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## ***Antidumping Law: Issues and Applications in High Technology Industries***

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Pursuant to the US antidumping laws,<sup>1</sup> US producers in high technology industries can petition the US government for relief from injurious sales of foreign products that are dumped in the United States at less than fair value. Two federal government agencies: (1) the International Trade Commission (ITC) and (2) the Department of Commerce (Commerce) are involved in two separate, but related, proceedings

to determine whether US producers are entitled to such relief. The ITC defines the “domestic like product” and the “industry” affected by the less than fair value sales and determines whether there is material injury or a threat of material injury to an industry in the United States by reason of such sales. Meanwhile, Commerce determines whether there are, in fact, sales of the foreign product at less than fair value, and if so, the extent of dumping. In order to obtain relief, the ITC must determine that there is material injury (or a threat of material injury) to an industry in the United States, and Commerce must determine that there are sales of the foreign product at less than fair value. If the ITC determines that there is material injury (or a threat of material injury) to an industry in the United States, and Commerce determines that there are sales of the foreign product at less than fair value, then an antidumping duty order is imposed on the imported merchandise. The antidumping duties in the order are equal to the amount by which the price in the exporting country, known as the “normal value,” exceeds the price in the United States, known as the “export price,” for the merchandise.<sup>2,3</sup>

In the mid-1980s through the early 1990s, there was a surge of high technology antidumping cases as a number of US producers of high technology products filed petitions to obtain relief from foreign imports. For example, Micron Technology, Inc. (Micron) filed a petition to obtain relief from 64K Dynamic Random Access Memory (DRAM) Components from Japan<sup>4</sup> and from DRAMs of One Megabit and Above From the Republic of Korea;<sup>5</sup> Intel Corp., Advanced Micro Devices and National Semiconduc-

tor Corp. jointly filed a petition to obtain relief from Erasable Programmable Read Only Memories (EPROMs) from Japan;<sup>6</sup> Verbatim Corp. filed a petition to obtain relief from 3.5 Inch Microdisks and Media Thereof From Japan;<sup>7</sup> and the Advanced Display Manufacturers Association filed a petition to obtain relief from High-Information Content Flat Panel Displays and Subassemblies Thereof from Japan.<sup>8</sup>

However, in the past decade, there has been a precipitous decline in the number of high technology dumping cases. Only three antidumping petitions involving high technology products have been filed in the past decade,<sup>9</sup> and none have been filed in the past four years.<sup>10</sup> This decline can be traced, in large part, to the technology boom of the 1990s. As a result of the market upswing in the technology sector, and concomitant increases in profits, few high technology industries in the United States could demonstrate injury in the 1990s caused by foreign competition. Virtually no high technology industries had overcapacity, and few faced on-going price competition for their products. Rather, many high technology industries experienced shortages of supply to meet burgeoning demand. In addition, the decline in the number of high technology antidumping cases can be traced to the high value of the US dollar during the 1990s. As a general proposition, the higher the value of the US dollar, the lower the normal value, and accordingly, the more difficult it is to demonstrate sales at less than fair value.

However, the current economic environment is far different. The technology boom of the 1990s is long over, and many high technology industries in the United States are exhibiting all of the hallmarks of economic injury. Under such circumstances, the ITC may likely find material injury, or the threat thereof, by reason of imported products. In addition, the value of the dollar has been declining, further enhancing the likelihood that Commerce may determine that there are sales of imported products at less than fair value.

## **ITC's Domestic Like Product and Industry Determination, and the Material Injury Determination**

### **Domestic Like Product and Industry Determination**

Before the ITC examines whether there is material injury or a threat of material injury to an industry in the United States by reason of less than fair value sales, the ITC must first define the "industry." 19 U.S.C. § 1677(4)(A) defines "industry" to mean "the producers as a [w]hole of a domestic like product."

Hence, a prerequisite to defining the "industry" is to define the "domestic like product."

### **Domestic Like Product Determination**

19 U.S.C. § 1677(10) defines "domestic like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation." The decision regarding the appropriate domestic like product(s) in an antidumping investigation is a factual determination that is made on a case-by-case basis.<sup>11</sup> The ITC looks for clear dividing lines among possible like products and disregards minor variations.<sup>12</sup> Although in defining the appropriate domestic like product(s) no one single factor is dispositive, the ITC generally considers a number of factors including: (1) physical appearance, characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes and production employees; and, when appropriate, (6) price.<sup>13</sup> In addition, the ITC may consider other factors it deems relevant in making its like product determination.

In four of the high technology antidumping proceedings that the ITC decided in the past decade, the ITC defined the domestic like product broadly: (1) DRAMs of One Megabit and Above From the Republic of Korea (DRAMs from Korea), (2) Dynamic Random Access Memory Semiconductors of One Megabit and Above from Taiwan (DRAMs from Taiwan), (3) Static Random Access Memory Semiconductors from the Republic of Korea and Taiwan (SRAMs from Korea and Taiwan),<sup>14</sup> and (4) Flat Panel Displays from Japan.

#### ***DRAMs from Korea***

In 1993, in DRAMs from Korea, the ITC analyzed four like product issues: (1) whether assembled and unassembled DRAMs are separate like products; (2) whether DRAMs of different densities are separate like products; (3) whether video dynamic random access memory (VRAMs) are a separate like product; and (4) whether Single In-Line Processing Modules (SIPs) and Single In-Line Memory Modules (SIMMs) (two types of memory modules) are separate like products.<sup>15</sup> Upon analyzing these issues, the ITC determined that (1) assembled and unassembled DRAMs are a single domestic like product; (2) DRAMs of different densities are a single domestic like product; (3) VRAMs are part of the domestic like product; and (4) SIPs and SIMMs are part of the domestic like product.<sup>16</sup> Accordingly, the ITC defined the domestic like product broadly, concluding that there was one single domestic like product consisting of "all DRAMs," irrespective of density or whether assembled or not, and including VRAMs and memory modules.<sup>17</sup>

### ***DRAMs from Taiwan***

In 1999, six years after the ITC rendered its DRAMs from Korea final decision, in *DRAMs from Taiwan*, the ITC, again, analyzed four like product issues concerning DRAMs: (1) whether cased (*i.e.*, assembled) and uncased (*i.e.*, unassembled) DRAMs are part of a single domestic like product; (2) whether the domestic like product includes DRAMs assembled into memory modules; (3) whether the domestic like product includes all DRAMs regardless of density (*i.e.*, megabits of memory capacity); and (4) whether specialty DRAMs are part of the same domestic like product as commodity DRAMs.<sup>18</sup> Upon analyzing these issues, the ITC determined that (1) cased and uncased DRAMs are a part of a single domestic like product; (2) the domestic like product includes DRAMs assembled into memory modules; (3) the domestic like product includes all DRAMs regardless of density; and (4) specialty DRAMs are part of the same domestic like product as commodity DRAMs.<sup>19</sup> Therefore, as in the *DRAMs from Korea* case, the ITC defined the like product broadly, stating that there is “a single domestic like product consisting of all DRAMs, regardless of density, including cased or uncased DRAMs, DRAMs assembled into memory modules, and specialty DRAMs.”<sup>20</sup> The ITC explicitly noted that this decision “was consistent with” its determination in the *DRAMs from Korea* case.<sup>21</sup>

