No. 07-449

In the Supreme Court of the United States

NTN CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a party is entitled to have the final results of the Department of Commerce's administrative review of antidumping duties set aside on the basis of an adverse World Trade Organization (WTO) report, where Commerce's final results are indisputably consistent with the governing domestic statute as well as with Commerce's policies at the time the results were issued and the party did not challenge the final results on that basis in the lower courts, and where Congress has specifically provided that WTO reports have no domestic legal effect except as implemented by the Executive Branch or Congress, neither of which has called into question the continuing validity of the final results here at issue.

2. Whether the court of appeals correctly sustained the Department of Commerce's factual determination that petitioners failed to cooperate to the best of their ability in justifying a particular methodology for allocating freight costs.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 481 F.3d 1355. The opinion of the Court of International Trade (Pet. App. 12a-82a) is reported at 346 F. Supp. 2d 1312.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2007. A petition for rehearing was denied on May 3, 2007 (Pet. App. 83a-84a). On July 31, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 31, 2007. On August 23, 2007, the Chief Justice further extended the time to September 30, 2007, and the petition was filed on September 28, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. Antidumping laws provide for the imposition of antidumping duties when "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. 1673. If the sale of a product at less than its fair value causes or threatens injury to an industry in the United States, the statute provides for imposition of an antidumping duty "in an amount equal to the amount by which the normal value [*i.e.*, the price when sold 'for consumption in the exporting country'] exceeds the export price [*i.e.*, the price when sold 'to an unaffiliated purchaser in the United States']." 19 U.S.C. 1673, 1677a(a), 1677b(a)(1)(B)(i).

If the Department of Commerce (Commerce) makes a final determination that merchandise is being sold in the United States at less than its fair value, it is required to determine an "estimated weighted average dumping margin." 19 U.S.C. 1673d(c)(1)(B)(i)(I). The statute specifies that the "dumping margin" is "the amount by which the normal value exceeds the export price," and that the "weighted average dumping margin" is the "percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices" for that exporter or producer. 19 U.S.C. 1677(35) (A) and (B).

Once Commerce finds that dumping has occurred, importers must then post a cash deposit or security for each entry in an amount based on the dumping margin of the exporter or producer of the entry. 19 U.S.C. 1673d(c)(1)(B). Before final liquidation of entries subject to an antidumping duty order, any interested party may request on an annual basis an administrative review of the antidumping duty. 19 U.S.C. 1675. The dumping margin that is determined during the course of that re-

view then becomes the rate at which the entries subject to the review are liquidated, as well as the basis for estimated antidumping duties on new entries. 19 U.S.C. 1675(a)(2)(A) and (C).

a. During the administrative review process, Commerce issues questionnaires to producers and exporters regarding the details of their sales (including their incurred expenses) both in the home market and in the United States. The answers to those questionnaires become the basis upon which Commerce determines whether sales have been made at less than fair value. Often, because of specific accounting practices, parties are not able to report their specific expenses as they were incurred on a transaction-specific basis. Accordingly, Commerce permits parties, when they cannot report their expenses on the bases upon which they were incurred, to allocate those expenses across a broader universe of sales. Commerce has promulgated regulations that explain that parties seeking to allocate an expense must demonstrate, "to the Secretary's satisfaction," that the allocation methodology is performed on as specific a basis as possible and is not distortive. 19 C.F.R. 351.401(g)(2); 19 U.S.C. 1677m(e) (requiring Commerce to accept information, if, *inter alia*, it is reliable, reflects the best efforts of the submitting party to provide information, and can be used without undue difficulties).

When Commerce cannot rely upon the information provided by a respondent, Commerce may rely upon otherwise available facts to determine the respondent's proper expenses. 19 U.S.C. 1677e(a). If Commerce determines additionally that a respondent has not acted to the best of its ability when responding to Commerce's questionnaires, Commerce may choose to apply an adverse inference to the respondent. 19 U.S.C. 1677e(b).

b. Once Commerce has accumulated all of the necessary and reliable information to make the ultimate dumping calculation, its long-standing practice has been to count only positive dumping margins when calculating aggregate dumping margins. Under that approach, when normal value does not "exceed[]" the export price, 19 U.S.C. 1677(35)(A), there is no, or zero, "dumping margin," and thus nothing to include when calculating the "aggregate dumping margin" that the statute specifies as the numerator in the "weighted average dumping margin" ratio. 19 U.S.C. 1677(35)(B). In other words, "negative" dumping margins for products sold above the normal value do not offset an exporter's or producer's dumped sales.

