NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW

Volume 15 | Number 3 Article 4

Fall 1990

Agency Investigation: Adjudication or Rulemaking - The ITC's Material Injury Determiniations under the Anitidumping and Contervailing Duty Laws

Edwin J. Madaj

Follow this and additional works at: https://scholarship.law.unc.edu/ncilj

 Part of the Commercial Law Commons, and the International Law Commons

Recommended Citation

Edwin J. Madaj, *Agency Investigation: Adjudication or Rulemaking - The ITC's Material Injury Determiniations under the Anitidumping and Contervailing Duty Laws*, 15 N.C. J. INT'L L. 441 (1990).
Available at: https://scholarship.law.unc.edu/ncilj/vol15/iss3/4

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Agency Investigation: Adjudication or Rulemaking?—The ITC's Material Injury Determinations Under the Antidumping and Countervailing Duty Laws

*Edwin J. Madaj**

I. Introduction

There are few distinctions as central to administrative law as the distinction made between types of agency actions, particularly between agency rulemaking and agency adjudication—a key dividing line drawn by the Administrative Procedure Act (hereinafter APA) itself.[1] Nevertheless, drawing that vital line in individual instances can be difficult and contentious. In the case of material injury investigations by the U.S. International Trade Commission under Title VII of the Tariff Act of 1930,[2] which have generally been recognized for at least a decade to be non-adjudicative in nature,[3] a school of thought maintains that such proceedings, while denominated "investigations," are in fact adjudications (largely due to changes in the statute made since the late 1970s).[4] Indeed, even recent statements

* A.B., J.D., University of Michigan; Member, D.C. Bar; Senior Attorney in the Office of the General Counsel, U.S. International Trade Commission. The views of this article are entirely those of the author and do not reflect the views either of the Commission or of the General Counsel.

[1] 5 U.S.C. §§ 551-559 (1988).

[2] *See* 19 U.S.C. §§ 1671-1677k (1988). Under this statutory scheme, which governs proceedings that can result in the imposition of a special "correcting" tariff on dumped or subsidized imports, the proceedings are conducted by two agencies—the International Trade Administration of the Commerce Department, which determines whether imports are being dumped or subsidized, and the International Trade Commission, which determines whether the relevant U.S. industry is materially injured, or threatened with material injury, or that the establishment of the industry is being materially retarded, by reason of the dumped or subsidized imports. If both agencies find in the affirmative, an antidumping or countervailing duty order is issued imposing the antidumping or countervailing duties. *See, e.g.*, Mitsubishi Electric Corp. v. United States, 898 F.2d 1577, 1578 (Fed. Cir. 1990).

[3] *See infra* notes 83-84 & 95 and accompanying text.

[4] *See, e.g.*, 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 806, Note 5 (1987) ("Countervailing duty proceedings in the United States are called 'investigations' . . . *but they have many of the characteristics of judicial proceedings.* They are not controlled by the private party initiating them, but they are adversarial as between the foreign party and the United States government.") (emphasis added); Taylor & Vermulst, *Disclosure of Confidential Information in Antidumping and Countervailing Duty Proceedings Under U.S. Law: A Framework for the European Communities*, 21 INT'L LAW. 43, 69 (1987); Ehrenhaft,

by the Reagan Administration characterized antidumping and countervailing duty proceedings as "quasi-adversarial in nature . . . with U.S. firms pitted against foreign firms and U.S. importers."[5]

The label given Commission investigations is important, although, as noted below, Congress has specified in some detail the procedures to follow, including admonishing the Commission not to follow formal APA adjudicatory procedures when it holds hearings in antidumping or countervailing duty investigations. The perception of the Commission proceedings by the courts and the Congress affects issues often critical to judicial review or legislative oversight of Commission determinations. For example, as discussed below, the U.S. Court of International Trade to date has denied any res judicata effect to Commission material injury determinations, but has given somewhat inconsistent reasons for its decisions. The missing piece in the court's analyses is the recognition, elsewhere reaffirmed by the court time and again, that Commission determinations are not adjudicatory in nature—neatly disposing of the question in light of the well-established principle that nonadjudicatory agency action is not to be given res judicata effect. Thus, understanding the nature of the agency's activity can be vital to a court's analysis of legal issues as they arise in judicial review, or to the Congress, should it desire to amend the statute.[6] This is true even if the understanding is that the statutory regime is a peculiar one, and that the Commission's material injury investigations are not easily classified.

The school of thought characterizing the Commission as an adjudicator of trade disputes contemplates a departure from the Commission's traditional mission. The historical *raison d'être* of the U.S.

A Practitioner's Response to the Anthony-Byrne Report: 'It Ain't Necessarily So', 17 LAW & POL'Y INT'L BUS. 71, 72 (1985) ("In the opinion of this practitioner [the Anthony-Byrne] . . . thesis rests on a fundamental misperception of the role of the Commission. It begins by viewing the ITC as an independent investigator rather than what it has become in fact: an adjudicator of disputes between adverse parties.").

There was a wholesale revision of the antidumping and countervailing duty laws beginning with the Trade Agreements Act of 1979, tit. I, Pub. L. No. 96-39, 93 Stat. 144, 150-93 (1979), which implemented into United States law the Tokyo Round of Multilateral Trade Agreements. There were lesser subsequent amendments to the statutes in 1984 and 1988, the relevant provisions of which are discussed below.

[5] STATEMENT OF ADMINISTRATIVE ACTION, U.S.-CANADA FREE TRADE AGREEMENT—IMPLEMENTATION ACT, H.R. DOC. No. 216, 100th Cong., 2d Sess. 273 (1988). Note the inconsistency of this statement, characterizing U.S. firms as the "adversary" of foreign exporters and U.S. importers, with the *Restatement*, which characterizes the "United States government" as the adversary of the "foreign party." It should also be noted, as explained further below, that a proceeding may be "adversarial" without being adjudicatory in nature.

[6] The Administrative Conference of the United States is currently studying whether to propose legislation that would procedurally change the Commission's investigations under the antidumping and countervailing duty laws. Further, a clear understanding of the nature of the proceedings is also desirable if Commission proceedings are viewed as a model to be adopted abroad, as Taylor and Vermulst propose for the European Community. *See supra* note 4.

International Trade Commission, created as the U.S. Tariff Commission, was not to "adjudicate" trade disputes, but to give expert and impartial advice to the Executive and Legislative branches of the federal government on tariff and international trade matters.[7] The issue explored in this Article is whether the Commission's material injury proceedings under Title VII of the Tariff Act of 1930 fall within this historical function,[8] or constitute some other type of agency action.[9] This Article first discusses general characteristics (as defined in the corpus of administrative law) of adjudications, rulemaking proceedings, and investigations, respectively. It then considers the nature of Commission injury investigations in light of these characteristics.[10]

---

[7] *See* S. REP. No. 1298, 93d Cong., 2d Sess. 115 (1974) [hereinafter S. REP. No. 1298]. In 1916 the Commission, then named the United States Tariff Commission, was established as an independent, nonpartisan agency with the principal function "to provide technical and fact-finding assistance to the Congress and the President upon the basis of which trade policies may be determined." *See also* Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 321 (1933) (noting "the historic function of the Commission as the advisor of the President or Congress in the business of legislation," and criticizing an argument casting the Commission's role "as an arbiter between adverse parties litigant"). *But see Overview and Compilation of U.S. Trade Statutes*, WMCP No. 14, 101st Cong., 1st Sess. 179 (1989) (the Commission "is an independent and quasi-judicial agency").

[8] Two decisions of the U.S. Customs Court have characterized Commission injury determinations in antidumping investigations as "fact-finding," not adjudication or rulemaking. *See* Pasco Terminals, Inc. v. United States, 477 F. Supp. 201 (Cust. Ct. 1979), *aff'd*, 634 F.2d 610 (C.C.P.A. 1980); Imbert Imports Inc. v. United States, 314 F. Supp. 784 (Cust. Ct. 1970), *aff'd*, 331 F. Supp. 1400 (Cust. Ct. App. Term 1971), *aff'd*, 475 F.2d 1189 (C.C.P.A. 1973). "In its role in antidumping proceedings the Tariff Commission is not an agency within the intent of the Administrative Procedure Act, nor do its methods of deliberation conform to the 'rulemaking' activity to which said act is directed. The Tariff Commission is acting in an advisory capacity only." *Imbert Imports*, 314 F. Supp. at 787 (citing Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933)).

> [T]he Commission's role . . . is a limited one. . . . The Commission formulates no 'order' or 'decree.' Although the Commission may exercise broad discretion in the selection of methods used to find the facts called for by the statute, it clearly has no discretion to fashion antidumping remedies. In point of fact, the Commission has no authority to take any direct remedial action to restrain dumping.

Imbert Imports, 331 F. Supp. at 1406. Note, however, that *Pasco Terminals* and *Imbert Imports* predate the revisions of the statute in 1979, 1984, and 1988 which arguably have made the Commission's investigations more "adjudicatory" in nature.

[9] For example, one type of Commission proceeding, the investigation of unfair practices in import trade under § 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 (1988), is uniformly considered an adjudication. That particular statute, however, explicitly directs the application of APA formal adjudicative procedures. *See* 19 U.S.C. § 1337(c). This contrasts with the antidumping and countervailing duty laws, which, as noted below, instead direct that such formal adjudicatory procedures not be applied in antidumping and countervailing duty hearings.

[10] The existing literature generally fails to consider this background. As noted below, the statute's legislative history and court decisions generally indicate that the Commission's investigations are not adjudications. However, none of the authorities cited in note 4, *supra*, the *Restatement*, Taylor & Vermulst, nor the Ehrenhaft article, discuss or note the existence of any authority contrary to their conclusion that the Commissioner's interpretations are adjudications. Indeed, the *Restatement* only cites two articles, another article by Ehrenhaft, *The Judicialization of Trade Law*, 56 NOTRE DAME LAW. 595 (1981) and Palmeter, *Torquemada and the Tariff Act: The Inquisitor Rides Again*, 20 INT'L LAW. 641 (1986), as support for its assertion that countervailing duty proceedings have many of the character-

It concludes with a reaffirmation of the traditional view that Commission material injury proceedings cannot, on balance, be deemed adjudications, notwithstanding the statutory changes that have occurred over the last ten years.[11]

II. The Distinguishing Characteristics of Adjudications, Rulemaking Proceedings, and Investigations

The APA classifies agency proceedings as adjudications or rulemaking. Agency adjudications resemble the proceedings of courts both in using trial-type procedure and in resolving disputes involving the past conduct of individuals. Agency rulemaking proceedings are more legislative in character and normally result in the promulgation of rules of general application that have prospective effect.[12] Unfortunately, administrative law principles are seldom this straightforward. Any analysis of the true character of an agency proceeding is complicated by the subdivision of adjudications into infor-

---

istics of judicial proceedings. The Ehrenhaft article cited by the *Restatement* merely describes what it views as a trend toward transforming "the process of policymaking into a system of quasi-adjudication." Ehrenhaft, *supra*, 56 NOTRE DAME LAW. at 608. Thus, it does not support the *Restatement's* general conclusion that countervailing duty proceedings currently have many of the characteristics of judicial proceedings. The Palmeter article also undercuts rather than supports the *Restatement's* view. The article describes the existing procedural system, which it denigrates as "inquisitorial," and openly calls for the system to be changed to an adjudicatory system. Palmeter, *supra*, 20 INT'L LAW. at 641. Further, the *Restatement* only addresses countervailing duty proceedings and does not characterize antidumping proceedings as having the characteristics of a "judicial proceeding." 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 806 (1987). The omission, or the reason for any difference, is unexplained.

The Taylor and Vermulst article bases its conclusion solely on the availability of limited disclosure of confidential information under protective order. Taylor & Vermulst, *supra* note 4, at 69-70. The Ehrenhaft article cited in note 4, *supra*, merely notes the fact that a poll taken by that author of a number of practitioners before the Commission indicates that most counsel share that author's opinion of the adjudicative nature of Commission proceedings. Ehrenhaft, *supra* note 4, at 71-72.

[11] This Article will not discuss in any depth the question of whether the Commerce Department's proceedings under the antidumping and countervailing duty laws, which determine whether imports are being dumped or subsidized within the meanings of those laws, differ conceptually from the Commission's proceedings by possessing more or less of the characteristics of an "adjudication."

[12] *See, e.g.*, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) [hereinafter ATTORNEY GENERAL'S MANUAL].

> Proceedings are classed as rule making under this act not merely because, like the legislative process, they result in regulations of general applicability but also because they involve subject matter demanding judgments based on technical knowledge and experience. . . . In many instances of adjudication, on the other hand, the accusatory element is strong, and individual compliance or behavior is challenged; in such cases, special procedural safeguards should be provided to insure fair judgments on the facts as they may properly appear of record. The statute carefully differentiates between these two basically different classes of proceedings so as to avoid, on the one hand, too cumbersome a procedure and to require, on the other hand, an adequate procedure.

Id. at 126-27.

mal and formal adjudications,[13] and the subdivision of rulemaking into informal and formal rulemaking.[14] One result is the anomaly that formal rulemaking is in many ways more procedurally like an adjudication than an informal adjudication.

Further, the distinctions between the types of proceedings are blurred by the use of labels such as "quasi-adjudication" and "quasi-rulemaking."[15] It is questionable whether this "quasi" categorization means very much, particularly since there appears to be no set definition of a quasi-adjudicative or quasi-legislative proceeding.[16] As Justice Jackson once noted, "quasi" is a linguistic device for creating the impression of logic and order where none exists.[17] A quasi-adjudication is not an adjudication, but rather some other type of proceeding which the categorizer is unable to describe except by styling it as something with similarities to an adjudicatory proceeding.

Finally, there is some dispute whether certain types of administrative actions can be characterized as neither rulemaking nor adjudication, but as something else, such as an investigation.[18] In the end,

---

[13] *See, e.g.*, Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1160-61 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); National Wildlife Fed'n v. Marsh, 568 F. Supp. 985, 992 (D.D.C. 1983) (formal versus informal adjudication).

[14] *See, e.g.*, *National Advertisers*, 627 F.2d at 1160-61; Hercules, Inc. v. EPA, 598 F.2d 91, 119 (D.C. Cir. 1978).

[15] *See* Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519, 542 (1978) (characterizing as "quasi-judicial" agency actions that "exceptionally affect" "very small" numbers of persons, which may require additional procedures even in a proceeding that nominally is a rulemaking proceeding); Mason General Hosp. v. Secretary of Dep't of Health and Human Services, 809 F.2d 1220, 1225 (6th Cir. 1987) (referring to "quasi-judicial rulemaking" and "quasi-legislative promulgation of rules"); Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876 (1st Cir. 1978) ("quasi-judicial"), *cert. denied*, 439 U.S. 824 (1978).

[16] *Black's Law Dictionary* defines "quasi" to mean "that one subject resembles another, with which it is compared, in certain characteristics, but that there are intrinsic and material differences between them." BLACK'S LAW DICTIONARY 1120 (5th ed. 1979). The courts have used the term "quasi-adjudication," for example, to refer to a number of different types of proceedings. In some cases "quasi-adjudication" or "quasi-judicial" refers to any *formal* agency adjudication under the APA, evidently to distinguish agency adjudications from adjudications by the courts. *See* Hannah v. Larche, 363 U.S. 420, 445 (1960); *Seacoast Anti-Pollution League*, 572 F.2d at 876. Another case uses the term to refer to certain types of rulemaking proceedings that might exceptionally affect a small number of individuals. *See Vermont Yankee*, 435 U.S. at 542. Another case criticized a district court's use of the term to refer to a "hybrid" type of rulemaking proceeding. *See National Advertisers*, 627 F.2d at 1160.

[17] *See* FTC v. Rubberoid Co., 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting).

[18] *Compare* ITT v. Local 134, Int'l Brotherhood of Electrical Workers, 419 U.S. 428, 442 (1975) (noting that certain types of agency action are neither rulemaking nor adjudications) *with National Advertisers*, 627 F.2d at 1160 ("The district court's characterization of section 18 rulemaking as a 'hybrid' or quasi-judicial proceeding . . . ignores the clear scheme of the APA. Administrative action pursuant to the APA is either adjudication or rulemaking."). *See also* City of West Chicago v. U.S. Nuclear Regulatory Comm'n, 701 F.2d 632, 644-45 (7th Cir. 1983) (quoting Izaak Walton League v. Marsh, 655 F.2d 346, 362 n.37 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981)) (characterizing "informal adjudications" as "all agency actions that are not rulemaking and that need not be con-

what appears to truly distinguish adjudicative and nonadjudicative agency action is not the label applied,[19] nor even the nominal procedures followed, but rather the inherent characteristics of the proceeding, including its purpose and effect.[20]

A. Adjudications

The APA defines adjudications as "agency process for the formulation of an order,"[21] while an order is defined as "the whole or part of a final disposition . . . of an agency in a matter other than rule making but including licensing."[22] As noted above, this definition supports the argument that if agency action is not rulemaking, it must be for the formulation of an order and hence a type of adjudication.[23] Agency actions that are adjudicative in nature are characterized procedurally by comparative formality, typified by trial-type hearings, with the rights of notice,[24] confrontation, cross-examination and the calling of one's own witnesses,[25] and a general prohibition of ex parte contacts with the decisionmaker.[26] Further, agency

---

ducted through 'on the record' hearings"); Batterton v. Marshall, 648 F.2d 694, 700 (D.C. Cir. 1980) (the APA "broadly defines an agency rule to include nearly every statement an agency may make").

[19] *See* United Air Lines, Inc. v. CAB, 766 F.2d 1107, 1116 (7th Cir. 1985).

[20] *See generally* United Steelworkers of America v. Marshall, 647 F.2d 1189, 1207 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981) (while either the agency or Congress can impose additional or "adjudicatory-type" procedural requirements, this does not convert rulemaking "into something akin to adjudication, nor empower courts to turn rulemaking into courtroom trials"); FTC v. Brigadier Industries Corp., 613 F.2d 1110, 1117 (D.C. Cir. 1979) ("[T]he focus is not on whether the particular proceeding involves trial-type devices but instead turns on the nature of the decision to be reached in the proceeding.") (footnote omitted) (emphasis omitted); RESTATEMENT (SECOND) OF JUDGMENTS § 83, Comment (b) at 270 (1982) ("procedural attributes are not of themselves sufficient to define adjudication"). *But see* 3 J. STEIN, G. MITCHELL & B. MEZINES, ADMINISTRATIVE LAW § 13.02[4] (1987) (the method used by the agency to conduct the proceeding, and the effect of the final action, are "essential" to classifying agency action); RESTATEMENT (SECOND) OF JUDGMENTS § 83, Comment (b) at 268 ("Where an administrative agency is engaged in deciding specific legal claims or issues through a procedure substantially similar to those employed by courts, the agency is in essence engaged in adjudication.").

