No. 13-1014

IN THE

Supreme Court of the United States

NSK CORP. *et al.*,

Petitioners,

v.

UNITED STATES INTERNATIONAL TRADE COMMISSION *et al.*,

Respondents.

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

BRIEF OF THE JAPAN BEARING INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL A. POLLARD
Counsel of Record
DIANE A. MACDONALD
BAKER & MCKENZIE LLP
300 East Randolph Street
Suite 5000
Chicago, IL 60601
(312) 861-8000
michael.pollard@bakermckenzie.com

Attorneys for Amicus Curiae

252722

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT OF INTEREST OF AMICUS[1]

The Japan Bearing Industry Association ("JBIA") is an association of Japanese manufacturers of antifriction bearings and their components.[2] Many JBIA members export their products to the United States. Also, many JBIA members produce bearings in the United States from materials purchased domestically and from components imported from Japan.

Since 1974, the United States has imposed at least one, and, at times, two, or three (depending on the company) antidumping duty orders on various kinds of antifriction bearings and their components produced in Japan and imported into the United States.[3] Because an antidumping duty order is imposed on a product- and country-specific basis, all JBIA member companies that manufacture the relevant bearing in Japan are subject to antidumping

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, or their counsel, made a monetary contribution intended to fund its preparation or submission. Petitioners JTEKT Corp. and NSK Corp. are members of JBIA, but none of the Petitioners has contributed to the preparation or submission of this brief. All parties have consented to the submission of this *amicus* brief.

2. A list of JBIA member companies is found in Appendix 1.

3. *See e.g., Timken v. United States*, 539 F. 2d 221 (D.C. Cir. 1976). *See also Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, U.S. Int'l Trade Comm'n, Pub. 3309 (June, 2000), at 4-6, for a history of trade-remedy activity in the bearing industry.

duties if their products are imported into the United States. The United States issued the antidumping orders at issue in 1989.[4]

JBIA members collectively are the parties most familiar with the costs -- in additional duties, in company resources, and in business uncertainty -- of this antidumping case. JBIA members have collectively, over the course of the two decades of this long case, prepared the hundreds of thousands of pages[5] that are required to respond to agency queries. JBIA members have devoted tens of thousands of hours and millions of dollars, in offices in Japan and in the United States, in compiling the exhaustive detail that goes into the final assessment of antidumping duties and their subsequent litigation.

JBIA members have also invested in significant U.S. plant and equipment over the last forty years and they are crucial parts of the North American supply chains of many industries.

The complexity of the antidumping duty calculations and the retrospective nature of U.S. antidumping procedures

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4. *See e.g., Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan*, 54 Fed. Reg. 20,904 (Dep't Commerce May 15, 1989). Initially, there were antidumping duty orders on certain kinds of bearings, including ball bearings, from France, Germany, Italy, Japan, Sweden, the United Kingdom, Romania, and Singapore. *See* U.S. Int'l Trade Comm'n, Pub. 3309, at 5.

5. Routinely, a single primary questionnaire response in an annual administrative review from one of the larger JBIA companies will consist of 1,000 --2,000 pages. This is only one of the many documents submitted during an administrative review.

inject significant and long-lasting unpredictability into the import process for both finished bearings and bearing components. In turn, this leads to complexities for domestic production because costs are not finalized for many years. JBIA members' path for challenging these costs is exclusively through the United States Court of International Trade ("Trade Court") and the United States Court of Appeals for the Federal Circuit.

JBIA members are, therefore, uniquely able to explain the increased costs and business uncertainties caused by a standard of review at the Federal Circuit that does not give full effect to the Trade Court's detailed examination of the record and to its expertise.

SUMMARY OF ARGUMENT

The existence of an antidumping duty order, and the additional amount each company must pay on each import, are derived from a narrative questionnaire responses and databases that are submitted by foreign manufacturer to the U.S. agencies that administer the trade laws. JBIA companies spend extraordinary amounts of time, effort, and resources in responding to these questionnaires and in preparing these databases. Consequently, a very detailed record is built during the agency proceedings. Trade Court, which has exclusive jurisdiction over all U.S. trade cases, 19 U.S.C. § 1516a(a)(2), and which makes frequent use of remand orders to clarify or to amplify the record, reviews this record using a substantial evidence standard. 19 U.S.C. § 1516a(b).

