No. 06- 061632 JUN 6 - 2007

IN THE

Supreme Court of the United States

JTEKT CORPORATION (F/K/A/ KOYO SEIKO COMPANY, LTD.), KOYO CORPORATION OF U.S.A., NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVESHAFT, INC., AND NTN-BOWER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court is required to remand an administrative decision to an agency, when the agency decision under review was based on a policy that the agency has since reversed or modified in a highly analogous context; and

2. Whether a federal court is required to remand an administrative decision to an agency, when the agency action has been found to violate the United States' treaty obligations and the agency is the only body statutorily authorized to consider whether and how to implement the treaty.

PARTIES TO THE PROCEEDING

Petitioner Koyo Corporation of U.S.A. is a wholly-owned subsidiary of Petitioner Koyo Seiko Co., Ltd., which is now known as JTEKT Corporation. JTEKT Corporation is a publicly-owned company with shares listed on the Tokyo Stock Exchange. Toyota Motor Corporation, a publicly-owned company with shares listed on the Tokyo, New York, and London Stock Exchanges, owns more than 10% of the shares of JTEKT Corporation.

Petitioners NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., and NTN-Bower Corporation are wholly-owned subsidiaries of NTN USA Corporation, which is a wholly-owned subsidiary of Petitioner NTN Corporation, a publicly-owned company with shares listed on the Tokyo Stock Exchange.

Respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Koyo Seiko Company, Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo"),[1] and NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., and NTN-Bower Corporation (collectively "NTN") respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals is available at 210 F. App'x 992 (Fed. Cir. 2006), Pet. App. 1a-2a. The order of the court of appeals denying the petition for rehearing is unreported, but is available at 2007 U.S. App. LEXIS 4456 (Fed. Cir. Feb. 6, 2007), Pet. App. 50a-51a.

The opinion of the United States Court of International Trade is reported at 341 F. Supp. 2d 1334 (Ct. Int'l Trade 2004), Pet. App. 3a-33a.

The final determination of the United States Department of Commerce in the underlying administrative review is reported at 66 Fed. Reg. 36,551 (July 12, 2001), Pet. App. 34a-49a.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2006. On February 6, 2007, the court of appeals entered an order denying Petitioners' timely motion for rehearing. On May 7, 2007, the Chief Justice granted Petitioners' application to extend the time for filing this Petition for a Writ of Certiorari to and including June 6, 2007.

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[1] On January 1, 2006, after the initiation of the underlying legal proceedings, Koyo Seiko Company, Ltd. changed its name to "JTEKT Corporation."

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Tariff Act of 1930 provides, in relevant part:

> If—
>
> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,
>
> then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.

19 U.S.C. § 1673.

The Tariff Act, as amended, further provides that "[t]he term 'dumping margin' means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise," and "[t]he term '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 and constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35)(A)-(B).

Finally, the Tariff Act, as amended, provides that "[i]n determining under this subtitle whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a).

STATEMENT OF THE CASE

This case presents two significant issues: (1) a circuit split between the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Federal Circuit on whether an agency's decision to change an administrative rule under which it previously rendered a decision adverse to a party requires a federal court on appeal to remand the case to the agency; and (2) whether a federal court must remand such a case to the agency when the change in rule is dictated by international treaty obligations, consistent with the constitutional separation of powers.

The Federal Circuit effectively answered both questions in the negative and refused to consider remanding this case, despite the fact that Petitioners were held liable by the United States Department of Commerce ("Commerce") for "dumping" under a policy that Commerce has since announced it will abandon. Commerce's change in policy was prompted by a decision of the World Trade Organization ("WTO"), holding that the procedure Commerce applied in this and other cases violates the United States' treaty obligations. The Federal Circuit's refusal to remand this case creates an unnecessary conflict with longstanding precedent of the D.C. Circuit, and an unwarranted schism in the law governing federal agencies, and violates important separation of powers principles by creating an obstacle to the Executive

Branch's ability to discharge the nation's treaty obligations. A writ of certiorari is required to correct the Federal Circuit's error, resolve the conflict between the courts of appeals, and restore the Constitution's balance in the field of foreign affairs.