[21] 5 U.S.C. § 551(7) (1988).

[22] 5 U.S.C. § 551(6) (1988).

[23] *See* ATTORNEY GENERAL'S MANUAL, *supra* note 12, at 13 ("[T]he definition of adjudication is largely a residual one, i.e., 'other than rulemaking.' "). *But see id.* at 61 (noting that the APA defines various "procedural rights of private parties which may be incidental to rule making, adjudication, or *the exercise of any other agency authority*" (emphasis added)).

[24] *See, e.g.*, United States v. Florida E. Coast Ry. Co., 410 U.S. 224, 242-43 (1973); RESTATEMENT (SECOND) OF JUDGMENTS § 83(2)(a) (1982).

[25] *See, e.g.*, Hannah v. Larche, 363 U.S. 420, 442-43, 445 (1960). *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 83(2)(b). Note, however, that the right of cross-examination is not mandated by the APA, but is left to the discretion of the presiding official at the hearing, which is subject to review on appeal. *See* Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 880 & n.16 (1st Cir.), *cert. denied*, 439 U.S. 824 (1978) (remanding the case to the agency so it could determine whether cross-examination "would be useful").

[26] *See, e.g.*, *Florida E. Coast Ry.*, 410 U.S. at 242-43 (noting that a party to an adjudication must be given an opportunity to cross examine ex parte statements); PATCO v. Federal Labor Relations Authority, 685 F.2d 547, 570 (D.C. Cir. 1982) ("We think it a

adjudications generally adjudicate facts or liabilities in particular cases which affect a limited number of parties,[27] and may be given res judicata or collateral estoppel effect in subsequent proceedings.[28] "The factual predicate of adjudication depends on ascertainment of 'facts concerning the immediate parties—who did what where, how, and with what motive or intent.' "[29] While adjudications are adversarial in nature, the existence of opposing sides is not a characteristic limited to adjudications, as any veteran of the legislative process could attest.[30]

In an adjudication, the decisionmaker's action is "unmixed with any concern as to the success of prosecution or defense. Courts are not expected to start wheels moving or to follow up judgments. . . ." [I]t is to be regretted whenever a court in any sense must become [a] prosecutor."[31] Further, in all but informal adjudications, the decisions must be based on the record generated by the trial-type hear-

---

mockery of justice to even suggest that judges or other decisionmakers may be properly approached on the merits of a case during the pendency of an adjudication."); Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981) (prohibition of ex parte contacts based on "basic notions of due process to the parties involved"); 5 U.S.C. § 557(d). Note, however, that despite this nominal prohibition, ex parte contacts do not necessarily invalidate an agency adjudication. *See, e.g.*, Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986).

[27] *See, e.g., Florida E. Coast Ry.*, 410 U.S. at 246 (referring to the "generalized" nature of the non-adjudicative order issued in that case). *See also* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 542 (1978).

[28] *See, e.g.*, University of Tennessee v. Elliott, 478 U.S. 788, 797-98 (1986); United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421-22 (1966); Delamater v. Schweiker, 721 F.2d 50, 53 (2d Cir. 1983). Note that res judicata effect may be denied to an agency adjudication if an evident legislative policy so requires. RESTATEMENT (SECOND) OF JUDGMENTS § 83(4).

[29] Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1161 (D.C. Cir. 1979) (quoting 2 K. DAVIS, ADMINISTRATIVE LAW § 15.03 (1958)).

[30] If the presentation of briefs and legal argument by counsel, or the presentation of opposing views, were sufficient to identify a judicial proceeding, the Congress as well as virtually every agency in Washington would be thereby "judicialized." Moreover, case law indicates that an adversarial posture is not uncommon in nonadjudicative proceedings, and the presence of opposing sides in a proceeding does not identify such a proceeding as an "adjudication." *See* United Steelworkers of America v. Marshall, 647 F.2d 1189, 1214 n.24 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981) ("the mere fact that this particular proceeding became highly adversarial cannot transform informal rulemaking into something else"). *See generally* United States v. Morton Salt, 338 U.S. 632, 640 (1950) ("investigations" are sometimes "adversary"); Home Box Office Inc. v. FCC, 567 F.2d 9, 55-56 & n.124 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 892 (1977) (noting "conflicting private claims" in the rulemaking context).

[31] United States v. Morton Salt, 338 U.S. 632, 641 (1950). *See also* Administrative Procedure Act § 5(c), 5 U.S.C. § 554(d) (providing that an "employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review"). This separation of functions is designed "[t]o achieve fairness and independence in the hearing process" by ensuring that the hearing officer has not received or obtained factual information outside the record generated by the hearing. *See* ATTORNEY GENERAL'S MANUAL, *supra* note 12, at 54 (explaining the reasons for the separation between adjudications and investigations) and at 42 (on the requirement that adjudications be made on the basis of the hearing record only).

ing, or on papers submitted in the proceeding,[32] and generally may not be based on information independently obtained by the hearing officer or administrative law judge.[33] The agency must rule on the parties' proposed findings, exceptions, or conclusions.[34] There is a clear allocation of the burden of proof, which is carried by the proponent of a proposed order.[35] Adjudications lead to the issuance of an order,[36] which will generally affect only the parties to the adjudication.[37]

Informal adjudications, those not required to be based on the hearing procedures specified by sections 556 and 557 of the APA,[38] are based on an informal, or speechmaking, hearing only, and may

---

[32] *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971); 5 U.S.C. § 556(e); Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 878 (1st Cir.), *cert. denied*, 439 U.S. 824 (1978) (quoting ATTORNEY GENERAL'S MANUAL, *supra* note 12 at 42-43: "[I]t is assumed that where a statute specifically provides for administrative adjudication (such as the suspension or revocation of a license) after opportunity for an agency hearing, such specific requirement for a hearing ordinarily implies the further requirement of decision in accordance with evidence adduced at the hearing.").

[33] *See* Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 881 (1st Cir.), *cert. denied*, 439 U.S. 824 (1978) (agency staff cannot make up for a party's failure to carry its burden of proof by adding information not on the record); ATTORNEY GENERAL'S MANUAL, *supra* note 12, at 42-43. *See also* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 547 (1978) (noting that informal rulemaking need not be based solely on evidence adduced at a hearing).

[34] *See* 5 U.S.C. § 557(c) (1988).

[35] 5 U.S.C. § 556(d) (1988). This consists of the burden of going forward with evidence, not the burden of persuasion. *See* NLRB v. Transportation Mgmt. Corp., 462 U.S. 393, 403-04 n.7 (1983); Fischer & Porter Co. v. U.S. International Trade Comm'n, 831 F.2d 1574, 1581 (Fed. Cir. 1987) (under the APA the proponent of an order has the burden to come forward "with evidence of good quality and sufficient quantity to amount to a preponderance"); Environmental Defense Fund, Inc. v. EPA, 548 F.2d 998, 1013 (D.C. Cir. 1976), *cert. denied sub nom.* Velsicol Chemical Corp., 431 U.S. 925 (1977); ATTORNEY GENERAL'S MANUAL, *supra* note 12, at 75 ("There is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going forward [with a prima facie case.]' ").

[36] *See* 5 U.S.C. § 551(6), (7) (1988); Hannah v. Larche, 363 U.S. 420, 450 (1960) (distinguishing between agency actions that "ordain," such as adjudications, and agency actions that merely "advise," such as investigations).

[37] *See* Ford Motor Co. v. FTC, 673 F.2d 1008, 1010 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982); 3 J. STEIN, G. MITCHELL & B. MEZINES, ADMINISTRATIVE LAW § 13.02[4] (1987). The interesting debate on whether rules of general applicability can be promulgated through agency adjudication is beyond the scope of this article. *See, e.g.*, Weaver, *Chenery II: A Forty Year Retrospective*, 40 ADMIN. L. REV. 161 (1988) for a more detailed discussion of this issue.

[38] These "informal" adjudications are not required to proceed in accordance with the trial-type hearing procedures specified by §§ 556 and 557 if the adjudication is not otherwise required by statute (or by other clear expression of legislative intent) to be held "on the record." *See, e.g.*, Steadman v. SEC, 450 U.S. 91, 97 n.13 (1981) (absence of phrase "on the record" not dispositive of whether §§ 556 and 557 procedures are applicable); Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477, 1481-82 (D.C. Cir. 1989); Railroad Comm'n of Texas v. United States, 765 F.2d 221, 228 (D.C. Cir. 1985) (citing 5 U.S.C. § 554(a) and Independent U.S. Tanker Owners' Committee v. Lewis, 690 F.2d 908, 922 n.63 (D.C. Cir. 1982), among other authorities); Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876 (1st Cir.), *cert. denied*, 439 U.S. 824 (1978). Also, due process may require the use of §§ 556 and 557 procedures. *See* City of West Chicago v. Nuclear Regulatory Comm'n, 701 F.2d 632, 644 n.11 (7th Cir. 1983).

involve matters that permit decision making.[39] It has been said that the bulk of administrative adjudication is informal in nature.[40]

B. Rulemaking Proceedings

Rulemaking is an exercise of delegated legislative authority,[41] generally prospective in effect,[42] that makes general or categorical determinations that may affect a large number of persons.[43] Such affected persons, though not parties, may participate by submitting written comments. "Such participation by nonparties who may be affected by the outcome is automatic in rulemaking proceedings, but not in informal adjudication."[44] Rulemaking is subject to judicial review.[45] The factual predicate of rulemaking is ordinarily general,

---

[39] *See* City of West Chicago v. Nuclear Regulatory Comm'n, 701 F.2d 632, 644-45 (7th Cir. 1983) (licensing proceeding is an "informal adjudication"); National Wildlife Fed'n v. Marsh, 568 F. Supp. 985, 992 (1983). *See also* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414-15 (1970) (the hearing held in that adjudication was "nonadjudicatory, quasi-legislative in nature"); Aircraft Owners and Pilots Ass'n v. FAA, 600 F.2d 965, 969 (D.C. Cir. 1979) (process included "nonadversary proceedings and written submissions").

Another distinguishing characteristic is the difference in the standard of review for formal versus informal adjudications, with the former proceedings governed by the "substantial evidence" standard, while the latter may be governed by the "arbitrary and capricious" standard of review. *See* Izaak Walton League of America v. Marsh, 655 F.2d 346, 362 (D.C. Cir. 1981). Nevertheless, an agency's organic statute may set a different standard for review. For example, informal rulemaking as well as informal adjudication may be governed by a substantial evidence standard of review, notwithstanding the fact that the record in these proceedings is not generated through an evidentiary hearing. *See, e.g., Aircraft Owners*, 600 F.2d at 967 (informal adjudication there reviewed under substantial evidence standard); United Steelworkers of America v. Marshall, 647 F.2d 1189, 1206 (1980); 1 K. DAVIS, ADMINISTRATIVE LAW § 6:6 at 469 (2d ed. 1978) ("A requirement of substantial evidence does not mean the rules must be made on the record in accordance with §§ 556 and 557."). Moreover, it has been asserted by at least some courts that "the dichotomy between the substantial evidence test and the arbitrary and capricious test is 'largely semantic.' " ADAPSO, Inc. v. Board of Governors, 745 F.2d 677, 684 (D.C. Cir. 1984) and cases cited therein.

[40] *See* 4 J. STEIN, B. MITCHELL & B. MEZINES, ADMINISTRATIVE LAW § 33.01[1] at 33-9 (1987).

[41] *See, e.g.*, United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972).

[42] *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); Mason Gen. Hosp. v. Secretary of Dep't of Health and Human Services, 809 F.2d 1220 (6th Cir. 1987).

[43] *See, e.g.*, Quivira Mining Co. v. U.S. Nuclear Regulatory Comm'n, 866 F.2d 1246, 1261-62 (10th Cir. 1989); United Air Lines, Inc. v. CAB, 766 F.2d 1107, 1119 (7th Cir. 1985) (a "genuine" rule is "a prospective regulation of general applicability"); Hercules, Inc. v. EPA, 598 F.2d 91, 117-18 (D.C. Cir. 1978); American Telephone and Telegraph Corp. v. FCC, 449 F.2d 439, 455 (2d Cir. 1971); 5 U.S.C. § 551(4) (1988) (a "rule" is an agency statement "of general or particular applicability and future effect"). Note, however, that "[c]ourts uniformly have rejected" the argument that a rulemaking proceeding must be deemed to be an "adjudication" if it affects only one party. *Quivira Mining*, 866 F.2d at 1261. *See also Hercules*, 598 F.2d at 118.

[44] Independent U.S. Tankers Owners' Comm. v. Lewis, 690 F.2d 908, 917 (D.C. Cir. 1982).

[45] *See, e.g.*, 5 U.S.C. § 702 (review of "agency action," defined in 5 U.S.C. § 551(13) as, *inter alia*, "the whole or part of an agency rule"); ATTORNEY GENERAL'S MANUAL *supra* note 12, at 93, 102 (if the agency's substantive statute provides for judicial review of the particular rulemaking in question). *See generally, e.g.*, Home Box Office Inc. v. FCC, 567

without reference to specific parties, and deals with industry conditions, for example, rather than with the actions of one member of the industry.[46] Rulemaking proceedings generally cannot have a res judicata or collateral estoppel effect.[47] Rulemaking, it has been said,

> is for the future and no issue of damages for past acts is involved .... [T]he key questions of fact [are] "legislative" rather than "adjudicatory"—that is, they [are] matters of statistics, economics and expert interpretation, rather than questions of whether . . . some norm [has been violated] and [someone] would thus be subject to retrospective sanctions or other judicial questions of who did what, when, and where.[48]

Procedures involved in rulemaking are usually much less formal, with the concerns regarding ex parte contacts applying with less force.[49] Rulemaking involves much more of an institutional effort than individual decision of an adjudicator based upon the trial record generated by the parties.[50] In informal rulemaking, all that is generally required of the agency is publication of notice of the

---

F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). This belies the claim that availability of judicial review is a distinguishing characteristic of agency adjudications or one of the "hallmarks of traditional litigation." *See* Ehrenhaft, *What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act [Can] [Will] [Should] Mean for U.S. Trade Policy*, 11 LAW & POL'Y INT'L BUS. 1361, 1396 (1979).

[46] Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1165 (D.C. Cir. 1979). *See also* United Air Lines, Inc. v. CAB, 766 F.2d 1107, 1118-20 (7th Cir. 1985) (allowing a Civil Aeronautics Board rulemaking proceeding to make "judgments on market power and related competitive issues without adjudicative hearings").

[47] *See, e.g.*, Facchiano v. U.S. Dep't of Labor, 859 F.2d 1163, 1167 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 2447 (1989) (issue preclusion only applies when the agency was acting in a judicial capacity); United Air Lines, Inc. v. CAB, 766 F.2d 1107, 1116 (7th Cir. 1985) (concern that rules might be given collateral estoppel effect in private antitrust suits was "quite unfounded"); Delamater v. Schweiker, 721 F.2d 50, 53-54 (2d Cir. 1983) (holding that the doctrine of administrative res judicata has no application to nonadjudicatory administrative action); ITT v. American Telephone and Telegraph Corp., 444 F. Supp. 1148 (S.D.N.Y. 1978) (no collateral estoppel effect to rulemaking). *Compare* ITT v. Local 134, Int'l Brotherhood of Electrical Workers, 419 U.S. 428 (1975) (no res judicata effect given to the particular rulemaking action at issue).

[48] American Telephone & Telegraph Co. v. FCC, 449 F.2d 439, 454-55 (2d Cir. 1971). *See also* ATTORNEY GENERAL'S MANUAL *supra* note 12, at 126-27.

[49] *See, e.g., National Advertisers*, 627 F.2d at 1168-69 (noting "[t]he legitimate functions of a policymaker, unlike an adjudicator, demand interchange and discussion about important issues"); Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981). *But see* Home Box Office Inc. v. FCC, 567 F.2d 9, 54 (D.C. Cir. 1977) ("Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those 'in the know' is intolerable."). *Home Box Office* is generally recognized as representing an extreme viewpoint most critical of ex parte contacts in informal rulemaking. The general rule now is that while ex parte comments or contacts in informal rulemaking are not prohibited, courts have required that ex parte comments or a record of ex parte contacts be placed in the public record of an informal rulemaking proceeding. *See* 1 K. DAVIS, ADMINISTRATIVE LAW § 6:18 at 535-37 (2d ed. 1978) (noting an Administrative Conference Recommendation, No. 77-3, that such contacts be memorialized in the public record) and 1982 Supp. at 115; 3 J. STEIN, B. MITCHELL & B. MEZINES, ADMINISTRATIVE LAW § 15.08[2] at 15-125 to -128 (1984).

[50] *See* United Steelworkers of America v. Marshall, 647 F.2d 1189, 1215-16 (D.C. Cir. 1980) (noting that the prohibition of ex parte contacts in *Home Box Office* did not prohibit intra-agency contacts in rulemaking, and in fact was a somewhat extreme example involv-

rulemaking in the *Federal Register*, opportunity for interested persons to participate through submissions, and publication of a concise general statement of the basis and purpose of the rules, which may include findings or conclusions, when the rules are finally promulgated.[51] The agency's record is not limited to the transcript of any hearing that may be held.[52] Such hearings do not generally provide the rights of confrontation and cross-examination that are afforded in evidentiary hearings.[53] This is because "legislative facts combine empirical observation with application of administrative expertise to reach generalized conclusions . . . [and] need not be developed through evidentiary hearings . . . . [On the other hand] [w]here adjudicative, rather than legislative facts are involved, the parties must be afforded a hearing to meet and present evidence."[54]

For formal rulemaking, those proceedings where "rules are required by statute to be made on the record after opportunity for an agency hearing," the agency must also hold a trial-type hearing.[55]

---

ing "massive evidence" of "secret lobbying"). *See also* Iowa State Commerce Comm'n v. Office of the Fed. Inspector, 730 F.2d 1566, 1576 (D.C. Cir. 1984).

