Hidden Agenda: The Expansion of Product Scope in International Trade Proceedings

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I. INTRODUCTION

In the current "Free Trade" versus "Fair Trade" debate in the United States, one of the few areas of common agreement is that penalty import duties should be assessed where foreign merchandise is being sold at unfair prices and is injuring U.S. industries. The two basic types of trade practices generally considered to result in such unfair pricing and injury are: (1) the "dumping" of foreign goods in the market at prices below fair value (i.e., below home market prices or below cost), and (2) the foreign subsidizing of exported goods to permit low-price sales in the U.S. market. The applicable U.S. trade laws provide for the Secretary of Commerce to order the Customs Service to impose "antidumping duties" or "countervailing duties" (to offset subsidies) against imports of foreign merchandise found to be unfairly sold and causing injury to a U.S. industry.

Because dumping and subsidies are uniformly considered to be improper, the U.S. antidumping and countervail laws trigger automatic trade sanctions (duties) if the necessary factual elements are found. Unlike other U.S. trade laws, implementation and enforcement do not depend upon discretionary policy decisions by the Administration. The legal standards and procedures established in the U.S. antidumping and countervail laws follow basically the Antidumping Code and the Subsidies Code of the General Agreement on Tariffs and Trade (the
These standards and procedures are designed to assure that only foreign merchandise that is being sold unfairly and is causing injury will be subject to antidumping and countervailing duty orders. They provide that a proceeding and any resulting order will be limited to a particular "class of merchandise" from a particular country, in recognition of the fact that, where substantial dumping or subsidies are found, the required resulting duties can severely diminish the ability to sell that merchandise in the U.S.

In enforcing the U.S. antidumping duty and countervailing duty laws, the Commerce Department is often called upon to rule whether related products in unfinished or modified forms should be included among the class of merchandise covered. The Commerce Department is forced in such instances to rule how far the "class of merchandise" extends. An increased need for these "product scope" rulings has resulted from increased sophistication by foreign producers in modifying their export products to avoid U.S. import duty sanctions.

Part II of this Article examines current legal standards. It concludes that U.S. product scope rulings are nominally made pursuant to a set of objective legal/factual standards, but that because of the breadth of these standards, the Commerce Department has considerable discretion in making such decisions. Part III examines recent Commerce Department product scope rulings, which highlights a policy goal of prevention of evasion by foreign suppliers. The Department, which technically has no authority to expand the product scope and no formal authority to consider evasion, is uncomfortable with this current situation. This has caused the Administration to propose amendments to the U.S. trade laws to address the problem, but these amendments are unlikely to eliminate the problem. Part IV of this Article examines certain unfair results caused by the procedures used in product scope rulings by the Department. It concludes that the Department could take steps to reduce substantially such unfair results while still maintaining its ability to assure effective enforcement of the antidumping and countervail sanctions.

II. CURRENT LEGAL STANDARDS FOR PRODUCT SCOPE RULINGS

Proceedings under the U.S. antidumping and countervail laws are carried out in tandem by the International Trade Administration of the Department of Commerce (the "ITA") and by the International Trade Commission (the "Commiss-

4. General Agreement on Tariffs and Trade ("GATT"); Agreement on Interpretation and Application of Articles VI, XVI, and XXIII, of the General Agreement on Tariffs and Trade ("Subsidies Code") (1973); Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade ("Antidumping Code") (1979).

5. The European Community has somewhat different standards and procedures, but has also recently been forced to wrestle with product scope problems and has adopted its own legislation to deal with one form of evasion by foreign producers, the modification of the form of foreign imports from completed products (subject to dumping orders) to unassembled parts for final assembly in Europe. See infra text accompanying notes 67-68.

6. Prior to 1980, the role of the ITA had been played by the Department of the Treasury.
sion"). The ITA determines whether the imported class of merchandise under review has been sold at less than fair value in antidumping proceedings, or whether there have been unfair subsidies in countervail proceedings. The Commission then determines whether imports of the merchandise have caused or are likely to cause material injury to the U.S. industry producing a "like product." 7

Antidumping and countervail proceedings are initiated by a petition filed on behalf of the U.S. industry manufacturing a particular type of merchandise. The petition specifies the type of merchandise and the country which are the target of the petition. 8 The petition must be limited to a particular target class of merchandise, although the target class of merchandise may contain several subgroups; for example, recent proceedings against "Fresh-Cut Flowers" from various countries included many types of flowers. 9

Within twenty days after a petition is filed, the ITA determines whether or not a proceeding, called an "investigation," will commence, and in its Notice of Initiation provides a description of the target merchandise covered. 11 Determinations are made thereafter in antidumping and countervailing duty investigations in the following sequence: (1) the Commission's preliminary (injury) determination, (2) the ITA's preliminary determination, (3) the ITA's final determination, and (4) the Commission's final (injury) determination. If the ITA's final determination affirmatively finds dumping or subsidies and the Commission's final determination affirmatively finds injury, an antidumping duty or countervailing duty "order" is entered which subjects imports of such merchandise to antidumping or countervailing duties for the indefinite future. 12

From time to time, during the initial proceeding or after an order is entered,

7. The specific procedures are established by the statutes, and further delineated by ITA and Commission regulations. 19 C.F.R. § 207 et seq. (Commission regulations); 19 C.F.R. § 353 (ITA antidumping duty regulations) and § 355 (ITA countervailing duty regulations). General international guidelines for such proceedings are provided in the Antidumping Code and Subsidies Code of the GATT. See supra note 4.

8. A U.S. industry may initiate proceedings against target merchandise from several different countries, but it must file a separate petition in the case of each separate country.

9. Commerce Department regulations require the petitioner to provide "a detailed description of the imported merchandise in question, including technical characteristics and uses" as well as the tariff classification(s) under the Tariff Schedules of the United States ("TSUS"). 19 C.F.R. §§ 353.36(a), 355.26(a) (1986).


11. 19 C.F.R. §§ 353.37(b), 355.27(b) (1986) Questionnaires are thereafter sent out by the Commission and subsequently by the ITA to the parties, requesting information concerning such merchandise. The Commission seeks particularly information concerning the health of the U.S. industry producing that merchandise and the impact of imports of such merchandise on the U.S. industry. The ITA, in antidumping proceedings, seeks information on the fair value of the merchandise and the U.S. sales price of the merchandise. In countervail investigations, it seeks information on subsidies provided to the foreign industry producing that merchandise.

the question arises before the ITA whether a particular product is included within the class of merchandise that is the target of the investigation or the order. For example, if the target merchandise were "telephones from Canada," there could be a question as to whether a bedside telephone/clock was covered, whether a cordless telephone was covered, or whether an unassembled telephone kit was covered. This determination is generally referred to as a "product scope" ruling. If the ITA rules that the product is within the target class of merchandise, imports may be subject to substantial antidumping or countervailing duties. If the ITA rules the product is not within the target class of merchandise, it can be imported and sold unimpared by such duties.

The product scope decision may arise in the case of direct imports from the original target country, or may arise in the case of products imported from another foreign country but consisting wholly or partially of a product from the original target country. Thus, in the example of "telephones from Canada" above, the ITA might be faced with an unassembled telephone kit imported directly from Canada to the U.S., or it might be faced with a telephone exported from Mexico where it was final-assembled from an unassembled telephone kit from Canada. Similarly, the ITA might be faced with a Canadian telephone to which a clock has been added in Canada or to which a clock has been added in Mexico. In each case, the ITA must determine whether the product as it was exported from Canada and has it was imported into the United States is within the target class of merchandise.

The question of whether a product is covered may arise at any time after the initiation of an investigation, from the preliminary stages of the initial investigation to many years after an antidumping duty or countervailing duty order has gone into effect. The question may be raised in a variety of ways: by the U.S. industry seeking to have a new form of the product covered; by the foreign producer seeking a declaration that the product is not covered; by the Customs Service seeking guidance on whether a particular product is covered; or by the ITA on its own initiative.

The standards for product scope determinations are nowhere in the statute; they have evolved from court cases and ITA decisions. In 1980, shortly after authority for determining antidumping and countervailing duties was shifted from the Treasury Department to the Commerce Department because Congress felt that Treasury had been too lax in enforcing those trade laws, the U.S. Court of International Trade in *Royal Business Machines, Inc. v. United States*, held that the Commerce Department (through the ITA) was not bound by Treasury standards. The ITA could define the target class of merchandise in its own

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13. Prior to that shift, product scope determinations were principally accomplished within the context of Customs classification determinations. The standards developed by Treasury and Customs are the root for the standards used by the ITA in today’s scope determinations at the Commerce Department. See infra note 17.