No statute, however, specifies the standard of review that the Federal Circuit should use when reviewing

Trade Court decisions. In this case, the Federal Circuit concluded that it was "appropriate to conduct a de novo review of the [Trade Court's] decisions, assessing whether the Commission's determination were supported by substantial evidence." *NSK Corp. v. U.S. Int'l Trade Commission,* 716 F. 3d 1352, 1363 (Fed. Cir. 2013). But, appellate review that uses the same standard as the Trade Court is unnecessary, given the complex record developed in these cases and the Trade Court's remand activity. A *de novo* review also compounds the unpredictability inherent in an antidumping case and increases the difficulties of doing business in the United States for JBIA members. A more deferential standard would diminish the possibility that the Federal Circuit, which is unable to undertake a detailed examination the record because of the size and composition of its caseload, would overturn a long-fought and carefully-constructed decision of the specialist Trade Court.

ARGUMENT

I. The Complex Agency Record is Vital to the Decision-Making Process

This case involves one aspect of an antidumping proceeding: whether or not the imported products would be likely to continue to cause injury to the U.S. industry if the antidumping order were no longer in effect. But, the issue of the Federal Circuit's standard of review applies both to the existence of an antidumping duty order and to the calculation of the additional duty to be paid on each importation. The Federal Circuit's decision to duplicate the Trade Court's work is unnecessary and may negate the nexus, established by the Trade Court, between the facts of record and the lower court's decision.

Yet, many JBIA companies regularly choose judicial review to contest various issues involved in the margin calculation methodology, in part because the case is heard by a specialized court where the record is reviewed in detail by judges familiar with trade cases. A second, duplicative review by the Federal Circuit, which purports to provide the same close examination of the record as the Trade Court, is unnecessary and, likely, impossible.

A. The Agency Records are Based on Quantitative Sales and Production Data, Supplemented by Narrative Explanations

An antidumping duty case begins when an entity, acting on behalf of a U.S. industry, simultaneously files a petition with the U.S. International Trade Commission ("Commission") and the U.S. Department of Commerce ("Commerce") requesting that both agencies investigate the effects on the U.S. market of imports of a defined product from specified countries. 19 U.S.C. § 1673a(b); *Diamond Sawblades Mfrs. Coal. v. United States*, 626 F. 3d 1374, 1376 (Fed Cir. 2010). If the Commission determines that the U.S. industry is materially injured, or is threatened with material injury, by reason of those imports, 19 U.S.C. § 1673(2), and if Commerce determines that the product is being, or is likely to be, sold in the United States at less than its fair value, 19 U.S.C. § 1673, an antidumping duty order will be imposed on all imports of the defined product from the specified countries. *Id.*

i. The Investigation

In all antidumping cases, after a petition is filed the Commission undertakes a detailed investigation, lasting

approximately one-and-a-half years, to determine if an antidumping order is necessary to protect the U.S. industry. During the investigation, foreign producers, U.S. importers, and domestic consumers of the product at issue respond to detailed questionnaires[6] that include questions about the volume of imports and changes thereto; the effect of these imports on prices in the United States; whether imported products significantly undersell the domestically-produced product; and economic factors related to the state of the domestic industry and domestic prices. Respondent must also report information on plant openings and closings; relocations; expansions; acquisitions; consolidations; shutdowns; revised labor agreements; and technological changes.[7] JBIA member companies fully participated in the investigation in this case not only as foreign producers but also as U.S. manufacturers and importers.

On the basis of this data, if the Commission preliminarily determines that a U.S. industry has been injured by reason of the imported product, then Commerce will examine whether there is a reasonable basis to believe that the imported merchandise is being sold in the United States at less than fair value. 19 U.S.C. § 1673b(a) and (b).

In making this determination, Commerce compares the adjusted price of a bearing sold in the United States with the adjusted price of the same, or similar, bearing

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6. Generic questionnaires used in investigations by the Commission for foreign producers, U.S. producers, U.S. importers, and U.S. purchasers may be found at U.S. Int'l Trade Comm'n, Generic Questionnaires, http://www.usitc.gov/trade_remedy/question.htm (accessed Mar. 9, 2014).

7. *Id.*, q. II-2, at 4.

sold in Japan.[8] This comparison is also based on a detailed questionnaire of some 150 pages set out in five sections.[9] Section A requests comprehensive information about a company's corporate structure; shareholders; accounting systems; distribution and sales processes; the level of trade to which it sells the relevant product; and parts, materials, specifications, applications, standards, and production processes used in the United States and in the foreign market.