A. Antidumping Proceedings.

Koyo and NTN are producers of various kinds of automobile parts and antifriction bearings, with facilities in Japan, the United States, and elsewhere around the world. In 1988, at the request of a domestic producer of antifriction bearings, Commerce and the United States International Trade Commission ("Commission") instituted an "antidumping" investigation of antifriction bearings imported from various countries, including Japan.[2] In an antidumping investigation, the Commission examines whether or not an industry in the United States is materially injured, or threatened with material injury, by reason of imports of merchandise. 19 U.S.C. § 1673(2). Simultaneously, Commerce investigates whether or not the merchandise is being sold, or is likely to be sold, in the United States at less than its fair value. *Id.* § 1673(1). If the final determinations of both agencies are affirmative, Commerce may (pursuant to the Tariff Act of 1930) impose upon the merchandise an antidumping "duty" equal to the amount by which the "normal value" of the merchandise (*i.e.*, the statutorily-adjusted price of the product in Japan) exceeds the statutorily-adjusted price of the product in the United States. *Id.* § 1673. This amount is known as the "dumping margin." *Id.* § 1677(35).

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[2] "Dumping" is a form of international price discrimination whereby an exporter sells its merchandise in the country of importation at prices lower than those at which it sells the same goods in its home market. *See* Jacob Viner, *Dumping: A Problem in International Trade* 4-5 (Augustus M. Kelley 1996) (1922).

Once an initial investigation is complete and an antidumping order has been issued, tentative dumping liability is established. Interested parties may, however, request an "administrative review" of the duty in each year following Commerce's initial investigation and order. *Id.* § 1675(a). The purpose of this annual review is to recalculate the antidumping margins for individual importers and assess the importer's actual dumping liability for the year. Thus, "administrative reviews" are distinct from initial "investigations," although the two administrative procedures are closely analogous.

Commerce issued an antidumping duty order on antifriction bearings from various countries, including Japan, on May 15, 1989. Since the imposition of the order, annual administrative reviews of the antidumping order have been requested with respect to the sales of both Koyo and NTN. This case results from the eleventh such annual review, covering the period May 1, 1999 to April 30, 2000.[3]

B. The Anti-Dumping Agreement And Uruguay Round Agreements Act.

In 1994, the United States signed and ratified the Uruguay Round Agreements, which established the WTO and required all Members to conform their antidumping practices to the terms of the treaty. See *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade*, Marrakesh Agreement Establishing the WTO, Annex 1A (Apr. 15, 1994) ("Anti-Dumping Agreement").[4] In calculating antidumping duties, Article 2.4 of the Anti-Dumping Agreement requires that

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[3] *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom,* 66 Fed. Reg. 36,551 (July 12, 2001) (Final Admin. Review), Pet. App. 34a-49a.

[4] *Reprinted in* H.R. Doc. No. 103-316, vol. I, at 1453-77 (1994).

> *[a] fair comparison shall be made between the export price and the normal value.* This comparison shall be made at the same level of trade, normally at the exfactory level, and in respect of sales made at as nearly as possible the same time.

Id. art. 2.4 (emphasis added.) Congress incorporated this requirement into U.S. law in the Uruguay Round Agreements Act of 1994 ("URAA"), Pub. L. No. 103-465, § 224, 108 Stat. 4809, 4878 (codified at 19 U.S.C. § 1677b(a)).

C. Commerce's "Zeroing" Practice.

In the administrative review at issue in this case, Commerce applied a rule known as "zeroing" when calculating Petitioners' dumping margins. When an importer sells merchandise in the country of importation at a price that is above the normal value, it results in a "negative dumping margin," which (as the WTO has held) should be included in the calculation to offset any "positive dumping margins" (*i.e.*, the margins generated by sales in the country of importation at prices below the normal value) when determining the weighted average dumping margin for that importer. Commerce, however, converts any negative dumping margins to zero when determining the importer's weighted average dumping margin, while accounting fully for any positive dumping margins. In this way, zeroing negates the benefit to importers from the fact that some of their sales in the United States (the country of importation) are at prices above the normal value.

This calculation methodology, therefore, artificially inflates the weighted average dumping margin, and can result in a positive weighted average margin even though the negative margins are equal to or greater than the positive margins.[5]

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[5] As a simple example, assume that only two U.S. sales of the subject merchandise occurred during the relevant period, one with a U.S. price, after adjustment, of $600, and the other with a U.S. price of $400. Assume further that the normal value in each case is $500. Thus, the first

Essentially, Commerce puts a heavy thumb on the scale in favor of finding the existence of, and inflating the amount of liability for, dumping. Indeed, "[b]y zeroing negative margins Commerce [would] find that some dumping occurred if *any* U.S. sales were made below the average [normal value,] even if the vast majority of sales made by the subject foreign producers in the United States were at prices higher than the average [normal value]." *Bowe Passat Reinigungs- und Waschereitechnik GmbH* v. *United States*, 926 F. Supp. 1138, 1149-50 (Ct. Int'l Trade 1996) (emphasis added) (internal quotation marks omitted).