[51] United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 758 (1972) (citing 5 U.S.C. § 553). Note that while there is no requirement that the agency rule on the proposed findings, exceptions, or conclusions of the parties, as is required in formal adjudications and formal rulemaking pursuant to 5 U.S.C. § 557(c), there is a requirement that the agency to at least some degree address the comments submitted in an informal rulemaking proceeding. *See, e.g.*, St. James Hosp. v. Heckler, 760 F.2d 1460, 1470 (7th Cir.), *cert. denied*, 474 U.S. 920 (1985); Home Box Office Inc. v. FCC, 567 F.2d 9, 35-36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (the agency must respond to "significant points raised by the public"); American Standard, Inc. v. United States, 602 F.2d 256, 269 (Ct. Cl. 1979) (the agency must respond so that a reviewing court can assess the reasonableness of the rule.); *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. LAW. REV. 507, 516-17 (1988) (noting the requirement imposed by several D.C. Circuit decisions that agencies "disclose their data and methodology, detail their reasoning, and respond to comments from aggrieved parties" in rulemaking proceedings) (remarks of Chief Judge Wald).

[52] *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 547 (1977) (criticizing the notion that fully adjudicatory procedures are necessarily the "best" for all types of agency proceedings, and in particular the uncritical assumption "that additional procedures will automatically result in a more adequate record because it will give interested parties more of an opportunity to participate in and contribute to the proceedings"); Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 877 (1978) ("A hearing serves a very different function in the rule making context . . . . The agency's final decision need not reflect the public input. The witnesses are not the sole source of the evidence on which the Administrator may base his factual findings.").

[53] *See* United Air Lines, Inc. v. CAB, 766 F.2d 1107, 1121 (7th Cir. 1985) (noting that "cross-examination is perhaps not a terribly useful tool for extracting the truth about what are at bottom complex economic phenomena."); Home Box Office Inc. v. FCC, 567 F.2d 9, 42-43 n.74 (D.C. Cir. 1977) ("specific findings" and a record "created under the strictures of rules of evidence and . . . [a] substantial evidence" standard of review "are not generally required in informal rulemaking").

[54] Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1162 (D.C. Cir. 1979) (quoting Alaska Airlines, Inc. v. CAB, 545 F.2d 194, 200 (D.C. Cir. 1976)). *See also United Air Lines*, 766 F.2d at 1118 (noting that "legislative facts" can be found reliably without an evidentiary hearing, unlike "adjudicative facts"). Of course, "[t]he distinction between legislative and adjudicative facts is often subtle or blurred." First Bancorporation v. Board of Governors, Fed. Res. Sys., 728 F.2d 434, 437 (10th Cir. 1984).

[55] 5 U.S.C. § 553(c) (1988).

Much like an adjudication, a recommended, or initial, determination must be rendered before final agency action may be taken, and like an adjudication, the proponent of the rule has the burden of proof.[56] This type of formal rulemaking has become less common than informal rulemaking.[57] Nevertheless, some types of informal rulemaking have become more like formal rulemaking, in that either an agency or the Congress has prescribed additional procedural requirements to the otherwise pristine simplicity of the notice and comment procedures of section 553. Such "hybrid" rulemaking procedures, however, "neither convert the essentially legislative process of informal rulemaking into something akin to adjudication, nor empower courts to turn rulemaking into courtroom trials."[58]

C. *Investigations*

Investigations, to the extent they can be deemed a type of agency action that is neither rulemaking nor adjudication, have generally been classified as proceedings ancillary to rulemaking or adjudication, but part of neither.[59] In their lack of rigid procedural formalities, such as in the absence of rights to cross examine during any hearings that may be held,[60] they bear much closer resemblance to informal rulemaking than to formal adjudication, though it is difficult to find an exact correspondence, and one should be wary of overgeneralizing. A classic example of agency investigation is the Federal Trade Commission's investigation of unfair trade practices which may, or may not, lead to the filing of a complaint against an offending party or the promulgation of certain rules of competi-

---

[56] 5 U.S.C. § 556(d) (1988).

[57] *See National Advertisers*, 627 F.2d at 1167 (quoting a report of the Administrative Conference of the United States that "requiring 'trial-type procedures . . . [in] rulemaking of general applicability [may] produce a virtual paralysis of the administrative process' ") and at n.34 ("Many recent commentators have echoed ACUS's view that full use of formal rulemaking provisions unnecessarily hampers the administrative process." (citations omitted)); 3 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW §§ 13.02[6], 15.01 (1987); 1 K. DAVIS, ADMINISTRATIVE LAW § 6:8 (2d ed. 1978). "The trial procedures of §§ 556 and 557 are not good for making rules of general applicability." *Id.* at 475. While formal rulemaking has declined, there is a trend toward "hybrid" rulemaking—informal rulemaking with some more "formal" elements grafted onto that procedure. *Id.* at 481.

[58] United Steelworkers of America v. Marshall, 647 F.2d 1189, 1207 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981) (citing *Nat'l Advertisers*, 627 F. Supp. at 1151). Note that the Supreme Court in *Vermont Yankee* restricted judicial interference in the informal rulemaking process, to which had previously been added court-mandated additional procedures to notice and comment rulemaking. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defence Council, 435 U.S. 519, 543-49 (1977). *See also* United Air Lines, Inc. v. CAB, 766 F.2d 1107, 1116 (7th Cir. 1985).

[59] 3 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 19.01, at 19-2 (1977) (noting that investigations aid in three principal functions: rulemaking, licensing, and adjudication"). *See generally, e.g.*, Withrow v. Larkin, 421 U.S. 35 (1975); Ash Grove Cement Co. v. FTC, 577 F.2d 1368, 1375 (9th Cir.), *cert. denied*, 439 U.S. 982 (1978).

[60] *See, e.g.*, Hannah v. Larche, 363 U.S. 420, 442-43, 445 (1960).

tion.[61] Similarly, investigations by the U.S. Civil Rights Commission may or may not lead to referral to the U.S. Attorney for prosecutions of violations of the civil rights laws.[62] "Factfinding" is an accurate description of these types of proceedings.[63] As the Supreme Court stated in *Hannah v. Larche*, these types of proceedings "advise rather than ordain."[64] As noted above, Commission proceedings, including injury investigations, have traditionally been considered fact-finding in nature.[65]

III. The Views of the Courts and the Congress on the Nature of Commission Material Injury Investigations

A. The Law Prior to the Passage of the Trade Agreements Act of 1979

Those who advocate that Commission material injury investiga-

---

[61] *See id.* at 446; *see generally* United States v. Morton Salt Co., 338 U.S. 632 (1950).

[62] *See* Hannah v. Larche, 363 U.S. 420 (1960). *See also* SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735 (1984) (describing the SEC's investigatory powers).

[63] See, *e.g.*, American Express Co. v. United States, 472 F.2d 1050, 1055-56 (C.C.P.A. 1973), where the court upheld a countervailing duty order against the allegation that the countervailing duty proceeding conducted by the Treasury Department had not followed the rulemaking procedures of the APA, noting that because the Treasury Department has no discretion to decline to impose a countervailing duty once a bounty or grant is found to exist, the proceeding was not rulemaking or legislative in character, but was rather "fact-finding activity". It is interesting that the court did not hold that such proceedings were adjudicatory in nature, despite noting that such a characterization had been made in a law review article cited in the opinion. Compare ASG Indus., Inc. v. United States, 467 F. Supp. 1200 (Cust. Ct. 1979), discussing *American Express* and appearing, without explicitly so holding, to consider Treasury subsidy determinations as a type of informal adjudication for purposes of determining the appropriate scope of judicial review. The decision distinguishes the holding of *Pasco Terminals, Inc. v. United States*, 477 F. Supp. 201 (Cust. Ct. 1979), *aff'd*, 634 F.2d 610 (C.C.P.A. 1980), regarding the investigatory nature of Commission injury determinations. *ASG Indus.*, 467 F. Supp. at 1236-37.

[64] 363 U.S. at 450. *See also* Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933) (describing the legislative character of the then-Tariff Commission's investigation under another trade statute).

[65] The Palmeter article cited by the *Restatement* indicates that an "inquisitorial" (or less pejoratively, an investigatory) administrative proceeding is "intolerable" and raises "serious questions of due process." *See* Palmeter, *supra* note 10, at 641. It is true that § 554 of the APA calls for a separation of investigative and adjudicatory functions in an agency, based on "fundamental principles of due process" (see ATTORNEY GENERAL'S MANUAL, *supra* note 12, at 55), but only for agency adjudications, which the Palmeter article argues antidumping and countervailing duty proceedings are not, but should be. The Palmeter article's denigration of the present administrative regime under the antidumping and countervailing duty laws as worthy of Torquemada and violative of constitutional rights is thus somewhat puzzling. There is nothing "intolerable" or facially inconsistent with due process in agency proceedings that combine decision-making and investigatory powers. *See* Chemical Waste Management, Inc. v. EPA , 873 F.2d 1477, 1484 (D.C. Cir. 1989) (quoting Withrow v. Larkin, 421 U.S. 35, 38 (1975)) ("even the combination in a single administrative decision maker of investigative and adjudicative functions . . . 'does not without more, constitute a due process violation' "); American Telephone and Telegraph Corp. v. FCC, 449 F.2d 439, 455 (2d Cir. 1989) ("The case law generally rejects the proposition that combination of judicial and adversary functions is a denial of due process.").

tions are really adjudicatory in nature[66] have based their argument on the changes that were made to the antidumping and countervailing duty laws by the Trade Agreements Act of 1979.[67] Presumably they would also argue that the subsequent amendments made by the Trade and Tariff Act of 1984[68] and the Omnibus Trade and Competitiveness Act of 1988[69] continued the "judicializing" trend. Commission injury proceedings under the pre-1979 antidumping or countervailing duty laws thus would not be considered adjudicatory under this school of thought.[70] Indeed, the law prior to the 1979 Act is well stated by a decision of the U.S. Customs Court (subsequently renamed the U.S. Court of International Trade) in *Pasco Terminals, Inc. v. United States*.[71] The court rejected the argument that the Commission's injury determinations were adversary proceedings,[72] and characterized the Commission's injury determinations as "nonadjudicative fact-finding investigations" where rights "such as cross-examination generally do not obtain."[73] Indeed, the court found the Supreme Court's decision in *Hannah v. Larche*[74] to be "directly relevant" to its conclusion.

The court, after noting that the Commission's determination was not based solely on evidence adduced at the hearing and that the Commission's rules made it clear that the hearing was not an adversary proceeding, held that no violation of due process, the applicable statute, or the Commission's rules occurred by not allowing opposing counsel at the hearing access to an exhibit submitted in confi-

---

66 *E.g.*, Taylor & Vermulst, *supra* note 4, at 69; Ehrenhaft, *supra* note 10, at 72.

67 Pub. L. No. 96-39, 93 Stat. 144 (1979).

68 Pub. L. No. 98-573, 98 Stat. 2948 (1984).

69 Pub. L. No. 100-418, 102 Stat. 1107 (1988).

70 Note, however, that some of the allegedly "judicializing" characteristics of the 1979 Act, viz., the provision of judicial review, the requirement that a hearing be held upon the request of a party, and the requirement that the agency issue findings and conclusions explaining the basis for its determination, actually predated that enactment.

71 477 F. Supp. 201 (Cust. Ct. 1979), *aff'd*, 634 F.2d 610 (C.C.P.A. 1980). The *Pasco Terminals* decision dealt with the judicial review of an affirmative Commission determination of injury under the Antidumping Act of 1921, including a challenge based in part on the refusal of the Commission, at the public hearing during the injury investigation, to allow counsel for the foreign exporter to inspect a confidential exhibit submitted by the U.S. petitioner and to cross-examine the witnesses for the U.S. petitioner. The U.S. Court of Customs and Patent Appeals (now the U.S. Court of Appeals for the Federal Circuit) affirmed and adopted the Customs Court's decision as its own. *See Pasco Terminals*, 634 F.2d at 612. Judge Miller, concurring, acknowledged "some merit" to the plaintiff-appellant's contentions, at least with respect to whether access should have been given to the confidential exhibit, but found any error committed to have been "harmless." *See id.* at 613 (Miller, J., concurring).

72 *See also* HOUSE WAYS AND MEANS COMMITTEE REPORT TO THE TRADE ACT OF 1974, H.R. REP. No. 571, 93d Cong., 1st Sess. 68 (1973) [hereinafter H.R. REP. No. 571] (noting "the informal and nonadversary nature of these proceedings"); S. REP. No. 1298, *supra* note 7 (Senate Finance Committee Report on the same legislation).

73 *Pasco Terminals*, 477 F. Supp. at 213. *See also id.* at 215 (distinguishing a licensing proceeding from "nonadjudicative fact-finding").

74 363 U.S. 420 (1960).

dence.[75] The court relied on the Supreme Court's holding in *Norwegian Nitrogen Products Co. v. United States*[76] for the proposition that

> nothing . . . suggested . . . that every producer or importer was to be viewed, like a party to a lawsuit, as the adversary of every other, with the privilege of examination and cross-examination extended through the series. Also . . . the statute before this court [the 1921 Antidumping Act] does not even require a hearing, but permits the Commission to make its determination based upon such investigation as it deems necessary. Thus, Congress did not intend that every producer or importer appearing at an optional hearing be viewed as the adversary of every other, with the privilege of unlimited examination and cross-examination.[77]

B. The 1979 Statutory Revisions

In 1979 Congress enacted the Trade Agreements Act of 1979, which made a number of procedural changes to the antidumping and countervailing duty laws, including injury determinations made by the Commission.[78] The changes included a statutory provision requiring a record of ex parte contacts placed on the public record of the investigation, provision for a preliminary material injury determination[79] by the Commission in every case,[80] clarification of the stan-

---

[75] *Pasco Terminals*, 477 F. Supp. at 211-12.

[76] 228 U.S. 294, 308 (1933) (involving another import relief statute, the so-called "flexible tariff" provisions of the Tariff Act of 1922).

[77] *Pasco Terminals*, 477 F. Supp. at 215 (citation omitted). Note that the injury determination under review in *Pasco Terminals* predated the Trade Act of 1974, which amended the Antidumping Act of 1921 to require the Commission to hold a hearing upon request. As is the case with the statutory provision requiring a hearing in the present statute, the hearing was explicitly exempted from APA provisions pertaining to adjudicative hearings, "[i]n order to preserve the informal and nonadversary nature of these proceedings" H.R. REP. No. 571, *supra* note 72, at 68. Thus, it cannot be argued that the 1979 Act's provision exempting the hearings from APA adjudication requirements, 19 U.S.C. § 1677c(b), reflected a congressional intention that Commission proceedings were adjudications that simply need not follow formal adjudicatory procedures, even if the legislative history of the 1979 Act did not indicate that Commission investigations are investigatory, rather than adjudicatory in nature.

[78] The Commission's determinations of "injury" under the Antidumping Act of 1921, became determinations of "material injury" under the new § 771 of the Tariff Act of 1930, although Congress did not intend the Commission's analysis generally to change. *See, e.g.*, S. REP. No. 249, 96th Cong., 1st Sess. 86-87 (1979) [hereinafter S. REP. No. 249].

[79] The statutory scheme calls for a preliminary material injury determination within 45 days of the filing of an antidumping or countervailing duty petition (or within the initiation of an antidumping or countervailing duty investigation by the Commerce Department where no petition is filed) as to whether there is a "reasonable indication" of material injury or threat thereof (or material retardation of the establishment of an industry) by reason of the imports under investigation. The purpose of the preliminary determination is to "weed out" clearly nonmeritorious cases at an early stage in the proceedings. *See generally* American Lamb Co. v. United States, 785 F.2d 994 (Fed. Cir. 1986).

[80] The Trade Act of 1974 had first provided for preliminary determinations by the Commission, but only when requested by the Treasury Department (the predecessor to the Commerce Department in administering the antidumping and countervailing duty laws). *See* S. REP. No. 1298, *supra* note 7, at 170-71 (Senate Finance Committee Report on the Trade Act of 1974).

dard for judicial review,[81] limited release of confidential business information under administrative protective order, and a change in statutory deadlines for completion of the Commission's preliminary and final investigations.[82]

While the changes to the procedures made by the 1979 Trade Agreements Act appear to make the proceedings more closely resemble adjudications, the legislative history of that statute explicitly contradicts that appearance: "Antidumping and countervailing duty proceedings are investigatory rather than adjudicatory in nature."[83] Many court decisions subsequently characterized the Commission's material injury investigations as generally nonadjudicatory in nature.[84] A number of the salient characteristics of Commission pro-

---

[81] The statute provides that Commission negative preliminary determinations are reviewable under the "arbitrary and capricious" standard of review, while all Commission final determinations are reviewable under the "substantial evidence" standard of review. *See* 19 U.S.C. § 1516a(b) (1988). Affirmative Commission preliminary determinations are not subject to judicial review.

[82] At least one commentator has claimed that the 1979 Act changed the law by providing for judicial review, a mandatory hearing, and the requirement that the agencies articulate the reasons for their determinations. *See* Ehrenhaft, *supra* note 45, at 1396-98. However, these matters had already been required by the Antidumping Act of 1921. *See* S.REP. No. 249, *supra* note 78, at 96-97, 245-46; *Pasco Terminals*, 477 F. Supp. at 219 n.14 (citing § 160(c) of the Antidumping Act of 1921); SCM Corp. v. United States, 450 F. Supp. 1178, 1180 (Cust. Ct. 1978).

[83] S. REP. No. 249, *supra* note 78, at 100; H.R. REP. No. 317, 96th Cong., 1st Sess. 77, 181 (1979) [hereinafter H.R. REP. No. 317] (also noting that antidumping and countervailing duty proceedings "are informal and nonadversarial and not subject to [APA] requirements"). While the House Ways and Means Committee Report also notes that procedural protections other than a trial-type hearing were provided to a party so that a "substantial evidence" standard of review could be applied (at least in final determinations), the imposition by Congress of additional procedural protections does not thereby convert a nonadjudication into an adjudication, even if the legislative history did not explicitly indicate the nonadjudicative nature of the proceedings. *See* United Steelworkers of America v. Marshall, 647 F.2d 1189, 1207 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981) (the addition of additional procedural requirements by either the agency or the Congress "neither converts the essentially legislative process of informal rulemaking into something akin to adjudication, nor empowers courts to turn rulemaking into courtroom trials").

