The Trade Agreements Act: Administrative Policy & Practice in Antidumping Investigations

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The Trade Agreements Act: Administrative Policy & Practice in Antidumping Investigations

by Linda F. Potts* and James M. Lyons**

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The views expressed are those of the authors and are not intended to represent or necessarily to reflect the position of the Department of Commerce on any issue or subject.
I. Introduction

During the past decade the contracting parties to the General Agreement on Tariffs and Trade have attempted to create conditions that would allow free trade to prosper. As the high tariffs which once posed the principal obstacle to trade gradually were reduced, attention focused increasingly on the elimination of nontariff trade barriers. It soon became obvious, however, that any further expansion of trade required the establishment of minimum standards of market behavior, particularly with respect to injurious price discrimination and subsidy practices. The multilateral trade agreements, which concluded the Tokyo Round of the Multilateral Trade Negotiations, reflect the progress made toward these goals.

The Trade Agreements Act of 1979 implements the multilateral trade agreements concluded during the Tokyo Round. The Act modifies U.S. law to reflect the changes in antidumping practice and procedure agreed to during the trade negotiations and addresses domestic and foreign criticism of the Antidumping Act of 1921. An important nonstatutory change also occurred in early 1980 when the responsibility for the administration of the antidumping law was transferred from the Department of the Treasury to the Department of Commerce. While the substance of the earlier law remains essentially intact, significant procedural reforms have nonetheless been achieved. The Trade Agreements Act not

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3 See Agreement on Implementation of Art. IV of the General Agreement on Tariffs and Trade done April 9, 1979, reprinted in 18 INT'L LEGAL MATERIALS 621 (1979).


only accelerates antidumping proceedings, but also provides for greater public participation in the proceedings, affords greater access to information developed during an investigation, yields earlier and more effective application of provisional measures to imports, and provides for the establishment of a new "material" injury standard. Other changes include the addition of detailed provisions concerning the suspension of investigations, the imposition of time limits on the liquidation of entries subject to the assessment of antidumping duties, and the provision for annual administrative reviews of outstanding suspension agreements and antidumping duty orders. The substantive changes effected by the Act relate to the redefinition of purchase price and the use of sampling and averaging techniques in the calculation of foreign market value. The Trade Agreements Act also substantially expands the opportunities for judicial review of decisions made by the administering authority and the International Trade Commission (ITC).

II. United States Price

In determining whether sales have been made at less than fair value, the "United States price" is compared to the "foreign market value" of the merchandise subject to investigation. "United States price," the price at which the imported merchandise of a particular manufacturer or exporter is sold in the United States, is a new term which incorporates concepts borrowed from the Antidumping Act of 1921. Two different

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7 See id. at 98-100, reprinted in [1979] U.S. CODE CONG. & AD. NEWS at 484-86.
8 Id.
9 See id. at 37, reprinted in [1979] U.S. CODE CONG. & AD. NEWS at 423.
11 Tariff Act of 1930, supra note 2, at § 734(b)-(j) (codified at 19 U.S.C. § 1673c(b)-(j) (Supp. III 1979)).
12 Id. § 736(a) (codified at 19 U.S.C. § 1673e(a) (Supp. III 1979)).
13 Id. § 751 (codified at 19 U.S.C. § 1675 (Supp. III 1979)).
15 See Tariff Act of 1930, supra note 2, at § 773(f) (codified at 19 U.S.C. § 1677b(f) (Supp. III 1979)).
17 Tariff Act of 1930, supra note 2, at § 777(i) (codified at 19 U.S.C. § 1677(i) (Supp. III 1979)) defines the term "administering authority" as meaning "the Secretary of the Treasury, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this title are transferred by law." Responsibility for the antidumping function was transferred on Jan. 2, 1980, to the Dept. of Commerce. See Exec. Order No. 12188, 3 C.F.R. § 131 (1980 Compilation).
18 Tariff Act of 1930, supra note 2, at § 772 (codified at 19 U.S.C. § 1677a (Supp. III 1979)).
20 The term "United States price" has no precursor in the Antidumping Act. However,
benchmarks exist under United States price: (1) purchase price\(^2\) and (2) exporter’s sales price.\(^2\) The category within which a particular transaction falls will be determined largely by whether the sales transaction to the first party in the United States, unrelated to the exporter,\(^2\) is consummated prior to importation.\(^2\) The characterization of the transaction will have substantial impact on the calculation of foreign market value.

The purchase price standard of comparison is applicable only where the sale between the manufacturer and the unrelated customer in the United States occurs before the importation of the merchandise.\(^2\) The purchase price standard is uniformly applicable where a foreign manufacturer sells directly to an unrelated customer in the United States. Several other fact patterns traditionally have been deemed to represent purchase price situations. For example, where a foreign manufacturer sells through a subsidiary who markets the merchandise in the United States, the transaction between the related selling party and the unrelated customer has been used to determine the purchase price if that sale was consummated prior to importation.\(^2\) Similarly, where an American purchaser has an overseas buying agent who purchases directly from an unrelated manufacturer, the price paid by the buying agent to the foreign manufacturer is the purchase price.\(^2\) The other situation commonly controlled by the purchase price provision involves a foreign producer and an unrelated foreign trading company that markets the merchandise through its U.S. subsidiary to an independent customer in the United States.\(^2\) The transaction between the foreign manufacturer and the trading company forms the basis for comparison with the appropriate foreign market value. If the purchase by the trading company from the manufacturer is completed prior to importation, and the manufacturer knows the destination of the goods, the criteria that make

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21 Tariff Act of 1930, supra note 2, at § 772(b) (codified at 19 U.S.C. § 1677a(b) (Supp. III 1979)) defines purchase price as “the price at which merchandise is purchased or agreed to be purchased, prior to the date of importation from the manufacturer or producer of the merchandise for exportation to the United States.”