### ***SRAMs from Korea and Taiwan***

In *SRAMs from Korea and Taiwan*, the ITC analyzed whether there should be (1) a single domestic like product consisting of all unassembled SRAMs, assembled SRAMs, and SRAM memory modules, regardless of access speed, or (2) separate domestic like products consisting, respectively, of “fast” SRAMs, defined as SRAMs with access speeds of 44 nanoseconds (ns.) and faster, and “slow” SRAMs, defined as those with access speeds of 45 ns. and slower.<sup>22</sup> Because the ITC could not discern a clear dividing line between fast and slow SRAMs, the ITC defined the domestic like product broadly, finding the domestic like product to consist of all unassembled SRAMs, assembled SRAMs, and SRAM memory modules of all access speeds.<sup>23</sup>

### ***Flat Panel Displays from Japan***

In *Flat Panel Displays from Japan*, the ITC analyzed whether there should be (a) a single domestic like product consisting of all high-information content flat panel displays, or (b) four domestic like products consisting of the four principal technologies used in making high-information content flat panel displays: (1) passive matrix liquid crystal displays (LCD), in which liquid crystals act as optical shutters and allow the passage of light when a small voltage is applied; (2) active matrix LCDs, which is similar to, but far more complex, than the passive matrix form and which contains a transistor at each pixel; (3)

plasma displays, in which voltage causes pixels of a gas to emit light; and (4) electroluminescent (EL) displays, in which voltage causes pixels in a solid EL material to emit light.<sup>24</sup> Based on the similarities in basic physical characteristics and general end uses, common channels of distribution, and overlap in production methodologies, the ITC defined the domestic like product broadly, finding it to encompass all high-information content flat panel displays.<sup>25</sup> The ITC noted that the distinguishing characteristics among the different types of displays were likely to become more blurred with movement toward higher performance display technologies and consequent converging appearance and power requirements.<sup>26,27</sup>

In spite of the ITC’s decisions in *DRAMs from Korea*, *DRAMs from Taiwan*, *SRAMs from Korea and Taiwan*, and *Flat Panel Displays from Japan* to define the domestic like product broadly, the ITC has not always done so in recent high technology antidumping proceedings. For example, in *Vector Supercomputers from Japan*, the ITC took a narrow view of the domestic like product. The ITC analyzed whether there should be (1) a single domestic like product consisting of all supercomputers (vector, as well as non-vector, supercomputers, such as massively parallel processors, scalable parallel processors, and symmetric multiprocessors), or (2) whether the domestic like product should be limited to vector supercomputers.<sup>28</sup> Based on the differing physical characteristics and end uses between vector and non-vector supercomputers, the lack of (or limited) interchangeability between vector and non-vector supercomputers for many applications, and producer and customer perceptions of vector and non-vector supercomputers, the ITC found that there was, in fact, a clear dividing line between vector supercomputers and non-vector computers, and therefore, limited the domestic like product to include only vector supercomputers.<sup>29</sup>

In addition, in *DRAMs from Korea*, the ITC refused to take a position on whether future generation DRAMs—DRAMs which did not exist at the time (*e.g.*, DRAMs above 16 megabits)—should be part of the domestic like product.<sup>30</sup> Hence, although they were not officially excluded from the domestic like product, future generation DRAMs were not included in the domestic like product. The ITC stated that it simply did not know whether technological innovations would result in future generations of DRAMs being “like” the existing generations, and therefore, could not determine whether future generation DRAMs should be part of the domestic like product.<sup>31</sup> The ITC’s following reasoning is instructive as to how it considers possible future technological developments in its domestic like product determination (either as evolutionary or revolutionary), and reinforces the ITC’s consideration of the domestic like product issue in high technology antidumping cases on a case-by-case basis:

The Commission has not, in the past, “limited” its like product determination to currently existing products, nor has it expressly included future products. In most cases, it is entirely possible that there will be further product developments. The fact that it is well known that DRAM development is a continual process, and that it is expected that new, higher density DRAMs will, in all likelihood continue to be introduced every three to four years, does not in our view warrant treating the like product issue differently in this investigation than in other cases.

Because future generation DRAMs do not yet exist, information concerning the characteristics and uses of future generation DRAMs is, at best, theory and speculation. The Commission does not have, and obviously could not at any given time obtain, information sufficient to determine whether non-existent future generation DRAMs are or are not like DRAMs currently being produced and imported. Thus, we do not have a sufficient basis in fact either to exclude or include future generation DRAMs from the like product. It may be true that future generations of DRAMs will be “like” the existing generations. However, it may also be true that the technological obstacles to be overcome in the development of future generation volatile memory chips will require revolutionary developments of design and process technology. Such revolutionary change could result in a product which might or might not be “like” the articles subject to the scope of this investigation. We believe that a determination whether future developments in this technology will be evolutionary or revolutionary is inherently speculative if made at this time . . . .<sup>32</sup>

## The Industry Determination

After defining the “domestic like product,” the ITC then determines the relevant industry. “Industry” is defined in 19 U.S.C. § 1677(4) as “the producers as a [w]hole of a domestic like product.” Accordingly, the key to determining the “industry” is to identify the producers of the domestic like product. In considering whether a US firm qualifies as a producer, the ITC analyzes the overall nature of a firm’s production-related activities in the United States.<sup>33</sup> Specifically, the ITC considers six factors: (1) the extent and source of a firm’s capital investment; (2) the technical expertise involved in US production activity; (3) the value added to the product in the United States; (4) employment levels; (5) the quantities and types of parts sourced in the United States; and (6) any other

costs and activities in the United States directly leading to production of the like product, including when production decisions are made.<sup>34</sup> No single factor, including value added, is determinative, and the ITC may consider any other factors it finds relevant in light of the specific facts of an investigation.<sup>35</sup>

In some high technology antidumping proceedings, it is relatively straightforward for the ITC to determine who are the producers of the domestic like product, and therefore, the agency may easily define the industry. For example, in *Vector Supercomputers from Japan*, when the domestic like product included only vector supercomputers, the ITC found, without much discussion, that there was only one producer of the domestic like product—the petitioner, Cray Research, Inc.<sup>36</sup> Accordingly, in *Vector Supercomputers from Japan*, the industry in the United States was composed of only Cray Research, Inc.