[84] *See* Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 936-37 & n.14 (Fed. Cir. 1984) (the majority agreed with the concurring view of Judge Nichols that the Commission "quasi-legislative" determination was made pursuant to delegated legislative powers, and that the Commission conducted its investigation "more like a congressional committee than a court"); Avesta AB v. United States, 689 F. Supp. 1173, 1189 (Ct. Int'l Trade 1988) (citing *Hannah v. Larche*, 363 U.S. 420 (1960)) ("Congress has stipulated that antidumping proceedings are . . . investigatory rather than adjudicatory in nature. In an investigative proceeding an agency need not provide these rights of apprisal, cross-examination, and confrontation applicable in an adjudicatory proceeding."); Budd Co. Ry. v. United States, 507 F. Supp. 997 (Ct. Int'l Trade 1980). *See also* Monsanto Co. v. United States, 698 F. Supp. 275, 283 (Ct. Int'l Trade 1988) (citing *Hannah v. Larche*, 363 U.S. 420 (1960)) (noting in review of a Commerce Department determination that antidumping and countervailing duty proceedings "might best be described as quasi-adjudicatory, quasi-investigatory" and noting that constitutional due process concepts "seem out of place" when the agency "is acting in an investigatory capacity"); Ipsco, Inc. v. United States, 687 F. Supp. 614, 628 (Ct. Int'l Trade 1988) ("Congress has exempted countervailing duty proceedings from APA adjudication requirements . . . [and has provided] alternative procedural protections."); Timken Co. v. United States, 630 F. Supp. 1327, 1333 (Ct. Int'l

ceedings have either been discussed by the courts in this context, or merit discussion in their own right.

1. Lack of a Burden of Proof and the Commission's Independent Obligation to Conduct a Thorough Investigation

As noted above, one common characteristic of adjudications and formal rulemaking is that the proponent of the order or rule has the burden of proof. In Commission material injury investigations, however, the petitioning industry does not have that burden.[85] In *Budd Company Railway Division v. United States*,[86] the U.S. Court of International Trade rejected the claim that the Commission determination under review in that case could be sustained on the grounds that the petitioner had somehow failed in its burden of proving "all facts necessary to establish a reasonable indication of material injury or threat thereof."[87] The court noted that the statute itself contained no reference to any burden of proof. The court found that the sole reference to a burden of proof was made on one page of the Senate Finance Committee Report, where it was said that the burden of proof in a preliminary investigation would be on the petitioner.[88] The court held that:

> it was manifest that the term "burden of proof" used in an investigative proceeding does not have the same meaning as when it is used

---

Trade 1986) (in construing the Commerce Department's duty to investigate, noting that "[a]ntidumping investigations are investigatory, not adjudicatory"); Sacilor, Acieries et Laminoirs de Lorraine v. United States, 542 F. Supp. 1020, 1025 (Ct. Int'l Trade 1982) (in reviewing the propriety of releasing confidential information under a protective order, holding that one "should not confuse the role and need of a party to an administrative investigation with that of a litigant in a court of law"). *Cf.* Badger-Powhatan v. United States, 633 F. Supp. 1364, 1369 (Ct. Int'l Trade 1986) (finding that antidumping orders are equivalent to licensing decisions, and characterizing the proceedings as "adjudicatory-type decisions," but not otherwise explaining the basis for this characterization).

[85] *Cf.* Mitsubishi Elec. Corp. v. United States, 700 F. Supp. 538, 559 (Ct. Int'l Trade 1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990) (the petitioner did not need to submit in the petition "information covering every single item that was of the same class or kind" that was investigated). The petitioner merely needs to present in the petition information "reasonably available" to him. *See* 19 U.S.C. §§ 1671a(b)(1), 1673a(b)(1). The legislative history indicates that "reasonably available" is to be defined "in light of the circumstances of each petitioner. Information may be reasonably available to one petitioner but not to another because of differing resources or other characteristics." S. REP. No. 249, *supra* note 78, at 63. *Cf.* Freeport Minerals Co. v. United States, 776 F.2d 1029, 1033 (Fed. Cir. 1985) (reversing and remanding a determination of the Commerce Department for its failure to obtain data, noting that the refusal to seek the data "placed upon [the petitioner] an impermissible burden of proof contrary to the policies underlying the applicable statute and regulations").

[86] 507 F. Supp. 997 (Ct. Int'l Trade 1980).

[87] *Id.* at 1003. The case involved a review of a negative preliminary determination of material injury, viz., "no reasonable indication of material injury or threat thereof." Such a determination terminates the proceeding. *See* 19 U.S.C. §§ 1671b(a), 1673b(a). Commission determinations in final investigations must be based upon more than a mere "reasonable indication." *See generally* American Lamb Co. v. United States, 785 F.2d 994 (Fed. Cir. 1986).

[88] *Budd*, 507 F. Supp. at 1003 (citing S. REP. No. 249, *supra* note 78, at 66).

> in an adjudicatory proceeding. Clearly, in the latter instance, the bearer of this burden would have a more extensive means of obtaining information to satisfy the burden.
>
> [T]he oblique reference to "burden of proof" contained solely in the Senate Committee Report can neither qualify nor minimize the duties or obligation imparted by the explicit language of the statute and the legislative history charging the Commission to make its preliminary determination "based upon the best information available." . . . [T]his mandate does not limit "the best information available" to that furnished by the petitioner or by any party-in-interest to the proceedings. . . . [A]ll information that is "accessible or may be obtained," from whatever its source may be, must be reasonably sought by the Commission. It is only in this manner that the Commission can comply with the intended congressional mandate to conduct a "thorough investigation."[89]

The court noted that because antidumping investigations were designated by Congress as investigatory, not adjudicatory, proceedings,[90] there was no procedure established by statute or regulation for discovery of an opposing party prior to, or during, the investigation. Indeed, the court noted that no hearing was required for preliminary investigations.[91] Further, the court cited the statutory procedure added by the 1979 Trade Agreements Act for release of certain confidential information under administrative protective order, together with the statutory provision requiring the Commission "to inform the parties to an investigation of the progress thereof" upon being so requested, as further expressing congressional intent that the information be obtained by the Commission, and not by the parties to the investigation.[92] Finally, the court noted that the parties had no authority to seek a subpoena to obtain relevant information, because that power was given by statute and regulation solely to the Commission.[93]

The court remanded the investigation to the Commission be-

---

[89] *Budd*, 507 F. Supp. at 1003-04.

[90] *Id.* at 1001 (citing H.R. REP. No. 317, *supra* note 83, at 77 and S. REP. No. 249, *supra* note 78, at 100) (antidumping and countervailing duty proceedings are "investigatory, not adjudicatory").

[91] *Budd*, 507 F. Supp. at 1001. The statute only requires that a hearing be held, if requested by a party to the investigation, before a *final* determination is made. *See* 19 U.S.C. § 1677c(a). This is despite the fact that a preliminary determination of "no reasonable indication of material injury or threat thereof" is a final decision that terminates the proceeding, and is subject to judicial review, albeit under the "arbitrary and capricious" standard rather than the substantial evidence standard of review applied to final determinations. *See* 19 U.S.C. § 1516a(b)(1). If Commission determinations are "adjudications," should there not be a statutory right to a hearing in preliminary investigations as well? Those who opine that Commission proceedings are "adjudications" have not addressed this anomaly in their position.

[92] *Budd*, 507 F. Supp. at 1001 (citing § 777(a)(2) of the Tariff Act of 1930). *See* 19 U.S.C. § 1677f.

[93] *Budd*, 507 F. Supp. at 1001-02. *Cf.* FTC v. Brigadier Indus. Corp., 613 F.2d 1110 (D.C. Cir. 1979) (noting the availability of third-party subpoenas in FTC rulemaking proceedings under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975), but holding that the availability of such

cause the Commission failed to conduct a thorough investigation by not seeking information relevant to its determination. The court held that the Commission could not rely on the petitioner's failure to submit such information for its consideration to justify its negative preliminary determination.[94]

Budd has repeatedly been cited for the proposition that no burden of proof exists in antidumping or countervailing duty investigations, and that the Commission is obligated to conduct a thorough investigation independent of the arguments and submissions of the parties to the investigation.[95] Indeed, the U.S. Court of Appeals for the Federal Circuit, citing *Budd*, has read the thorough investigation requirement in conjunction with the statutory provision authorizing the use of "best information available" when a person is unable or

---

"discovery" devices in a rulemaking proceeding did not convert that proceeding into an adjudication).

[94] *Budd*, 507 F. Supp. at 1006-07.

[95] *See, e.g.*, American Lamb Co. v. United States, 785 F.2d 994, 1003 (Fed. Cir. 1986); Avesta AB v. United States, 689 F. Supp. 1173, 1189 (Ct. Int'l Trade 1988); USX Corp. v. United States, 655 F. Supp. 487, 498-99 (Ct. Int'l Trade 1987) (The Commission chooses the relevant data and "must acquire all obtainable or accessible information on the economic factors necessary for its analysis." It "cannot precondition meaningful review upon specific requests for information by the parties."); Kenda Rubber Indus. Co. v. United States, 630 F. Supp. 354, 357-58 & n.4 (Ct. Int'l Trade 1986); Roquette Freres v. United States, 583 F. Supp. 599, 604 & n.8 (Ct. Int'l Trade 1984) ("It is incumbent on the ITC to acquire all obtainable or accessible information from the affected industries on the economic factors necessary for its analysis."); Haarman & Reimer Corp. v. United States, 1 Ct. Int'l Trade 207, 210 (1981); CONFERENCE REPORT ON THE TRADE AND TARIFF ACT OF 1984, H.R. REP. No. 1156, 98th Cong., 2d Sess. 182 (1984) [hereinafter H.R. REP. No. 1156].

> In section 751 review investigations, as in all Commission antidumping and countervailing duty investigations, neither petitioner nor respondent has a burden of proof. The Commission conducts its own fact-finding . . . . The duty of the parties is to cooperate with the Commission's requests for information. The Commission, for its part, has a duty to conduct a thorough investigation within the context of the strict time constraints of the dumping and countervailing duty law and to seek the information necessary for a reasoned determination.

Id. See also Palmeter, *Injury Determinations in Antidumping and Countervailing Duty Cases—A Commentary on U.S. Practice*, 21 J. WORLD TRADE L. 7, 11 (1987) ("An ITC investigation, however, is not an adversarial, adjudicatory proceeding. The petitioner has no formal burden of proof. Rather, as the name implies, it is an investigatory proceeding in which the ITC itself must establish its own record." (footnote omitted)). *See generally* Bomont Indus. v. United States, 718 F. Supp. 958, 964 (Ct. Int'l Trade 1989) ("the obligation to verify rests with the administering authority, and not with the private parties before it. . . . As stated in [*Budd*] [the statutory provisions] clearly express congressional intent that the administrative agency will obtain information through its own investigative efforts." (citations omitted)).

Cf. Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1561 (Fed. Cir. 1984) (noting that there is no statutorily-based definition of a "thorough investigation," and that "implicit" in any remand or reversal based on inadequate data "would be the reviewing court's finding that some person or institution, whether the parties or the ITC or all, inadequately collected and/or interpreted the data"). The Federal Circuit's statement in *Atlantic Sugar* is inexplicably broad, and seems to contemplate, for example, that "the parties" would be engaged in interpretation of data in a manner that could become the subject of judicial review. Such a happenstance would be a usurpation of the agency's role whether the Commission investigation is styled an adjudication, rulemaking or investigation.

unwilling to supply requested data to the agency in a timely manner.[96] Rather than allowing a ruling that one party or another has failed in their burden of proof, the court held that the "best information available" rule was intended by Congress to be a club over the Commission's head, forcing it to come to some determination within the short statutory deadlines the Congress had imposed.[97]

Accordingly, this aspect of antidumping and countervailing duty proceedings is inconsistent with the notion that they are judicial in nature because APA adjudications require that the proponent of an order have the burden of proof.[98] Moreover, other cases, while not explicitly citing *Budd*, have routinely pointed to the independent obligations and prerogatives of the Commission as an independent fact-finder.[99] To the extent that some commentators have asserted that the "parties themselves" have taken "over part of the investigative duty of the administrative agencies,"[100] this point of view has not been evident either in practice or in the courts. To the contrary (as noted below) the courts have repeatedly admonished counsel for parties to the investigation that their role is not to supplant the agency's function.[101]

Not only is there no burden of proof, but the statute contemplates that the parties to the investigation, including the petitioning party, will not necessarily know the status of the investigation until so

---

[96] *See* Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1560 (Fed. Cir. 1984); 19 U.S.C. § 1677e(c) (The Commission "shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.").

[97] *See Atlantic Sugar*, 744 F.2d at 1560.

[98] Administrative Procedure Act, 5 U.S.C. § 556(d) (1982).

[99] *See* Freeport Minerals Co. v. United States, 776 F.2d 1029, 1032 (Fed. Cir. 1985) (noting congressional intent that both Commerce and the ITC should always use the most up-to-date information available); Wieland Werke, AG v. United States, 718 F. Supp. 50, 62 (Ct. Int'l Trade 1989) ("the Commission is entitled to rely on its own data, and need not rely" on data "just because it is submitted by a party to a proceeding"); Hannibal Indus. v. United States, 710 F. Supp. 332, 336-37 (Ct. Int'l Trade 1989); Mitsubishi Elec. Corp. v. United States, 700 F. Supp. 538, 562-64 (Ct. Int'l Trade 1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990) (the Commission must seek relevant information; it cannot use a "product-line" analysis if it did not first request segregated data); Hercules, Inc. v. United States, 673 F. Supp. 454, 482-83 (Ct. Int'l Trade 1987) (noting that "inadequate collection of data" may be grounds for a remand to the ITC but holding that the Commission's investigation was "adequate and diligently undertaken").

[100] Taylor & Vermulst, *supra* note 4, at 69.

[101] *See* Bethlehem Steel Corp. v. United States, 718 F. Supp. 70, 73 (Ct. Int'l Trade 1989) ("Although disclosure of confidential information is meant to aid in effective advocacy, petitioners' counsel are not empowered to act as independent investigators. . . . Petitioners should not attempt pure duplication of [the agency's] function . . . ."); SNR Roulements v. United States, 704 F. Supp. 1103, 1109 (Ct. Int'l Trade 1989); Monsanto Indus. Chemicals Co. v. United States, 6 Ct. Int'l Trade 241, 243 (1983); Sacilor, Acieries et Laminoirs de Lorraine v. United States, 542 F. Supp. 1020, 1025 (Ct. Int'l Trade 1982) (In reviewing the propriety of releasing confidential information under a protective order, the court held that one "should not confuse the role and need of a party to an administrative investigation with that of a litigant in a court of law.").

informed by the Commission.[102] As *Budd* discusses, parties to a Commission material injury investigation have not and do not engage in discovery; information collection remains in the exclusive control of the Commission.[103] The investigation as a whole—from deciding on the appropriate period of time from which to request data[104] to deciding on the questions to be asked in questionnaires sent to producers, importers and purchasers,[105] is under the control of the Commission, not the parties to the investigation, subject of course to judicial review of the reasonableness of the investigation conducted.[106] Lack of control by the parties is the reason that the statute contains a provision directing the Commission to give the parties a progress report on the investigation.[107] Thus, this represents another procedural distinction between the Commission's proceeding and that which would normally be the posture of an adjudication.[108] Note, however, that this distinction has been

---

[102] In practice, the Commission issues an investigation schedule each time it institutes an investigation, indicating the various steps in the proceeding, such as deadlines for return of questionnaires, deadlines for briefs, the date of the hearing (in final investigations), and the deadline for the Commission's staff to submit its report to the Commission. Further, the parties are usually in telephone contact with the Commission staff assigned to the case and are informally apprised of the progress of the investigation, to the extent there are questions regarding the investigation. Further, the provisions on release of business proprietary information under administrative protective order, discussed below, also tend to keep the representatives of parties under protective order informed at least of the raw business proprietary data submitted to the Commission shortly after it is received.

[103] The *Restatement (Second) of Judgments* suggests that an indispensable element of administrative adjudicatory procedure may be a party's right to compulsory process to obtain evidence. RESTATEMENT (SECOND) OF JUDGMENTS § 83, Comment (c) (1982). *See also* United Air Lines, Inc. v. CAB, 766 F.2d 1107, 1117 (7th Cir. 1985) (contrasting informal rulemaking and adjudication, and noting there was "no opportunity [in informal rulemaking] to use subpoenas or other methods of pretrial discovery or to cross-examine the witnesses on whose depositions the [Justice] Department's comments were based, or to explore the background, authenticity and meaning of various corporate documents . . . ."); Wells Mfg. Co. v. United States, 677 F. Supp. 1239, 1247 (Ct. Int'l Trade 1987) (the parties have no right to insist that the summary of information that the staff prepares for the Commission (the "staff report") "present the data in the light most favorable" to one party or another. "The staff is concerned solely with presenting a complete and accurate picture. . . .").

[104] *See, e.g.*, Wieland Werke, AG v. United States, 718 F. Supp. 50, 55 (Ct. Int'l Trade 1989) (the Commission has broad discretion to determine the appropriate period of investigation); USX Corp. v. United States, 655 F. Supp. 487, 498 (Ct. Int'l Trade 1987).

[105] *See* Roses, Inc. v. United States, 720 F. Supp. 180, 184 (Ct. Int'l Trade 1989) (permissible for the Commission to rely on annual, as opposed to quarterly, financial data and to refuse to request the submission of data separately broken down by rose variety, or by geographic producer sector).

[106] *See, e.g.*, USX Corp. v. United States, 655 F. Supp. 487, 498 (Ct. Int'l Trade 1987) (Commission discretion is not "unbridled.").

[107] 19 U.S.C. § 1677f(a)(2); H.R. REP. No. 317, *supra* note 83, at 77 (need for parties to an investigation to have access to information in light of the applicability of judicial review under a substantial evidence standard); S. REP. No. 249, *supra* note 78, at 100.

[108] *Cf.* United States v. Morton Salt, 338 U.S. 632, 641 (1950) (noting that courts do not actively prosecute litigation or "start wheels moving"); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 319-20 (1933) (contrasting a lawsuit to a Commission investigation under the statutory provision requiring changes in tariff rates in order to equalize costs of production between foreign countries and the United States, currently

blurred by the expanded access to proprietary information under administrative protective order mandated by the 1988 Act, discussed further below.