2. In 1994, the United States became a signatory to several Executive agreements, known collectively as the Uruguay Round Trade Agreements (Agreements), one of which is the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement), *reprinted in* 1 H.R. Doc. No. 316, 103d Cong., 2d Sess. 1453 (1994) (H.R. Doc. No. 316). Congress enacted the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809 (19 U.S.C. 3501 *et seq.)*, to implement those Agreements. 19 U.S.C. 3511. In the URAA, Congress established detailed rules regarding the relationship between the Agreements and domestic law (including domestic trade laws), as well as an elaborate process for resolving disputes concerning the consistency of domestic laws with the Agreements.

As a general matter, Congress emphasized the continuing primacy of domestic law in the event of any conflict between it and the Agreements. As such, "[n]o provision of any of the Uruguay Round Agreements, nor the

application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. 3512(a)(1). Congress further stated, with respect to the interaction of the URAA and domestic law, that "[n]othing in this Act shall be construed * * * to limit any authority conferred under any law of the United States * * * unless specifically provided for in this Act." 19 U.S.C. 3512(a)(2).

The URAA also clarifies that neither the Agreements nor Congress's approval of the Agreements creates privately enforceable rights or provides a basis for challenging an Executive Branch action:

> No person other than the United States—
>
> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
>
> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States * * * on the ground that such action or inaction is inconsistent with such agreement.

19 U.S.C. 3512(c)(1).

Because the URAA specifies that the Agreements create no privately enforceable rights and cannot provide the basis for challenging administrative actions, only the Agreements' mechanisms may be invoked to resolve disputes as to the United States' compliance with its obligations under the Agreements. See Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding), 33 I.L.M. 1226 (1994); 19 U.S.C. 3511(d)(16). Those procedures include a proceeding before a World Trade Or-

ganization (WTO) panel, the findings of which can be appealed to the WTO Appellate Body. See Dispute Settlement Understanding Arts. 6, 17, 33 I.L.M. at 1230, 1236. Private entities may not initiate a proceeding before a WTO panel; rather, only a WTO member may invoke the WTO dispute settlement procedures. *Id.* Art. 2.1, 33 I.L.M. at 1226.

Congress was very specific about the manner in which the United States would respond to reports issued by WTO panels or the WTO Appellate Body. The Statement of Administrative Action (SAA) approved by Congress in connection with the passage of the URAA, see 19 U.S.C. 3511(a), 3512(d), makes clear that WTO panels and Appellate Body reports "will not have any power to change U.S. law or order such a change." H.R. Doc. No. 316, at 659. Nor may a party ask a court to direct implementation of a WTO report. To the contrary, "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it." *Ibid.*

In the URAA, Congress established two procedures by which a WTO report may be implemented in domestic law. The first method, set forth in Section 123 of the URAA, 19 U.S.C. 3533, establishes a procedure for amending, rescinding, or modifying an agency regulation or practice (within the meaning of United States law) to implement a WTO report concluding that the regulation or practice is inconsistent with the Uruguay Round Agreements, including the Antidumping Agreement. 19 U.S.C. 3511. Section 123(g) specifies that the regulation or practice that the WTO body has found inconsistent with the Agreements "*may not* be amended, rescinded, or otherwise modified * * * unless and until" the elaborate procedures detailed in the subsection

have been complied with. 19 U.S.C. 3533(g)(1) (emphasis added). The United States Trade Representative (USTR) is required to consult with the appropriate congressional committees, agency or department head, and private sector advisory committees, and to provide an opportunity for public comment, before determining whether and how to implement a WTO report. 19 U.S.C. 3533(g)(1)(A)-(F).