14. 507 F. Supp. 1007 (Ct. Int’l Trade 1980), aff’d, 669 F.2d 692 (Fed. Cir. 1982). The ITA had to
PRODUCT SCOPE

terms, held the court, even if this definition did not correspond to Customs tariff classifications established under Treasury's authority.

The *Royal Business Machines* decision established a key limitation on the ITA's product scope determinations, however:

> each stage of the statutory proceeding maintains the scope passed on from the previous stage. Thus, the class or kind of merchandise described in the petition, which becomes the subject of the investigation under 19 U.S.C. § 1675(c)(2) is the subject of the preliminary injury determination of 19 U.S.C. § 1673(b), the suspension of liquidation under 19 U.S.C. § 1673(c) [the ITA preliminary], and the final determinations of 19 U.S.C. § 1673(d).¹⁵

After the product scope is established, stated the court, neither Customs, the ITA, nor any other agency may modify the scope of the investigations. All activity thereafter is merely the ministerial application of the antidumping or countervailing duty order.¹⁶ Thus, neither Customs nor the ITA is permitted to expand or reduce the product scope of a final order.

While the *Royal Business Machines* decision held that the ITA could not change the class of merchandise, it did recognize the ITA's authority to clarify what that class of merchandise includes. (The ITA accordingly has called its product scope determinations “clarifications.”) Yet, the court did not provide standards by which to determine whether a particular product is within the established class of merchandise. Therefore, based on the *Royal Business Machines* decision and based on established standards for product class determinations used previously by Treasury and its Customs Service, the ITA developed a two-step approach for addressing product scope questions.

As the first step, the ITA determines whether the product was clearly included in or excluded from the investigation at an earlier stage. If so, that was the end of the inquiry, based on *Royal Business Machines*. As the second step, (if the product was not clearly included or excluded previously) the ITA applies standards for determining whether a product is within a class of merchandise that are similar to those used previously for Customs classification cases.¹⁷ Those “sec-

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¹⁵. 507 F. Supp. at 1014.
¹⁶. Id.
¹⁷. A good description of these standards is the decision of the United States Court of Customs and Patent Appeals in United States v. Carborundum Co., 536 F.2d 373 (1976). The question presented was whether finely powdered ferrosilicon belonged to the same class or kind of merchandise as lump and coarse-powder ferrosilicon used as a raw material in the manufacture of ferrous metals. In concluding that the finely powdered ferrosilicon was not in the same class of merchandise, the court recapitulated what it believed were the factors generally considered pertinent in determining whether an imported produce falls within a particular class of merchandise. It listed the following factors:

- the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels, class or kind of trade in which the merchandise moves, . . . the manner in which the merchandise is advertised and displayed, . . . the use, if any, in the same manner
"one-step" ITA standards were set forth in several early ITA product scope decisions, such as *Parts for Self-Propelled Bituminous Paving Equipment from Canada*, where the ITA in 1981 issued a "Notice of Clarification of Scope," stating:

The Department's decision as to whether a particular imported product is of the class or kind covered by an antidumping duty order may be based on several factors, including general physical characteristics, the expectations of the ultimate purchaser, the channels of trade in which the merchandise moves, the manner in which the merchandise is advertised and displayed, and the ultimate use of the merchandise in question.18

The Court of International Trade in 1983 endorsed the ITA's approach and standards in *Diversified Products Corp. v. United States*.19 The court held that the second step criteria for product scope rulings were:

- The general physical characteristics of the merchandise,
- The expectation of the ultimate purchasers,
- The channels of trade in which the merchandise moves,
- The ultimate use of the merchandise, and
- Cost.20

In addressing the ITA's authority in this area, the Court stated that the ITA "has the authority not only to define the scope of an antidumping investigation but also to clarify the statement of its scope."21

The *Diversified Products* and *Royal Business Machines* decisions have been considered the basic authorities on the legal standards for ITA product scope clarifications.22 These decisions are regularly cited by the ITA and by practi-
tioners in connection with product scope issues. The list of factors varies slightly
from case to case, however. For example, in *Kyowa Gas Chemical Industry Co. v. United States*, the Court of International Trade adopted most of the factors cited
in *Diversified Products*, but added one factor, “the manner in which the product
is advertised and displayed,” and eliminated one factor, “cost.”

Although there has been some question whether third-country exports should
be tested under the same standards as direct target-country exports to the United
States, it appears that, in effect, the same standards have been used. In the case of
unfinished products from the target country that are then finished in third coun-
tries, the ITA has performed a typical product scope analysis of the unfinished
form of the product exported from the target country. If the incomplete product
as exported from the target country is in the same class of merchandise, the
complete product will be subject to the order upon importation into the U.S. from
the third country. Similarly, a complete target product produced in the target
country but modified in a third country will be subject to the order if it remains
within the class of merchandise after modification in the third country and export
to the U.S.

The generalized language of the standards and the fact that the standards are
modified slightly from case to case provides a substantial amount of leeway to the
ITA in product scope determinations. Furthermore, the ITA’s approach to those
standards is treat them broadly and flexibly. For example, the “expectation of the
ultimate purchasers,” “channels of trade” and “ultimate use of the merchandise”
tests are sufficiently nebulous and vague that the ITA has little trouble finding that
any products that are generally related or derivative meet these tests, if the ITA
wishes to so find. These standards might well permit the clichéd apples and
oranges to be placed in the same class of merchandise.

Furthermore, the ITA has taken the position that not all criteria need be met in
the usual sense. For example, in an ITA decision finding that five-dollar sub-

*Countervailing Duty Cases, 20 INT’L LAW. 1015 (1986)* (prepared by the immediate past Deputy
Assistant Secretary for Import Administration at ITA and his former deputy).


(EPROMs assembled in third countries from Japanese EPROM “dice” are within the class).

produced in third countries from raw Iranian pistachios within the class of raw pistachios (ITA
decision later reversed by ITA)); Nylon Impression Fabric from Japan, 50 Fed. Reg. 49976 (1985)
(Inked typewriter ribbon produced in third country from Japanese nylon impression fabric not within
class of nylon impression fabric).

26. Arguably, the “expectations of the ultimate purchasers” are the same (a fruit to eat), the
channels of trade are similar, and the cost may be very close. Thus four of the five *Diversified
Products* criteria would be met. The ITA analysis in actual cases is not dissimilar. For example in
*In-Shell Pistachio Nuts from Iran*, the ITA found roasted, salted ready-to-eat pistachios to be in the same
class of merchandise as raw pistachios basically because both were ultimately eaten as snack nuts. 51
assemblies were in the same class as the 800 dollar completed products, the ITA downplayed the "general physical characteristics" standard.27 The ITA has also found that different pieces of brass fire-fighting equipment are all in the same class of merchandise28 even though the individual products are clearly distinct from one another both physically and in the eyes of purchasers.

This broad discretion provided by the product-scope standards is attributable in large part to the wide range of products that are subject to ITA investigations. A set of standards that would specifically establish whether certain chemicals and chemical blends were in the same class would be useless in determining whether certain vehicles or fruits or textiles or electronics were in the same class. In explicitly divorcing itself from the Treasury/Customs classification criteria, in order to address the special concerns of product scope determinations in antidumping and countervailing duty cases, the ITA has asserted its desire to maintain substantial discretion in its product scope determinations.29 So long as the ITA has the authority to make such product scope determinations, it is likely that it will continue to have broad discretion in those determinations.

III. PREVENTION OF EVASION AS THE PRINCIPAL FACTOR IN RECENT PRODUCT SCOPE RULINGS

While the ITA has nominally followed the two-step approach approved in the Diversified Products and Kyowa Gas decisions, in reality, a third consideration, a policy consideration, has played a major role in the ITA's recent product scope determinations. That consideration is the perceived need to include products related to the target product in order to prevent evasion of the antidumping or countervailing duty relief protecting the U.S. industry. If the ITA perceives that exclusion of a related product will allow substantial evasion of an antidumping or countervailing duty order, the ITA will rule that the product is included within the target class of merchandise. Because the objective standards recognized in Diversified Products are vague and broad, such a result-oriented approach is easily implemented. If the questioned product is such that imports of that product can be used to evade antidumping or countervailing duties established against the initially targeted products, the ITA generally will be able to defend a ruling that the Diversified Products standards are met.

27. Cellular Mobile Telephone from Japan, 50 Fed. Reg. 45447 (1985). Similarly, the ITA has found that different types of flowers are all in the same class of merchandise. Fresh-Cut Flowers from Canada, 52 Fed. Reg. 2126 (1987).