In other high technology antidumping proceedings—when, for example, the nature of the production activities related to the domestic like product differs from company to company—identification of the producers of the domestic like product is subject to much debate. For example, *DRAMs from Taiwan* raised four issues concerning the production of the domestic like product: (1) whether fabrication of uncased DRAMs constitutes domestic production; (2) whether assembly of uncased DRAMs into cased DRAMs constitutes domestic production; (3) whether assembly of cased DRAMs into DRAM modules (module assembly) constitutes domestic production; and (4) whether the industry in the United States includes “fables” design houses.<sup>37</sup> The ITC held that fabrication of uncased DRAMs, and assembly of uncased DRAMs into cased DRAMs constituted domestic production, but, on the other hand, held that module assembly did not constitute domestic production.<sup>38</sup> The ITC also ruled that the industry in the United States did not include “fables” design houses.<sup>39</sup> Therefore, in *DRAMs from Taiwan*, the ITC held that the industry was composed of only those firms that either fabricated uncased DRAMs (*i.e.*, fabricators of DRAMs), and those that assembled uncased DRAMs into cased DRAMs (*i.e.*, assemblers of DRAMs) in the United States, as fabricators of DRAMs and assemblers of DRAMs were held to be the only *producers* of the domestic like product.<sup>40</sup>

## The Material Injury Determination

After the ITC determines the composition of the industry in the United States, it then determines whether that industry is materially injured, or threatened with material injury, by reason of the imports under investigation.

In making its material injury determination, the ITC must consider the volume of imports, the effect of the imports on prices in the United States for domestic like products, and the impact of the imports on domestic producers of the domestic like products,

but only in the context of US production operations.<sup>41</sup> “Material injury” is defined in 19 U.S.C. § 1677(7)(A) as “harm which is not inconsequential, immaterial or unimportant.” In assessing whether an industry in the United States is materially injured by reason of the imports under investigation, the ITC considers “all relevant economic factors” that impact the state of the industry in the United States.<sup>42</sup> Some of the factors that the ITC considers include “output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development.”<sup>43</sup> No single factor is dispositive, and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>44</sup> Although the ITC may consider causes of injury other than imports, “it is not to weigh the causes,” and “need not determine that imports are ‘the principal, a substantial, or a significant cause of material injury.’”<sup>45</sup> Rather, the standard for finding material injury is quite low, inasmuch as determining that imports are a cause of material injury is sufficient.<sup>46</sup> This means that all that the ITC needs to find is that the imports “contribute in a more than *de minimis* way to material injury.”<sup>47</sup>

In making its threat of material injury determination, the ITC analyzes whether “further dumped . . . imports are imminent and whether material injury by reason of imports would occur unless an order is issued.”<sup>48</sup> The ITC may not, however, make a threat of material injury determination “on the basis of mere conjecture or supposition,” and considers the threat factors “as a whole” in making its determination whether dumped imports are imminent and whether material injury by reason of imports would occur unless an order is issued.<sup>49</sup> In making its threat of material injury determination, the ITC considers, among other relevant economic factors, the following factors set forth in 19 U.S.C. § 1677(7)(F): (1) existing unused production capacity or imminent, substantial increase in production capacity in the exporting country; (2) a significant rate of increase of the volume or market penetration of imports of the product under investigation; (3) whether imports of the product under investigation are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports; (4) inventories of the product under investigation; (5) the potential for product-shifting if production facilities in the exporting country, which can be used to produce the product under investigation, are currently being used to produce other products; (6) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product; and (7) any other demonstrable adverse trends that indicate the proba-

bility that there is likely to be material injury by reason of imports (or sale for importation) of the product under investigation (whether or not it is actually being imported at the time). As with the relaxed standard for material injury, all that the ITC needs in order to find threat of material injury is that the imports “contribute in a more than *de minimis* way” to the threatened material injury to the domestic industry.<sup>50</sup>

The ITC has found material injury, or threat of material injury, in several of the high technology antidumping proceedings that it has decided in the past decade: (1) DRAMs from Korea, (2) Vector Supercomputers from Japan, and (3) Flat Panel Displays from Japan.

### ***DRAMs from Korea***

In DRAMs from Korea, the ITC determined that the industry in the United States producing DRAMs was materially injured by reason of the imports under investigation.<sup>51</sup> In making its determination, the ITC considered the volume of the imports from Korea, their effect on prices for the like domestic product, and their impact on domestic producer’s US production operations.<sup>52</sup>

The ITC found that the volume of subject imports, which was near zero before the period of investigation (POI), increased dramatically during the POI, and captured a substantial share of the US market by the end of the POI.<sup>53</sup> The ITC also found that the lower priced subject imports put downward pressure on domestic prices, and concluded that the price of subject imports had “a significant depressing effect on prices of the domestic product.”<sup>54</sup> Further, the ITC held that the subject imports had an injurious impact on both sales and operating results of the domestic industry and limited the domestic industry’s ability to develop new products.<sup>55</sup> For all these reasons, the ITC determined that the industry producing DRAMs was materially injured.

### ***Vector Supercomputers from Japan***

In Vector Supercomputers from Japan, the ITC determined that the industry in the United States producing the imports under investigation was threatened with material injury.<sup>56</sup> The ITC found that the significant increase in the volume of subject imports during the POI, coupled with the fact that there were many sales that were either canceled or postponed because of the antidumping proceeding, indicated “the imminent likelihood of substantially increased imports.”<sup>57</sup> The ITC determined that these increased imports “will enter at prices likely to depress or suppress domestic prices to a significant degree.”<sup>58</sup>

The ITC considered the causation issue carefully in this investigation. The ITC found no present material injury based on its determination that three economic conditions other than imports accounted for the harm experienced by the domestic industry dur-

ing the POI: (1) the post-Cold War decline in government purchases of supercomputers; (2) the conversion of certain applications from vector to non-vector systems; and (3) the major financial restructuring that the one firm comprising the industry in the United States (Cray Research, Inc.) undertook partly in response to these events.<sup>59</sup> However, when the ITC examined these economic conditions in the context of threat of material injury, the ITC found that the industry's weakened financial condition due to these three factors made the domestic industry vulnerable to material injury by reason of imports under investigation.<sup>60</sup> In this context, the ITC found that "imports themselves make more than a *de minimis* contribution to the threatened material injury to the domestic industry," and thus, determined that imports themselves threaten material injury to the vulnerable domestic industry producing vector supercomputers.<sup>61</sup>

### ***Flat Panel Displays from Japan***

In Flat Panel Displays From Japan, the ITC determined that the domestic industry that produces high-information content flat panel displays was materially injured by the cumulative imports of active-matrix and electroluminescent displays, the two kinds of displays on which Commerce imposed an antidumping order.<sup>62,63</sup> In making its determination, the ITC considered the volume of imports, their effect on prices for the like domestic product, their impact on domestic producers, as well as "the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product."<sup>64</sup>