A second procedure for implementing a WTO report in domestic law is set forth in Section 129 of the URAA, 19 U.S.C. 3538. Section 129 is narrower in scope than Section 123(g), and applies when a WTO report indicates that a particular action by Commerce (or the International Trade Commission) in an antidumping proceeding was not in conformity with the obligations of the United States under the Antidumping Agreement. 19 U.S.C. 3538(b)(1). Like the statutory procedure under Section 123, Section 129 provides for consultation between the USTR and relevant stakeholders before the USTR makes a determination whether, and Commerce determines how, to implement the WTO body report. 19 U.S.C. 3538(b)(3) and (d). Upon completion of that process, the USTR "*may* * * * direct [Commerce] to implement, in whole or in part," a new determination consistent with the WTO body's findings. 19 U.S.C. 3538(b)(4) (emphasis added). If the USTR requests Commerce to issue a new determination and orders Commerce to implement it under Section 129, that new determination applies only to "unliquidated entries of the subject merchandise" "that are entered or withdrawn from warehouse, for consumption on or after" the date the USTR directs Commerce to implement the new decision. 19 U.S.C. 3538(c)(1).

In the URAA, Congress made clear that the USTR could, after consultation, choose not to alter the administrative action that is the subject of an adverse WTO report. 19 U.S.C. 3538(b)(4) (the USTR "may" direct implementation of a new determination consistent with a WTO report "in whole or in part"); H.R. Doc. No. 316, at 1015; 19 U.S.C. 3533(f)(3) (requiring USTR to consult with the appropriate congressional committees "concerning *whether to implement* the report's recommendation and, *if so*, the manner of such implementation and the period of time needed for such implementation" (emphases added)); 19 U.S.C. 3538(b)(4) (USTR "may" direct implementation of a new determination consistent with WTO report "in whole or in part"). Importantly, the political branches could decide not to implement the new determination, but instead compensate the complaining party in some other way. See Dispute Settlement Understanding, Arts. 3.7, 22, 33 I.L.M. at 1227, 1239; H.R. Doc. No. 316, at 1016.

3. Petitioners are a Japanese corporation and American affiliated entities that manufacture, export, and import anti-friction bearings to the United States: NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN-Driveshaft, Inc., and NTN-BCA Corporation. In 1989, Commerce determined that antifriction bearings from Japan (and other countries) were being sold, or likely to be sold, in the United States at less than fair value and issued an antidumping duty order. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof from Japan*, 54 Fed. Reg. 20,904 (1989). Each year thereafter, Commerce has conducted an administrative review of entries during the preceding year.

On June 19, 2001, Commerce initiated the twelfth administrative review of that order, covering the period May 1, 2000, through April 30, 2001. During the course of the review, Commerce issued several questionnaires to foreign producers, including petitioners, requesting that they report their freight expenses on the bases on which those expenses were incurred (such as weight or volume). Pet. App. 3a-5a. If petitioners could not do so, Commerce requested that they explain why and also explain why their chosen methodology for allocating those expenses was not distortive. *Id.* at 4a. Each time Commerce asked for an explanation, petitioners provided Commerce with the same response, asserting that their freight expenses were incurred on multiple bases and that the only variable for which they had data for all products was sales value. Petitioners then stated that they used sales value to allocate their freight expenses and that "[t]his allocation methodology is not distortive because it represents the most consistent method of estimating what freight expenses would have been." *Id.* at 4a-5a.

On August 30, 2002, Commerce issued the final results of the twelfth administrative review. Pet. App. 85a-99a. In the final results, Commerce evaluated the allocation methodology that petitioners used to report their freight expenses and determined that petitioners had failed to demonstrate adequately that their chosen allocation methodology was on as specific a basis as possible and that it was not distortive. See Memorandum from Richard W. Moreland to Faryar Shirzad, Issues and Decision Memorandum for the Administrative Reviews of Ball Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom – May 1, 2000,

through April 30, 2001, at 75-78 (Decision Memorandum) (visited Dec. 20, 2007) <http://ia.ita.doc.gov/frn/summary/multiple/02-22254-1.pdf>. Additionally, because petitioners failed multiple times to explain why their allocation methodology was specific and not distortive, Commerce determined that petitioners had failed to act to the best of their ability and, accordingly, applied an adverse inference to its consideration of facts otherwise available. *Id.* at 78-79.