29. In response to a question at an unpublished luncheon address delivered on June 4, 1987, at the Hyatt Regency in Washington, D.C., Gilbert Kaplan, Deputy Assistant Secretary of Commerce, for Import Administration, the head of ITA, stated that the ITA has no intention of adopting a product scope approach based on Customs classifications because of ITA's desire to maintain the flexibility necessary for effective enforcement of the antidumping and countervails laws.
In the first few years following the 1980 transfer of authority from Treasury to the ITA, no anti-evasion emphasis was apparent. For example, in *Tapered Roller Bearings and Certain Components Thereof from Japan*, the ITA in 1981 issued a clarification of scope holding that unfinished tapered roller bearings were not the same class of merchandise as the target products—complete tapered roller bearings.\(^{30}\) Therefore, unfinished bearings were not included in the investigation. The possibility that unrestricted imports of unfinished bearings created a substantial possibility for evasion of an order against finished bearings was not addressed by the ITA.

Similarly, in 1982, the ITA issued two product scope rulings that essentially held that, unless all necessary components of the target product were exported from the target country, such exports would not be considered products within the class of merchandise subject to antidumping orders. These rulings, in *Television Receivers from Japan*\(^{31}\) and in *Metal-Walled Above Ground Pools from Japan*,\(^{32}\) both involved products exported from third countries but assembled from pre-assembled components made in Japan. The fact that the ITA did not take strong anti-evasion steps was all the more notable in light of the fact that both cases involved activities that permitted the same products that were subject to the antidumping orders to enter the United States through the third country.

Since those early decisions, a growing anti-evasion policy has been manifested in the ITA’s decisions. This trend is well demonstrated in four recent ITA product scope rulings chosen for particular discussion here. Two of the rulings cover processed agricultural products which were produced (often in third countries) from the target products covered by the petitions: *Fuel Ethanol from Brazil (Fuel Ethanol)*\(^{33}\) and *In-Shell Pistachio Nuts from Iran (Raw Pistachios)*\(^{34}\). The other two rulings involved target components which could be used easily to produce the complete electronics products covered by the petitions: *Cellular Mobile Telephones and Subassemblies Thereof from Japan (Cellular Phones)*\(^{35}\) and *Color Television Receivers from Korea (Color Televisions)*.\(^{36}\)

Subsection A below deals with the two rulings applying to modified forms of the merchandise, *Fuel Ethanol* and *Raw Pistachios*. For the purposes of this

34. Id. at 17220.
article, "modified form" of the merchandise is any form of the initially targeted product that incorporates additional elements or further processing. The question before ITA is whether the modification has taken the product out of the class of merchandise subject to the investigation or order. In the "Telephones from Canada" hypothetical in Section I, further modified forms of the merchandise would include cordless telephones or a bedside telephone/clock. The modification may take place in the target country or in a third country.

Subsection B below deals with two rulings applying to components of the merchandise, Cellular Phones and Color Televisions. For the purpose of this article, "components" of the merchandise are any products that constitute elements or forms of the target product before the product is completely produced to its functioning state. In the "Telephones from Canada" hypothetical, components could include an un assembled kit of telephone parts, the base phone assembly without cover or handset, or any other form of the telephone before completion. The question before ITA is whether the components have reached a sufficient level that they are within the class of merchandise subject to the investigation or order.

A. Inclusion of Modified Forms of the Merchandise

In both Fuel Ethanol and Raw Pistachios, the petitions were initially targeted at particular basic products. In Fuel Ethanol the target class of merchandise was limited to fuel ethanol in its simple form; in Raw Pistachios it was limited to raw in-shell pistachios. In both cases, the target merchandise was clearly delineated in the ITA Notice of Initiation by Customs classifications (TSUS Nos.) which pertained only to the target merchandise. In both cases, the Commission's preliminary injury investigation was limited to the target merchandise. However, in each case, the U.S. industry became concerned midway through the investigation that the target merchandise which it sought to cover could be imported into the United States in a different form, thereby avoiding antidumping and countervailing duties.

In an effort to prevent such evasion, the U.S. industry in each case sought to have the ITA "clarify" the product scope and find that the modified products not previously considered in the investigation nevertheless fell within the target class of merchandise. In many instances, the processing occurred in third countries,

38. There was a countervailing duty case as well as an antidumping case filed against fuel ethanol from Brazil, but the primary focus on the scope issue occurred in the antidumping case. There was also a countervailing duty investigation against pistachios from Iran, which had already been completed at the time the U.S. industry raised its product scope concern in the antidumping proceeding. The scope issue in the countervail proceeding was held in abeyance until the decision was made in the antidumping proceeding.
but, as noted above, the ITA took the position that such a product is subject to the investigation where it remains within the target class of merchandise following processing. In *Fuel Ethanol from Brazil*, the modified product was chemical/ethanol blends, which contained Brazilian fuel ethanol as the major ingredient but which were separate products under the Customs classifications. In *Pistachios Nuts from Iran*, the modified product was roasted, salted, ready-to-eat in-shell pistachios, produced in Europe from raw, in-shell Iranian pistachios. In both instances, the ITA "clarified" the product scope to include these modified products. Yet in both cases, the Commission subsequently prevented antidumping sanctions against the modified products: in *Fuel Ethanol* the Commission subsequently made a negative injury finding, and in *Raw Pistachios* statements by the Commission convinced the ITA to reverse its clarification determination and exclude roasted pistachios from the scope of the investigation.

The ITA's decision to include certain blends in *Fuel Ethanol*, which was included in the ITA's preliminary determination, did not include any substantial analysis under the *Diversified Products* standards. The record in the proceeding shows that the blends had not been included in the "previous stage" of the investigation because no data on blends was requested by the ITA, and the Commission had not considered blends. Rather, the focus of ITA action was the desire to prevent evasion. For example, a letter submitted on behalf of the U.S. industry late in the investigation in an effort to have additional blends included in the target class of merchandise stated:

> At present, this latest tariff class classification for ethanol blends is not within the scope of this investigation or the countervailing duty investigation. However, petitioners, in a letter dated January 17, 1986, have alerted the Department to this latest scheme, and have requested the Department to clarify the scope of these investigations (which was previously clarified to encompass other known ethanol blend tariff classifications) to encompass this newest blend. . . . Petitioners fully anticipate that the Department will move quickly to close this loophole. . . . [emphasis added].

The U.S. industry's understanding of the ITA's motivation was confirmed in its Final Determination. In the section of that determination on "Scope of Investigati-

40. 51 Fed. Reg. 23254 (1986). Following the ITA decision to include roasted pistachios, the Commission, through channels, clearly indicated to the ITA that the Commission's preliminary investigation had been limited to raw pistachios, that this had been the product scope selected by the U.S. industry, that the Commission record clearly showed this. Accordingly, the Commission's preliminary injury determination had not covered roasted pistachios. On the basis of this new information "not previously in the record," the ITA reversed itself. *Id.*
41. In fact, the ITA simply included the TSUS numbers for certain blends when it issued its preliminary determination. 50 Fed. Reg. 38871 (1985).
42. Letter dated September 26, 1985, from Rogers & Wells to Gilbert B. Kaplan, at page 4; letter dated September 20, 1985, from Royal Daniel III to Gilbert B. Kaplan, at page 2. (Record documents are available in microfiche form from the ITA.)
tion” the ITA included blends of ethanol falling under certain TSUS numbers, then stated broadly that also “[o]ther blends may be included in the scope of the investigation.”44 The ITA went on to warn that the ITA “intends to work closely with the U.S. Customs Service to prevent circumvention of our determination through importation of ethanol blends.”45 In response to a challenge to its inclusion of blends in the product scope, given that they were not included in the scope of the petition and had not been investigated, the ITA merely stated that it had the power to clarify the scope and that it had determined blends were within the target class of merchandise,46 but provided no analysis under the established judicial standards for product scope rulings. The ITA stated that it was not required to investigate all products within the class.47

Similarly, in Raw Pistachios, a major portion of the comments filed by the parties on the product scope issue pertained to the question of whether the inclusion of roasted pistachios was necessary to prevent massive increases in imports of roasted pistachios to evade import relief with respect to raw pistachios.48 In its scope ruling in May, 1986, the ITA provided no meaningful analysis of the product scope question under the established standards, simply announcing that “[r]aw and roasted are within the same class or kind.”49 The ITA excused the fact that its Notice of Initiation (and, indeed, all of the investigation up to that point) had been limited to pistachios imported under the Customs classification for raw pistachios alone with the circular statement that “the Department’s use of a TSUS classification . . . does not limit its investigation” where it discovers another product (roasted pistachios) is “already under the investigation,” citing Royal Business Machines.