In the investigation phase and in each of the annual reviews of its order, including the annual review at issue, Commerce has used zeroing to calculate the antidumping duty margins for Koyo and NTN. In this review, Commerce calculated, using zeroing, weighted-average dumping margins for Koyo of 10.10% for ball bearings, 5.27% for cylindrical roller bearings, and 0.00% for spherical plain bearings; and weighted-average dumping margins for NTN of 9.16% for

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transaction has a dumping margin of -$100, and the second has a dumping margin of $100. Under the Department's zeroing practice, the -$100 would be converted to zero, and the weighted average dumping margin would be calculated as follows:

$$\frac{0 + \$100}{\$600 + \$400} = 10 \text{ percent}$$

If the full effect of the negative dumping margin transaction were considered, however, the weighted average dumping margin would be:

$$\frac{-\$100 + \$100}{\$600 + \$400} = 0 \text{ percent}$$

The result of the Department's practice was to impose a 10% antidumping duty on all of the company's imports of the subject merchandise into the United States, rather than the mathematically correct duty-free treatment those imports should have received.

ball bearings,[6] 16.26% for cylindrical roller bearings, and 3.60% for spherical plain bearings.

Both Koyo and NTN challenged Commerce's use of zeroing in their administrative briefs before the agency during the course of the review, and explained that if their negative margins were properly included in the calculation of their weighted average margins, those margins would be negative. In other words, but for Commerce's use of the zeroing practice, neither Petitioner would have been liable for dumping in this annual review, and they would be entitled to a refund of their cash deposits, which accumulated in the millions of dollars.

D. The WTO Has Found That Commerce's Zeroing Practice Violates The United States' International Obligations, And Commerce Has Agreed Fully To Implement This Determination.

Petitioners appealed Commerce's antidumping determination in its eleventh administrative review to the Court of International Trade, which held that Commerce's use of the zeroing methodology was a permissible interpretation of the antidumping statute. Pet. App. 20a-21a. Petitioners appealed to the Federal Circuit, which affirmed the Court of International Trade's decision without opinion. See *id.* at 1a-2a.[7]

After the court of appeals' decision, but before the Federal Circuit issued its mandate, the Department of Commerce announced that it would not use zeroing in any pending or future dumping investigation. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin*

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[6] This margin was later revised to 8.98% for reasons unrelated to this Petition.

[7] The Federal Circuit has exclusive jurisdiction over appeals from the Court of International Trade governing Commerce decisions under the antidumping statute. *See* 28 U.S.C. § 1295(a)(5).

During an Antidumping Investigation, 71 Fed. Reg. 77,722, 77,725 (Dec. 27, 2006) , *amended by* 72 Fed. Reg. 3783 (Jan. 26, 2007).[8] Commerce's change in policy was prompted by an earlier WTO decision (in a case brought against the United States by the European Community) that zeroing violates the treaty when used in initial investigations. See Appellate Body Report, *United States – Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")* ¶ 263, WT/DS294/AB/R (Apr. 18, 2006).

Before the Federal Circuit issued its mandate, the WTO Appellate Body also issued another decision that covered, *inter alia,* this very case, holding that Commerce's zeroing practice did not ensure a "fair comparison" as required by the Anti-Dumping Agreement and thus violated the United States' treaty obligations when used in *either* initial investigations or annual administrative reviews. See Appellate Body Report, *United States – Measures Related to Zeroing and Sunset Reviews* ¶¶ 138, 166, 176, WT/DS322/AB/R (Jan. 9, 2007) (hereinafter "*U.S. – Zeroing (Japan)*"), Pet. App. 53a-54a.[9] The WTO Dispute Settlement Body adopted the Appellate Body's report as the final action of the WTO on January 23, 2007. See Action by the Dispute Settlement Body, *United States – Measures Relating to*

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[8] Commerce stated that this change in rule would become effective on January 16, 2007. It later extended this date to February 22, 2007. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 72 Fed. Reg. 3783 (Jan. 26, 2007).