Commerce also explained that it continued to treat petitioners' nondumped sales in the same manner that it had always treated nondumped sales—in other words, Commerce followed its long-standing "zeroing" methodology and did not offset dumped sales with nondumped sales in the margin calculation. Decision Memorandum 12-14.

4. Petitioners filed suit in the Court of International Trade challenging Commerce's determination not to accept petitioners' allocation of their freight expenses and its application of an adverse inference. Pet. App. 17a. The Court of International Trade sustained the final results of Commerce's administrative review in a decision dated August 20, 2004. *Id.* at 22a-82a. Although other parties to the action challenged Commerce's methodology for calculating the dumping margin before the trial court, petitioners did not. *Id.* at 15a.

5. Petitioners appealed on the issue of Commerce's treatment of their freight allocation. In an opinion dated March 7, 2007, the court of appeals affirmed. Pet. App. 1a-11a. The court held that petitioners had failed to demonstrate that allocation by sales value was not distortive or inaccurate. The court further held that petitioner's defense of their allocation method was "little more than a combination of the obvious observation that

sales value is a feature of every product and the unsupported assertion that sales value is 'the most consistent method of estimating what freight costs would have been.'" *Id.* at 7a (citation omitted). The court of appeals also held that substantial evidence supported Commerce's conclusion that petitioners had failed to cooperate to the best of their ability in explaining their allocation methodology. Accordingly, the court held that Commerce's application of an adverse inference from facts otherwise available was supported by substantial evidence and in accordance with law. *Id.* at 10a.

Petitioners did not appeal the issue of Commerce's treatment of nondumped sales, *i.e.*, its use of the "zeroing" methodology. See Pet. App. 2a, 119a. And, although petitioners' appeal was originally consolidated with an appeal by NSK Ltd. and its affiliates in which the NSK appellants did raise that issue, the NSK appellants ultimately withdrew their appeal. Although petitioners had not raised the zeroing issue in the Court of International Trade or on appeal, they filed a petition for rehearing, contending for the first time that the court of appeals should consider the issue of zeroing in light of a recent report of the WTO Appellate Body. *Id.* at 119a. The court denied the petition. *Id.* at 83a-84a.

6. On January 9, 2007, while the appeal was pending, the WTO issued its report in *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, concluding that the Department of Commere's zeroing methodology in administrative reviews was inconsistent with the Antidumping Agreement. That WTO proceeding concerned a challenge to Commerce's zeroing methodology in administrative reviews and also a challenge to the specific determination in the twelfth administrative review (among others) of antifriction

bearings from Japan. In response to that report, the United States has stated that it intends to comply with its WTO obligations, but has not yet stated how it intends to do so, and has not undertaken the statutory process to make a determination pursuant to Section 123 or Section 129. The period for bringing United States practice into compliance with the WTO report will end on December 24, 2007. Agreement on Reasonable Period of Time, *United States-Measures Relating to Zeroing and Sunset Reviews,* WT/DS322/20 (May 8, 2007). After that date, if Japan believes that the United States is not in compliance with its WTO obligations, Japan may seek further review at the WTO regarding the issue.

ARGUMENT

Petitioners seek review (Pet. 21-26) of the court of appeals' refusal to vacate the Department of Commerce's final results—results that petitioners concede are consistent with the antidumping statute, with Commerce's established policies at the time those results were issued, and even with Commerce's presently stated policies regarding administrative reviews—so that Commerce may determine whether to apply retroactively any new policy that it may in the future choose to adopt in response to the report of a WTO Appellate Body. That argument, which petitioners raised for the first time below in their petition for rehearing in the court of appeals, and which would give impermissible judicial effect to the WTO body's report, is substantively identical the question that this Court recently declined to review in *JTEKT Corp.* v. *United States*, cert. denied, 128 S. Ct. 486 (2007) (No. 06-1632). There is no reason for a different result here.