The best indication of the ITA’s true concern in Raw Pistachios came when the ITA was later forced by Commission pressure to recant its original scope decision and to again put roasted pistachios outside of the investigation. The ITA indicated that if the U.S. industry would file a petition against roasted pistachios, the

45. Id. at 5573.
46. Id. at 5576.
47. Id. at 5576.
48. Letter of April, 1986, from Timothy A. Harr to Gilbert B. Kaplan; letter of April, 1986 from David Birenbaum to Gilbert B. Kaplan. Record documents are available on microfiche from the ITA.
49. 51 Fed. Reg. 17220 (1986). The ITA asserted that roasted pistachios had always been included in the investigation, but the record contradicted this assertion. Only when threatened with litigation did the ITA make an effort to bolster its scope decision, by readressing the issue in its Final Determination and applying the Diversified Products standards to reach the same result. 51 Fed. Reg. 18919 (1986). This application of the traditional standards demonstrated the ease with which those standards may be used to justify the ITA’s product scope result. See supra text accompanying notes 25–28. The ITA essentially based its conclusion that the standards were met on the ground that most raw pistachios are eventually roasted for individual consumption and that the roasting (and other processing) is not highly costly.
investigation would receive special expedited treatment, and this was done.\textsuperscript{50} Indeed, in less than half the normal time, the ITA had issued a preliminary determination imposing massive bonding or cash deposit requirements for imports of roasted pistachios.\textsuperscript{51} The ITA had clearly taken an institutional interest in preventing the evasion of the raw pistachio antidumping and countervailing duty orders by means of imports of roasted pistachios.\textsuperscript{52}

\textbf{B. Inclusion of Components of the Merchandise}

In two lengthy product scope rulings involving components of the electronics merchandise—\textit{Cellular Phones} and \textit{Color Televisions}—the ITA's desire to prevent evasion was even more clear. In both instances, the ITA included components of the merchandise because it felt that imports of the components or subassemblies, for quick final assembly in the U.S., would permit foreign producers to evade antidumping relief against the target merchandise.

In \textit{Cellular Phones}, the product scope was an issue from the outset of the investigation.\textsuperscript{53} In its Final Determination, the Department stated: "the Department feels it necessary to include CMT [cellular mobile telephone] subassemblies within the scope of this investigation since otherwise any resulting order could easily be circumvented,"\textsuperscript{54} and conceded that the inclusion of subassemblies within the scope of the investigation was based on the need to prevent circumvention of any antidumping order on CMTs as well as the "Department's broader conclusion" that the investigation should include subassemblies.\textsuperscript{55} The ITA explained that, "[i]f the investigation were limited to completed CMTs alone" imports of subassemblies would avoid antidumping sanctions "even if all

\begin{itemize}
\item \textsuperscript{50} Notice of Initiation, Roasted In-Shell Pistachios from Iran, 51 Fed. Reg. 25084 (1986).
\item \textsuperscript{51} 51 Fed. Reg. 8342 (1986).
\item \textsuperscript{52} The principal net result of the ITA's scope reversal and the new petition was that only entries of roasted pistachios after August 21, 1986, were covered, rather than entries after March 11, 1986, reversing a retroactive application of the expansion of product scope. \textit{See infra} note 59.
\item \textsuperscript{53} One difference between the \textit{Cellular Phones} and \textit{Color Televisions} decisions was that in \textit{Cellular Phones} the petitioner clearly anticipated that another form of the merchandise would be used to evade an antidumping order directed solely against cellular phones and the decision to include subassemblies was made at the inception of the proceeding. The petition itself covered not only cellular phones, but also \textit{subassemblies} of those phones, but, anticipating that most of such subassemblies would be imported together, the cellular phone kits. In its Notice of Initiation, the ITA specifically included subassemblies, and gave examples, and the Commission covered subassemblies in its initial investigation. In its preliminary determination, the ITA provided a working definition of a cellular phone subassembly. Thus, importers and foreign producers were on notice from the outset that subassemblies would be covered at least in some form. By contrast, the ITA made its product scope ruling two years after the initial investigation in \textit{Color Televisions}.
\item \textsuperscript{54} 50 Fed. Reg. 45447, 45448 (1985).
\item \textsuperscript{55} \textit{Id.} at 45448.
\end{itemize}
of the subassemblies were of Japanese origin—and the complete CMT [produced therefrom] was substantially of Japanese origin".56

The ITA went on to find that individual subassemblies, even if imported separately and constituting only five dollars of the value of a cellular phone worth hundreds of dollars, were the same class of merchandise as complete cellular phones, under standards similar to those set forth in Diversified Products.57 However, the ITA performed this analysis only as a result of a challenge from the Japanese respondents that subassemblies were not of the same class of merchandise. The ITA rejected the claims that it had improperly expanded the scope of the proceeding beyond the scope of the petition (which had referred to "kits of components and subassemblies"), in violation of Royal Business Machines, but asserted that in any event Royal Business Machines "does not in any way limit the Department's discretion to define the scope of the petition."58 In effect, the ITA asserted that at least in the course of an initial investigation, it has broad discretion to define the product scope so as to assure the effectiveness of the relief ordered and to prevent evasion.

In the Color Televisions scope ruling, the ITA claimed that its discretion continued even long after the final determination in the initial proceeding. The October 17, 1986, unpublished scope ruling memorandum occurred more than two-and-a-half years after the ITA's final determination in the initial antidumping investigation. The ITA scope ruling in Color Televisions was devoid of any analysis under the standards established for product scope determinations in Diversified Products. Instead, the ITA initially observed that imports of color television printed circuit boards ("PCBs") and picture tubes had increased manyfold since the imposition of antidumping relief, apparently to avoid the antidumping duties on complete color television sets. "Put simply," the ITA stated, "imports of PCBs and color picture tubes have surpassed imports of complete and incomplete receivers and appear to be replacing them."59

The ITA went on to dedicate a substantial portion of its decision to the evasion issue, and attempted to justify its exercise of authority as the driving factor in its decision:

It is clear that our responsibility to enforce antidumping duty orders includes the responsibility to see that those orders achieve their intended purpose: the protection of a United States industry against an injurious unfair trade practice. Congress's

56. Id.
57. The ITA rejected arguments that the Cellular Phones scope ruling was contrary to its scope ruling in Tapered Roller Bearings and Certain Components Thereof from Japan, 46 Fed. Reg. 40550 (1981), stating that in Tapered Roller Bearings the investigation had not initially included the questioned product, while in Cellular Phones, it had specifically included subassemblies from "the outset" (i.e., from the petition and Notice of Initiation).
58. Id. at 45449.
59. Color Television, at 3. The ITA found that PCB imports had risen from 163,882 units to 1,232,600 units and picture tube imports had risen from 99,298 units to 776,255 units. Id.
intent that we undertake this responsibility is obvious from the overall scheme
Congress enacted for vigorous and aggressive administration of the antidumping law [citing no authority]. . . . Unless separately imported PCBs and color picture
tubes are within the scope of our order, we cannot meet our obligation to enforce the
statute and the order will not fulfill its intended purpose.\textsuperscript{60}

In reaching its result-oriented decision to include picture tubes and PCBs in the
Color Televisions class of merchandise, the ITA largely circumvented the hurdles
posed by the legal standards in Diversified Products, giving lip service only to
the requirement that the class of merchandise be limited to products included in
the previous stages of the investigation.\textsuperscript{61} This decision has caused confusion
recently due to the filing of an antidumping complaint against Korean picture
tubes.\textsuperscript{62}

IV. Administrative Discomfort with Goal-Oriented Approach

Foreign producers and their related U.S. importers are becoming increasingly
sophisticated in avoiding antidumping and countervailing duty orders through
modification of the form in which their products are imported. The establishment
of subsidiary assembly plants or further-processing plants in the U.S. and in third
world countries has become an increasing feature of the international trade equa-
tion, facilitating the modification of the form of exports from the home country
and into the United States.\textsuperscript{63} This has been a major cause of the increased concern
at the ITA with respect to product scope issues. The ITA has essentially taken the
position that it will not permit evasion of its orders through importation of closely
related forms of the subject product.

The ITA’s position is driven by two factors. First, the bringing of an antidump-
ing or countervailing duty proceeding is an expensive and time-consuming en-

\textsuperscript{60} Id. at 8–9.