[9] The WTO's decision was issued in response to a complaint brought against the United States by Japan, which included the application of zeroing to Petitioners in the annual review at issue here. *See* Request for Consultations by Japan, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/1 (Nov. 29, 2004).

Zeroing and Sunset Reviews, WT/DW322/15 (Jan. 30, 2007).[10]

In light of the Department of Commerce's change in the rule governing investigations, and the WTO's determination that zeroing likewise violates the United States' treaty obligations when employed in administrative reviews, *including the very review that is the subject of this appeal*, Petitioners jointly requested rehearing by the Federal Circuit and a stay of the mandate for the purpose of seeking a remand of this case to the agency for further consideration. The Federal Circuit inexplicably refused. See Pet. App. 51a.

On February 20, 2007, the United States formally announced, as expected, that it would comply fully with its treaty obligations in light of the WTO's decision in *U.S. – Zeroing (Japan)*, which extends to the administrative review that is the subject of this appeal. See Dispute Settlement Body, *Minutes of the Meeting* ¶ 34, WT/DSB/M/226 (Mar. 26, 2007) (hereinafter "*Minutes*"), Pet. App. 58a; Statement of David P. Shark, U.S. Deputy Chief of Mission, WTO (Feb. 20, 2007), *available at* http://www.usmission.ch/Press2007/0220DSB.html (hereinafter "Statement of David P. Shark"). The United States has committed to Japan that it will fully implement the Appellate Body's decision by December 24, 2007. See Agreement on Reasonable Period of Time, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/20 (May 8, 2007) (hereinafter "*Agreement*"), Pet. App. 59a-60a. The United States cannot fulfill its diplomatic commitments regarding this administrative review, however, unless the case is remanded to the Department of Commerce to allow the agency to decide how to implement the WTO's decision. The Federal Circuit inexplicably refused to follow this perfectly reasonable course.

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[10] The WTO maintains a complete electronic collection of the documents filed in this case, available at http://www.wto.org/english/tratop_e/ dispu_e/cases_e/ds322_e.htm.

REASONS FOR GRANTING THE PETITION

This petition presents an exceptionally important issue that exposes a conflict between the Federal Circuit and the United States Court of Appeals for the District of Columbia Circuit in the law governing federal agencies, and concerns a serious (and unnecessary) judicially created obstacle to the executive branch's ability to implement the United States' treaty obligations. A writ of certiorari is warranted to harmonize the courts of appeals' rules and preserve the constitutional separation of powers.

First, the decision below is inconsistent with longstanding law in the D.C. Circuit and precedents of this Court. As explained, the Department of Commerce found Koyo and NTN liable for dumping based on its "zeroing" rule—a decision Commerce renewed in the annual administrative review on which Petitioners' appeal is based. While this case was still before the Federal Circuit, the WTO held that the use of zeroing violates the United States' treaty obligations, particularly in this case. Commerce is charged with ensuring U.S. compliance with those treaty obligations and has previously responded to adverse WTO rulings on the subject of zeroing by announcing that it will comply with the WTO decision and stop using zeroing. In the D.C. Circuit, this situation would result in a remand to allow the agency to reconsider its decision in light of the changed rule. The Federal Circuit, however, has followed a contrary rule in this and other cases. This creates an intolerable conflict in the law governing federal agencies that should be resolved by this Court.

Second, the decision below creates a serious and wholly unnecessary obstacle to the Executive Branch's ability to discharge the nation's treaty obligations, and thus violates the constitutionally mandated separation of powers. Congress has placed responsibility for implementing WTO decisions squarely in the hands of the Executive Branch. The United

States has given the WTO and its treaty partners specific assurances that it will implement the WTO's rejection of zeroing in all cases (including *this specific case*), and has assured the WTO generally that the Department of Commerce (and not the courts) will decide whether to reopen completed investigations in light of subsequent rule changes. The Federal Circuit's refusal to remand antidumping cases to the agency for reconsideration in light of the demise of the zeroing procedure is flatly inconsistent with the nation's treaty obligations, and makes hollow the Executive Branch's diplomatic assurances that the United States will implement and comply with the WTO agreements in this and other cases. The Federal Circuit's decision below thus frustrates the Executive Branch's ability to conduct the foreign affairs of the United States. This unwarranted violation of separation of powers principles requires this Court's intervention. Indeed, if this Court does not correct the Federal Circuit's erroneous decision below, Petitioners will be left without a remedy for the treaty violations the WTO has identified in this case, because the Executive Branch will be unable to provide the remedy it has promised.