In sections B (related to sales in foreign market) and C (related to sales to the United States), companies must assign a sequence number to each sale of the relevant product during the period of investigation, of which, particularly for the bearing industry, there may be tens or hundreds of thousands, or one million or more. For each sequence number, a company must report the normal commercial product code and create a "control number," which is based on the characteristics that Commerce determines are important for purposes of the antidumping case. Many JBIA companies have thousands of control numbers. Then, for each sale, respondents must report the control number, customer; date of sale; invoice number; date of shipment; date of payment; terms of delivery and payment; quantity sold; billing adjustments; early payment or other discounts; domestic and international freight costs; insurance; commissions; the unit cost of credit; and every detail required to strip the transaction

8. 19 U.S.C. § 1677a, § 1677b(a), 19 U.S.C. § 1677(16).

9. Generic questionnaires used by the Commerce Department in investigations may be found at U.S. Dep't of Commerce, Antidumping Questionnaires, http://enforcement.trade.gov/questionnaires/questionnaires-ad.html (accessed Mar. 9, 2014).

of costs other than costs for the bearing itself.[10] Sections D and E of the questionnaire requires information about the cost of production of each of the bearing models reported in the previous sections. Additionally, once retrieved from a company's books and records, these costs must be allocated to the product under review and to each sale. The process is arduous and the attributes of a few sales -- or a single sale -- can result in extraordinary amounts of antidumping duties.

In making final determinations, both agencies hold hearings and accept briefs. 19 C.F.R. § 207.23-25; 19 C.F.R. § 351.309-.310. If both agencies make affirmative final determinations, an order is issued and antidumping duties are assessed. 19 U.S.C. § 1673d(a), (b), and (c).

The antidumping duty amount or "margin" that each company must pay on each import is equal to the amount by which the adjusted (stripped-down) foreign market price exceeds the adjusted U.S. price for the relevant product. 19 U.S. C. § 1673; 19 U.S.C. § 1677(35). This duty is in addition to any applicable regular customs duty, thereby providing a trade remedy for the domestic industry. 19 U.S. C. § 1673; *Torrington Co. v. United States,* 82 F.3d 1039, 1041 (Fed. Cir. 1996).

ii. Five-Year "Sunset" Reviews

Once an order is issued, every five years both the Commission and the Commerce Department must conduct a "sunset" review to determine if the order should be continued. 19 U.S.C. § 1675(c)(1). This case involves

10. *Id.*, Sec's B and C generally.

the second five-year review.[11] The Commission issues questionnaires[12] for five-year reviews that are similar to those of the investigation and the Commerce Department will determine whether an antidumping margin previously calculated for a party remains applicable for purposes of this review. Briefing and a hearing are again part of the agency review process.

iii. Annual Administrative Reviews

After an order is imposed, Commerce will also annually review the antidumping duty margin calculated for each company, if either a domestic party or the foreign producer requests a review. 19 U.S.C. § 1675(a). If Commerce conducts a review, the foreign manufacturers must repeat the process of responding to a detailed questionnaire,[13] which is substantially similar to that used in the investigation process. To date, there have been twenty-two annual administrative reviews in this case.

After a company submits its response, Commerce officials may verify a company's response, as it relates either to sales in the foreign, or in the U.S., market, or both. 19 U.S.C. § 1677m(i). Throughout the two decades

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11. The requirement for a five-year review was enacted into law in Pub. L. 103–465, § 220(a) in 1994, five years after the orders at issue went into effect.

12. Generic questionnaires used by the Commission in five-year reviews may be found at http://www.usitc.gov/trade_remedy/question.htm.

13. Generic questionnaires used by the Commerce Department in annual reviews may be found at http://enforcement.trade.gov/questionnaires/questionnaires-ad.html.

of these antidumping duty orders, JBIA companies have been verified, in total, likely one hundred times or more.