\textsuperscript{61} The ITA addressed at length the parties’ assertion that individual components, such as PCBs
and picture tubes, had not been included in the original investigation and the fact that the Commission
had stated in its final determination that the investigation did not include “various imported subassem-
blies and components used in the manufacture” of color televisions. The ITA concluded that the
Commission had never considered the injurious consequences of large-scale circumvention by way of
separate shipments of components, and asserted that, “it is the Department’s responsibility to address
problems of this type.” Color Televisions, supra note 36, at 15. In effect, the ITA found that kits
containing PCBs, picture tubes and other necessary components for a television were within the class
of merchandise covered by the ITA, and therefore, the ITA had the power to include such components
subsequently, even if imported separately. The ITA also rejected the argument that such products
should be excluded because Customs classifications distinguishing between the components and
completed receivers were used by the ITA to identify the covered products in the initial investigation.
The ITA stated that such classifications were not binding but only illustrative. Id. at 11–12. Thus, the
ITA asserted a broad remedial power and discretion with respect to product scope questions.

\textsuperscript{62} The ITA has gone back and forth in its efforts to decide which investigation should involve

deavor. Therefore, if an existing investigation or order can be stretched to include an unanticipated and troublesome form of the merchandise, the imports of which injure the same U.S. producers in the same market, this stretching is preferable to requiring the domestic U.S. industry to bring another proceeding on that related product.

Second, although ITA is in a very real sense the judge and jury in antidumping and countervailing duty proceedings, it is also the enforcer of trade sanctions once they appear warranted under the statute. When foreign producers develop strategies to avoid the payment of duties, the ITA plays the role of policeman. To an extent, this sets up an adversarial or competitive relationship between the ITA and duty-avoidance motivated foreign producers. The ITA is understandably reluctant to allow importation of a foreign producer's related product when this will permit the foreign producer to beat the ITA in this competition.

These two semi-protectionist motivations are particularly strong in the current political atmosphere, ironically, because of the current Administration's decidedly "Free Trade" attitude and its desire to prevent the passage of legislation that it considers "protectionist." One of the strongest lines of defense used by the "Free Traders" in the current Administration in their battle against protectionist legislation is that the current U.S. fair trade laws are sufficient to protect legitimate U.S. trade interests. This position is undermined whenever it is perceived that foreign producers found in violation of the trade laws are able to evade the trade sanctions. Accordingly, the ITA, as an agency of the Administration, currently has a heightened interest in playing its role as policeman vigorously and effectively.

Other considerations, however, make the ITA reluctant to take aggressive product scope actions. First, if the ITA's goal-oriented product scope rulings go too far, they may trigger a court review and a reversal that would not only overrule the ITA product scope decision in the particular case, but also could severely narrow the ITA's range of discretion on product scope issues generally. Second, an aggressive product scope policy has the potential for offending America's trading partners, triggering protests, retaliatory actions, or proceedings under the GATT. The Administration's goal to be perceived as Free Traders by America's trading partners would thereby be diserved. Third, ITA product scope rulings may have harsh and inequitable results that appear to violate directly the

64. The ITA product scope ruling in Cellular Phones was appealed and is currently awaiting a decision in the Court of International Trade. The ITA countervailing duty decision in Pistachios was also appealed to the Court of International Trade by a roasted pistachio importer but was withdrawn when the ITA reversed its product scope ruling. The ITA scope ruling in Cell-Site Transceivers from Japan was upheld by the court in Kokusai Electric Co., Ltd. v. United States, 632 F. Supp. 23 (Ct. Int'l Trade 1986). In recognition of the importance of product scope rulings and judicial review thereof, Congress added a new subsection to the Court of International Trade's jurisdictional statute to provide specifically the authority to review such rulings. 19 U.S.C. § 1516a(2)(B)(vi).
principles of due process and governmental restraint that are the hallmark of the "Fair Trade" philosophy.

The ITA is vulnerable to judicial review because it acts without any specific legislative mandate in taking steps to prevent evasion through product scope rulings. The current trade laws do not direct the ITA to prevent evasion nor authorize it to adjust product scope. Although the ITA asserted such authority generally in Color Televisions and other decisions, the judicial decisions to date—Royal Business Machines and Diversified Products—specifically state that the ITA does not have the authority to expand the scope beyond the merchandise previously subject to the investigation.

To address this problem, and to provide a justification and legitimacy to the de facto position of the ITA, the Administration has proposed an amendment to U.S. trade law that would specifically extend antidumping and countervailing duty orders to related products in pre-assembly forms (e.g., Cellular Phones and Color Televisions) whether completed in the U.S. or in a third country. This legislation would therefore protect the ITA in many instances with respect to its first concern—judicial review—by providing statutory authority for certain expansions of product scope. However, it would not apply to further processed forms (e.g., Fuel Ethanol and Raw Pistachios), thus addressing only some of the product scope situations faced by the ITA. In a sense, the amendments also address the second concern—maintaining the Administration's Free Trade image abroad—because the amendment can be explained as compromise legislation designed to prevent more aggressive product scope expansion urged by House and Senate trade "protectionists." With respect to the third concern—unfair or harsh results for those caught by a product scope ruling—the statutory authority provides little relief and could exacerbate the problem by increasing the number of product scope expansions by the ITA.

The proposed Administration amendments, which were Section 5008 of the Administration's proposed bill, were added as amendments to the House and Senate omnibus trade bills (with certain modifications) in place of more aggressive congressional committee provisions.

The provisions as they appear in the House bill, H.R. 3, provide:

(B) DUMPING OR SUBSIDIZATION OF MERCHANDISE INTRODUCED INTO COMMERCE.—If a product which is within the class or kind of merchandise covered by an [antidumping duty or countervailing duty] order, or finding [issued under the Antidumping Act, 1921], is completed or assembled in the United States with parts or components imported from the country covered by the order or finding, the order or finding shall apply to those parts or components used in the completion or assembly of the merchandise in the United States, if—

(i) substantially all the parts and components are imported from the country covered by the order or finding;

(ii) the value added in the United States is small in relation to the total value of the merchandise entered into the commerce of the United States; and
The Administration amendments would extend antidumping and countervailing duty orders to imported parts or components of the target merchandise covered in the original investigation, if the parts are from the target country and are imported for final assembly in the United States. It would also encompass target merchandise assembled from such target country parts or components in a third country. The proposed amendment applies only if the production steps needed to complete the merchandise from the parts and components are relatively minor compared to the total production effort necessary to produce the merchandise. Furthermore, the provision applies only where the foreign producer is "related" to the party performing the completion or assembly. Not surprisingly, this proposed legislation would have justified the ITA's product scope rulings in Cellular Phones, Color Televisions, Cell Site Transceivers or EPROMS, in the face of any challenge in court.

The Administration should be able to defend its amendments to Free Traders and foreign trading partners in part on the ground that it does not go as far as the anti-evasion legislation initially proposed by Congressional committees. Within the context of the massive trade bill, these particular provisions are certainly not among those considered most politically sensitive. The reasons for this are: First, the legislation does not appear to do much more than legitimize the current ITA practice and policy. Second, the United States' principal trading partner, the European Community ("EC"), has faced similar problems of trade-sanction evasion and recently adopted its own measure to counteract imports of components in place of complete antidumping target products. On June 22, 1987, the EC adopted a regulation which provides that where a type of merchandise from a foreign country is subject to an antidumping order, similar merchandise assembled in the EC will also in some cases be subject to the payment of such

(iii) the parts or components were produced or exported by a company related to the company performing the completion or assembly in the United States.

(C) DUMPING OR SUBSIDIZATION OF MERCHANDISE COMPLETED OR ASSEMBLED IN THIRD COUNTRIES.—If the administering authority decides such action to be appropriate to prevent significant evasion of an [antidumping or countervailing duty] order, or finding, the administering authority may include in the order or finding merchandise of the class or kind covered by the order or finding that is completed or assembled in a third country before importation into the United States, if—set up the same way as above (i) substantially all the parts and components are imported from a country covered by the order or finding; (ii) the value added in the third country is small in relation to the total value of the merchandise imported into the United States; and (iii) the parts or components were produced or exported by a company related to a company performing the completion or assembly in the third country.

H.R. 3, § 155.

67. Indeed, the House Ways and Means Committee Report accompanying H.R.3 stated that these amendments were designed only to "clarify" the product coverage of antidumping and countervailing duty orders. H. Rept. No. 100–40, 100th Cong., 1st Sess. (1987).
duties if it is made from components produced in the target country. The duties apply where the target country components represent at least sixty percent of the materials, the EC assembler is related to the foreign producer, and there has been a substantial increase in such assembly operations since the entry of the anti-dumping order.