I. THE DECISION BELOW IS CONTRARY TO PRECEDENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND PERPETUATES AN UNWARRANTED CONFLICT IN THE LAW GOVERNING JUDICIAL REVIEW OF FEDERAL AGENCIES.

The D.C. Circuit—which like the Federal Circuit has statutory responsibility for reviewing many agency actions—has long held that a court reviewing an agency decision must remand the case to the agency when the agency has announced a change in its governing regulations or policies during the pendency of the appeal. In *Panhandle Eastern Pipe Line Co.* v. *FERC*, 890 F.2d 435 (D.C. Cir. 1989), for example, the Federal Energy Regulatory Commission denied

certain tariff sheets proposed by a natural gas pipeline company on grounds that the method of apportioning transportation entitlements was not allowed by FERC policy. While the appeal was pending, the FERC announced a change in policy that would allow the apportionment. The court of appeals held that the agency's announcement required it to remand the case to the agency. As the court explained,

> Such a disposition represents the intersection of two well-established doctrines. The first holds that an appellate court must consider the law in effect at the time it renders its decision, even when a change in governing law is made by an administrative agency. [Citing *Thorpe* v. *Housing Auth.*, 393 U.S. 268, 281 (1969).] The second holds that a reviewing court may "not supply a reasoned basis for the agency's action that the agency itself has not given." [Quoting *Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).] Thus, because we are at liberty neither to evaluate the Commission's decision under FERC's *old* policy[,] nor to assess on our own how Panhandle's tariffs would fare under FERC's *new* policy, we are required to remand so that the Commission may indicate how, if at all, its decision would be affected by its intervening policy change.

Id. at 438-39 (footnotes omitted). See also *Williston Basin Interstate Pipeline Co.* v. *FERC*, 165 F.3d 54, 62-63 (D.C. Cir. 1999) (remanding to the FERC where an intervening change in agency policy regarding the calculation of return on common equity might require the appellant's rate of return to be recalculated); *Nat'l Fuel Gas Supply Corp.* v. *FERC*, 899 F.2d 1244, 1249-50 (D.C. Cir. 1990) (remanding to the agency where the legal basis for an agency's decision was undercut in a subsequent court of appeals decision).

The D.C. Circuit did not fashion this rule out of whole cloth. As explained in *Panhandle*, this Court's "intersect[ing] doctrines" of applying the law in force at the time of appeal,

and declining to supply reasons for an agency decision on which the agency did not rely, *require* a remand when an agency bases a decision on a rule that it then changes while the aggrieved party's appeal is pending. See *Panhandle*, 890 F.2d at 438-39 (citing *Thorpe*, 393 U.S. at 281, and *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43).

In fact, the D.C. Circuit's rule was arguably dictated by this Court's decision in *NLRB* v. *Food Store Employees Union*, 417 U.S. 1 (1974), in which this Court reversed a court of appeals decision that purported to apply a changed agency rule to the circumstances of the case before it. This Court explained, *inter alia*, that "a court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act." *Id.* at 10 n.10.[11]

The Federal Circuit's decision in this case is inconsistent with the rule in the D.C. Circuit and the decisions of this Court on which the D.C. Circuit's longstanding rule is based. Here, before the Federal Circuit issued its mandate, the WTO held that Commerce's zeroing rule as used in investigations violated the treaty. Commerce announced that it would no longer use zeroing in investigations, and the WTO further ruled that Commerce's zeroing practice violates the United States' obligations under the Antidumping Agreement when used in administrative reviews, including the one at issue in this case. In light of these developments, Petitioners filed a petition for rehearing in the Federal Circuit requesting a stay for purposes of seeking a remand to the agency. Petitioners

[11] Other courts of appeals have applied the *Food Store Employees* rule to require remands when agency decisions are later called into question by appellate decisions or changes in the governing agency rule. *See NLRB* v. *Coca-Cola Bottling Co. of Buffalo*, 55 F.3d 74, 78 (2d Cir. 1995); *Blackman-Uhler Chem. Div., Synalloy Corp.* v. *NLRB*, 561 F.2d 1118, 1119 (4th Cir. 1977) (en banc).