Petitioners' additional argument (Pet. 26-30) that the court of appeals erred in sustaining Commerce's refusal to credit petitioners' allocation of freight expenses and its application instead of an adverse inference from facts otherwise available amounts to a challenge to the court of appeals' ruling on the sufficiency of the evidence to support Commerce's determination and does not warrant this Court's review.

1. Petitioners' first challenge is to Commerce's application of its zeroing methodology in determining petitioners' antidumping duty. Petitioners failed to raise a timely challenge to Commerce's zeroing methodology before either the trial court or the court of appeals, and therefore should not be permitted to raise that argument before this Court. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below.").

But even if the Court were to look beyond petitioners' default, the petition for a writ of certiorari on that issue should be denied, just as the Court denied the petition in *JTEKT*, in which the petitioners had preserved the issue by raising it in the lower courts. As in *JTEKT*, petitioners here do not contend that the Department of Commerce's final results are inconsistent with the antidumping statute, or with Commerce's established policies at the time those results were issued, or even with Commerce's presently stated policies regarding administrative reviews. Rather, petitioners argue that the policy on which the final results are based "violates the United States' treaty obligations." Pet. 7. That argument is one that Congress has expressly foreclosed by specifying that no party can challenge government action "on the ground that such action * * * is inconsis-

tent with" one of the Uruguay Round Agreements. 19 U.S.C. 3512(c)(1)(B). Nor can petitioners circumvent that express limitation by urging the Court to vacate and remand a determination that is concededly proper as a matter of domestic law, simply for Commerce to consider conforming that determination to an adverse WTO body report. Vacating the final results on that ground would give impermissible judicial effect to the WTO body's report, in direct contravention of Congress's explicit determination that such decisions have no legal effect "unless and until" the political branches have implemented them. 19 U.S.C. 3533(g)(1).

Petitioners' argument (Pet. 20) that the court of appeals' failure to remand the case "has deprived Commerce of the opportunity to implement its change in practice" is absurd. The Executive Branch has not requested vacatur or a remand, and instead affirmatively opposes such relief. The relief sought by petitioners would thus interfere with, rather than advance, "the statutory scheme that Congress established to implement" WTO Appellate Body Reports. Pet. 7.

As petitioners acknowledge (Pet. 17), the same arguments that they make here were recently advanced in the petition for a writ of certiorari in *JTEKT Corp.* v. *United States*. The Court denied certiorari in that case, 128 S. Ct. 486 (2007) (No. 06-1632), and the same result is warranted here.

a. Petitioners do not dispute that the Department of Commerce's "zeroing" methodology in administrative reviews is consistent with domestic law. That issue was determined in the Government's favor in *Timken* v. *United States*, 354 F.3d 1334 (Fed. Cir.), cert. denied, 543 U.S. 976 (2004), and petitioners do not challenge that holding. There, in the context of an administrative

review, the court of appeals held that, while the antidumping statute does not compel zeroing, *id.* at 1341-1342, Commerce's "zeroing practice is a reasonable interpretation of the statutory language," *id.* at 1342. The court noted that Commerce's construction "makes practical sense," has been upheld repeatedly by the Court of International Trade (both before and after the URAA), and "combats the problem of masked dumping, wherein certain profitable sales serve to 'mask' sales at less than fair value." *Id.* at 1342-1343. See *Corus Staal BV* v. *Department of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) (upholding Commerce's policy of zeroing in initial antidumping investigations), cert. denied, 546 U.S. 1089 (2006).

Petitioners nevertheless urge the Court to vacate the final results based upon the United States' general statement that it intends to comply with its WTO obligations. That argument is foreclosed by the URAA, which expressly provides that no agency action may be challenged upon the ground that it conflicts with the Agreements and that only the political branches, and not the courts, may give effect to an adverse WTO body report. See 19 U.S.C. 3512(c)(1)(B) ("No person other than the United States * * * may challenge * * * any action or inaction by any department, agency, or other instrumentality of the United States * * * on the ground that such action or inaction is inconsistent with" the Agreements.); H.R. Doc. No. 316, at 659 (WTO panel and Appellate Body reports "will not have any power to change U.S. law or order such a change"; "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.").