If adopted, the Administration's proposed amendments would reduce the ITA's discomfort in making product scope determinations, but the amendments are unlikely to eliminate or even reduce the ITA's broad discretion in the product scope area. They do not address the problem of products in modified form faced in Raw Pistachios and Fuel Ethanol, and the ITA only for certain pre-assembled forms of the products and even there provide fairly broad discretion. Thus, the ITA will continue to use product scope rulings to effect enforcement of its orders, and will continue to exercise discretion to include similar products where deemed justified. Indeed, it is unlikely that any statutory or judicial standards can combine both the necessary flexibility to cover the universe of different products, and the necessary predictability to allow parties to anticipate accurately the outcome of product scope determinations in the future.

IV. DUE PROCESS PROBLEMS AND SOLUTIONS

When the ITA exercises its discretion to include a product in the target class of merchandise, implementation of such a scope ruling can have unfair and harsh results for importers and exporters of newly included products. As shown below, these results may constitute an effective denial of due process for those affected. The unfair results can be broken down into three categories: (1) denial of a reasonable opportunity to show that a product has not been dumped or subsidized or to raise other key issues, (2) injurious retroactive application of antidumping or countervailing duty orders, (3) a year or more of cash deposits, even if the product is not being dumped or assisted by subsidies.

To a significant degree, these harsh results of implementation of U.S. product scope rulings are compelled by the ITA's adherence to the myth that its scope rulings are merely clarifications of the original product scope, i.e., that they maintain the status quo. The reality is that often (e.g., Fuel Ethanol, Raw Pistachios, Color Televisions) no one, not the parties, the Customs Service, or the ITA, previously considered the newly affected product to be within the target class of merchandise. So long as the ITA takes the position that the newly affected product has always been included in the target class, despite clear evidence that this was not the case, unfair and harsh results are likely to follow.

As a first step, therefore, the ITA should acknowledge that in many instances product scope determinations change rather than perpetuate the status quo. Once

this fact is recognized, three guiding principles emerge for the ITA to increase
due process and fairness in implementation of its product scope rulings: (1) To the
greatest extent possible, the ITA should avoid being put in the position of having
to change the product status quo in order to implement trade relief effectively. (2) The
ITA should avoid retroactive application of the change in product scope unless retroactivity is warranted by evidence of intentional evasion of an anti-
dumping or countervailing duty order. (3) The ITA should provide parties af-
fected by the change in status quo some right to show that they should not be
subject to existing cash deposit levels, if those levels are high. Implementation of
these principles would substantially diminish unfair results of ITA decisions
without loss of effective enforcement of the U.S. trade laws.

A. Denial of Opportunity to Address the Merits

Generally, at least some of the parties who would be adversely affected by a
product scope determination have an opportunity to present arguments and evi-
dence on the issue of product scope. 69 Such parties are often effectively denied
the opportunity to address the substantive issues of subsidies or dumping or
injury, however. Often there is insufficient time remaining within which to de-
velop the necessary record and arguments, even when the product scope contro-
versy emerges in the midst of an investigation. After that time, there is no
opportunity whatsoever to raise such issues. 70

For example, in Raw Pistachios, the major importer of roasted pistachios
(added to the investigation) had no opportunity whatsoever to participate in the
countervailing duty determination, which had already been completed at the time
the product scope review began, and only a very limited opportunity to partici-
pate in the antidumping proceeding, which had already proceeded to the pre-final
stage at the time the scope issue was raised. 71 All of the information developed by
the ITA’s questionnaires had been limited to raw pistachios. Ironically, under the
statute and regulations on standing, 72 the importer technically had no right to

69. However, this is often the result of their own diligence rather than any notice by the ITA that
such a process is under way. The ITA has no practice of notifying all interested parties of its
consideration of a scope “clarification.” Affected parties may learn of the fact if they happen to be
parties to the underlying investigation, but if they are not, they learn of it only through the grapevine,
through monitoring the underlying investigation or when they suddenly find that Customs will not
liquidate their entries.

70. Because of the statutorily imposed deadlines and limited statutory extensions, the ITA and the
Commission cannot freely postpone proceedings to permit a late-added party to make submissions
and present arguments on the merits.

71. Even then, there was no formal or official announcement that a scope investigation would be
undertaken, despite the fact that roasted pistachios were not being treated as within the investigations
up to that time.

72. 19 U.S.C. § 1677(9)(a); 19 C.F.R. §§ 353.12(c)(1), 355.7(c)(1).
participate in the proceedings unless it was found that roasted pistachios were in the target class of merchandise—a determination that had not yet been made. By the time roasted pistachios were included within the product scope, the ITA antidumping investigation was over.

Because antidumping duties are determined on a company-by-company basis, the ability to raise individual arguments and factual assertions is highly important. For example, in *Raw Pistachios*, open market sales of the roasted pistachios in a third country provided a strong argument that the fair value for determining dumping for roasted pistachios should be based on sales prices in that third country. In fact, the ITA decision conceded that this provision could be applied in that case. Such an approach probably would have resulted in dramatically different dumping duties for roasted pistachios than for other pistachios because the sole basis for the massive antidumping duties was an aberrant rate in the target country, Iran. However, there was no information in the record from which to develop the argument nor any reasonable opportunity to provide such information.

Whenever the scope determination is made after completion of the initial investigation, as in *Color Televisions*, the importer of the newly included product—e.g., picture tubes—also has been denied all opportunity to argue to the Commission that its imports have not caused injury to the U.S. industry producing a like product. Even if the ITA finds that all related products are within a single “class of merchandise,” the Commission may find that an investigation covers several different “like products” under the Commission’s somewhat different statutory mandate. If so, the Commission will assess the injury question separately for each U.S. industry producing each like product. Thus, an importer of picture tubes would have been able to argue to the Commission that picture tubes are a different “like product” from color televisions and that imports of picture tubes have not been causing injury for the U.S. industry producing the “like product.”

As a practical matter, the only way to solve this problem is by eliminating the possibility that there will be a later product scope ruling adding products to the covered merchandise. To further this goal, the ITA in its Notice of Initiation should establish a product *range* that is subject to the investigation, describing the parameters of the class of merchandise in terms of pre-assembled forms and modified forms. This product range and its parameters would initially be set out

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73. See 19 U.S.C. § 16776(g).

74. For example, while the ITA found that cellular phones and subassemblies constituted a single class or kind of merchandise, the Commission found nine like products, including several discrete subassemblies. *Cellular Mobile Telephones and Subassemblies from Japan*, Inv. No. 7 (Final) U.S. INT’L TRADE COMM’N PUBLICATION No. 1786 (1985).

75. Indeed, a subsequent antidumping investigation was launched against color picture tubes, in which the picture tubes are necessarily considered a like product separate from televisions.
in the Petition by the Petitioner. This would minimize the need and the ITA discretion to later expand the product scope.76

In Fuel Ethanol, Raw Pistachios, Color Televisions, and most other product scope cases, the need for a later scope ruling could have been obviated by putting the burden on the Petitioners to establish the range of products included in the investigation. This practice would force Petitioners to choose the product range that would apply throughout the investigation.77 For example, in Raw Pistachios, the domestic industry clearly had an interest in excluding U.S. producers of roasted pistachios at the Commission injury stage because of their relative economic health. There would have been no question of expansion of product scope to include roasted pistachios later in the investigation if the ITA had forced the Petitioner at the outset to state affirmatively that the range of products excluded roasted products. Conversely, if the domestic industry had decided to include roasted pistachios from the outset, roasted pistachio interests would have been on notice and would have had an opportunity to participate in the investigation on the merits to show no injury and/or no unfair pricing.78

In Cellular Phones, the petitioners and the ITA took a step in this direction by providing at the outset a general range of the products included within the scope of the investigation. The ITA stated in the Notice of Initiation that cellular phone

76. This would not preclude the coverage of forms of the product not yet produced or imported. In order to make an affirmative determination, the ITA need only find that the class of merchandise as a whole "is likely to be, sold . . . at less than fair value," in the case of dumping, 19 U.S.C. § 1673, or that a class of merchandise as a whole is receiving a subsidy is "likely to be sold" in the U.S. in the case of subsidies, 19 U.S.C. § 1671). As shown by Fuel Ethanol and Raw Pistachios, the Commission may base an injury finding on the forms of the product for which information is available and may also consider threat of injury. Thus, even if certain forms of the product have not yet been sold in the U.S., the ITA and the Commission have the authority to include them in the relief granted. See Erasable Programmable Read-Only Memory Components from Japan, Inv. No.731-TA-288 (Final), U.S. INT'L TRADE COMM. PUBLICATION NO. 1927 (1986), where future generations of EPROMS were included in both the ITA and Commission affirmative decisions.