Beginning in 1988, therefore, there has been an enormous expenditure by JBIA companies, in money, time, and resources, to build the factual databases required in an antidumping case. Collectively, over the course of this antidumping case, JBIA companies have spent tens of thousands of hours and millions of dollars collecting and formatting the data required for a questionnaire response; analyzing the preliminary and final results of Commerce's calculations; and reviewing drafts of briefs submitted during agency hearings. This complicated record is of paramount importance.

iv. Retrospective Calculation and Assessment of Duties

The United States maintains a retrospective system for the calculation and assessment of antidumping duties and for the determination of whether an antidumping order will be continued or revoked. That is, JBIA companies do not know the final amount of antidumping duties they must pay, if any, until after -- indeed, it may be many years after -- it imports a bearing.[14]

Beginning at the preliminary determination during the period of investigation, 19 U.S.C. § 1673b(d), a cash deposit of estimated antidumping duties is required on

14. *See e.g.,* 19 C.F.R. § 351.213(a) ("[T]he United States has a 'retrospective' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported.")

every entry of imported merchandise. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F. 3d 1041, 1047 (Fed. Cir. 2012). The deposit rate is based on data from a previous time period, but it applies to current imports. After the final results of an investigation or an annual administrative review, the amount a company will owe is finalized by Commerce. This rate may be higher or lower than the amount deposited. *Id.* The company will receive a bill for additional duties or a refund of excess deposits. Thus, the amount a company will owe, or whether or not any antidumping duties will be owed, remains unsettled until there is a final decision, including all appeals, by the courts. As the Federal Circuit has noted, the antidumping laws "provide[ ] a complex framework" for calculating margin rates. *Id.*

B. The Trade Court Judges Engage in a Detailed Review of the Administrative Record, Often Remanding an Issue for Further Analysis or Data Collection; the Federal Circuit Should not Duplicate this Effort

While these cases are based on agency factfinding, the Trade Court uses remand orders to discern the record basis for agency analysis and to clarify and amplify the record. 28 U.S.C. §2643(b) (If the Trade Court is unable to reach a decision on the basis of the record presented, it may "order such further administrative … procedures as the court considers necessary to enable it to reach the correct decision."). Appellate review of Trade Court decisions should not, and likely cannot, duplicate that review.

i. The Trade Court Relies on Remand Orders to Clarify and Amplify the Record

The Trade Court's remand activity is extensive. For example, in 2013, the Trade Court issued 158 decisions, 110 of which involved an aspect of an antidumping or countervailing duty case. U.S. Court Int'l Trade, *Slip Opinions*, http://www.cit.uscourts.gov/SlipOpinions/SlipOps-2013.html (accessed March 23, 2014). Of those 110 decisions, the judge ordered a first, second, or third remand in 70 cases, or in 64% of their decisions.[15] *Id.* Sixteen of the remands were second or third remands, involved an aspect of the case currently on a second remand, or opened the scope of a prior remand. In two of these sixteen cases, the judge invited Commerce to open the record for additional findings.[16]

In keeping with this activity, the Trade Court remanded this case four times. In the first remand, the Trade Court ordered the Commission to provide a fuller explanation of the reasons it believed that continuation of the order was required, in light of significant increases in imports from countries not subject to the order and the effects of significant restructuring in the domestic industry. *NSK Corp. v. United States*, 577 F. Supp. 2d 1322 (Ct. Int'l Trade 2008). On remand, the Commission

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15. Two of these remands were pursuant to orders from the Federal Circuit; one based on the Government's voluntary remand request.

16. *See Home Meridian Int'l, Inc. v. United States,* 922 F. Supp. 2d 1366 (Ct. Int'l Trade 2013) (Court Int'l Trade Slip Opinion 13-81); *DuPont Teijin Films v. United States*, 931 F. Supp. 2d 1297 (Ct. Int'l Trade 2013) (Court Int'l Trade Slip Opinion 13-111).

again determined that revocation of the order was not appropriate. *Certain Ball Bearings & Parts Thereof from Japan & the United Kingdom,* Invs. Nos. 731-TA-394-A (Second Review) (First Remand) USITC Pub. 4131 (U.S.I.T.C. May 2009). Again dissatisfied with the Commission's analysis of the effect of non-subject imports on the domestic industry and its analysis of imports from the United Kingdom, the Trade Court remanded the case a second time. *NSK Corp. v. United States*, 637 F. Supp. 2d 1311 (Ct. Int'l Trade 2009). In its remand order, the Trade Court instructed the Commission to "demonstrate a rational connection between the evidence on the record and the conclusions it reaches, as well as provide a more through account of the conflicting evidence on the record and an explanation as to why that evidence is not relevant or is unpersuasive[,]" and to "address conflicting evidence on the record in reaching its conclusions and explain why that evidence is irrelevant or is unpersuasive[.]" *Id.* at 1329.