explained that Commerce, and not the federal courts, should decide whether to implement the WTO's rejection of zeroing in this administrative review as it had in pending and future investigations. The Federal Circuit, however, refused to rehear the case or to issue a stay to determine whether a remand was necessary.[12] Less than three weeks after the Federal Circuit issued this decision, the United States (as expected) assured the WTO and its treaty partners that it would fully comply with its obligations under the Antidumping Agreement in light of the WTO's decision rejecting the use of zeroing in administrative reviews.[13]

The Federal Circuit's decision below is plainly inconsistent with the rule the D.C. Circuit follows, and the rationale underlying that rule. The WTO's condemnation of zeroing as violative of U.S. treaty obligations in this case, and Commerce's response to a prior condemnation of the same practice in a closely analogous category of administrative proceedings, made it abundantly clear that the Federal Circuit's decision rested on legal principles that the agency was extremely likely to (and in fact did) change. In the D.C.

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[12] The Federal Circuit has steadfastly refused to remand Commerce's antidumping determinations despite the WTO's repeated determinations that the zeroing rule is invalid, and despite Commerce's announced intention to follow the WTO's decisions. In addition to the decision below, the Federal Circuit recently refused a similar remand request in *Corus Staal BV* v. *Department of Commerce*, and a Petition for a Writ of Certiorari is currently pending before this Court in that case. *See* Petition for Certiorari, *Corus Staal BV* v. *United States*, No. 06-1057 (filed Jan. 25, 2007). As in this case, the Federal Circuit denied Corus' request for rehearing to remand to the Department of Commerce, despite the fact that the WTO had earlier held that zeroing was a violation of treaty obligations in that case, and Commerce announced its intention to comply with the WTO's ruling. *See id.* at 6-9, 11-12. Indeed, the Federal Circuit apparently felt that its no-remand rule was so well established that it denied Koyo's and NTN's request without *any* explanation for its decision. *See* Pet. App. 2a.

[13] *Minutes*, Pet. App. 58a; Statement of David P. Shark, *supra*.

Circuit, petitioner would have obtained a stay and remand so that Commerce could decide whether petitioner should be found liable for dumping under the agency's new policy.

The Federal Circuit has adopted a different rule, however, which requires Petitioners and the Department of Commerce to live with an agency decision that was based on a rule subsequently disapproved by the WTO and the Department of Commerce. These flatly inconsistent approaches to judicial review of agency actions should be resolved by this Court.

II. THE FEDERAL CIRCUIT'S DECISION IS INCONSISTENT WITH THE CONSTITUTIONAL SEPARATION OF POWERS AND INTERFERES WITH THE EXECUTIVE BRANCH'S ABILITY TO COMPLY WITH THE UNITED STATES' TREATY OBLIGATIONS.

It is well established that the separation of powers requires courts to defer to the Executive Branch in matters involving the foreign affairs of the United States. See, *e.g.*, *Republic of Mex.* v. *Hoffman*, 324 U.S. 30, 35 (1945) ("[T]he courts should not so act as to embarrass the executive arm in its conduct of foreign affairs."); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936). Moreover, under the URAA, Congress has placed responsibility for implementing adverse WTO decisions squarely in the hands of the Executive Branch, specifically the Department of Commerce and the United States Trade Representative ("USTR"). See 19 U.S.C. §§ 3533(g), 3538.

The D.C. Circuit's remand rule—which accords with this Court's precedents—is doubly important in cases involving treaty obligations. In cases like this one, where an agency rule conflicts with treaty obligations and the Executive Branch announces its intention to modify its rule for that reason, a remand to the agency is necessary to allow the Executive Branch to reevaluate its earlier decision, thus minimizing the likelihood that the United States will act

contrary to its international obligations. Because the statute grants Commerce and the USTR sole responsibility for implementing adverse WTO decisions, a remand allows the Executive Branch properly to discharge its statutory and treaty obligations.

Indeed, the United States has given the WTO *specific assurances* that where (as here) an agency rule is to be revoked in implementing a WTO decision, "*Commerce* would need to decide what to do with respect to entries [*i.e.*, final administrative decisions] that took place prior to the date of revocation." Second Written Submission of the United States, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act* ¶ 19, WT/DS221 (Mar. 8, 2002) (emphasis added), Pet. App. 66a. In that case, Canada challenged the United States' legal regime for implementing adverse WTO reports on grounds, *inter alia*, that it would not allow the Executive Branch to revisit its previously issued decisions when revoking an antidumping order. The United States argued, consistent with the remand rule that prevails in the D.C. Circuit, that *the agency* has authority to decide whether a policy change requires modification or reversal of the agency's prior decision, and that court-ordered remands were available as a vehicle by which implementation of WTO decisions could be obtained. *Id.* ¶ 19-20, Pet. App. 66a-67a. Based largely on this assurance, the WTO ruled that the United States was not in violation of its treaty obligations. See Panel Report, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act* ¶¶ 6.82-6.83, WT/DS221/R (July 15, 2002).