77. This will prevent the Petitioners' frequent practice of seeking a narrow product description at the Commission injury stage in order to minimize the breadth of U.S. companies reviewed and improve the chance of an affirmative injury determination, then, at a later stage, as the scope of the relief is being considered, seeking to broaden the products covered.

78. Similarly, in the Fuel Ethanol case, the Department should have determined at the outset whether ethanol blends and other further processed forms would be included. Such a determination would have allowed a proper preliminary injury assessment by the Commission, focusing on the U.S. industry producing products included, and would have resulted in ITA questionnaires and investigations focusing on the full range of included products. Any threat of evasion through imports of blends would have been assessed at the outset, and there would have been no disputes as to whether blends were covered. If the Commission found blends to be separate "like products," it would have determined whether imports of blends posed a threat of injury to the U.S. industry producing blends. Although the Petitioner might prefer to avoid the possibility that the Commission would find that the blends did not pose the real and imminent threat necessary for an injury finding, it can scarcely be argued that this result would be contrary to the intent of the statute. Certainly, importers of blends are entitled to the injury assessment provided by statute.
subassemblies were covered on the pre-assembly end of the range (giving examples of the types of subassemblies) and that “transportable” cellular phones were included on the modified end of the range. Because the description did not provide a definition of subassemblies, this did not prevent further squabbling on the product scope issue, but it minimized unfairness by putting interested parties on notice that subassemblies and transportables were within the investigation. The parties had the opportunity to address those products at each stage of the investigation, including the injury stage. The opportunity would have been even greater if the ITA (and the Petitioner) had presented a more concrete statement in the Notice of Initiation of the subassemblies included.

In some recent cases the ITA appears to be taking further steps to establish the parameters of the target class of merchandise. While no formal change in practice has been announced, the ITA has given much fuller product descriptions than it did in the past. For example, the Notice of Initiation in Certain Internal-Combustion, Industrial Forklift Trucks from Japan, contains the following further detail in its product description:

Assembled, not assembled, and less than complete, finished and not finished operator-riding forklift trucks powered by gasoline, propane, or diesel fuel internal-combustion engines of off-the-highway types used in factories, warehouses, or transportation terminals for short-distance transport, towing, or handling of articles “less than complete” forklift trucks are defined as imports which include a frame by itself or a frame assembled with one or more component parts.

The ITA should establish a policy of providing such detailed and delineated product descriptions in every case, and should direct that petitioners include such a description in their petitions.

B. Retroactive Impact

In a normal antidumping or countervail investigation, imports of the merchandise are first directly affected upon the publication of the ITA’s preliminary determination. If the ITA preliminary is affirmative, all subsequent imports of

79. The ITA found that subassemblies, cellular mobile phones, and transportables were all within the same class of merchandise. 50 Fed. Reg. 45447 (1985). The Commission found nine separate “like products” but found injury with respect to all products. Cellular Mobile Telephones and Subassemblies Thereof, Inv. No. 731-TA-207 (Final) U.S. INT’L TRADE COMMISSION PUBLICATION No. 1786 (1985). 80. 52 Fed. Reg. 18588 (1987). 81. Id. at 18589. 82. An exception to this is the “critical circumstances” provision of 19 U.S.C. § 1673b(e), which permits the effective date to be moved forward to ninety days before the preliminary determination in extraordinary cases. 83. If the preliminary determination is negative (e.g., no evidence of dumping) the imports continue unaffected. If the ITA thereafter makes an affirmative final decision, imports after that decision are affected. If the ITA final decision is negative, the proceeding is terminated.
the merchandise become susceptible to the payment of duties. The ITA directs the Customs Service to "suspend liquidation" of all future imports, (i.e., directs Customs not to issue the final papers declaring that the proper duty has been paid), and directs Customs to demand a bond or cash deposit on each import based on the ITA's "estimated" antidumping duty or countervailing duty margins, expressed as a percentage of the Customs valuation of the merchandise. The amount of actual duty paid on each entry of such merchandise is ultimately determined each year by the ITA in annual administrative reviews under § 751 of the Trade Act of 1930. Once the antidumping and/or countervailing duty amounts are determined and assessed on an import-by-import basis, Customs will liquidate the imports.

If the ITA later rules that the target class of merchandise includes a product not previously affected, the ITA's practice has been to include not only imports of the product from the date of that scope ruling, but also all imports that have not yet been liquidated by the Customs Service at the date of the ruling, based on the legal myth that the product scope ruling is merely a "clarification" of the unchanging product scope of the investigation. This ITA practice produces unfair results that do not serve the goals of the antidumping or countervailing duty law. For this reason, the ITA should recognize that its product scope rulings often do change the status quo, and should apply such rulings retroactively only in cases of clear attempted evasion.

Because Customs liquidation generally takes several months (up to a year), the effect of the ITA's action retroactively subjects months of past imports to substantial additional duties. The importer has had no opportunity to take normal steps to avoid such duties generally having good reason to believe its product will not

84. Thus, if the ITA's preliminary determination is published on March 1, 1986, finding a preliminary dumping margin of twenty percent, no import of that merchandise after March 1 will be liquidated by Customs, and the importer will pay a bond or cash deposit on each import (pending determination of actual duty owed) equal to twenty percent of the value of the merchandise. At the time of the final ITA determination, the cash deposit level is generally modified to reflect the final dumping margins found, although the statute indicates that this should not occur until after there is also a final affirmative determination by the Commission. 19 U.S.C. §§ 1673d(2), 1673e, 1673f (1982).

85. 19 U.S.C. § 1675 (1982). In annual § 751 reviews of antidumping orders, the importer must pay an antidumping duty equal to the amount by which the sales price of any of the merchandise is found to fall below fair value.

86. As noted above, the importer has been paying a cash deposit equal to the estimated antidumping or countervailing duty on each entry. If the duty actually found to be owed in the annual review is less than the cash deposit, the difference is returned to the importer; if the actual duty owed is more than the cash deposit, the importer must pay the additional amount. 19 U.S.C. § 1675(a)(2). The one exception to this is the period after the ITA's preliminary determination and before the final determination in the initial investigation. During this period, the maximum amount that the importer must pay is the amount of the bond or cash deposit already imposed. 19 U.S.C. § 1671f (countervailing) and § 1673f (antidumping).

87. A foreign exporter or U.S. importer whose product is clearly subject to an investigation has the opportunity at the time of the ITA preliminary determination (1) to cease such imports, (2) to adjust its prices (or avoid further subsidies) in order to avoid the payment of substantial duties at the time of
be covered, because the importer has not been required previously to post a bond or cash deposit. In a dramatic example of this, the major importer of roasted pistachios in *Raw Pistachios* suddenly found itself facing retroactive duties of more than 200 percent of the total value of goods imported from March through May 1986 despite the fact that no party sought this result. In some cases, the retroactivity applies back even further because the ITA has ordered Customs to suspend liquidation on the product long before the scope ruling is made. This occurred in *Color Televisions*, where suspension of liquidation was ordered on January 9, 1986, and the scope ruling was issued on October 20, 1986.

On an equitable plane, retroactive application may be justified in exceptional cases, where a respondent intentionally modifies its product targeted by an antidumping or countervail order and imports the modified products quickly in large volumes as a substitute for the target product in an effort to avoid antidumping cash deposits. In effect, the U.S. industry is still being substantially injured by imports of basically the same product. Assuming that the ITA then rules that the modified product is within the scope of the order, it is reasonable that the importer should not be permitted to profit from his evasion effort, and that those imports, if unliquidated, should be subject to payment of the antidumping or countervailing duty.

In any other case, a determination by the ITA to include imports retroactively is unfair and harsh. Inasmuch as the government, through Customs, has apparently previously taken the position that the product is not covered, the affected parties should not be prejudiced by reliance on this position. Retroactivity is also unlikely to serve the purpose of the antidumping and countervail laws. Where the entry has already been made and the product already sold, the retroactive imposition of duties on past shipments will not provide the relief for which the antidumping and countervail laws were established. It cannot cause the foreign

the § 751 review, or (3) to take other steps to offset the impact of potential duties, such as raising resale prices to cover the penalties. Thus, the notice of the preliminary determination serves as notice to such exporters and importers that their imports are thereafter at risk, and that remedial steps must be taken. However, in the case of an exporter or importer of a product that apparently is not covered by the preliminary determination, there is no such notice and no reason to modify activities to protect against the imposition of duties.

88. Because the ITA has directed Customs to demand such a bond or cash deposit on all merchandise that is subject to the investigation, the fact that no bond or deposit is required is reasonably understood by those parties to be a U.S. government decision that the products are not subject to the investigation.