The Trade Court remanded the case a third time after rejecting the Commission's second remand analysis of the likely "discernible" effects of U.K. imports on the domestic market and its conclusion that cumulated subject imports constitute more than a minimal or tangential cause of injury to the domestic industry. *Certain Ball Bearings & Parts Thereof from Japan & the United Kingdom,* Invs. Nos. 731-TA-394-A (Second Review) (Second Remand) USITC Pub. 4131 (U.S.I.T.C. Jan. 2010). The Court also invited the Commission to open the record to collect additional data on the issue of U.K. imports because it did not believe that "the existing record, taken as a whole, can support an affirmative discernible adverse impact finding[.]" *NSK Corp. v. United States*, 712 F. Supp. 2d 1356 (Ct. Int'l Trade 2010).

In its third remand determination, the Commission declined to reopen the record and determined that ball bearings from the United Kingdom likely would not lead to the continuation or recurrence of material injury absent the order, and stated that it would not have made this determination except for the Court's decision that the record would not support a "discernible impact" finding. *Certain Ball Bearings & Parts Thereof from Japan & the United Kingdom,* Invs. Nos. 731-TA-394-A (Second Review) (Third Remand) USITC Pub. 4194 (U.S.I.T.C. Aug. 2010). The Court affirmed this finding but again determined that the Commission failed to adequately account for the role of non-subject imports when analyzing whether the cumulated imports likely would have more than a minimal effect on the U.S. industry. In remanding a fourth time, the Trade Court ruled that "the record evidence cannot support affirmative significant adverse impact or causation determinations[ ] or "an affirmative finding of material injury[ ]" and invited the Court to reopen the record to gather additional data on these issues. *NSK Corp. v. United States*, 744 F. Supp. 2d 1359, 1366-7 (Ct. Int'l Trade 2010).

The Commission issued a negative injury determination on the fourth remand, although it made clear that it believed that the Trade Court had left it no choice. *Certain Ball Bearings & Parts Thereof from Japan & the United Kingdom,* Invs. Nos. 731-TA-394-A & 399-A (Second Review) (Fourth Remand) USITC Pub. 4223 (U.S.I.T.C. Mar. 2011). The Trade Court then sustained this determination. *NSK Corp. v. United States*, 774 F. Supp. 2d 1296 (Ct. Int'l Trade 2011).

Each of the Trade Court's decisions in this case demonstrates its scrutiny of the record for evidence that supports agency decisions and its role in clarifying or amplifying that record. This case demonstrates how carefully, completely, and scrupulously the Trade Court reviews agency determinations to meet its statutory obligations. It is disappointing, at the very least, to have such a detailed review overturned by a less comprehensive one.

The judges on the Trade Court are specialist judges: five of the current fourteen judges (including senior judges) had a background in international trade law before joining the court,[17] and the other judges have become experts, by virtue of the court's docket, which is composed exclusively of cases arising out of the international trade laws of the United States.[18] Moreover, as in this antidumping proceeding, Trade Court judges are often assigned numerous cases involving the same parties and similar issues because each annual review can generate one or more cases. The Trade Court judges have unquestioned familiarity with the complexities of the bearings case.

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17. Judges Stanceu and Barzilay practiced international trade law before being appointed to the Court; recently-appointed Judge Kelly practiced and taught international trade law, and recently-appointed Judge Barnett worked at the Office of Chief Counsel for Import Administration, Department of Commerce, before being appointed to the Court. Judge Gordon worked as Assistant Clerk, then Clerk, of the Trade Court before being appointed to the bench. *See* U.S. Court of Int'l Trade, *Judges of the United States Court of International Trade,* http://www.cit.uscourts.gov/Judges/index.html (accessed March 23, 2014).

18. 19 U.S.C. § 1516a(a).