The ITC noted that there was a significant increase in imports of the products under investigation, and that these imports gained market share rapidly during the POI.<sup>65</sup> The ITC also found that imports had an adverse effect on the prices of products sold by the domestic industry during the POI, depressing and suppressing domestic prices.<sup>66</sup> In terms of the impact of imports on the development and production efforts of the domestic industry, the ITC found that the domestic industry was unable to raise capital to due the presence of Japanese imports.<sup>67</sup> The ITC found that the lack of funds severely hampered research and development efforts, which were critical to the progress of the domestic industry.<sup>68</sup> The ITC opined that the inability to conduct research and development "[i]n this investigation involving a high-technology product" was "a particularly clear indication of material injury to the domestic industry."<sup>69</sup> Accordingly, the ITC determined that the industry producing active-matrix and electroluminescent flat panel displays was materially injured.<sup>70</sup>

In spite of the ITC's decisions in DRAMs from Korea, Vector Supercomputers from Japan, and Flat Panel Displays from Japan finding material injury or a threat of material injury, the ITC has not found material injury or a threat of material injury by reason of imports in

several other recent high technology antidumping proceedings. For example, in DRAMs from Taiwan, the ITC found no material injury, or threat of material injury, in light of the lack of significant volumes of imports and significant price effects, as well as in light of the improving trend in the domestic industry's financial condition.<sup>71</sup> The domestic industry experienced rising fabrication capacity, production, shipment quantities, and employment throughout the POI.<sup>72</sup> In addition, the fact that the domestic industry's research and development expenses rose during the POI, coupled with the fact that the domestic industry's capital expenditures also rose, were key to the ITC's determination that there was no material injury or threat thereof.<sup>73</sup>

Likewise, in SRAMs from Korea, the ITC found no material injury or threat of material injury by reason of imports.<sup>74</sup> The volume of imports was not significant.<sup>75</sup> In addition, the ITC did not find that imports suppressed or depressed prices for the domestic like product.<sup>76</sup> Further, although the domestic industry's operating margins declined, and although the domestic industry curtailed capital expenditures as well as research and development expenditures, the ITC found "no basis to conclude that these difficulties were by reason of the subject imports."<sup>77</sup>

Moreover, in SRAMs from Taiwan, the ITC also found no material injury or threat of material injury by reason of imports.<sup>78</sup> The parties to this investigation did not dispute that the SRAM industry in the United States experienced material injury.<sup>79</sup> The issue was whether imports were a cause of the material injury. The ITC determined that imports were not a cause of the material injury. Instead, the ITC found significantly greater supply relative to demand "learning curve" effects,<sup>80</sup> and that the dominant presence of imports not subject to the antidumping investigation caused material injury to the SRAM industry in the United States.<sup>81</sup>

## **Department of Commerce's Less Than Fair Value Determination**

### **Overview of the Less Than Fair Value Determination**

To make its less than fair value determination, Commerce compares the US price, known as the export price (EP)<sup>82</sup> or constructed export price (CEP),<sup>83</sup> to the normal value (NV), which is either the price in the exporting country,<sup>84</sup> third country price, or constructed value of the imported merchandise.<sup>85,86</sup> The dumping margin is defined as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise."<sup>87</sup>

When Commerce makes its less than fair value determination and determines the dumping margin,

it occasionally excludes certain products from the scope of its investigation. For example, in Flat Panel Displays from Japan, Commerce excluded the following products from the scope of the investigation: (1) passive-matrix liquid crystal high information content flat panel displays and display glass therefore; (2) segmented flat panel displays; (3) matrix addressed flat panel displays with less than 120,000 pixels; and (4) cathode ray tubes.<sup>88</sup> Likewise, in SRAMs from Korea, Commerce excluded SRAMs that were physically integrated with other components of a motherboard in such a manner as to constitute one inseparable amalgam (*i.e.*, SRAMs soldered onto motherboards) from the scope of the investigation.<sup>89</sup> In deciding whether to exclude certain products from the scope of the investigation, Commerce relies on the following factors: (1) the physical characteristics of the products; (2) the expectations of the ultimate purchasers; (3) the ultimate use of the products; (4) the channels of trade in which the products are sold; and (5) the manner in which the products are advertised or displayed.<sup>90</sup>

Also, in making its less than fair value determination, and determining the dumping margin, Commerce excludes “merchandise” that is imported “by, or for the use of, a department or agency of the US Government,” if (1) the merchandise has “no substantial nonmilitary use,” or if (2) the merchandise comes from a country with which the Department of Defense had a Memorandum of Understanding in effect on January 1, 1988, and has continued to have a comparable agreement (including renewals) or superceding agreements.<sup>91,92</sup> To date, no high technology merchandise has been excluded pursuant to this government importation exemption. However, other merchandise has been excluded pursuant to this exemption,<sup>93</sup> and the issue of this antidumping duty waiver has incurred the opposition of the US Customs & Border Protection, Commerce, politicians, and US manufacturers, alike. It is, therefore, reasonable to expect some disagreement as to the interpretation of the requirement that the merchandise be imported “by, or for the use of,” a department or agency of the US government. Notably, whether the word “merchandise” requires that the imported product must be the actual end-item being sold to the Department of Defense or whether the phrase “for the use of” requires that the actual imported product must be for the use of a department or agency of the US government has not yet been scrutinized.

### **Issues That Arise When Commerce Uses Constructed Value to Determine Normal Value**

If neither the exporting country’s market nor any third country market are suitable for calculating the normal value, or if all of the foreign sales are found to

be at prices that are less than the cost of production, then Commerce uses constructed value (CV) to determine normal value.<sup>94</sup> The use of CV to determine normal value in high technology antidumping proceedings principally raises issues such as: (1) the treatment of research and development (R&D) costs; (2) startup cost adjustments; and (3) the treatment of royalty expenses.

### **Treatment of Research and Development Costs**

Two issues arise concerning the treatment of R&D costs: (1) whether R&D costs should be recognized in the year incurred, or whether such costs should be amortized and deferred, and not recognized until revenue is realized from the projects for which the R&D is being spent; and (2) whether R&D costs should be allocated on a product-specific basis, or whether such costs should be allocated across all the products that they benefit.

In terms of whether R&D costs should be recognized in the year incurred, or whether such costs should be amortized and deferred, and not recognized until revenue is realized from the projects for which the R&D being spent, Commerce requires that a respondent recognize R&D costs in the year incurred.<sup>95</sup> Commerce does so in order to “reasonably and accurately reflect . . . [a] . . . company’s actual R&D costs for a given year.”<sup>96</sup> Commerce is concerned that were R&D costs to be amortized and deferred, they may never be recognized, as the projects for which the R&D is being spent may never come to fruition. As Commerce stated in DRAMs from Korea:

[T]here is no guarantee that . . . [R&D] . . . costs, if incurred to develop a new product or production process, would hold any future benefit to a company. To the contrary, after many months of costly research, a manufacturer could find its new product technologically useless due to the efforts of its competitors. In that case, the amounts incurred for R&D would not benefit the producer in terms of future product sales. Under these circumstances, the *R&D expenditures must be recognized as a [sic] expense in the year incurred* rather than amortized to some future periods.<sup>97</sup>