89. Letter from Timothy A. Harr to Gilbert Kaplan, April 16, 1986. In this instance, even the petitioners agreed that retroactive application was not warranted. Despite this fact, the ITA applied the ruling retroactively, asserting it had no choice given that the product had always been within the class of merchandise. 51 Fed. Reg. 18919 (1986). The sincerity of the ITA’s belief on this topic was undermined by the fact that a “critical circumstances” ruling covering raw pistachios was not extended to roasted pistachios despite the fact that critical circumstance rulings usually apply to the entire class. *Id.*

exporter or the U.S. importer to raise prices or to eliminate the low priced imports. The product has already been entered and sold.

In sum, to apply a product scope ruling retroactively, the ITA must find the same type of willfulness on the part of the respondents that is necessary to apply a regular antidumping or countervailing duty retroactively under the so-called "critical circumstances" provision. On the other hand, where a foreign producer has been consistently selling a particular product to certain customers or has engaged in other normal trade practices, without previous application of the investigation or order to his product, a ruling that in the target class product should be prospective only.

C. Payment of Cash Deposits

Although an importer of a product newly included within the scope of an antidumping or countervailing duty order will have the opportunity to show no dumping or subsidies at the annual § 751 review, until the time of such review the importer will be forced to pay cash deposits on each entry. The cash deposit will be at an "all other" rate established on the basis of the cash deposit levels for all producers previously participating. Because of the long timetables for § 751 reviews, the importer may be required to pay such cash deposits for more than a year before the importer has an opportunity to show that in fact no antidumping or countervailing duties are owed.

91. The effective date of an order may be moved forward to ninety days before the ITA preliminary determination where the ITA and the Commission make certain findings which indicate that the respondent knew that its imports were being sold unfairly and injuring the U.S. industry and nevertheless attempted to get large volumes of the product into the United States before relief could be implemented. 19 U.S.C. § 1673d(a)(3).

92. Two related provisions of law suggest that prospective-only treatment is appropriate for most product scope cases. First, where a previous Customs Service classification is reinterpreted by a court such that a product is placed in a different, less-advantageous, classification, the effect of the decision is prospective only, beginning in thirty days. 19 C.F.R. § 152.16 (b-c). By analogy, in a trade proceeding, if a product has been consistently imported during the investigation and has not been included in the investigation nor in the suspension of liquidation, a subsequent ruling to include that product should be deemed a change in policy, and should be given prospective treatment only.

Second, under the antidumping and countervailing duty laws, where the Commission finds only a threat of injury but no actual injury, dumping or countervailing duties are prospective only, from the time of the final determination. 19 U.S.C. § 1673e(b)(2). By analogy, in a trade proceeding where the ITA adds a previously non-covered product to the scope of the investigation to prevent future evasion rather than to respond to extensive current evasion, prospective treatment is appropriate. In such instances, prospective treatment will provide all the necessary relief to the U.S. industry, and at the same time will not impose sanctions on importers that have relied on the apparent product scope of the investigation in conducting their business.

93. For example, assume that the § 751 annual review period is January 1 through December 31, the prevailing "all other" estimated cash deposit rate is twelve percent, and a product scope determination finds a new product within an antidumping order on May 1, 1986. If this product scope decision applies to all entries as of May 1, 1986, it might well cover entries as early as February 1986 because it
Although excess cash deposits are reimbursed with interest, the importer has in fact incurred a substantial penalty. In order to cover the cash deposit, the importer may well have been forced to increase its prices to levels that are less competitive. The importer is uncertain until the decision in the later § 751 review whether the ITA will support his claims of no dumping. Given the multitude of methodological and factual decisions that ITA must make in many cases, the importer can seldom be confident that the ITA will endorse the importer’s factual analysis.

In defense of its policy, the ITA takes the position that once it is determined that the product is within the scope of the antidumping or countervailing duty order, the law requires that a cash deposit be paid. Also, the importer of the newly included product is in a sense treated no more harshly than a new importer of an originally targeted product; such an the importer must pay the weighted-average cash deposit of the parties that participated in the previous § 751 review. Finally, absent information on the proper antidumping margin for the new product, the “all other” level is arguably a reasonable basis for determining the proper cash deposit level.

On balance, to the extent that the new product is made by the same foreign producers that produce the original product, the ITA may be justified in relying on the margins established for the basic product. Also, where the weighted average margins are low, the ITA may be justified in waiting for the first § 751 review on the ground that payment of a small cash deposit will not cause substantial injury to importers. However, for an importer whose product is for the first time covered due to a scope ruling the ITA should assure that high cash deposit levels do not cause substantial irreparable harm to the importer without an opportunity for the importer to establish a reduced cash deposit level for that product. In cases where the applicable “all others” cash deposit is above a certain level (e.g., ten percent) the ITA should permit producers or importers of a product that previously had not been subject to cash deposits to provide information within sixty days showing that the margins for that product should be lower.

Section 736 of the Trade Act of 1930 contains specific provisions for accelerated reviews at the end of the initial investigation. As a matter of policy, the ITA has almost uniformly denied requests for such reviews in recent years. By initiating such reviews at the request of new parties when a scope ruling includes

takes three months to liquidate that product. The importer therefore would be required to pay cash deposits on entries from February 1986 of twelve percent. Sometime after December 1986, the ITA would begin its annual review, which might take a year and a half to complete. Thus, in June 1988, the ITA might finally conclude that the February through December 1986 entries had been sold at fair value and that no dumping duties were owed. Eventually, the previously paid dumping duties would be returned with interest.

94. 19 U.S.C. § 1673e(c).
a related product late in an investigation (as in Raw Pistachios or Fuel Ethanol), the ITA could obtain the information necessary to establish a valid cash deposit level for the new product. Such a limited practice would not open the flood gates for § 736 reviews in other cases, and would increase the fairness of the ITA's action. The ITA should not complain of this additional work because if, as the ITA must find, the related product should have always been covered, the same work should have been done initially.

In the case of product scope rulings made long after the initial investigation, as in Color Televisions, the § 736 review will not be available, but the ITA is not prevented by statute from modifying the results of its § 751 review. Thus, where a scope ruling adds new parties and the existing "all others" cash deposit level is substantial, the ITA should allow the new parties to submit information to form the basis for a modification of the previous § 751 results such that the new parties obtain cash deposit levels based on their own activities.

V. CONCLUSION

Although the federal courts have established an elaborate set of standards for ITA determinations of product scope questions in cases such as Diversified Products and Royal Business Machines, these standards have not been the decisive factors in many recent product scope rulings. In order to encompass the wide variety of products imported into the United States, the standards developed have been necessarily broad, vague and subjective. This has given the ITA considerable discretion in its product scope rulings.

The ITA has endeavored to use this broad discretionary power to assure the effectiveness of its antidumping and countervail relief. Where the ITA believes that the purpose of that relief may be evaded by the parties through imports of a related product, the ITA will stretch to include the related product within the ambit of the import relief. The ITA is restrained in this action only to the extent that the related product was clearly and explicitly excluded from the proceedings, and even here the ITA has evidenced a willingness to read the record of the proceedings in a way that unfetters the ITA's discretion. While the ITA's goal to protect evasion is laudable, the unbridled discretion necessary to achieve this goal under current statutory provisions can lead to harmful and unfair results.

In an effort to provide clearer statutory guidelines for one of the most frequent product scope/evasion problems—unfinished or unassembled goods—currently proposed trade legislation contains provisions covering such imports. This proposed legislation generally aims to give the ITA clearer standards for dealing with such imports, but such legislation will not eliminate the ITA's discretion. In order to be sufficiently comprehensive to cover all intended circumstances, the legisl-

96. In Color Televisions and Raw Pistachios, the ITA ignored clear evidence that the related products had been excluded. See supra Section III of this article.
tion is still broad in its language and provides subjective standards to be applied by the ITA. Furthermore, it does not address other types of product scope situations, such as modified forms of the target merchandise.

Therefore, even if the legislation is adopted, it is likely that the ITA will continue to exercise broad discretion in product scope rulings. Thus, it remains important that the ITA modify its procedures to minimize the possible unfair results that the exercise of such discretion necessarily cause. The ITA should recognize that its product scope rulings often represent a highly adverse change in the status quo for some parties. Accordingly, the ITA should seek to minimize the need for such rulings through fuller product descriptions at initiation, should make application of such rulings retroactive only where clearly warranted, and should permit adjustment of substantial cash deposit levels for newly included parties. By thus minimizing unfair results, the ITA will make its exercise of discretion less troublesome for itself and for the parties affected.