2. *Even in Final Antidumping and Countervailing Duty Investigations Where Hearings are Required, Such Hearings Are Not Trial-Type Hearings*

Because no trial-type hearing is conducted and the Commission is not limited to the testimony given at the hearing in making its determinations,[109] Commission material injury proceedings are not adjudicatory in the formal sense. The statute expressly indicates that while a hearing must be held upon request in final investigations, the hearing is not subject to the Administrative Procedure Act requirements that pertain to adjudicatory hearings.[110] Indeed, the courts have recognized that "[d]umping investigations do not include and never have included due process adversary hearings."[111] In preliminary investigations, no hearing need be provided, though the Com-

---

codified at 19 U.S.C. § 1336, and noting that the Commission's investigation, unlike a lawsuit between parties, is "its own").

Also note that the Commission routinely publishes a *Federal Register* notice at the institution of its preliminary and final injury investigations which, *inter alia*, solicits comments from nonparties to the proceeding. As noted above, this is a procedural characteristic normal for rulemaking, not agency adjudications. *See* Independent U.S. Tankers Owners Comm. v. Lewis, 690 F.2d 908, 917 (D.C. Cir. 1982) ("participation by nonparties who may be affected by the outcome is automatic in rulemaking proceedings, but not in informal adjudication").

[109] *See* National Ass'n of Mirror Mfrs. v. United States, 696 F. Supp. 642, 647 (Ct. Int'l Trade 1988) ("the Commission did not err in choosing to rely on financial data rather than the domestic industry's testimony" at the hearing). This point is obvious. If the Commission cannot passively rest its determination solely on the submissions of the parties but must independently investigate, a fortiori it must seek information beyond that given by the parties at the hearing.

[110] *See* 19 U.S.C. § 1677c(b). As noted above, a similar statutory provision was added to the Antidumping Act of 1921 by the Trade Act of 1974. The Commission, as a matter of practice, usually affords an opportunity for limited cross-examination at its public hearings in final investigations (though not at the "staff conferences" held in preliminary investigations). *See* 19 C.F.R. § 201.13(a). Note, however, that because time for cross-examination is taken out of the limited time allotted to the parties, any cross-examination by a party tends to be "quite brief." *See* Palmeter, *supra* note 95, at 13. The entire hearing usually is completed within four to six hours. It is interesting to note that the Commerce Department does not permit cross-examination at all during its hearings. *See* PPG Indus., Inc. v. United States, 708 F. Supp. 1327, 1329 (Ct. Int'l Trade 1989); 19 C.F.R. §§ 353.38(f)(3), 355.38(f)(3).

[111] United States v. Roses, Inc., 706 F.2d 1563, 1567 (Fed. Cir. 1983). *See also* Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 936 (Fed. Cir. 1984); Palmeter, *Representing Exporters and Importers in U.S. Antidumping Investigations*, 3 REV. INT'L BUS. L. 1, 18 (1989) (" 'briefing' and 'hearing' at the ITC rarely comport with what most lawyers will associate with those terms"). *But see* American Lamb Co. v. United States, 785 F.2d 994, 999 (Fed. Cir. 1986) (noting in passing that the Commission conducts a "trial-type" hearing, without reconciling this description with the above-noted cases or the statute's plain language). *Cf.* Ehrenhaft, *supra* note 45, at 1396-97 (claiming that the 1979 statutory amendments give antidumping and countervailing duty proceedings the "hallmarks of traditional litigation" including the holding of hearings, which allegedly give the investigations "a more adjudicative cast"). The Ehrenhaft article did not discuss why the hearings

mission, as a matter of practice, usually holds a staff conference at which the parties and their witnesses may offer testimony and answer questions from the Commission's staff.[112] Unlike an adjudicatory proceeding, where the trial is the basis for the generation of the record and is essentially the focal point of the entire proceeding, the hearing in a Commission investigation is simply one element among others in the investigation.[113] Indeed, the Commission is entitled to disregard information submitted by a party to a proceeding in favor of information that it itself garners.[114] The lack of a mandatory, trial-type hearing is a further characteristic that distinguishes Commission material injury proceedings from at least formal adjudications (or formal rulemaking proceedings), though it must be recognized that informal adjudications need not utilize a trial-type hearing, nor, depending on the circumstances, any hearing at all.

3. Ex Parte Contacts Are Not Prohibited

In Commission investigations, ex parte contacts are essential to the agency's task, as the legislative history of the 1979 Trade Agreements Act recognizes: "Because antidumping and countervailing duty proceedings are investigatory rather than adjudicatory in nature, some of the pertinent information . . . is presented [to the agency] in ex parte meetings."[115] While ex parte contacts are generally prohibited in agency adjudications,[116] the antidumping and countervailing duty laws do not prohibit such contacts between the agencies involved and any party or nonparty to a proceeding. The statute merely requires that a record of such contacts be placed on

---

mandated by the Trade Act of 1974 had not already given the proceedings an "adjudicative cast."

[112] *See* 19 C.F.R. § 207.15 (1990) ("If he deems it appropriate, the Director shall hold a conference . . . ."). For an example of a preliminary investigation in which no staff conference was held, see Certain Cast-Iron Pipe Fittings from Brazil, Inv. No. 731-TA-278 (Preliminary), USITC Pub. 1753 (September 1985) at A-2.

[113] Indeed, it can generally be said that the responses submitted to the Commission's questionnaires by the surveyed members of the industry, importers, and, at least in final investigations, purchasers (many of whom often are not parties to the investigation), are more important to the Commission's determination than testimony of the parties at the hearing, though the latter information is also probative. *See generally* T. VAKERICS, D. WILSON & K. WIEGEL, ANTIDUMPING, COUNTERVAILING DUTY AND OTHER TRADE ACTIONS § 2.6(a), at 134 (1987).

[114] *See* Wieland Werke, AG v. United States, 718 F. Supp. 50, 62 (Ct. Int'l Trade 1989). *Cf.* Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 881 (1st Cir.), *cert. denied*, 439 U.S. 824 (1978) (in an adjudication agency staff cannot make up for a party's failure to carry its burden of proof by adding information not on the record).

[115] H.R. REP. No. 317, *supra* note 83, at 77; *See* S. REP. No. 249, *supra* note 78, at 100. *See also* United States v. Roses, Inc., 706 F.2d 1563, 1567 (Ct. Int'l Trade 1989) (holding that ex parte communications with respondents are prohibited with Commerce Department officials during the first 20 days after the filing of a petition, yet noting that antidumping duty investigations "always have included ex parte meetings separately with the contenders" and the Trade Agreements Act of 1979 was not intended to change this practice).

[116] *See supra* note 26 and accompanying text.

the public record of the investigation so that the parties may be aware of such contacts.[117] This requirement applies only to the Commissioners themselves and their immediate advisors; it does not apply to the Commission staff.[118] Allowing ex parte contacts further distinguishes Commission investigations from agency adjudications. As noted above, merely requiring that a record of ex parte contacts be placed in the record is comparable to the requirements that currently apply to informal rulemaking proceedings.[119]

4. *Extensive Disclosure of Information Under Protective Order With the Right to Comment*

One important change made by both the Trade Agreements Act of 1979 and the Omnibus Trade and Competitiveness Act of 1988 was to increase significantly the information available to counsel of parties to the Commission's investigation. The Commission collects information from U.S. producers, importers, and purchasers, many of whom are not parties to the Commission's investigation, on sensitive matters such as profitability, prices, existing customers, and research and development efforts. The information is often not publicly available. Prior to the 1979 enactment the Commission did

---

[117] There is no explicit right to comment on information presented in such ex parte meetings that is specified by this provision. The legislative history merely indicates that a record of ex parte contacts is to be placed on the record of the investigation "for purposes of judicial review." *See* H.R. REP. No. 317, *supra* note 83, at 77. To the extent that the information presented is business proprietary information, the provisions of the statute pertaining to disclosure of such information under administrative protective order may also mandate its release to the parties, with the possible opportunity to comment, if such contacts were made sufficiently early in the investigation to make the receipt of comments feasible. Moreover, the court has in one case found a general and strong congressional intent that parties be allowed to submit comments during the course of the proceeding, although that case involved the unusual circumstance that the Commerce Department moved, on judicial review of its determination, to supplement the record to include information that the agency had apparently utilized but not placed in the record submitted to the court. *See* PPG Indus., Inc. v. United States, 708 F. Supp. 1327 (Ct. Int'l Trade 1989).

[118] *See* Roquette Freres v. United States, 583 F. Supp. 599, 605-06 (Ct. Int'l Trade 1984) (noting no problems with an ex parte "field trip" by ITC staff to a domestic producer's facility to ascertain the reasonableness of the allocations made by that producer with respect to its financial data reported to the Commission, though noting the Commission should avoid the "semblance of secrecy" in its investigation). It should be noted that it is common for ITC staff to visit on an ex parte basis the facilities of both domestic producers and importers or purchasers in the course of the investigation. Further, extensive telephone contacts are made by ITC staff on an ex parte basis with producers, importers, and purchasers during the course of an investigation. *See also*, Gilmore Steel Corp. v. United States, 585 F. Supp. 670, 679 (Ct. Int'l Trade 1984) (citing United States v. Roses Inc., 706 F.2d 1563, 1567 (Fed. Cir. 1983)) ("Ex parte communications *per se* are thus not improper, but a record of them must be maintained and made available.").

[119] *See supra* note 49. *Cf.* Ehrenhaft, *supra* note 45, at 1396-97 (asserting, without discussing the *Home Box Office* line of cases, that the requirement that a record of ex parte meetings be kept and placed on the record "tends to transform Assistant Secretaries into judges").

not release any proprietary information[120] to representatives of parties to its investigations.[121] The 1979 Act authorized the Commission to release such information under administrative protective order, but made the release mandatory with respect to only a limited category of information.[122] Commission practice was to abstain from releasing more than the limited amount of information that could be compelled upon order of the Court of International Trade.[123]

The 1988 Act requires the Commission to release all proprietary information under administrative protective order, with certain limited exceptions for privileged and classified information, and for "specific information for which there is a clear and compelling need to withhold from disclosure."[124] The statute also requires that to the extent the parties attempt to provide data to the Commission, it must be done on a timely basis in order to allow comment on such information. If insufficient time remains for such comments, the agencies are given discretion to return the data without consideration.[125] As noted below, the legislative history makes it clear that only the parties are thereby restricted—the Commission remains free to seek out data until the last moment.

This greater access to information that would otherwise have been inaccessible to representatives of parties to the investigation provides them with the potential for a greater role in the investigation, but its effect should not be unrealistically magnified.[126] The

---

120 The terms "confidential information" and "business proprietary information" are generally synonymous in this context. *See* 19 C.F.R. § 201.6(a) (1990).

121 *See, e.g.*, Pasco Terminals, Inc. v. United States, 474 F. Supp. 201 (Cust. Ct. 1979), *aff'd*, 634 F.2d 610 (C.C.P.A. 1980); S. REP. No. 249, *supra* note 78, at 98-99.

122 The 1979 Act specified that the Commission could be required by the U.S. Court of International Trade to release domestic price or cost of production information concerning the like product that was submitted by the petitioner, or an interested party in support of the petitioner. *See* 93 Stat. 188 (1979).

123 *See* S. REP. No. 71, 100th Cong., 1st Sess. 112 (1987) [hereinafter S. REP. No. 71]; *In re* U.S. International Trade Commission Investigation No. AA 1921-147A (Electric Golf Cars from Poland), 491 F. Supp. 1356 (Cust. Ct. 1980); Taylor & Vermulst, *supra* note 4, at 53. The rationale for this refusal was that the Commission, unlike the Commerce Department, also gathers confidential data from nonparties such as U.S. producers or importers who do not participate in the investigation or purchasers of the product under investigation. The Commission also is heavily dependent on voluntary compliance with its questionnaires, because the short statutory deadlines made large-scale use of its subpoena power impracticable, however effective it might be in individual cases. The Commission was thus concerned about the "chilling effect" of widespread release, even under protective order, of the information of nonparties. *See generally* S. REP. No. 71, *supra*, at 113.

124 19 U.S.C.A. § 1677f(e) (West Supp. 1990); Omnibus Trade and Competitiveness Act of 1988, § 1332, 102 Stat. 1208 (1988).

125 *See* 19 U.S.C.A. § 1677f(e) (West Supp. 1990).

126 *But cf.* Ehrenhaft, *supra* note 45, at 1396-97 (describing the 1979 Act's more limited provisions for access under protective order as one of the "hallmarks of traditional litigation," and noting, without citing any authority, that "the introduction of lawyers for this purpose will, quite naturally, contribute to the conversion of investigations into litigation-like proceedings").

Court of International Trade has repeatedly admonished counsel that their access to information under administrative protective order does not inflate their role to supplant that of the agency as the investigator, nor make them the equivalent of a litigator in a trial.[127] The legislative history of the 1988 Act confirms that the control of data collection remains in the hands of the Commission, and that the parties' roles are limited to that of commenting on the data.[128] As noted above, the right to comment is not absolute—the Conference Committee Report notes that the Commission is not prohibited from continuing to seek out "particular items of information in the final days or hours before its determination," and that the statute is not intended to place restrictions on "the Commission's ability to seek out information which it does not have but views as important to make the best possible determination it can."[129] The Commission may consider this data even if there is no time for the parties to comment.[130]

Thus, the protective order provisions of the 1979 and 1988 Acts merely enhance the rather limited role played by the parties to the investigation. They do not give the Commission's investigation the characteristics of a trial or a formal adjudication, with the rights of

---

[127] *See* Bethlehem Steel Corp. v. United States, 718 F. Supp. 70, 73 (Ct. Int'l Trade 1989); SNR Roulements v. United States, 704 F. Supp. 1103, 1109 (Ct. Int'l Trade 1989); Monsanto Indus. Chem. Co. v. United States, 6 Ct. Int'l Trade 241, 243 (1983); Sacilor, Acieries et Laminoirs de Lorraine v. United States, 542 F. Supp. 1020, 1025 (Ct. Int'l Trade 1982).

[128] There is, for example, still no provision for mandatory discovery by a party—a party's representative merely has access under protective order to that data the Commission has obtained. Moreover, a requirement that a party be permitted to comment on a given matter is not necessarily linked to access to protective order information. *See* Maverick Tube Corp. v. United States, 687 F. Supp. 1569, 1575 (Ct. Int'l Trade 1988); USX Corp. v. United States, 682 F. Supp. 60, 69-70 (Ct. Int'l Trade 1988) (expert testimony on elasticities "and adversarial participation in the administrative process below helped assure the basic reliability of estimates subsequently relied on"). These latter statements by the court are somewhat puzzling. They appear to note a preference for the Commission to follow a more "adversarial" procedure, though they do not indicate that such a procedure is required. The court simply appears more likely to give deference to a factual finding of this nature when that procedure is followed. What is puzzling is that arguably the most "adversarial" process is a trial-type hearing, which indeed is deemed necessary by courts to ensure the "reliability" of *adjudicative* facts. *See* United Air Lines, Inc. v. CAB, 766 F.2d 1107, 1118 (7th Cir. 1985). This suggests a judicial preference, if not a requirement, for an adjudicative type hearing. This is troubling because the statute, at 19 U.S.C. § 1677c(b), expressly exempts Commission hearings from APA requirements applicable to adjudicatory hearings, and *Vermont Yankee* generally indicates that courts should not impose additional procedural requirements on agencies where the Congress has not done so.

[129] H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 624 (1988).

[130] *Id.* Also note that certain raw data is exempt from disclosure under protective order, viz., "working papers and notes" to the extent either that such data would be reflected in a document that is released (such as a staff report summarizing or analyzing the data) or that such data would be unlikely to have a bearing on the outcome or basis of the agency's determination. *Id. Cf.* Timken Co. v. United States, 699 F. Supp. 300, 309 (Ct. Int'l Trade 1988) (summarily rejecting the claim that due process rights were violated by the failure of Commerce to give petitioner an opportunity to comment on one telex received shortly before the determination was made).

"apprisal, confrontation and cross-examination."[131] The right to comment has been enhanced to some extent, but, as noted above, even informal notice and comment rulemaking imposes some stringent requirements that an agency allow the parties to comment on data.[132] The most that may be said is that the agency proceeding has been made significantly more transparent to the parties (or, more accurately, to their counsel or other representatives under the protective order, since the parties themselves generally do not obtain access under the protective order).[133]

5. *Lack of Individualized Findings*

As noted above, one of the key distinctions between adjudications and rulemaking is that questions of fact in rulemaking are legislative rather than judicial, although the distinction is often difficult to discern.[134] A central question is whether the facts the Commission finds are legislative or adjudicative in nature. The question is difficult to answer because one type of fact can seem adjudicatory based on one description of the distinction, and legislative based on another.[135] Still, "[t]he factual predicate of adjudication depends on ascertainment of 'facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent.' "[136] By contrast, "the nature of legislative fact is ordinarily general, without reference to specific parties."[137] Indeed, the distinction noted above

---

[131] *Cf.* Avesta, AB v. United States, 687 F. Supp. 1173, 1189 (Ct. Int'l Trade 1988) (noting these distinguishing characteristics of adjudications); Hannah v. Larche, 363 U.S. 420, 442-43 (1959).

[132] *See, e.g.*, Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

[133] An intriguing question, which the author has not examined in any detail, is whether any agency allows parties to an informal rulemaking proceeding access to confidential business information under administrative protective order. *Cf.* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984) (public disclosure of certain business confidential information submitted by applicants for pesticide registration under FIFRA is designed to "provide an effective check on the decisionmaking processes of EPA").

[134] United Air Lines, Inc. v. CAB, 766 F.2d 1107, 1118 (7th Cir. 1985).

[135] *Compare, e.g.*, ATTORNEY GENERAL'S MANUAL, *supra* note 12, at 15 (listing as an example of an "adjudication" antitrust-based proceedings of the FTC "leading to the issuance of orders to cease and desist from unfair methods of competition") *with United Air Lines*, 766 F.2d at 1120 (allowing "judgments on market power and related competitive issues without adjudicative hearings" in a rulemaking proceeding) and at 1116 (despite the fact that "[t]he Board finds that United and the other airline owners of computerized reservation systems have market power, and while studiously, perhaps too studiously, disclaiming any conclusion that a particular airline has abused that power . . . leaves the reader in no doubt that this is precisely what it believes").

[136] Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1161 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) (citing 2 K. DAVIS, ADMINISTRATIVE LAW § 15.03, at 353 (1958)).