In addition, Commerce has determined that amortizing and deferring R&D costs is “contrary to the principle of conservatism in accounting where an expense is recognized when incurred if the probability of associated revenue is remote or uncertain,” and thus believes that amortizing and deferring R&D costs “does not reasonably reflect the cost of producing the subject merchandise.”<sup>98</sup>

In terms of whether R&D costs should be allocated on a product-specific basis, or whether such costs should be allocated across all the products that they benefit, Commerce requires that respondents allocate R&D costs across all the products which they benefit.<sup>99</sup> Commerce does so because it concludes that R&D conducted for one type of high technology product intrinsically benefits the development of other types of high technology products (*i.e.*, cross fertilization of scientific ideas occur),<sup>100</sup> and that merely allocating R&D costs on a product-specific basis does not reasonably reflect the costs associated with the production and sales of a high technology product.<sup>101</sup> For example, in SRAMs from Korea, Commerce stated:

[T]he benefits from the results of result of R&D, even if intended to advance the design or manufacture of a specific product, provide an intrinsic benefit to other semiconductor products. It is impossible to measure the extent to which R&D benefits one semiconductor product relative to another. Thus, identification of specific R&D costs with any one product causes overstating or understating of these costs in relation to the benefits that product derived from the total R&D expenditures for semiconductors.<sup>102</sup>

Commerce allocates R&D across all the products that the R&D benefits, even if a respondent, in its normal accounting records, categorizes R&D costs by product. According to Commerce, "accounting records do not address the critical issue of whether R&D in one area benefits another area."<sup>103</sup> Therefore, Commerce does not accept the proposition that the R&D costs set forth in such accounting records reasonably reflect the appropriate cost of producing any given product.<sup>104</sup>

### Adjustments for Startup Costs

When Commerce makes a startup cost adjustment, it replaces the unit production costs incurred *during* the startup period with the unit production costs incurred at the end of the startup period.<sup>105</sup> If the startup period extends beyond the POI, then Commerce uses "the most recent cost of production data that it reasonably can obtain, analyze, and verify without delaying the timely completion of the investigation."<sup>106</sup>

Commerce, pursuant to 19 U.S.C. § 1677b(1)(C)(ii), makes a startup cost adjustment only when, during the POI:

(I) a producer is using new production facilities or producing a new product that requires substantial additional investment, and

(II) production levels are limited by technical factors associated with the initial phase of commercial production.<sup>107,108</sup>

In determining why commercial production levels have been limited, Commerce considers factors unrelated to startup operations that might affect the volume of production processed.<sup>109</sup> These factors include demand, seasonality, and/or business cycles.<sup>110</sup> For Commerce to make a startup cost adjustment, commercial production levels must be limited by technical factors, and not by these other factors unrelated to startup operations.

In SRAMs from Taiwan, Commerce made a startup cost adjustment for respondent UMC.<sup>111</sup> Commerce first determined that UMC was using a new production facility.<sup>112</sup> Then, Commerce determined that a number of technical factors associated with the initial phase of commercial production limited production levels.<sup>113</sup> Such factors included the development of process parameters, cleaning of the fabrication facility, and installation, adjustment, calibration, and testing of new equipment.<sup>114</sup> Commerce rejected the petitioner's argument that the absence of customer demand may have contributed to the low production levels.<sup>115</sup>

In making the startup cost adjustment in SRAMs from Taiwan, Commerce replaced UMC's unit production costs incurred during the startup period with UMC's unit production costs incurred at the end of the start up period.<sup>116</sup> This resulted in Commerce excluding some costs that were incurred during the startup period from the actual cost calculation.<sup>117</sup> Commerce amortized over the useful life of the machinery (subsequent to the startup phase) the difference between the actual costs incurred and the costs calculated for purposes of the startup adjustment.<sup>118</sup> Commerce also capitalized certain pre-production costs that were incurred before the new production facility began production.<sup>119</sup>

In *DRAMs from Taiwan*, however, Commerce declined to make a startup cost adjustment for respondent MVI.<sup>120</sup> Although Commerce determined that MVI was using a new production facility, Commerce did not find that production levels were limited by technical factors associated with the initial phase of commercial production during the POI.<sup>121</sup> Instead, Commerce determined that any technical factors that may have limited production levels ceased to be an issue, as commercial levels of production were reached prior to the start of the POI, and as such, the startup period ended by the beginning of the POI.<sup>122,123</sup> Moreover, Commerce stated that even if production levels were limited during the POI, MVI failed to provide Commerce with sufficient evidence of technical factors that may have limited production levels.<sup>124</sup>

## Treatment of Royalty Expenses

The issue involving royalty expenses is whether such expenses should be treated as direct selling expenses, or whether such expenses should be treated as a cost of manufacturing. The manner in which royalty expenses are categorized in high technology antidumping proceedings is critical. Due to adjustments that could be made to both constructed value and/or export price for direct selling expenses,<sup>125</sup> treating royalty expenses as direct selling expenses could result in a higher dumping margin.<sup>126</sup>

Commerce has resolved this issue by treating royalty expenses as a cost of manufacturing, even in circumstances when royalty expenses were based on sales revenue. Commerce's basis for doing so is that royalty expenses are not a cost of selling, but rather a payment made for production technology, and as such, more properly treated as a cost of manufacturing.<sup>127</sup> For example, in DRAMs from Korea, Commerce treated royalty expenses as a cost of manufacturing, stating, "it has been the Department of Commerce's longstanding practice to treat royalty payments for production technology as [a] cost of manufacturing, even in circumstances where royalty payments were based on sales revenue."<sup>128</sup> The CIT

affirmed Commerce's treatment of royalty expenses as a cost of manufacturing, stating, "The Court [of International Trade] finds . . . [Commerce's] established practice reasonable, as it is based on sound logic: quite simply, a payment made for production technology more properly corresponds to the cost of manufacturing certain merchandise, than to expenses associated with the sale of the merchandise."<sup>129</sup>

Likewise, in both DRAMs from Taiwan, and SRAMs from Taiwan, Commerce also treated royalty expenses as a cost of manufacturing, rather than as direct selling expenses.<sup>130</sup>

## Conclusion

It is evident from the foregoing discussion that the US antidumping laws have been seriously underutilized by high technology industries, especially given present business conditions, and the demonstrated efficacy of relief in past antidumping proceedings. That being the case, US producers of high technology products should be expected to carefully consider using the antidumping laws to obtain relief from imports of competing goods.