For example, 28 of the 173 decisions the Trade Court published in 2000, 11 years after the orders at issue went into effect, were related to one of the antidumping duty orders on antifriction bearings; this comprised 16.2% of the Trade Court's docket. U.S. Court Int'l Trade, *Slip Opinions*, http://www.cit.uscourts.gov/SlipOpinions/SlipOps-2000.html (accessed March 23, 2014). In 2005, 12 of the Trade Court's 168 published decisions (7.1%) involved antidumping orders on bearings, U.S. Court Int'l Trade, *Slip Opinions*, http://www.cit.uscourts.gov/SlipOpinions/SlipOps-2005.html (accessed March 23, 2014), and in 2010, 10 of the Trade Court's 142 published decisions (7%) involved the antidumping orders on bearings. U.S. Court Int'l Trade, *Slip Opinions*, http://www.cit.uscourts.gov/SlipOpinions/SlipOps-2010.html (accessed March 23, 2014). Since 1989, therefore, the antidumping orders on bearings have been a significant part of the Trade Court's docket.

Not only do issues carry over from year-to-year, but also final resolution is often years away, given the review-and-remand process of the Trade Court. For example, a consolidated case from the sixteenth review of this order (covering 2004-2005) dealt with, among other issues, Commerce's change in the methodology it used in first fourteen previous reviews to match bearings sold in the United States with bearings sold in Japan.[19] This was also an issue in cases that arose from the fifteenth review of the order, which were ongoing when the sixteenth review cases began.[20] In the sixteenth review case,

19. Ct. Int'l Trade, Cons. Court No. 06-250.

20. *Koyo Seiko Co. Ltd. v. United States*, 516 F. Supp. 2d 132 (Ct. Int'l Trade 2007); aff'd 551 F.3d 1286 (Fed. Cir. 2009),

JBIA members put forth arguments, among others, that Commerce's new methodology should have expanded the seven available bearing "design types" used in the new methodology to determine the critical issue of whether two bearings are sufficiently similar to be matched for purposes of the margin calculation. The Trade Court remanded the expanded bearing design types issue so that Commerce could respond to the Court's questions about these issues. Not satisfied that Commerce fully followed its remand order, the Trade Court ordered a second remand to further develop certain aspects of the issue; that remand redetermination is pending as of the date of this submission.[21]

Consequently, nearly ten years after the initial imports from the 2004-2005 period of review, the duty payments are still not finalized for some JBIA companies. During that decade, the record has been painstakingly compiled and subject to multiple reviews on issues large and small, the agency has clarified the record, and the parties have commented these clarifications. It would be nearly impossible, unnecessary, and wasteful for the Federal Circuit to duplicate this review process.

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rehearing denied by, rehearing, en banc, denied by *Koyo Seiko Co. v. United States*, 2009 U.S. App. LEXIS 13856 (Fed. Cir., Apr. 23, 2009).

21. *JTEKT v. United States*, 780 F. Supp. 2d, 1357, 1371 (Ct. Int'l Trade 2011); *JTEKT Corp. v. United States*, 2014 Ct. Intl. Trade LEXIS 13, 16 (Ct. Int'l Trade 2014).

ii. *De Novo* Review by the Appellate Court Undermines the Expertise of Specialized Tribunals and Ignores the Role of Appellate Courts

This case and the one described above are just two examples of the detailed review of the Trade Court and of the possibility that that long process may be upended up by a standard of review that requires the Federal Circuit to step into the shoes of the Trade Court. The cases demonstrate the Trade Court's special expertise, "somewhat like the expertise of the Tax Court," *United States v. Haggar Apparel Co.*, 526 U.S. 380, 394 (1999), which the Trade Court uses to grapple with the voluminous data of an antidumping case. The Federal Circuit cannot duplicate this effort because of its varied jurisdiction and, therefore, a standard of review that requires it to do so makes no sense. As Judge Plager has noted, "[the Federal Circuit's] replication of the record review already performed effectively renders the Court of International Trade's review superfluous[, and] undercuts the benefits [the Federal Circuit] derives from the experience and expertise of the Court of International Trade." *Zenith Electronics Corp. v. United States*, 99 F. 3d 1576, 1583 (Fed. Cir. 1996) (Rader, J., concurring) (citations omitted).

This Court has recognized that a review of the decisions of specialty courts or tribunals is different from other reviews, particularly when the issue is based on an elaborate set of facts. *See Shinseki v. Sanders*, 556 U.S. 396, 412 (2009) ("[T]he Federal Circuit is the wrong court to make [harmless error] determinations. … [T]he Veterans Court, which has exclusive jurisdiction over these cases, is likely better able than is the Federal

Circuit to exercise an informed judgment as to how often veterans are harmed by which kinds of notice errors."). This conclusion hold true even when reviewing the decisions of non-specialty tribunals with caseload concentrations. Thus, when reviewing a trial court's Sentencing Guidelines determination regarding the consolidation of prior convictions, this Court concluded that the Court of Appeals for the Seventh Circuit was correct that deferential review was appropriate "because a district judge sees many more 'consolidations' than does an appellate judge." *Buford v. United States*, 532 U.S. 59, 66 (2001).