[137] *Id.* For example, the EPA can issue rules that consider issues of general policy with respect to limits to be set for a pollutant, which issues would be the same whether the pollutant was discharged by one or a thousand manufacturers. *See* Hercules, Inc. v. EPA, 598 F.2d 91, 118 (D.C. Cir. 1978) (considering "issues of general policy," rather than "issues of fact" and noting the propriety of using rulemaking rather than adjudicatory

is often cited as the justification for dispensing with the use of adjudicatory procedures to develop facts in rulemaking "[b]ecause legislative facts combine empirical observation with application of administrative expertise to reach generalized conclusions."[138]

None of the proponents of the "Commission investigation as adjudication" school have argued that the factual character of Commission investigations has changed over the years, but have instead focused on such procedural refinements as the release of confidential business information of nonparties to parties under the protective order. Nonetheless, the matter is subject to question. On the one hand, the Commission does delve into some very specific allegations, including whether a particular sale to a particular customer was lost to a particular importer on a particular date,[139] which would appear to be sufficiently specific, and often relating to the conduct of an importer who is party to the investigation, to be considered an adjudicative fact. Further, there is no question that although the Commission is engaged in investigating whether a domestic industry is being materially injured or threatened with material injury by reason of dumped or subsidized imports, the Commission, at least generally, examines past conduct[140] by importers and those who sell the

---

proceedings where agency action affects more than just the polluters, i.e., those exposed to pollutants, or those whose activities or business may be affected by pollutants).

See also Brown v. McGarr, 774 F.2d 777, 780 (7th Cir. 1985).

> To determine whether an action was rulemaking or adjudication, courts consider: (1) whether the action is generalized in nature, i.e., whether the action applies to specific individuals or to unnamed and unspecified persons; (2) whether the promulgating agency considers general facts or adjudicates a particular set of disputed facts; and (3) whether the action determines policy issues or resolves a specific dispute between particular parties.

[138] *National Advertisers*, 627 F.2d at 1162. *See also United Air Lines*, 766 F.2d at 1118 (legislative facts "can be found reliably without an evidentiary hearing" but adjudicative facts cannot). Unfortunately, this "definition" can be viewed as circular because it indicates that adjudicatory facts are those necessary to be reached through an adjudicatory procedure, a standard not particularly helpful to one attempting to characterize the proceeding itself.

[139] *See, e.g.*, Maverick Tube Corp. v. United States, 687 F. Supp. 1569, 1576-77 (Ct. Int'l Trade 1988). Note, however, that "lost sales," while potentially relevant to the Commission's analysis, rarely are central to the determination. *See generally* S. REP. NO. 71, *supra* note 121, at 117 (directing that, with the exception of sales of "big ticket items" the Commission's analysis should not be of "isolated sales" but instead of "statistically relevant data"); USX Corp. v. United States, 655 F. Supp. 487, 491 (Ct. Int'l Trade 1987) ("In some cases anecdotal evidence of lost revenue may shed some light, but such evidence is not, *per se*, a reason to remand a negative determination. Neither is the lack of such evidence, *per se*, a justification for a negative decision . . . ."); Lone Star Steel Co. v. United States, 650 F. Supp. 183, 186 (Ct. Int'l Trade 1986):

> Anecdotal evidence of lost sales and revenue rarely adds distinct information to a record of this type but rather confirms what is already substantially demonstrated. . . . The court has indicated on other occasions that instances of lost sales alone do not mandate a finding of injury, rather it is for ITC to determine whether lost sales, together with other factors, indicate a causal nexus between [less than fair value] imports and material injury.

[140] *See* ATTORNEY GENERAL'S MANUAL, *supra* note 12, at 14.

imported product.[141] Finally, the Commission's determination typically focuses on factual, not policy, issues, and considers the question of material injury on a case-by-case basis.[142] Consequently, Commission determinations are not viewed as precedent, because each investigation is so factually unique as to be sui generis. One can argue that the Commission's analysis is thus sufficiently long on facts and short on policy as to be more typical of an adjudicatory proceeding than a rulemaking proceeding.

On the other hand, the Commission generally makes categorical determinations.[143] It makes findings pertaining to the domestic industry as a whole, not just the petitioner, and does not make injury findings on a firm by firm basis.[144] Similarly, the Commission does not make injury findings on an exporter by exporter or importer by importer basis.[145] Instead, the focus is on the effects of the entire class or kind of merchandise identified by the Commerce Depart-

---

[141] For a discussion of the Commission's period of investigation, see, e.g., USX Corp. v. United States, 655 F. Supp. 487, 498 (Ct. Int'l Trade 1987); Kenda Rubber Indus. v. United States, 630 F. Supp. 354, 359 (Ct. Int'l Trade 1986).

[142] This is yet another purportedly distinguishing characteristic of adjudications as opposed to rulemaking. "[F]ormal adjudication . . . is, by contrast to rulemaking, characteristically long on facts and short on policy—so that the inadequacy of factual support is typically the central issue in the judicial appeal and is the most common ground for reversal." Association of Data Processing Serv. Orgs., Inc. v. Board of Governors of the Fed. Reserve Sys., 745 F.2d 667, 685 n.6 (D.C. Cir. 1984).

[143] *See, e.g.*, Hercules, Inc. v. EPA, 598 F. Supp. 91, 118 (D.C. Cir. 1978).

[144] *See* Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 736 (Ct. Int'l Trade 1989); Sandvik AB v. United States, 721 F. Supp. 1322, 1330 (Ct. Int'l Trade 1989), *aff'd mem.*, 904 F.2d 46 (Fed. Cir. 1990) (stating that "there is no basis for a firm by firm analysis of the condition of the domestic industry"); National Ass'n of Mirror Mfrs. v. United States, 696 F. Supp. 642, 647-48 (citing Copperweld Corp. v. United States, 682 F. Supp. 552 (Ct. Int'l Trade 1988)). Indeed, it is common for producers accounting for significant percentages of domestic production to be neither petitioners nor participating parties to the Commission investigation. *See, e.g.*, U.S. Int'l Trade Comm'n v. E & J Gallo Winery, 637 F. Supp. 1262, 1268 (D.D.C. 1985) (subpoena enforcement action against Gallo, which did not join other members of the industry in petitioning the Commission and Commerce Department for relief under the statute).

The Commission does assess the condition of each producer in cases in which a "regional industry" is found, but such cases are relatively rare. Moreover, the producer by producer analysis has been subject to some criticism even in regional industry cases. *See* Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1562 n.27 (11th Cir. 1985) ("It is unfortunate that the parties have not squarely appealed and briefed the issue, since our review of the statute and legislative history indicates no basis" for a producer by producer analysis.).

[145] *See generally* USX Corp. v. United States, 682 F. Supp. 60, 69 (Ct. Int'l Trade 1988) ("[I]t is improper for [the Commission] to place at the center of its causation analysis the intent of a foreign producer."). One exception to this rule is allowed in assessing threat of material injury. In assessing the threat, the stated intentions of a foreign exporter or U.S. importer may be given weight. *See generally* American Permac, Inc. v. United States, 831 F.2d 269, 274 (Fed. Cir. 1987) (noting that "intentions are very important" in section 751 reviews which focus on the future behavior of the foreign exporters and the importers); American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1280 (Ct. Int'l Trade 1984), *aff'd sub nom.* Armco, Inc. v. United States, 760 F.2d 249 (1985) ("when forecasting future import levels, intentions are a proper . . . element" to consider).

ment as being dumped or subsidized.[146] The Commission is not compelled "to match up LTFV [less than fair value] sales with evidence of lost U.S. sales,"[147] for example. The Commission is compelled to examine imports of the entire class or kind of merchandise identified by the Commerce Department even if an exporter claims that its product in that class or kind is unique.[148] While in certain cases, only one importer or exporter may be involved, or there may be only one domestic producer in the industry,[149] it is well-established that the accident of a small number of entities implicated by a particular proceeding does not of itself convert a category of non-adjudications into adjudications.[150]

Further, there is no determination that any exporter or importer has engaged in any unlawful behavior,[151] though members of the importers' bar may quibble as to whether an affirmative determination

---

[146] *See* Algoma Steel Corp., Ltd. v. United States, 688 F. Supp. 639 (Ct. Int'l Trade 1988), *aff'd*, 865 F.2d 240 (Fed. Cir. 1989), *cert. denied*, 109 S.Ct. 3244 (1989).

[147] *Id.* at 644.

[148] *See* Sony Corp. of America v. United States, 712 F. Supp. 978, 984 (Ct. Int'l Trade 1989). The claim made in *Sony* was that the Sony "Trinitron" picture tube did not compete generally with the other color picture tubes under investigation or with the domestic like product. The *Algoma* litigation is significant for this issue because it also held that the Commission is not required to exclude sales of products that are not dumped, and that are in fact identified by the Commerce Department as being sold at fair value. The Commerce Department in its antidumping investigations usually examines six months of sales data, and typically finds that some sales are not being dumped while others are being dumped. The Department calculates a "weighted average margin" which becomes the deposit rate for an antidumping duty for incoming imports. The argument was made in *Algoma* that the Commission was required either to engage in a sale by sale analysis to determine whether material injury was by reason of the imports, or at the least to disregard the proportion of imports that were found to be sold at fair value in calculating import market share. *Algoma*, 688 F. Supp. at 641. The *Algoma* court rejected this argument.

There is an exception to the "one class or kind principle," namely, when the Commission finds that there is more than one domestically produced product "like" the imports under investigation, and thus, more than one domestic industry. In that case, the Commission may "split" its determination, finding material injury to one industry and not to another. In these precise circumstances, an order would be imposed only with respect to that portion of the "class or kind" that was subject to an affirmative determination by both the Commerce Department and the Commission. *See* Badger-Powhatan v. United States, 633 F. Supp. 1364 (Ct. Int'l Trade 1986) *and* 608 F. Supp. 653 (Ct. Int'l Trade 1985). Also, there is a procedure by which the Commerce Department can exclude a foreign exporter from its affirmative determination (and hence from an order). The foreign exporter needs to make a timely request for exclusion so that the Commerce Department can specially investigate its exports and, if no dumping or subsidization is found, exclude the exporter from the scope of any affirmative Commerce Department determination. *See* 19 C.F.R. §§ 353.14, 355.14 (1990).

[149] *See, e.g.*, Industrial Nitrocellulose from Brazil, Japan, People's Republic of China, Republic of Korea, United Kingdom, West Germany, and Yugoslavia, Invs. Nos. 731-TA-439 to 445 (Preliminary), USITC Pub. 2231 (Nov. 1989) at 11 (only one U.S. producer); Aluminum Sulfate from Venezuela, Inv. No. 701-TA-299 (Final) and Inv. No. 731-TA-431 (Final), USITC Pub. 2242 (Dec. 1989) (one U.S. producer in a regional industry); Generic Cephalexin Capsules from Canada, Inv. No. 731-TA-423 (Final), USITC Pub. 2211 (Aug. 1989) at A-18 (one importer of the Canadian goods) and at A-30 (one Canadian exporter).

[150] *See supra* note 43.

[151] For example, there is no determination that any exporter or importer has engaged in "predatory" behavior. *See generally* USX Corp. v. United States, 682 F. Supp. 60, 68 (Ct.

of material injury by reason of imports may not have "an accusatory flavor."[152] For example, the Commission determines whether "the imports" are underselling the domestic like product, and does not usually make findings as to which of the importers are price leaders in this regard.[153] Further, the Commission is not permitted, under the statute, to exclude certain imports (and, presumably, certain importers or exporters) from an otherwise affirmative determination.[154] As discussed below, the relief imposed is not monetary damages to a particular petitioning member of the domestic industry as damages for the injury suffered by it, but rather an imposition of an additional tariff on all imports of the product involved from the country or countries that are subject to affirmative determinations by the Commerce Department and the Commission.[155]

Moreover, as a perusal of any Commission determination and its accompanying report would reveal, Commission determinations are largely a matter "of statistics, economics and expert interpretation, rather than questions of some norm" having been violated.[156] The Commission examines such matters as the volume and market share of imports under investigation, the prices for both the U.S. "like product" and the imported product, factors pertaining to the condition of the domestic industry, including industry profitability, shipments, production, employment, market share, as well as analytical questions combining one or more of these factors, such as whether prices are being suppressed relative to costs.[157]

This process is analogous to that of a committee of the Congress holding hearings and gathering data to determine whether to enact a

---

Int'l Trade 1988); Maverick Tube Corp. v. United States, 687 F. Supp. 1569, 1573-74 (Ct. Int'l Trade 1988).

[152] *Cf.* ATTORNEY GENERAL'S MANUAL, *supra* note 12, at 14.

[153] *See generally* Florex v. United States, 705 F. Supp. 582, 592 (Ct. Int'l Trade 1989) ("ITC seeks to arrive at a general conclusion about price underselling over a three year period of time. Its conclusion is not quantified.").

[154] *See* Sandvik AB v. United States, 721 F. Supp. 1322, 1333 (Ct. Int'l Trade 1989) ("[T]he ITC does not have the authority to exclude merchandise from the like product designation" and "[t]he ITA controls the scope of the investigation, while the ITC determines whether there is material injury or the threat of material injury to the domestic industry producing the like product."); Sony Corp. of America v. United States, 712 F. Supp. 978, 981 (quoting Algoma Steel Corp. v. United States, 688 F. Supp. 639, 644 (Ct. Int'l Trade 1988), *aff'd*, 865 F.2d 240 (Fed. Cir. 1989), *cert. denied*, 109 S. Ct. 3244 (1989)) ("the Commission 'determines what domestic industry produces products like the one in the class defined by ITA and whether that industry is injured by the relevant imports' ").

[155] *See* S. REP. No. 249, *supra* note 78, at 37. *Cf.* United States v. Florida E. Coast Ry., 410 U.S. 224 (1973) (contrasting the "adjudication" of a complaint by a shipper that specified rates set by a particular railroad were unreasonable with nationwide incentive payments ordered to be made by all railroads). Note that the additional tariff is applicable even to exporters who were not investigated by the Commerce Department and who have therefore not been determined to have dumped their exports in the United States or received countervailable subsidies from the governments involved.

[156] *Cf.* American Telephone & Telegraph Co. v. FCC, 449 F.2d 439, 455 (2d Cir. 1989).

[157] 19 U.S.C. § 1677(7)(C) (1988).

tariff increase for imports from a particular country on the ground that such imports are adversely affecting a U.S. industry.[158] The Commission is directed to consider, in addition to the list of factors specified by the statute, all relevant factors of trade, competition, and development in making its determinations.[159] Indeed, while the Commission is not to weigh causes of material injury, it is to consider whether any injury may be due to "the volume and prices of imports sold at fair value, contraction in demand or changes in patterns of consumption, trade, restrictive practices of and competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry."[160] Further, to the extent that at least some Commissioners have increased their reliance on economic modelling to assist in their analysis,[161] such modelling pertains more to general market conditions and principles of economic analysis than anecdotal evidence of "who did what to whom and when."

The imposition of mandatory cumulation of imports by the Trade and Tariff Act of 1984 is a further factor arguing for the legislative character of the facts considered and found by the Commis-

---

[158] Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 305 (1933).

> What is done by the Tariff Commission and the President in changing the tariff rates to conform to the new conditions is in substance a delegation, though a permissible one, of the legislative process . . . . The kind of hearing assured by the statute to those affected by the change is a hearing of the same order as had been given by congressional committees when the legislative process was in the hands of Congress and no one else. To be sure there has been a change of sanction. What was once a mere practice has been converted into a legal privilege.

Id. See also Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 936 (Fed. Cir. 1984) ("Following its historic practice, the ITC conducted its investigation more like a congressional committee than a court, and of course it was exercising delegated legislative powers.") (Nichols, J., concurring). Indeed, the Congress nearly every year holds hearings on "miscellaneous tariff bills," which generally are requests for the suspension of duty on various specific articles in non-controversial cases, because, for example, retaining the duty might adversely affect an industry dependent on those imported articles for some process of manufacturing. *See* S. REP. No. 71, *supra* note 123, at 240-42 (proposing that an administrative procedure be established to delegate factfinding in such instances to the Commission).

[159] *See* S. REP. No. 249, *supra* note 78, at 88; H.R. REP. No. 317, *supra* note 83, at 46-47.

[160] *See* S. REP. No. 249, *supra* note 78, at 57, 74; H.R. REP. No. 319, *supra* note 83, at 47; STATEMENTS OF ADMINISTRATIVE ACTION, H.R. DOC. 153, Part II, 96th Cong., 1st Sess. 435 (1979).

[161] *See, e.g.*, Maverick Tube Corp. v. United States, 687 F. Supp. 1569, 1574 (Ct. Int'l Trade 1988). *See also* Copperweld Corp. v. United States, 682 F. Supp. 552, 573-75 (Ct. Int'l Trade 1988); USX Corp. v. United States, 682 F. Supp. 60, 69 (Ct. Int'l Trade 1988); Alberta Pork Producers' Mktg. Bd. v. United States, 669 F. Supp. 445, 463 (Ct. Int'l Trade 1987); Maine Potato Council v. United States, 617 F. Supp. 1088, 1090 (Ct. Int'l Trade 1985); Certain Welded Carbon Steel Pipes and Tubes from Taiwan, Inv. No. 731-TA-349 (Final), USITC Pub. 1994 (July 1987) at 52-55; Digital Readout Systems and Subassemblies Thereof from Japan, Inv. No. 731-TA-390 (Preliminary), USITC Pub. 2081 (May 1988) at 19-23.

sion.[162] Simply put, cumulation "involves aggregating volume and price data with respect to imports from two or more countries for purposes of the Commission's material injury determination."[163] Cumulation of imports is mandated by the statute if imports from different countries are subject to investigation and compete with each other and the domestic like product.[164] The different countries need not be simultaneously subject to investigation, though they need to be "reasonably coincident" in marketing.[165] Thus, imports of foreign producer A may be cumulated with those of foreign producer B from a different country whose imports were earlier investigated by the Commission, even though foreign producer B may not be a party to the second investigation and foreign producer A may not have been a party to the first investigation. Once the decision to cumulate is made, the consideration of causation of material injury is generally made on the basis of cumulated, not individual country, imports.[166]

Note the movement back towards a more categorical legislative fact orientation. Not only are imports from the entire country examined (as opposed to imports on an exporter by exporter basis) for the purpose of the material injury analysis, but imports from a number of countries may be examined together for purposes of the Commission's analysis. As the Court of International Trade has noted:

> the purpose and goal of the statutory cumulation provision are compelling, and address the reality of modern day trade patterns, where

---

[162] Indeed, because cumulation was made mandatory by the 1984 Act (if certain specified conditions are met) it can be argued that this legislative change counters any trend since the late 1970s towards "judicialization" of the Commission proceedings.

