
286. Id. at 1050-51.
287. Id. at 1053.
288. Id.
290. Lantz, supra note 1, at 1053-54. “[T]he suspension agreement[s] [would have] insured that significant injury caused by imports from economies in transition would be remedied in the short term, while enhanced enforcement authority would promote effective long range agreements.”
291. Id. at 1069.
292. Id.
293. Id.
295. Id.

http://scholarlycommons.law.hofstra.edu/hlr/vol34/iss2/9
that affords Commerce much latitude in determining antidumping duties, as their reasonable interpretation will be upheld even if the court could have come to a contrary conclusion.\footnote{See Koyo Seiko Co. v. United States, 16 Ct. Int'l Trade 539, 540-41 (1992).} When a remand occurs under this standard, the court often merely asks for an explanation of Commerce's findings.\footnote{See id.} Thus, Commerce may easily review a report upon remand and still come to the same conclusions.\footnote{In Crawfish, Commerce rejected Hontex's two submissions corroborating the Spanish Study upon which, Hontex argued, Commerce should have relied as the source for valuing live whole crawfish. Crawfish Processors Alliance v. United States, 343 F. Supp. 2d 1242 (Ct. Int'l Trade 2004). The court remanded Commerce's final results, instructing Commerce to reconsider its decision to use Australian or Spanish data only if Hontex's submissions were so compelling that its original decision to not use the Spanish data became unreasonable. Id. at 1248. Commerce did not have to reconsider every aspect of its decision of whether Australian or Spanish data was the best available information. Id.}

Commerce and the Commission are given this wide leeway because they, like most specialized governmental agencies, "are authorities in the investigation and determination of dumping activity.\"\footnote{Bolander, supra note 112, at 1040.} The CIT, however, also has "specialized expertise and thus maintains the ability to effectively review antidumping determinations" because the court's jurisdiction encompasses primarily such specialized categories of international trade issues as antidumping, countervailing duties, and import restrictions.\footnote{Id. at 1047.} However, the reasonableness standard restricts the court from extensively scrutinizing the methods used by the agencies in the investigations.\footnote{Id. at 1047.}

Under a more thorough standard for when Commerce can move toward using best available information, the court can guide Commerce to take into account the "legitimacy of using a surrogate country to determine home market data for non-market economies, and the use of 'best information available' to manipulate determination results."\footnote{Id. at 1047.} The case-by-case approach to determining what constitutes best available information can be abandoned for a more bright-line regulatory standard. Given the antidumping statute's purpose to calculate dumping margins as accurately as possible, data that is completely removed from the actual factors of production used, and their values, calls into question the accuracy of the calculation. Furthermore, where adverse facts are applied, the accuracy focus is even further diluted.

\footnote{296. See Koyo Seiko Co. v. United States, 16 Ct. Int'l Trade 539, 540-41 (1992).}
\footnote{297. See id.}
\footnote{298. In Crawfish, Commerce rejected Hontex's two submissions corroborating the Spanish Study upon which, Hontex argued, Commerce should have relied as the source for valuing live whole crawfish. Crawfish Processors Alliance v. United States, 343 F. Supp. 2d 1242 (Ct. Int'l Trade 2004). The court remanded Commerce's final results, instructing Commerce to reconsider its decision to use Australian or Spanish data only if Hontex's submissions were so compelling that its original decision to not use the Spanish data became unreasonable. Id. at 1248. Commerce did not have to reconsider every aspect of its decision of whether Australian or Spanish data was the best available information. Id.}
\footnote{299. Bolander, supra note 112, at 1040.}
\footnote{300. Id. at 1047.}
\footnote{301. Id.}
\footnote{302. Id.}
V. CONCLUSION

The United States has encouraged countries that have been transforming their economies to free-markets and shedding government influence to adhere to free trade rules. Nevertheless, trade imbalance has occurred as a result of cheap imports. When imports are sold at a lower price in the United States than comparable domestic goods, the domestic injury will be lost sales and market share, resulting in lost profits and potentially exiting the market. Since 2000, the United States has lost over 2.7 million manufacturing jobs due to domestic inability to compete with Chinese businesses. As a result, the U.S. government aids the domestic industry in competing with the cheaper imports by imposing a tax on the cheaper imports. Commerce may want to impose a high tax on the import to ensure that the domestic industry can compete and to maintain a check on Chinese hegemonic aspirations. The growing trade deficit between China and the United States has increased the calls for protection; Congress had “considered proposals for across-the-board tariffs on China.” However, China may not necessarily be the main cause of United States job loss because the “biggest job losses have been in industries in which America’s imports from China are small.”

Commerce has imposed high taxes on the Chinese companies using the wide discretion afforded to the agency in the statute. While accepting certain data in investigations, Commerce in other investigations has rejected the same data. Nevertheless, Commerce’s calculation of duties often stands as long as it can be reasonably explained. Even though Commerce’s determinations fall within the reasonable standard of the statute, they contravene the statute’s purpose, to calculate the values of the product and in turn the final duty, as accurately as possible. Should the CIT review standard be stricter, Commerce would need to more thoroughly explain its findings and the data used for its calculation beyond a reasonable standard. Such a heightened standard for “best available information” would ensure process adherence and maintain credibility with foreign countries in the U.S. antidumping law. In addition, a clearly delineated statute as to the specific factors that make supplied information unreliable and permit Commerce to use other

303. Fair or Foul, supra note 23, at 2.
304. Id. at 95.
305. The Halo Effect, supra note 236, at 9, 11.
available data would guide companies in their business planning and maintain the goal of the statute.

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