1. 19 U.S.C. §§ 1673 *et seq.*
2. Both the ITC and Department's decisions can be appealed to the US Court of International Trade (CIT), or, in cases involving Canada and/or Mexico, to a North American Free Trade Agreement (NAFTA) panel. CIT decisions can, in turn, be appealed to the US Court of Appeals for the Federal Circuit. NAFTA Panel decisions, however, cannot be appealed to the Federal Circuit.
3. Five years after an antidumping duty order is imposed, the ITC and Commerce both conduct a so-called sunset review. *See* 19 U.S.C. § 1675(c). The ITC determines whether revoking the order would likely lead to a continuation or recurrence of material injury, and Commerce determines whether revoking the order would be likely to lead to continuation or recurrence of dumping, at if so, at what margin. If the ITC determines that revoking the order would likely not lead to a continuation or recurrence of material injury, or if Commerce determines that revoking the order would likely not lead to a continuation or recurrence of dumping, then the order will be revoked.
4. *See* 50 Fed. Reg. 27498 (July 3, 1985).
5. *See* 57 Fed. Reg. 18163 (April 29, 1992).
6. *See* 50 Fed. Reg. 41230 (October 9, 1985).
7. *See* 53 Fed. Reg. 7581 (March 9, 1988).
8. *See* 55 Fed. Reg. 30042 (July 24, 1990).
9. The three petitions filed in the last decade involving high technology products are as follows: (1) On July 29, 1996, Cray Research, Inc. filed a petition to obtain relief from Vector Supercomputers From Japan, 61 Fed. Reg. 41181 (August 7, 1996); (2) On February 25, 1997, Micron filed a petition to obtain relief from Static Random Access Memory Semiconductors From the Republic of Korea and Taiwan, 62 Fed. Reg. 10073 (March 5, 1997); and (3) On October 22, 1998, Micron filed a petition to obtain relief from DRAMs of One Megabit and Above From Taiwan, 63 Fed. Reg. 5806 (October 29, 1998). Segments of other cases that were filed in the 1980s and early 1990s, however, have been decided in the past decade.
10. Today, the vast majority of antidumping proceedings involve either (a) steel and metal products, (b) agricultural products, or (c) basic chemical products.
11. *See, e.g.,* NEC Corp. v. Department of Commerce, 36 F. Supp. 2d 380, 383 (Ct. Int'l Trade 1998).
12. *Id.*
13. *Id.*
14. In response to a petition filed by Micron, alleging that an industry in the United States is materially injured and threatened with material injury by reason of less than fair value imports of SRAMs from Korea and Taiwan, the ITC instituted a single investigation covering both imports

- from Korea and Taiwan. *See* SRAMs from Korea and Taiwan, Inv. No. 731-TA-761-762 (Preliminary), USITC Pub. 3036 (April 1997) at 2.
15. *See* DRAMs from Korea, Inv. No. 731-TA-556 (Final), USITC Pub. 2629 (May 1993) at 6-12.
16. *Id.*
17. *Id.* at 12.
18. *See* DRAMs from Taiwan, Inv. 731-TA-811 (Preliminary), USITC Pub. 3149 (December 1998) at 5-7; DRAMs from Taiwan, Inv. No. 731-TA-811 (Final), USITC Pub. 3256 (December 1999) at 6.
19. *See* DRAMs from Taiwan, Inv. 731-TA-811 (Preliminary), USITC Pub. 3149 (December 1998) at 5-7.
20. *See* DRAMs from Taiwan, Inv. No. 731-TA-811 (Final), USITC Pub. 3256 (December 1999) at 6.
21. *Id.* at 6 n.18.
22. SRAMs from the Republic of Korea and Taiwan, Inv. 731-TA-761-762 (Final), USITC Pub. 3098 (April 1998) at 5.
23. *Id.* at 8, 8 n.55.
24. *See* High-Information Content Flat Panel Displays And Subassemblies Thereof From Japan, Inv. No. 731-TA-469 (Preliminary), USITC Pub. 2311 (September 1990) at 5.
25. Certain High-Information Content Flat Panel Displays And Display Glass Therefor From Japan, Inv. No. 731-TA-469 (Final), USITC Pub. 2413 (August 1991) at 3-14.
26. *Id.*
27. The ITC's final determination was appealed to the CIT. The CIT remanded the ITC's like product determination. *See* Hosiden Corp. v. United States, 810 F. Supp. 322, 324 (Ct. Int'l Trade 1992). On remand, three of the six ITC Commissioners found there to be a single domestic like product consisting of all high-information content displays. Certain High-Information Content Flat Panel Displays and Display Glass Thereof from Japan, 731-TA-469 (Views on Remand), USITC Pub. 2610 (March 1993) at I-12. The other three Commissioners found active-matrix LCDs and EL displays to be separate like products. *Id.* at II-4-II-9. The US Court of Appeals for the Federal Circuit later reversed the remand of the original ITC determination, and reinstated the ITC's original finding of a single domestic like product consisting of all high-information content displays. *See* Hosiden Corp. v. Advanced Display Mfrs. of Am., 85 F.3d 1561, 1569-1570 (Fed. Cir. 1996). In 2000, the antidumping order on flat panel displays underwent a sunset review. In the sunset review, the ITC continued to uphold its original finding of a single domestic like product consisting of all high-information content displays. *See* Electroluminescent Flat Panel Displays From Japan, 731-TA-469 (Sunset Review), USITC Pub. 3285 (March 2000) at 20 ("No information gathered in this review indicates that we should depart