A second, *do novo* review would negate the advantages provided by the Trade Court's exclusive jurisdiction and its expertise. *See Pierce v. Underwood*, 487 U.S. 552, 560 (1988) ("[E]ven where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense[.]"). Antidumping duty orders often engender multiple lawsuits, not only from successive years of the same case, but also from multiple parties subject to the same order, not all of which are appealed. This, and the Trade Court's exclusive jurisdiction, makes it impractical to believe that the Federal Circuit can replicate the Trade Court's review. *See id.* The primacy of the record is better served if the Federal Circuit were to review the Trade court's process, rather than to reinvent its review of the record.

Additionally, the role of the appellate courts is to make precedent and clarify the law. When questions are as fact-dependent as those in trade-remedy proceedings, *de novo* review of the Trade Court's determinations undermines this role. To review anew the Trade Court's determination,

the Federal Circuit would be required to review the entire record, for supporting evidence and for lack thereof. *Universal Camera Corp. v. Nat'l Labor Relations Board*, 340 U.S. 474, 488 ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."); *Pierce*, 487 U.S. at 560. Considering that Trade Court review is often a multi-year process, this is a waste of scarce judicial resources. *Cooter & Gell v. HartmarxCorp.*, 496 U.S. 384, 404 (1990) (Deference to lower courts "will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court[.]").

Therefore, without a review of the entire record, an appellate court cannot presume to see the facts in the same light at the district judge, particularly a Trade Court judge, where trade remedy cases are "food for the court on a regular basis." *Elliott v. CFTC*, 202 F. 3d 926, 932, quoting *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 915 (3rd Cir. 1981). Moverover, duplicate review benefits neither JBIA members and similar companies nor the judicial process. The decision of each court may be different simply as a result of "multifarious, fleeting, special, narrow facts that utterly resist generalization[.]" *Pierce*, 487 U.S. at 561-562 (1988) (quoting Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L. Rev. 635, 638 (1971)). The Federal Circuit's role in establishing precedent would be diminished as a result of the fact-specific decisions. *See e.g.*, *Buford*, 532 U.S. at 66 ("In light of the fact-bound nature of the legal decision, the comparatively greater expertise of the District Court, and the limited value of uniform court of appeals precedent," the Seventh Circuit properly reviewed the District Court's decision with deference.).

And, while the Trade Court is not a factfinder in an antidumping case, it plays a significant role in clarifying and amplifying the record through remand orders; this role should be afforded some degree of deference. The meaning of a particular issue in the context of the entire record is lost when, on appeal, a complete review of the record is impossible.

Individual judges on the Federal Circuit have acknowledged that applying anew the same standard of review used by the Trade Court "waste[s] scarce judicial resources[,]" *Zenith*, 99 F. 3d at 1579 (Plager, J., concurring), and "arguably could lead that expert body to abdicate its statutory review responsibility." *Id.* at 1584 (Rader, J. concurring); *see id.* at 1579 (Plager, J. concurring (duplicative review "finds support in neither the statutes nor in common sense.")). Also, duplicative review exacerbates the uncertainties that are part of retrospective annual administrative reviews and recurring five-year sunset reviews. Federal Circuit decisions that purport to apply the same standard of review to agency decisions as the Trade Court could undermine conclusions years in the making and unnecessarily prolong cost uncertainties.

II. An Appellate Standard of Review that Fails to Give Full Effect to Trade Court Decisions Jeopardizes JBIA Members' Investments in the United States

The production of bearings is a global industry and many bearing manufacturers have production facilities all over the world. JBIA companies may use proprietary technology to produce a bearing component in Japan that is then sent to the United States, where it is combined with

other components and assembled into a finished bearing. The U.S. production process maybe fairly simple. It may also be complex, involving, for example, a rough forging that will require extensive heat-treating, grinding, and finishing in the United States. Also, because of the variety of applications for, and the complexity of, bearings, it is generally impossible to meet the requirements of U.S. customers with U.S. production alone. Therefore, JBIA companies routinely supplement their U.S. product lines with finished bearings that are imported from other countries such as Japan or the United Kingdom, the two countries at issue here. The imported bearings and parts thereof that are covered by this case are part of these complex production requirements of the worldwide bearing industry