Petitioners cannot circumvent those strictures by casting their argument in terms of allowing Commerce "the opportunity to implement its change in practice." Pet. 20. The final results are concededly consistent with domestic law. Thus, a judicial decision vacating and remanding the final results for reconsideration in light of the WTO body's view of the United States' "international obligations" would necessarily give forbidden judicial effect to those Agreements and reports. As Congress has made clear, WTO reports have no legal effect "unless and until" implemented by the political branches pursuant to the statutory processes specified by Congress. 19 U.S.C. 3533(g)(1); *Corus Staal*, 395 F.3d at 1348-1349; *Corus Staal BV* v. *United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007). Precisely because the political branches have made no determination to give the WTO reports retrospective effect (or, as of yet, any effect at all), there is no basis upon which this Court could vacate the final results in the completed administrative review at issue in this case. See *NSK Ltd.* v. *United States*, No. 2007-1114, 2007 WL 4357773, *3 (Fed. Cir. Dec. 14, 2007) ("[B]ecause Commerce's zeroing practice is in accordance with our well-established precedent, until Commerce officially abandons the practice pursuant to the specified statutory scheme, we affirm its continued use in this case.").

b. In any event, contrary to petitioners' suggestion (Pet. 20), Commerce has not changed its zeroing practice in administrative reviews. The United States has issued a general statement that it "intends to comply * * * with its WTO obligations" in connection with the report in *US-Zeroing (Japan)*, which found the United States' "zeroing" practice in administrative reviews to violate the Antidumping Agreement. But the United

States has not yet implemented that report, and it has given no indication that compliance would affect retroactively the validity of final results, such as those in the present administrative review, that were completed long before the WTO's ruling.

To the contrary, the United States has made clear that compliance with its WTO obligations does not require setting aside final administrative reviews, especially when they have been overtaken by a subsequent administrative review. Indeed, Commerce has specifically stated in the seventeenth administrative review of antifriction bearings from Japan—issued many months *after* the United States' statement that it would comply with its WTO obligations regarding the WTO report on administrative reviews—that it has not changed its zeroing practice with respect to completed administrative reviews. Memorandum from Stephen J. Claeys to David M. Spooner, Issues and Decision Memorandum for the Antidumping Duty Administrative Reviews of Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom for the Period of Review May 1, 2005, through April 30, 2006, at 9 (visited Dec. 20, 2007) <http://ia.ita.doc.gov/frn/summary/multiple/e7-2051-1.pdf> ("because no change has yet been made with respect to the issue of 'zeroing' in administrative reviews, the Department has continued with its current approach to calculating and assessing antidumping duties for these administrative reviews"); *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Review in Part*, 72 Fed. Reg. 58,054 (2007) (adopting decision memorandum).

(i) The presumption against making retroactive changes in light of adverse WTO reports is clear from the URAA itself. In Section 129 of the URAA, 19 U.S.C. 3538, Congress specified that, when the political branches choose to respond to the WTO body report by issuing a WTO-compliant determination under that Section, the new determination will "apply with respect to unliquidated entries of the subject merchandise * * * that are entered, or withdrawn from warehouse, for consumption on or after" the date upon which the USTR directs implementation. 19 U.S.C. 3538(c)(1). Because the entries at issue here necessarily predate any as-yet hypothetical Section 129 implementation of *US-Zeroing (Japan)*, such an implementation could have no effect upon this case.

(ii) Likewise, if the political branches choose to implement the report in *US-Zeroing (Japan)* through a more general change in methodology, as provided in Section 123 of the URAA, such a change would not benefit petitioners with respect to the present administrative review, which was concluded long before the WTO report and any implementing determination. For example, Commerce made clear in its Section 123 implementation of *US-Zeroing (EC)* (regarding zeroing in antidumping investigations) that a change in methodology pursuant to that Section does not undermine the validity of final agency determinations that predate the modification. See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,725 (2006) (limiting application of change in methodology under Section 123 "to all investigations pending before the Department as of the effective date").

c. Although petitioners would not obtain retrospective relief under either Section 129 or Section 123—the two methods provided by Congress for implementing an adverse WTO report—petitioners nonetheless urge the Court to vacate the final results of the twelfth administrative review so that Commerce can provide retrospective relief by other, unspecified means. Petitioners contend (Pet. 25) that when the United States "explained to the WTO that 'Commerce would need to decide what to do with respect to entries [] that took place prior to the date of revocation,'" it somehow expressed the opinion that courts were "author[ized] to remand cases involving prior unliquidated entries." Pet. 26.