- from the Commission's previous like product definition of all HIC FPDs [high-information content flat panel displays] . . . . Accordingly, we find, as in the original investigation, a single like product consisting of all high-information content flat panel displays." )
28. See Vector Supercomputers from Japan, 731-TA-750 (Final), USITC Pub. 3062 (October 1997) at 4.
  29. *Id.* at 4–12. The CIT affirmed the ITC's domestic like product decision. See *NEC Corp. v. Department of Commerce*, 36 F. Supp. 2d 380, 390 (Ct. Int'l Trade 1998).
  30. DRAMs from Korea, 731-TA-556 (Final), USITC Pub. 2629 (May 1993) at 10.
  31. *Id.* at 11.
  32. *Id.*
  33. Certain High-Information Content Flat Panel Displays And Display Glass Therefor From Japan, Inv. No. 731-TA-469 (Final), USITC Pub. 2413 (August 1991) at 15.
  34. *Id.* at 15–16, n.48.
  35. *Id.* at 15–16.
  36. See Vector Supercomputers from Japan, Inv. No. 731-TA-750 (Final), USITC Pub. 3062 at 12, 12 n.62; Vector Supercomputers from Japan, Inv. No. 731-TA-750 (Preliminary), USITC Pub. 2993 at 8–9.
  37. See DRAMs from Taiwan, Inv. No. 731-TA-811 (Preliminary), USITC Pub. 3149 (December 1998) at 7–10.
  38. See DRAMs from Taiwan, Inv. No. 731-TA-811 (Final), USITC Pub. 3256 (December 1999) at 6–12.
  39. *Id.*
  40. *Id.*
  41. See 19 U.S.C. § 1677(B)(i). The ITC "may consider such other economic factors as are relevant to the determination" but shall "identify each [such] factor . . . and explain in full its relevance to the determination." 19 U.S.C. § 1677(7)(B).
  42. See 19 U.S.C. § 1677(7)(C)(iii).
  43. See SRAMs from Korea and Taiwan, 731-TA-761-762 (Final), USITC Pub. 3098 (April 1998) at 16.
  44. 19 U.S.C. § 1677(7)(C)(iii).
  45. See DRAMs from Korea, Inv. No. 731-TA-556 (Remand), USITC Pub. 2997 (October 1996) at 3, 3 n.26 (quoting S. Rep. No. 249 at 57, 74).
  46. *Id.* at 2 n.26. In contrast, in "safeguard" investigations, under 19 U.S.C. § 2252 *et seq.*, the standards of finding injury are much higher. That statute requires that the ITC determine that imports are a "substantial cause" (important and not less than any other cause) of the serious injury or threat of serious injury.
  47. See Vector Supercomputers from Japan, Inv. No. 731-TA-750 (Remand), USITC Pub. 3166 (May 1999) at 5–6.
  48. See 19 U.S.C. § 1677(7)(F)(ii).
  49. *Id.*
  50. See Vector Supercomputers from Japan, Inv. No. 731-TA-750 (Remand), USITC Pub. 3166 (May 1999) at 5–6.
  51. See DRAMs from Korea, Inv. No. 731-TA-556 (Remand), USITC Pub. 2997 (October 1996) at 8, *aff'd*, Hyundai Elec. Indus. Co., Ltd. v. United States, 1997 WL 250496, at \*2–3 (Ct. Int'l Trade May 2, 1997).
  52. See DRAMs from Korea, Inv. No. 731-TA-556 (Remand), USITC Pub. 2997 (October 1996) at 3–8.
  53. *Id.* at 3–4.
  54. *Id.* at 5–6.
  55. *Id.* at 6–8.
  56. See Vector Supercomputers from Japan, Inv. No. 731-TA-750 (Remand), USITC Pub. 3166 (May 1999) at 1, *aff'd*, *NEC Corp. v. Department of Commerce*, 83 F. Supp. 2d 1339 (Ct. Int'l Trade 1999).
  57. See Vector Supercomputers from Japan, Inv. No. 731-TA-750 (Remand), USITC Pub. 3166 (May 1999) at 7.
  58. *Id.*
  59. *Id.*
  60. *Id.* at 11.
  61. *Id.* at 12–13.
  62. See Certain High-Information Content Flat Panel Displays And Display Glass Therefor From Japan, Inv. No. 731-TA-469 (Final), USITC Pub. 2413 (August 1991) at 1–2. Commerce did not impose an antidumping duty order on glass plasma displays, because Commerce determined that they were not sold at less than fair value. See High Information Content Flat Panel Displays and Display Glass Therefor From Japan; Final Determination; Rescission of Investigation and Partial Dismissal of Petition, 56 Fed. Reg. 32376, 32376 (July 16, 1991). Likewise, Commerce did not impose an antidumping duty order on passive-matrix LCD flat panel displays, as Commerce determined that the petitioners did not produce passive-matrix LCD flat panel displays, and thus, did not have standing to file a case involving passive-matrix LCD flat panel displays. *Id.*
  63. Whether the ITC could, as a matter of law, cumulate the effects of active-matrix and electroluminescent displays in making its material injury determination was the source of much debate. Although the CIT held that the ITC could not do so, and thus, had to conduct a separate material injury analysis for each of these types of displays (see *Hosiden Corp. v. United States*, 810 F. Supp. 322, 331 (Ct. Int'l Trade 1992)), the US Court of Appeals for the Federal Circuit later vacated the CIT decision, and held that the ITC reasonably interpreted and applied the law in cumulating the effects of active-matrix and electroluminescent displays in making its material injury determination. *Hosiden Corp. v. Advanced Display Mfrs. of Am.*, 85 F.3d 1561, 1569–1570 (Fed. Cir. 1996).
  64. See Certain High-Information Content Flat Panel Displays And Display Glass Therefor From Japan, Inv. No. 731-TA-469 (Final), USITC Pub. 2413 (August 1991) at 22–23.
  65. *Id.* at 23.
  66. *Id.* at 24.
  67. *Id.* at 26.
  68. *Id.*
  69. *Id.* at 22.
  70. In June 1993, the sole domestic producer of active-matrix flat panel displays issued a statement of that it was no longer interested in the antidumping order on flat-panel displays, and as such, the antidumping order on active-matrix flat panel displays was retroactively revoked. See Active Matrix Liquid Crystal High Information Content Flat Panel Displays and Display Glass Therefor From Japan: Final Results of Changed Circumstances Administrative Review, Revocation of the Order and Termination of Administrative Review, 58 Fed. Reg. 34409 (June 25, 1993). Therefore, the antidumping order only applied to electroluminescent flat panel displays. In the year 2000 sunset review (see *supra* n.27), the ITC determined that revocation of the antidumping order covering electroluminescent flat panel displays would be likely to lead to continuation or recurrence of material injury, and thus, kept the order in place. See Electroluminescent Flat Panel Displays From Japan, 731-TA-469 (Sunset Review), USITC Pub. 3285 (March 2000) at 1.
  71. See DRAMs from Taiwan, Inv. No. 731-TA-811 (Final), USITC Pub. 3256 (December 1999) at 29.
  72. *Id.* at 27.
  73. *Id.* at 27, n.146.
  74. See SRAMs from Korea and Taiwan, Inv. Nos. 731-TA-761-762 (Final), USITC Pub. 3098 (April 1998) at 1.
  75. *Id.* at 19.
  76. *Id.* at 20.
  77. *Id.*
  78. See SRAMs from Taiwan, Inv. No. 731-TA-762 (Second Remand), USITC Pub. 3319 (June 2000) at 1, *aff'd*, Taiwan Semiconductor Industry Assoc. v. United States, 118 F. Supp. 2d 1250 (Ct. Int'l Trade 2000), *aff'd*, Taiwan Semiconductor Industry Assoc. v. International Trade Comm'n, 266 F.3d 1339 (Fed. Cir. 2001).
  79. See Taiwan Semiconductor Industry Assoc. v. International Trade Comm'n, 266 F.3d 1339, 1342 (Fed. Cir. 2001).
  80. The ITC explained that there was a "learning curve" for each generation or type of SRAM, under which the cost of manufacture and prices for particular SRAM products normally fall over time as producers increase production yields and reduce defects. This price drop is normally steep when a product is first introduced to the market, and then becomes more gradual over time. The "learning curve" normally exerts downward pressure on SRAM prices." SRAMs from Taiwan, Inv. No. 731-TA-762 (Second Remand), USITC Pub. 3319 (June 2000) at 7.
  81. *Id.* at 7, n.21.
  82. "Export Price" is defined in 19 U.S.C. § 1677a(a) as "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States."
  83. "Constructed export price" is defined in 19 U.S.C. § 1677a(b) as "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter." Commerce uses CEP when there is an affiliation between exporter and importer; Otherwise, Commerce uses EP in determining if there are less than fair value sales.
  84. When Commerce bases the normal value on the price in the exporting country, it only considers sales made "in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). "Ordinary course of trade" is defined in 19 U.S.C. § 1677(15) as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind."
  85. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 Fed. Reg. 8909, 8911 (February 23, 1998) ("To determine whether sales of SRAMs from Taiwan to the United States were made at less than fair value, we compared the EP or CEP, as appropriate, to the Normal Value (NV).")