[163] Bingham & Taylor Div. Virginia Indus. v. United States, 815 F.2d 1482, 1484 n.4 (Fed Cir. 1987). *See also* USX Corp. v. United States, 655 F. Supp. 487, 491 n.5 (Ct. Int'l Trade 1987) (cumulation "is a method of assessing the volume and price effects of imports from a particular country by examining the volume and effect of imports from that country together with like imports from other countries"). As two Commissioners put it in one of the first determinations to cumulate imports:

> [A]n industry can be as much injured by small amounts of LTFV imports from many different sources as it can by the same total amount from one source. Accordingly, for purposes of making the injury determination, the source of the imports is not important. It is their combined effect on the domestic industry which controls.

Potassium Chloride (Muriate of Potash) from Canada, France and West Germany, Inv. Nos. AA1921-58 to -60, USITC Pub. 303 at 26 (Nov. 1969) (Clubb and Moore, Comm'rs).

[164] 19 U.S.C. § 1677(7)(C)(iv) (1988).

[165] H.R. REP. No. 1156, *supra* note 95, at 173. *See generally, e.g.*, USX Corp. v. United States, 655 F. Supp. 487 (Ct. Int'l Trade 1987).

[166] Indeed, one commentator has complained of the difficulty that cumulation, and particularly cumulation of imports under investigations that are not proceeding simultaneously, presents to counsel attempting to prepare arguments to make to the Commission on its injury analysis in a given case. *See* Palmeter, *Representing Exporters and Importers in U.S. Antidumping Investigations*, 3 REV. INT'L BUS. L. 1, 20 (1989). Once again, the statutory scheme points to facts under development that are not under the control of the parties to a particular investigation.

> dumping and subsequent injury to the domestic industry seldom manifest themselves as factors of a single country acting alone, but are rather the concerted result of simultaneous "cumulative" dumping of like products by several nations.[167]

At its heart, the principle of cumulation involves consideration of several factors and conditions of trade.[168] It involves consideration of the characteristics of the products, their marketing patterns, and, generally, factors pertaining to their sale and distribution in the United States.[169] It typically does not involve an assessment of the acts of individual exporters or importers. Thus, on balance, the nature of the facts considered and found by the Commission appear to be categorical in nature, and hence legislative in character.[170] The existence of sharp factual dispute by opposing sides in the investigation does not, as noted above, convert the proceeding into an adjudication.

6. *Issue Preclusion/Collateral Estoppel/Res Judicata*

If Commission material injury proceedings were agency adjudications, one might expect its determinations would be given res judicata or some other preclusive effect in subsequent proceedings, since one characteristic of administrative adjudications is that they may be given res judicata or collateral estoppel effect in other actions.[171] However, such has not been the case with Commission material injury determinations. The general rule is that Commission determinations are sui generis, and absent complete factual identity between one investigation and another, a determination in a previous investigation will not have a dispositive effect on a subsequent determina-

---

[167] Marsuda-Rodgers Int'l v. United States, 719 F. Supp. 1092, 1101 (Ct. Int'l Trade 1989) (remanding the Commission's determination and questioning whether the imports competed with the domestic like product, as the cumulation provision of the statute now requires). *Marsuda-Rodgers* is currently on appeal to the United States Court of Appeals for the Federal Circuit.

[168] *See* City Lumber Co. v. United States, 290 F. Supp. 385 (Cust. Ct. 1968), *aff'd*, 311 F. Supp. 340 (Cust. Ct. 1970), *aff'd*, 457 F.2d 991 (C.C.P.A. 1972); S. REP. No. 1298, *supra* note 7, at 180-81.

[169] *See, e.g.*, Certain Cast-Iron Pipe Fittings from Brazil, Republic of Korea, and Taiwan, USITC Pub. 1845 at 8 n.29, *aff'd sub nom.* Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898 (Ct. Int'l Trade 1988), *aff'd*, 859 F.2d 915 (Fed. Cir. 1988). In that investigation, the Commission considered:

> the degree of fungibility between imports from different countries and between imports and the domestic like product, the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product, the existence of common or similar channels of distribution of imports from different countries and the domestic like product, and whether the imports are simultaneously present in the market.

[170] Also note that the Commission publishes a notice of the investigation in the *Federal Register* soliciting comments from nonparties to the investigation, a characteristic generally lacking in adjudications. *See* Weaver, *Chenery II: A Forty-Year Retrospective*, 40 ADMIN. L. REV. 161, 164-65 (1988).

[171] *See supra* note 28.

tion.[172] What is puzzling is that no court has yet explicitly ruled that issue-preclusive principles such as res judicata do not apply to the Commission's investigations on the grounds that those investigations are not adjudicatory, although the Court of International Trade has declined in at least three cases to apply some form of issue preclusion.[173] The simple approach to the question of issue preclusion or res judicata would seem dictated by the *Budd* line of cases, i.e., because Commission material injury proceedings are investigatory and not adjudicatory in nature, and because issue preclusive principles do not apply to nonadjudicatory agency actions,[174] application of collateral estoppel or res judicata principles would be inappropriate.

Instead, the court has struggled on a case-by-case basis with the potential applicability of such principles, only to find them inapplicable owing to inherent characteristics of the statutory scheme.[175] One wonders whether the court's labors have simply rediscovered the principles underlying the general rule announced in the *Restatement (Second) of Judgments*, that only adjudicatory agency actions can have a res judicata or issue-preclusive effect.[176] It is unclear whether the court has taken this approach because it implicitly believed, despite the *Budd* line of precedent, that Commission determinations were adjudications which were nominally capable of having an issue

---

[172] *See* Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1087-88 (Ct. Int'l Trade 1988) (quoting Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1169 n.5 (Ct. Int'l Trade 1988)) (noting that the Commission could change the like product definition from an earlier investigation involving the same product from the same country because " 'each finding . . . must be based on the particular record at issue *including the arguments raised by the parties*' ") (emphasis in original); Armstrong Bros. Tool Co. v. United States, 483 F. Supp. 312, 328-29 (Cust. Ct.), *aff'd*, 626 F.2d 168 (C.C.P.A. 1980).

Of course, Commission action is subject to judicial review, and this means that any deviation from prior Commission action would need to be explained or have a discernible rational basis. *See, e.g., Citrosuco Paulista*, 704 F. Supp. at 1087-89; USX Corp. v. United States, 655 F. Supp. 487, 490-91 (Ct. Int'l Trade 1987) (same industry). Nevertheless a "rational basis" may simply be that a different industry or a different record is involved.

Further, the sui generis nature of Commission investigations goes more to the lack of the application of the principle of administrative stare decisis than res judicata, except in those cases, discussed below, where there is a virtual identity of parties and virtually the same subject matter as a recently concluded investigation.

[173] *See infra* notes 174-82 and accompanying text, discussing Fundicao Tupy v. United States, 9 Ct. Int'l Trade 424 (1985), Lone Star Steel Co. v. United States, 649 F. Supp. 75 (Ct. Int'l Trade), *aff'd*, 650 F. Supp. 1983 (Ct. Int'l Trade 1986), and Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075 (Ct. Int'l Trade 1988).

[174] *See supra* note 47.

[175] As described below, those characteristics essentially are that: (1) the statute commands that an investigation be conducted, with no exception made for the fact that an investigation of the same product from the same country has recently been concluded; (2) because any antidumping or countervailing duty order is only applied prospectively, the finding of each investigation, even of the same product from the same country, will nominally involve a different time period and a different res; and (3) Commission investigations are sui generis by nature.

[176] RESTATEMENT (SECOND) OF JUDGMENTS § 83(d) (1982).

preclusive effect, and labored to find a res judicata effect to no avail on that misapprehension, or whether the court had not had its attention focused on the nonapplicability of issue preclusive principles to nonadjudications.

One way in which the res judicata issue has been raised is when an unsuccessful petitioner files a new petition against the same goods from the same country shortly after the conclusion of an earlier attempt to have antidumping or countervailing duties levied on imports from that country. The court has ruled that the petitioner is permitted to try again, and the court will not enjoin, on res judicata grounds, the Commission's second investigation. In *Fundicao Tupy v. United States*,[177] members of the U.S. cast-iron pipe fitting industry had filed a countervailing duty petition against allegedly subsidized imports of cast-iron pipe fittings from Brazil. Countervailable subsidies were found to exist, but the Commission found in its final material injury determination that any injury being suffered by the domestic industry was not by reason of the imports from Brazil.[178] Four months later, the same industry coalition filed an antidumping petition against imports of cast-iron pipe fittings from Brazil, concurrently with other antidumping petitions against imports of the same product from Korea and Taiwan.[179] The Brazilian exporter and a U.S. importer filed suit seeking to enjoin the Commission from conducting a material injury investigation with respect to the imports from Brazil on the grounds that the doctrines of res judicata and collateral estoppel would require the Commission to reach a negative determination in the second investigation of Brazilian imports.[180] The U.S. Court of International Trade dismissed the injunctive action, notwithstanding the allegation that the same products would be investigated over virtually the same time period as was the subject of the negative countervailing duty determination. The court noted that the antidumping and countervailing duty laws mandated that the Commission conduct the investigation, leaving no room for agency discretion that could be enjoined by a court.[181]

---

[177] 9 Ct. Int'l Trade 424 (1985).

[178] *See* Certain Cast-Iron Pipe Fittings from Brazil, Inv. No. 701-TA-221 (Final), USITC Pub. 1681 (April 1985).

[179] *Fundicao Tupy*, 9 Ct. Int'l Trade at 425.

[180] The reasoning of the Brazilians was that the Commission had just determined that Brazilian pipe fittings were not a cause of material injury to the U.S. industry, and the U.S. industry was, in effect, engaging in harassment of the Brazilians by filing the second petition. *See* Commission General Counsel Memorandum GC-I-185 (September 9, 1985) at 2. According to the *Restatement*, the agency, as opposed to the "adversary" party, may be barred by res judicata when the means of "enforcement" are not in the control of the private petitioning party. RESTATEMENT (SECOND) OF JUDGMENTS § 83, Comment (c), at 272 (1982).

[181] *Fundicao Tupy*, 9 Ct. Int'l Trade at 426. *See also* Horlick, *Summary of Procedures Under the United States Antidumping and Countervailing Duty Laws*, 58 ST. JOHN'S L. REV. 828, 830 (1984) ("in theory there is no rule against refiling a petition"). In the *Pipe Fittings* case the

Another case denying res judicata effect to an earlier Commission determination was *Lone Star Steel Co. v. United States*.[182] The petitioners filed a second antidumping petition against products that had been the subject of an earlier negative final material injury determination by the Commission. The second investigation proceeded, but was terminated after the Commerce Department issued a negative final determination finding no dumping existed.[183] In the appeal of the first determination (the negative injury determination by the Commission) it was argued that because no dumping was found to exist in the subsequent case, there could be no effective relief, even if a court-ordered remand resulted in an affirmative final injury determination. Effectively, since the Commerce Department had subsequently determined that no dumping existed (in the second investigation), the first investigation would, according to this argument, at best result in an antidumping duty order imposing zero duties.[184]

The court rejected this argument and held that principles of res judicata were inapplicable because a different res was implicated in the investigation. "What is affected are individual entries which occur for an indefinite time forward. Because different time periods are under consideration, different determinations may result. An action with regard to one determination does not address the same res as does an action with regard to another determination."[185] Note that this case technically does not deal with any preclusive effect of a Commission determination, and it is somewhat unclear why the

---

Commission conducted a preliminary investigation, reached an affirmative preliminary determination based on the cumulated volume and effects of the imports from the three countries investigated, and eventually issued a final affirmative determination on the same grounds. Certain Cast-Iron Pipe Fittings from Brazil, Republic of Korea, and Taiwan, Inv. Nos. 731-TA-278 to -280 (Final), USITC Pub. 1845 (May 1986), *aff'd sub nom.*, Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898 (Ct. Int'l Trade 1988).

[182] 649 F. Supp. 75 (Ct. Int'l Trade 1986), *aff'd*, 650 F. Supp. 183 (Ct. Int'l Trade 1986).

[183] Under the statute, a negative final determination of no dumping (or no subsidization in a countervailing duty case) by the Commerce Department terminates the proceeding without the need for a final determination of material injury by the Commission. *See* 19 U.S.C. § 1673d(c)(2) (antidumping); § 1671d(c)(2)(countervailing duty).

[184] This is so because, as discussed below, antidumping and countervailing duty orders generally operate prospectively. Thus, by the time the Commission's negative determination could have been reversed on appeal, any resulting antidumping duty order would arguably conflict with the finding of the second investigation that no dumping existed. The court was willing to deal with that problem when and if it arose. *See* Lone Star Steel Co. v. United States, 649 F. Supp. 75, 78 (Ct. Int'l Trade), *aff'd*, 650 F. Supp. 183 (Ct. Int'l Trade 1986) ("potential conflict . . . does not seem an insurmountable problem"). As it turned out, the Commission negative determination was affirmed on appeal, thus mooting any such possible conflict. *Lone Star Steel*, 650 F. Supp. at 183. Also note that an order imposing zero duties, at least in part, is a theoretical possibility under the statutory scheme. *See* Oregon Steel Mills, Inc. v. United States, 862 F.2d 1541, 1544 (Fed. Cir. 1988). *See generally* 19 C.F.R. §§ 353.14, 355.14 (1990).

[185] Lone Star Steel v. United States, 649 F. Supp. 75, 76-77 (Ct. Int'l Trade), *aff'd*, 650 F. Supp. 183 (Ct. Int'l Trade 1986).

court was addressing the issue as presenting a res judicata issue at all, as opposed to solely an issue of mootness.

In a third instance, the court declined to hold that the Commission was required to reach the same result as to certain subsidiary findings in a later investigation of the same product from the same country as it had in an earlier determination. Specifically, the Commission was not required to adopt the same definition of the U.S. product "like" the imports under investigation in a subsequent investigation of the same imported product (frozen concentrated orange juice) from the same country (Brazil). The court noted that each Commission determination "is sui generis, involving a unique combination and interaction of many economic variables; and consequently, a particular circumstance in a prior investigation cannot be regarded by the Commission as dispositive of the determination in a later investigation."[186]

Of course, the court's refusal in these cases to give the Commission's prior determination res judicata effect is not necessarily proba-

---

[186] Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1087-88 (Ct. Int'l Trade 1988) (quoting Armstrong Bros. Tool Co. v. United States, 489 F. Supp. 269, 279 (Cust. Ct. 1980), *aff'd*, 626 F.2d 168 (C.C.P.A. 1980)). *See also* Citizen Watch Co. v. United States, 733 F. Supp. 383, 388 (Ct. Int'l Trade 1990) (holding it would be "anomalous" to give conclusive effect to explicit or implicit preliminary findings in an investigation when further investigation might call those findings into question).

More perplexing is the court's ruling in a case involving judicial review of a Department of Commerce determination. PPG Industries, Inc. v. United States, 712 F. Supp. 195, 199 (Ct. Int'l Trade 1989). There the court also declined to give issue-preclusive effect to a Commerce Department determination as to the countervailability of a subsidy, which determination had been affirmed on review by the court. In the action before the court, the same plaintiff, the petitioner in the administrative proceeding, was raising the same issue in the administrative review of an outstanding countervailing duty order that is held yearly upon request. The Commerce Department argued the plaintiff was collaterally estopped from "rearguing" the countervailability issue in the second action. The court declined to find any issue preclusion as a result of the first action, noting that under the statutory scheme, the court would be extremely cautious in finding an issue preclusive effect. "[T]he agencies involved perform the function of expert finders of fact concerning different programs, different time frames, economic statistics and other factors . . . . To hold otherwise would have a chilling effect upon the administrative processes envisioned by the Congress." *Id.* at 199. The court did not address the question of whether these agency proceedings were nonadjudicative, which would have rendered moot concerns regarding issue preclusion. Although the court cited the *Restatement (Second) of Judgments*, it cited only the introductory note to chapter 3, which pertains to res judicata effects of judicial, not administrative, actions.

See also Cabot Corp. v. United States, 694 F. Supp. 949, 953-55 (Ct. Int'l Trade 1988) (declining to hold the Commerce Department collaterally estopped from relitigating an issue in judicial review of a section 751 review that was decided in the previous appeal of the underlying countervailing duty order. The court based this ruling on the ground that the previous litigation had not resulted in an appealable judgment on which the Commerce Department could have sought appellate review); Timken Co. v. United States, 630 F. Supp. 1327, 1332 (Ct. Int'l Trade 1986) (denying res judicata effect to a Commerce Department determination, but basing that decision on the lack of judicial affirmance of the administrative determination, not on the nonadjudicative nature of the determination, notwithstanding the court's recognition elsewhere in the opinion, *id.* at 1333, that antidumping proceedings are investigatory, not adjudicatory, in nature).

tive of the question of whether Commission material injury determinations are adjudications, absent a holding based on the nonadjudicatory nature of Commission investigations. Agency adjudications are not always afforded res judicata effect,[187] particularly where the procedures used in informal adjudications vary from those used in a trial court.[188] Given, however, that one characteristic of agency adjudications can be their issue-preclusive effect, the lack of such an effect for Commission determinations must be viewed as distinguishing Commission determinations at least from the normative agency adjudication.

7. *Whether the Commission's Proceedings Can be Viewed as "Agency Process for the Formulation of an Order," A Type of APA Adjudication*

A final affirmative Commission determination results in the Commerce Department issuing an antidumping or countervailing duty order.[189] As noted above, the APA defines adjudications as "agency process for the formulation of an order,"[190] suggesting that perhaps these proceedings should be deemed adjudications after all. Nevertheless, the Commission itself issues no order, even if its determination is that a domestic industry has been materially injured, or threatened with material injury, by reason of the imports that Commerce has determined are dumped or subsidized.[191] Thus, it could be argued that because the Commission's proceeding is not "process for the formulation of an order," it is not an adjudication. This would be consistent with the reasoning of such cases as *Norwegian Nitrogen Products* and *Hannah v. Larche* that distinguish between a mere report or advice, which may or may not be acted upon, and an actual order or decree. This would support the proposition that the Commission's investigation is a mere fact-finding investigation as described in those cases.