Consistent with these assurances, the United States also committed to the WTO in *this specific administrative review* that it will implement the WTO's rejection of zeroing. See *Minutes*, Pet. App. 58a; Statement of David P. Shark, *supra* (stating, in reference to the WTO's decision in *U.S. – Zeroing (Japan)*, that "the United States wishes to state that it intends to comply in this dispute with its WTO obligations and will

be considering carefully how to do so"). As explained, the United States has committed to Japan that it will fully implement the WTO Appellate Body's report by December 24, 2007. See *Agreement*, Pet. App. 59a. And, the Department of Commerce has stopped using zeroing in any new or pending antidumping investigations. See *Antidumping Proceedings*, 71 Fed. Reg. at 77,725. Petitioners are certainly entitled to a decision by the agency whether this change in policy applies to Petitioners' pending "administrative review," particularly since the Executive Branch has committed to the WTO and its treaty partners that it will implement the WTO's decision that zeroing violates treaty obligations in administrative reviews as well as investigations. See *U.S.-Zeroing (Japan)* ¶¶ 138, 166 (concluding that zeroing is inconsistent with the United States' treaty obligations in *both* "original investigations" and "periodic reviews"), Pet. App. 53a-54a.

The Federal Circuit's decision in this case prevents the United States from fulfilling its treaty obligations and implementing the assurances made by the Executive Branch to the WTO and U.S. treaty partners. A writ of certiorari is thus required to allow the Executive Branch to determine whether and how to comply with the WTO's explicit directives in this case. Indeed, unless this Petition is granted, there will be *no* way for the Executive Branch to comply with its treaty obligations in this administrative review, and Petitioners will be effectively unable to challenge dumping liability that was imposed in clear violation of the United States' treaty obligations.

As explained in footnote 12 above, the Federal Circuit's error is not an isolated incident. This is especially perplexing given the Federal Circuit's earlier solicitude for the Executive's prerogatives in such cases. In *Corus Staal BV* v. *Department of Commerce*, 395 F.3d 1343 (Fed Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006), decided after the WTO's rejection of zeroing in investigations but before Commerce's

announcement that it would implement fully the WTO's decision, the court of appeals explained that it could not usurp the Executive's role in deciding when and how to comply with treaty obligations.

> Congress ... has authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement [the] WTO reports and determinations and, if so implemented, the extent of implementation.... We will not attempt to perform duties that fall within the exclusive province of the political branches.

Id. at 1349.

This attentiveness to the separation of powers was short-lived: as noted, the Federal Circuit abruptly and inexplicably changed its position in its next *Corus* decision and refused to remand the case to the agency following Commerce's announcement that it would repeal its zeroing rule. The same occurred here with regard to administrative reviews. Thus, the Federal Circuit is preventing the Executive from doing precisely what the court recognized the Executive should do. If not corrected by this Court, the Federal Circuit will perpetuate its error in all pending and future antidumping determinations to which adverse WTO decisions apply.[14]

* * * *

The Federal Circuit's decision in this case will frustrate the Executive Branch's attempts to implement the nation's treaty obligations, particularly in this and other antidumping proceedings. It also makes hollow the specific assurances the Executive Branch has made to the WTO and to U.S. treaty partners in this case, and assurances the United States made previously to the WTO in defending its legal regime for

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[14] As explained, the Federal Circuit has exclusive jurisdiction over appeals from antidumping decisions. *See* 28 U.S.C. § 1295(a)(5).

implementing adverse decisions. As this Court has emphasized, "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting domestic legislation in such [a] manner as to violate international agreements." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995). The same principle applies here. The Federal Circuit's refusal to entertain Petitioners' request for rehearing and a stay for the purpose of seeking a remand to the agency threatens the Executive Branch's ability properly to conduct the nation's foreign affairs and treaty relationships. Accordingly, this Court should intervene to correct this unwarranted violation of the separation of powers.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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