86. The normal value is based on the prices at which the foreign like product is first sold for consumption in the exporting country. 19 U.S.C. § 1677b(a)(1)(B)(i). However, if the exporting country's market is not "viable," *i.e.*, not sufficiently large or it is otherwise unusable as a comparison market, then normal value is based on either (a) the prices at which the foreign like product is first sold in a third country, or (b) constructed value using cost data (rather than price data).
87. See 19 U.S.C. § 1677(35).
88. See High Information Content Flat Panel Displays and Display Glass Therefor From Japan: Final Determination; Rescission of Investigation and Partial Dismissal of Petition, 56 Fed. Reg. 32376, 32377 (July 16, 1991).
89. See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From the Republic of Korea, 63 Fed. Reg. 8934, 8934 (February 23, 1998).
90. See 19 C.F.R. § 351.225(k)(2).
91. See 19 U.S.C. § 1677(20).
92. A Memorandum of Understanding is a bilateral agreement between the US Department of Defense and the Ministry of Defense of an allied or friendly country which calls for the waiver of "buy national" restrictions, customs, and duties in order to allow the contractors of the signatories to participate, on a competitive basis, in the defense procurements of the other country.
93. For example, in Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Review, 63 Fed. Reg. 33320, 33347 (June 18, 1998), certain antifriction bearings imported by the US Government from the United Kingdom were excluded from Commerce's less than fair value determination.
94. As set forth in 19 U.S.C. § 1677b(e), Commerce determines CV by adding: (1) the cost of manufacturing; (2) the amount for selling, general, administrative expenses (SG&A expenses), and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under investigation; and (3) the cost of packing for shipment to the United States. However, CV determined under this statutory provision, may be adjusted, as appropriate, see 19 U.S.C. § 1677b(a)(8), and due to circumstances surrounding the sale, see 19 U.S.C. § 1677b(6)(c)(iii).
95. See, *e.g.*, Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Order in Part, 64 Fed. Reg. 69694, 69700 (December 14, 1999) (requiring that respondents recognize R&D expenses currently); Notice of Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above (DRAMs) from Taiwan, 64 Fed. Reg. 56308, 56319 (October 19, 1999) (stating "R&D costs should be expensed as incurred).
96. See Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 66 Fed. Reg. 52097 (October 12, 2001).
97. See Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Order in Part, 64 Fed. Reg. 69694, 69700 (December 14, 1999) (emphasis added) (*quoting* Antidumping Duties; Countervailing Duties; Notice of Proposed Rule Making and Request for Public Comments, 61 Fed. Reg. 7308, 7342 (February 27, 1996)).
98. See Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Order in Part, 64 Fed. Reg. 69694, 69699 (December 14, 1999).
99. See, *e.g.*, Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 65 Fed. Reg. 68976 (November 15, 2000); Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From the Republic of Korea, 63 Fed. Reg. 8934 (February 23, 1998).
100. See, *e.g.*, Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 20216 (May 6, 1996) (noting the existence of cross fertilization of R&D in the DRAM industry).
101. See, *e.g.*, Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From the Republic of Korea, 63 Fed. Reg. 8934, 8940 (February 23, 1998) (determining that allocating R&D costs for SRAMs on a product-specific basis does not reasonably reflect the costs associated with the production and sale of SRAMs).
102. See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From the Republic of Korea, 63 Fed. Reg. 8934, 8939 (February 23, 1998) (*quoting* Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea, 58 Fed. Reg. 15470, 15472 (March 23, 1993)).
103. See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From the Republic of Korea, 63 Fed. Reg. 8934, 89340 (February 23, 1998).
104. *Id.*
105. 19 U.S.C. § 1677b(f)(1)(C)(iii). This statutory provision defines the end of the startup period to be "the point at which the level of commercial production that is characteristic of the merchandise, producer, or industry concerned is achieved." Notably, "the attainment of peak production levels" is not the standard for identifying the end of the start up period, because the startup period may end before a company achieves optimum capacity utilization. See Notice of Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above (DRAMs) From Taiwan, 64 Fed. Reg. 56308, 56322 (October 19, 1999) (*quoting* Statement of Administrative Action at 836)).
106. *Id.*
107. The initial phase of commercial production ends at the end of the startup period. 19 U.S.C. § 1677b(f)(1)(C)(ii).
108. Production levels are measured based on units processed. See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan, 63 Fed. Reg. 8909, 8930 (February 23, 1998).
109. 19 U.S.C. § 1677b(f)(1)(C)(ii).
110. *Id.*
111. See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan, 63 Fed. Reg. 8909, 8930 (February 23, 1998).
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Static Random Access Memory Semiconductors From Taiwan, 62 Fed. Reg. 51442, 51448 (October 1, 1997).
117. *Id.*
118. *Id.*
119. *Id.* Commerce amortized these pre-production costs, beginning with the first month in which production took place, over the useful life of the machinery.
120. See Notice of Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above (DRAMs) From Taiwan, 64 Fed. Reg. 56308, 56321-56323 (October 19, 1999).
121. *Id.* at 56322.
122. *Id.*
123. Pursuant to 19 U.S.C. § 1677b(f)(1)(C)(iii), the end of the startup period is "the point at which the level of commercial production that is characteristic of the merchandise, producer, or industry concerned is achieved." See *supra* n.105.
124. *Id.* at 56323.
125. These adjustments could be made pursuant to 19 U.S.C. § 1677b(6)(C)(iii) (circumstance of sale adjustment) and 19 U.S.C. § 1677b(8).
126. See *Micron Technology, Inc. v. United States*, 44 F.Supp. 2d 216 (Ct. Int'l Trade 1999) (petitioner Micron appealed Department's decision on royalty expenses to the CIT, advocating that royalty expenses be treated as direct selling expenses in order to obtain a higher dumping margin).
127. See, *e.g.*, Final Determination of Sales at Less Than Fair Value: Extruded Rubber Thread From Malaysia, 57 Fed. Reg. 38465, 38469-70 (August 25, 1992) ("Although the royalty is calculated based on sales revenue, these payments are not a cost of selling. Instead, the royalty is a payment for production technology and, hence, is properly treated as a cost of manufacturing.")
128. Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 20216, 20218 (May 6, 1996).
129. *Micron Tech., Inc. v. United States*, 44 F.Supp. 2d 216, 222 (Ct. Int'l Trade 1999).
130. See Notice of Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above ("DRAMs") From Taiwan, 64 Fed. Reg. 56308, 56311, 56312 (October 1999); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Static Random Access Memory Semiconductors from Taiwan, 62 Fed. Reg. 51442, 51448 (October 1, 1997), *aff'd*, Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan, 63 Fed. Reg. 8909, 8933 (February 23, 1998).

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