Matters are not so simple, however. A negative final determina-

---

187 The *Restatement (Second) of Judgments* indicates that considerations of evident legislative policy may preclude the application of res judicata principles even with respect to agency proceedings that otherwise could be deemed "adjudications." RESTATEMENT (SECOND) OF JUDGMENTS § 83(d) (1982).

188 4 K. DAVIS, ADMINISTRATIVE LAW § 21:3 (2d ed. 1978). Davis espouses the view that res judicata should be applicable even absent procedures similar to those of trial courts.

189 19 U.S.C. §§ 1671d(c), 1673d(c)(2) (1988); American Permac Inc. v. United States, 831 F.2d 269, 274-75 (Fed. Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988).

190 5 U.S.C. § 551(7) (1988). Yet note that an "order" is defined as "the whole or part of a final disposition . . . of an agency in a matter *other than rulemaking* but including licensing," suggesting that the relevant inquiry is first whether the agency action should be deemed a type of rulemaking. 5 U.S.C. § 551(6) (emphasis added).

191 *See, e.g.*, Imbert Imports, Inc. v. United States, 331 F. Supp. 1400, 1406 (Cust. Ct. App. Term 1971), *aff'd*, 475 F.2d 1184 (C.C.P.A. 1973) ("The Commission formulates no 'order' or 'decree.' ").

tion has consequences because it terminates the proceeding.[192] An affirmative final determination by the Commission results in the promulgation of an appropriate antidumping or countervailing duty order by the Commerce Department. The Court of International Trade has made it plain that the issuance of the order by the Commerce Department is merely a ministerial act.[193] An affirmative or negative Commission determination is not merely a report which can be accepted, modified, or rejected by the Commerce Department.[194] Thus, it must be concluded that the Commission's investigation differs from the pure fact-finding described in *Norwegian Nitrogen Products* or *Hannah v. Larche*. Further, because the promulgation of an appropriate order is mandated by statute following an affirmative Commission determination, that Commission determination could, perhaps, be viewed as part of the "agency process of the formulation of an order."[195]

"[P]arts of a proceeding that lead to an order are not necessarily themselves adjudications," however.[196] One could argue that an antidumping or countervailing duty order could be more like quasi-rulemaking than an adjudicatory order, notwithstanding its title.[197] The primary characteristic of a rule is that it is "the whole or part of any agency statement of general or particular applicability and future

---

[192] 19 U.S.C. §§ 1671d(c)(2), 1673d(c)(2) (1988). The same is also true for a negative preliminary determination by the Commission. 19 U.S.C. §§ 1671b(a), 1673b(a) (1988).

[193] Royal Business Machines, Inc. v. United States, 507 F. Supp. 1007, 1012-13 (Ct. Int'l Trade 1980), *aff'd*, 669 F.2d 692 (C.C.P.A. 1982) ("the issuance of a final antidumping duty *order* is purely a ministerial act" (emphasis added)); Badger-Powhatan v. United States, 608 F. Supp. 653 (Ct. Int'l Trade 1985) (the order merely effectuates the final determination). *See also* Badger-Powhatan v. United States, 633 F. Supp. 1364, 1368 n.6 (Ct. Int'l Trade 1986).

[194] *See* Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 318 (1933).

[195] It should be noted, however, that a similar lack of discretion existed prior to the 1979 revision of the law, yet Commission injury determinations were nonetheless regarded as factfinding. *See generally* Pasco Terminals, Inc. v. United States, 477 F. Supp. 201 (Cust. Ct. 1979); Imbert Imports, Inc. v. United States, 314 F. Supp. 784 (Cust. Ct. 1970), *aff'd*, 331 F. Supp. 1400 (Cust. Ct. App. Term 1971), *aff'd*, 475 F.2d 1189 (C.C.P.A. 1973). *Cf.* American Express Co. v. United States, 472 F.2d 1050, 1055-56 (C.C.P.A. 1973) (noting that because the Treasury Department has no discretion to decline to impose a countervailing duty once a bounty or grant is found to exist, the proceeding was not rulemaking or legislative in character, but was rather "fact-finding activity").

[196] ITT Corp. v. Local 134, IBEW, 419 U.S. 428, 445 (1975).

[197] Note, however, that, as stated above, the Court of Customs and Patent Appeals (the predecessor court to the Federal Circuit) has ruled that a countervailing duty proceeding is not "rulemaking" within the meaning of the APA because the Treasury Department (the predecessor to the Commerce Department in this function) had no discretion to decline to impose a countervailing duty once a bounty or grant is found to exist. American Express Co. v. United States, 472 F.2d 1050, 1055-56 (C.C.P.A. 1973). Further, as noted above, the *Imbert Imports* cases indicate that the Commission's injury determinations under the dumping laws also were not "rulemaking" within the meaning of the APA. *See* Imbert Imports, Inc. v. United States, 314 F. Supp. 784, 787 (Cust. Ct. 1970), *aff'd*, 331 F. Supp. 1400, 1406 (Cust. Ct. App. Term 1971), *aff'd*, 475 F.2d 1189, 1192 (C.C.P.A. 1973) (agreeing that "the Commission has only the responsibility for making the determination of injury under the statute and does not prescribe the remedial action").

effect designed to implement . . . or prescribe law . . . and includes the . . . prescription for the future of rates . . . ."[198] An antidumping or countervailing duty order arguably implements the antidumping or countervailing duty law, is of general or particular applicability,[199] and generally prescribes a future tariff rate.[200] Indeed, prior to the 1979 statutory changes,[201] the term of art for the final culmination of an affirmative antidumping determination was an antidumping "finding," not an antidumping order.[202] Since Congress generally indicated its intent not to convert antidumping proceedings into adjudications, it would be anomalous to do so simply on the basis that the 1979 legislation substituted the term "order" for "finding." Moreover, rulemaking proceedings can result in the promulgation of orders without thereby converting the proceeding into an adjudication.[203] To the extent, however, that antidumping or countervailing duty actions do not exactly meet the definition of rulemaking, the residual definition of order under the APA as final agency action "other than rulemaking"[204] would support classifying the action as an order if there is doubt.

---

198 5 U.S.C. § 551(4) (1988).

199 As discussed above, the duties are not applied to all imports, but are usually applied to all imports from a given country, absent the exclusion of an importer or importers by the Commerce Department, although there may be varying rates assessed for the various exporters investigated, with a catch-all "all others rate" for those exporters not investigated.

200 The order itself actually only sets a "deposit rate" for imports; the actual additional duty is not assessed until an "annual review" proceeding is completed by the Commerce Department subsequently, or until the anniversary of the order passes without a party requesting that an annual review be conducted. *See, e.g.*, Tai Yang Metal Indus. Co. v. United States, 712 F. Supp. 973, 976 n.3 (Ct. Int'l Trade 1989); Kejriwal Iron and Steel Works, Ltd. v. United States, 729 F. Supp. 1365, 1370-71 (Ct. Int'l Trade 1990) (a countervailing duty is not "imposed" until it is assessed, and it is not assessed "until the end of the next review period or the completion of the administrative review"); Pasco Terminals Inc. v. United States, 477 F. Supp. 201, 212 n.9 (Cust. Ct. 1979), *aff'd*, 634 F.2d 610 (C.C.P.A. 1980) ("[T]he injury determination merely created the possibility that imported Mexican sulphur would be subjected to dumping duties in the event the Customs Service determined on an entry-by-entry basis that the purchase price (or the exporter's sales price) . . . was less than the applicable foreign market value."). There is a small exception to the "prospective" nature of the duties imposed. The duties will be collected back to the date of Commerce's preliminary determination, if affirmative, or the Commerce affirmative final determination, if the preliminary determination was negative. 19 U.S.C. §§ 1671e(b)(1), 1673e(b)(1) (1988). Further, the "critical circumstances" provision of the statute, 19 U.S.C. §§ 1671b(e)(2), 1673b(e)(2) (1988), also permits collection of duties up to 90 days prior to the date that suspension of liquidation was first ordered, which is usually the date of Commerce's affirmative preliminary determination, in those circumstances that critical circumstances are found to exist.

201 Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979).

202 *See generally* Matsushita Electrical Corp. v. United States, 529 F. Supp. 670, 673 (Ct. Int'l Trade 1981) (holding that an antidumping "finding" under the Antidumping Act of 1921 was the equivalent of an antidumping "order" for purposes of deciding whether section 751 of the statute applied); SCM Corp. v. United States, 450 F. Supp. 1178, 1180 (Cust. Ct. 1978).

203 *See, e.g.*, Home Box Office Inc. v. FCC, 567 F.2d 9, 13 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

204 5 U.S.C. § 551(6) (1976).

The issue presented is an interesting one. Because the courts have held that these investigations are neither rulemaking nor adjudications, and the Congress has indicated that antidumping and countervailing duty proceedings are investigatory in nature, not adjudicatory, despite denominating the agency action resulting from the process as an order (at least when relief is given), it must be concluded that this particular factor does not shed much light on the general question.

8. *The Requirement that Reasons for the Determination Be Articulated*

Superficially, the statute's requirement that the Commission's determinations must give the facts and conclusions of law upon which the determination is based might appear similar to an adjudicative ruling on the issues presented by the proceeding.[205] Such is not the case. In contrast to the provisions of the APA,[206] there is no requirement that the Commission must rule on each finding, conclusion, or exception presented by a party appearing before it.[207] Indeed, it is well-established that the Commission need not address the arguments of the parties except to the extent it deems it appropriate to do so,[208] and its discussion even then may be limited due to concerns about the confidentiality of the data involved.[209] Moreover, a statement of reasons is generally required in rulemaking proceed-

---

[205] *Cf.* Ehrenhaft, *supra* note 45, at 1397; SCM Corp. v. United States, 487 F. Supp. 96, 102 (Cust. Ct. 1980) (noting that the Trade Act of 1974 required a statement of reasons, findings, and conclusions, drawing an analogy to the language of section 557(c) of the APA, pertaining to findings to be made in adjudications, but not explicitly addressing the question of whether the Commission's investigation was an "adjudication.").

[206] The APA requires that in formal adjudications the agency address each finding, conclusion, or exception presented by the parties. 5 U.S.C. 557(c) (1988).

[207] *See, e.g.*, Roses, Inc. v. United States, 720 F. Supp. 180, 185 (Ct. Int'l Trade 1989) ("[T]he law does not require a written response by the ITC to all points made by parties before it."); Pasco Terminals Inc. v. United States, 477 F. Supp. 201, 218 (Cust. Ct. 1979), *aff'd*, 634 F.2d 610 (C.C.P.A. 1980).

[208] *See, e.g.*, Granges Metallverken AB v. United States, 716 F. Supp. 17, 24 (Ct. Int'l Trade 1989) (holding that an agency must consider all issues properly raised by the record evidence, but "the fact that certain information is not discussed in a Commission determination does not establish that the Commission failed to consider that information because there is no statutory requirement that the Commission respond to each piece of evidence presented by the parties"); Roses, Inc. v. United States, 720 F. Supp. 180, 185; British Steel Corp. v. United States, 593 F. Supp. 405, 414 ("While . . . it would be helpful to the parties and to the Court if the Commission were to specifically address the main contentions of the parties, it cannot be said that the law imposes such a requirement on the Commission."); National Ass'n of Mirror Mfrs. v. United States, 696 F. Supp. 642, 648-89 (Ct. Int'l Trade 1988) (only when specific issue is "material" must it be discussed); S. REP. No. 71, *supra* note 123, at 115.

[209] *See* Avesta AB v. United States, 689 F. Supp. 1173, 1184 (Ct. Int'l Trade 1988) (The requirement that an agency must articulate a rational basis for its determination "must yield to a reasonable regulation designed to protect the unprotected and uncontrolled disclosure of confidential information to the public."). It must be conceded, however, that this same principle is applicable to at least some degree to adjudicatory decisions as well.

ings,[210] so the requirement that the Commission state its reasons for its determinations is not indicative of an adjudicative nature.

9. Exhaustion of Remedies

A number of court decisions reviewing Commission material injury determinations have made it clear that, pursuant to 28 U.S.C. § 2637(d), an appellant challenging the Commission's determination will be required by the court to have exhausted its administrative remedy by raising its objections during the administrative proceedings below. Failure to do so may, in "appropriate circumstances," result in an unsuccessful appeal.[211] Although one court decision has implied that the application of this principle thereby reveals a quasi-adjudicatory aspect to the proceeding,[212] such an implication is incorrect. The requirement of exhaustion of administrative remedies is not limited to agency adjudications, but has also been applied in judicial review of rulemaking proceedings.[213] Thus, the application of the principle of exhaustion of administrative remedies can not be deemed to indicate an agency adjudication.

IV. Conclusion

As the above discussion indicates, Commission material injury proceedings do not match the paradigm for agency adjudications, even informal adjudications. Stated differently, any adjudicatory characteristics the proceedings may possess are so riddled with traits that suggest a contrary nonadjudicatory nature that the conclusion that such proceedings are adjudicatory would be a logical contortion.[214] Many of the allegedly quasi-judicial characteristics of Commission proceedings that have been cited by some commentators as demonstrating the adjudicatory nature of those proceedings are, upon closer examination, either characteristics that also apply to

---

[210] *See, e.g.*, American Maritime Ass'n v. United States, 766 F.2d 545, 566 n.30 (D.C. Cir. 1985) (requiring an agency to justify the assumptions essential to its actions even if the parties to the rulemaking proceeding do not raise objections); American Standard, Inc. v. United States, 602 F.2d 256, 269 (Ct. Cl. 1979) (necessary to state reasons in rulemaking so that a court can assess the reasonableness of a rule for purposes of judicial review).

[211] *See, e.g.*, Wieland Werke AG v. United States, 718 F. Supp. 50, 55 (Ct. Int'l Trade 1989) and authorities cited therein.

[212] Monsanto Co. v. United States, 698 F. Supp. 275, 283 (Ct. Int'l Trade 1988).

[213] *See* Northside Sanitary Landfill, Inc. v. Thomas, 849 F.2d 1516, 1519-1521 (D.C. Cir. 1988) (Even in notice and comment rulemaking, a party has "a modicum of responsibility for flagging the relevant issues which its documentary submissions presented."), *cert. denied sub nom.*, Northside Sanitary Landfill, Inc. v. Reilly, 109 S.Ct. 1528 (1989); Home Box Office Inc. v. United States, 567 F.2d 9, 35-36 n.58 (D.C. Cir. 1977) (comments that "are purely speculative and do not disclose the factual or policy basis on which they rest" may be ignored by the agency).

[214] One nominal solution would be to add a qualifying term to the categorization. While the resulting terminology arguably would be more precise, it would have to be carried to absurd extremes, for example, by labelling the proceedings as "semi-quasi-informal adjudications."

nonadjudicatory proceedings or are characteristics that predate the allegedly judicializing trend. For example, the availability of judicial review and the requirement that the agency state the reasons for its determination both are features of rulemaking proceedings and were required prior to the 1979 statutory changes that allegedly judicialized the process. Further, while access to confidential information under protective order affords greater transparency than before, that characteristic is not dispositive. Transparency does not define an adjudication.

The key characteristics militating against treating the proceedings as adjudicatory are the parties' lack of control over the investigation and the information collected by the Commission, and the Commission's corresponding independent obligation to conduct a thorough investigation. The parties do not have discovery procedures available so they cannot compel information from other parties or nonparties; they may not supplant the Commission's investigation with their own efforts; and they may not themselves verify or cross-examine the information obtained by the Commission. While the issues investigated may be sharply disputed by the parties, the categorical nature of many of the facts considered by the Commission means that the agency must obtain much of the information necessary for its determination from nonparties.[215]

There is no easy answer to what the Commission material injury

---

[215] As the introduction to this Article states, understanding the nature of any agency proceeding is vital for reasoned legislative oversight of the agency process. Proposals to change Commission proceedings through legislation to make them more adjudicatory in nature thus should be carefully scrutinized lest the legislative changes have unintended consequences. As the Supreme Court indicated in *Vermont Yankee*, adjudicatory procedures are not necessarily appropriate for all agency actions. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 547 (1978). In Commission proceedings, for example, one of the more important concerns of Congress in revising the statute in 1979 was expediting the administrative proceedings. *See* S. REP. No. 249, *supra* note 78, at 49, 66; Atlantic Sugar Ltd. v. United States, 744 F.2d 1556, 1560 n.14 (2d Cir. 1984). Adding an evidentiary hearing, with attendant burdens of proof and discovery, however, would almost certainly require significantly extending the short statutory deadlines. *See* Iowa State Commerce Comm'n v. Office of Federal Inspector of Alaska Natural Gas Transp. Sys., 730 F.2d 1566, 1577 (D.C. Cir. 1984) ("Discovery can add months or even years to proceedings, and Congress apparently desired these proceedings to be expedited at the expense of more traditional [procedural] guarantees . . . ."); Association of Nat'l Advertisers Inc. v. FTC, 627 F.2d 1151, 1167 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) (quoting a report of the Administrative Conference that use of trial-type procedures in nonadjudicatory proceedings may " 'produce a virtual paralysis of the administrative process' "). Further, shifting the burden of proof and investigation from the Commission to the parties, particularly to the petitioning members of the domestic industry, could significantly increase the costs of bringing an antidumping or countervailing duty case for the domestic industry, as well as increasing costs for the responding importers or foreign producers. Other more esoteric questions are also raised, including whether in an adjudicatory proceeding the antidumping or countervailing duty would need to be limited to those foreign exporters who were parties to the "adjudication," see *supra* text accompanying note 37, or whether the Commission would need to make exporter- or importer-specific material injury determinations.

proceedings are if they are not adjudications. No one has seriously proposed classifying the proceedings as rulemaking, and indeed, attempting to do so would involve its own series of logical contortions. The Commission does not weigh issues of policy, nor does it promulgate a rule—it considers factual data from a period in the past to make factual findings. Perhaps, under this "precise and peculiar statutory framework,"[216] the best answer may be, with apologies to Justice Jackson, quasi-investigative, for although the Commission material injury determinations have more legal force than mere advice or a report, the historical factfinding function of the Commission is the category with the most comfortable, albeit imperfect, fit.

[216] Freeport Minerals Co. v. United States, 758 F.2d 629, 634 n.13 (Fed. Cir. 1985).