JBIA companies have become critical parts of the automotive supply chain that stretches across the United States, Canada, and Mexico. As well, they form integral parts of the supply chains for agricultural and industrial machinery. In fact, U.S. affiliates of foreign-owned companies have contributed to the development of the U.S. economy by spurring the growth of compensation, productivity, research and development, and exports with numbers far greater than their size would foretell.[22]

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22. *See Insourcing Companies: How They Raise Our Game,* Organization for International Investment, D. Ikenson, Oct. 30, 2013, at 2. " Even though insourcing companies represent less than 0.5 percent of all U.S. companies with payrolls, collectively they account for 5.9 percent of private-sector value added; 5.4 percent of all private-sector employment; 13.0 percent of U.S. private-sector employee benefits; 11.7 percent of new private-sector, non-residential capital investment, and; 15.2 percent of private-sector research and development spending. According to the most recent data, they paid 13.8 percent of all corporate taxes; earned 48.7

But, because of the retroactive U.S. antidumping process, JBIA companies often do not know the final cost of their merchandise until many years after that merchandise has been imported, which makes customer negotiations and business planning extremely difficult. A standard of review at the Federal Circuit that does not give substantial weight to the decisions of the Trade Court exacerbates these challenges because the years-long review process at the Trade Court may be overturned by the Federal Circuit in a purported attempt to provide anew the same careful review. This duplicative and, likely, cursory review by an appellate court after a specialized review by an expert court adds to the complexities of doing business in the United States and may factor into the fundamental decision of where to invest in plant and equipment.

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percent greater revenues from their fixed capital than the private sector average, and; compensated their workers at a premium of 22.0 percent above the U.S. private-sector average."

CONCLUSION

Antidumping duties are based on the voluminous data submitted by foreign producers and their U.S. affiliates. This record is crucial to both the existence of an antidumping order and to the amount of money paid each year in additional import duties. The Trade Court performs a thorough review of all challenges to the record and assists in clarifying or supplementing it through remand orders. A second, theoretically identical, review by the Federal Circuit is unnecessary. The Federal Circuit should review Trade Court decisions with deference to the Trade Court's process and to its expertise.

Respectfully submitted,

Michael A. Pollard
Counsel of Record
Diane A. MacDonald
Baker & McKenzie LLP
300 East Randolph Street
Suite 5000
Chicago, IL 60601
(312) 861-8000
michael.pollard@
bakermckenzie.com

Attorneys for Amicus Curiae

APPENDIX

APPENDIX — JBIA MEMBER COMPANIES

Amatsuji Steel Ball Mfg. Co., Ltd.

Asahi Seiko Co., Ltd.

Daibea Co., Ltd.

Daio Steel Ball Mfg. Co., Ltd.

EXEDY Fukushima Co., Ltd

Fuji Seisakusho Co., Ltd.

Fujino Iron Works Co., Ltd.

Hantsune Seisakusho Co., Ltd.

Heiwa Hatsujo Industry Co., Ltd.

Higashino Sangyo Co., Ltd.

Hikari Seiko Co., Ltd.

Inoue Jikuuke Kogyo Co., Ltd.

Izumoto Seiko Co., Ltd.

JTEKT Corporation

Kitanihon Seiki Co., Ltd

Maekawa Bearing Mfg. Co., Ltd.

Maekawa Bearing Mfg. Co., Ltd.

Minebea Co., Ltd.

Nachi-Fujikoshi Corp.

Nakanishi Metal Works Co., Ltd.

Nankai Seiko Co., Ltd.

Nichia Precision Industry Co., Ltd.

Nippon Pillow Block Co., Ltd.

Nippon Thompson Co., Ltd.

NSK Ltd.

NSK Micro Precision Co., Ltd.

NSK Needle Bearing Ltd.

NTN Corporation

NTN Kongo Corporation

Osaka Pump Co., Ltd.

Shimizu Seiko Co., Ltd.

Takai Seiki Co., Ltd.

Appendix

Tohshin Seiki Co., Ltd.

TOK Bearing Co., Ltd.

Tsubaki Nakashima Co., Ltd.

Utsunomiya Kiki Co., Ltd.

Wada Seiko Co., Ltd.