Petitioners rely upon a brief filed by the United States before a WTO panel, see Pet. App. 130a, but petitioners over-read the United States' WTO representations by a considerable degree. In the filing cited by petitioners, the United States observed that, while Congress has specified that a Section 129 determination only has prospective effect upon future entries, that Section does not mandate or preclude any action in *subsequent* administrative reviews—that is, reviews initiated after the Section 129 determination. Pet. App. 143a. Nothing in the United States' WTO brief suggests that a Section 129 determination could provide a basis for courts to vacate and remand for further agency action already-completed administrative reviews.

d. Commerce has made clear that nothing in the as-yet-unimplemented WTO report in *US-Zeroing (Japan)* undermines the validity of the final results at issue in this case. Thus, there is no need for this Court to remand in order to permit Commerce to decide whether it will implement "the intervening change in policy" retroactively in petitioners' already-completed administrative

review. Pet. 22. Because there has been no change in policy with respect to administrative reviews, the principle cited by petitioners—that a court should remand following an agency's change in policy to permit the agency to determine in the first instance the extent to which the policy change should be applied retroactively—is simply inapposite. Pet. 21-23 (citing *NLRB* v. *Food Store Employees Union*, 417 U.S. 1 (1974); *Panhandle E. Pipe Line Co.* v. *FERC*, 890 F.2d 435, 438-449 (D.C. Cir. 1989); *Williston Basin Interstate Pipeline Co.* v. *FERC*, 165 F.3d 54, 62-63 (D.C. Cir. 1999)).

2. The second issue on which petitioners seek review (Pet. 26-30) is, in essence, the question whether substantial evidence supported Commerce's decision to draw an adverse inference from facts otherwise available to determine the allocation of petitioners' freight costs among transactions, rather than utilizing petitioners' own proposed allocation. The court of appeals correctly held that Commerce's decision to reject petitioners' allocation as distortive and to resort instead to an adverse inference from facts otherwise available was supported by substantial evidence. That holding of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Indeed, petitioners do not allege such a conflict, or even that the court of appeals' decision raises an important question of law. As the court of appeals recognized, the *only* issue presented by petitioners' appeal was whether Commerce's determination was supported by substantial evidence. The court of appeals' resolution of that fact-bound issue does not warrant this Court's review.

Petitioners contend that Commerce's decision to apply an adverse inference from facts otherwise available is contrary to the statute. In substance, however, peti-

tioners merely raise a challenge to the weight of the evidence supporting Commerce's decision, asserting that "because [petitioners'] actions did not rise to [the] threshold necessary under the statute. * * * Commerce's decision failed to follow the statutory scheme." Pet. 28.

An adverse inference may be drawn only when a party has failed to act to the best of its ability in cooperating with Commerce's requests for information. 19 U.S.C. 1677e(b). As the court of appeals correctly held, Commerce reasonably found that petitioners had failed to act to the best of their ability when, after several chances, they still neglected to explain adequately how their allocation methodology was non-distortive. The court found Commerce's conclusion reasonable because petitioners provided only "summary statements, unrelated to the relationship between its freight expenses and the basis on which those expenses were allocated." Pet. 10a.

Indeed, as the court noted, Pet. App. 10a-11a, petitioners misunderstand Commerce's obligation under the statute. Commerce is not required to find that petitioners willfully decided not to comply with Commerce's many requests. It is sufficient that petitioners failed, after multiple opportunities, to either change their allocation methodology or expand on why it was not distortive. At bottom, petitioners merely disagree that the substance of their response to Commerce's questions was deficient. That kind of factual question involves nothing more than straight-forward substantial-evidence review, which is not an appropriate matter for this Court's attention. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951) (discussing the Administrative Procedure Act and Taft Hartley Act and

stating "[w]hether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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