22 Id. § 772(c) (codified at 19 U.S.C. § 1677a(a) (Supp. III 1979)) defines exporter’s sales price as “the price at which merchandise is sold in the United States, before or after the time of importation, by or for the account of the exporter . . . .”

23 Id. § 771(13) (codified at 19 U.S.C. § 1677(13) (Supp. III 1979)) indicates those parties which are considered to be related to the exporter for purposes of section 772(c).


27 Id.

purchase price applicable are satisfied. The price from the foreign manufacturer to the unrelated trading company is accepted as a reliable price because there generally would be little incentive for a trading company to sell the merchandise below its own cost of acquisition and marketing.\(^{29}\) To assure that the trading company does not sell at prices below its cost, section 772(b) provides that the purchase price will be adjusted downward if necessary to reflect the actual net price to the trading company.\(^{30}\)

The exporter's sales price provision is applied most frequently where the merchandise has not as yet been sold at the time of importation.\(^{31}\) The merchandise, consequently, is imported for the benefit of the exporter\(^{32}\) since the exporter or a subsidiary still has title over the merchandise. A common situation governed by exporter's sales price occurs when a foreign manufacturer transfers the merchandise to its U.S. subsidiary which in turn sells the merchandise from inventory to an unrelated customer in the United States. For purposes of fixing a United States price the transaction between the subsidiary and the unrelated customer is the relevant price.

Whether a particular sale falls into the purchase price category or the exporter's sales price grouping will determine which sales are selected from the home market or relevant third country markets for the less than

\(^{29}\) In this situation, exporter's sales price could also be applicable because the merchandise is sold in the United States by or for the account of the exporter—the trading company and the exporter's sales price provision addresses both transactions made before as well as after importation. In such circumstances, the sale between the trading company and the independent U.S. purchaser would be the relevant transaction. Use of the exporter's sales price would be mandatory if the foreign manufacturer did not know the destination of the merchandise at the time of the sale to the trading company. See generally, S. REP. NO. 249, supra note 6, at 94 reprinted in [1979] U.S. CODE CONG. & AD. NEWS at 381.

\(^{30}\) Tariff Act of 1930, supra note 2, at § 772(b) (codified at 19 U.S.C. § 1677a(b) (Supp. III 1979)); see note 21 supra.

\(^{31}\) Exporter's sales price may also in some circumstances be applicable when the sale has occurred before importation. By definition, however, only the exporter's sales price can be applicable where the sale has been made after importation.

\(^{32}\) Exporter is defined in the Tariff Act of 1930, supra note 2, at § 771(13) (codified at 19 U.S.C. § 1677(13) (Supp. III 1979)) as:

\[\text{the person by whom or for whose account the merchandise is imported into the United States if—}\]

\[(A)\; \text{such person is the agent or principal of the exporter, manufacturer, or producer;}\]

\[(B)\; \text{such person owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in the business of the exporter, manufacturer, or producer;}\]

\[(C)\; \text{the exporter, manufacturer, or producer owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in any business conducted by such person;}\]

\[(D)\; \text{any person or persons, jointly or severally, directly or indirectly, through stock ownership or control or otherwise, own or control in the aggregate 20 percent or more of the voting power or control in the business carried on by the person by whom or for whose account the merchandise is imported into the United States, and also 20 percent or more of such power or control in the business of the exporter, manufacturer, or producer.}\]
fair value (LTFV) determination. Where purchase price is the applicable standard, those sales occurring in the foreign market during essentially the same time period in which the sales to the United States were made will provide the basis for comparison.\textsuperscript{33} The exporter’s sales price provision, however, requires the use of sales made in the foreign market at approximately the time the merchandise was exported to the United States.\textsuperscript{34} Thus, in the exporter’s sales price situation the foreign sales used to calculate foreign market value will necessarily precede the U.S. sales with which they are compared.

Significant differences also exist in the manner in which exporter’s sales price and purchase price are calculated. Although both the exporter’s sales price and the purchase price methods attempt to net out all costs back to an ex-factory price, the fact that additional costs are usually reflected in the exporter’s sales price situation requires that additional reductions be made in the relevant transaction price to derive the proper United States price.\textsuperscript{35} Such elements as the cost of all containers and the amount of rebated import duties are added to both exporter’s sales price and purchase price.\textsuperscript{36} Other factors such as those costs incident to bringing the merchandise from the place of shipment to the United States or the amount of an export tax are subtracted from both.\textsuperscript{37} Other deductions such as indirect selling expenses incurred in the United States on behalf of the exporter are only deducted from the exporter’s sale price.\textsuperscript{38} However, adjustment to foreign market value for similar expenses in the home market has traditionally been permitted as an offset to the exporter’s sales price expense deductions.

Not infrequently, a manufacturer will have sales during the investigatory period to both related parties and independent customers in the United States, possibly necessitating both an exporter’s sales price and purchase price analysis. Under Treasury practice a minimum of sixty percent of the merchandise sold to the United States was investigated. Because the purchase price sales often exceeded sixty percent of the total volume sold, the related party exporter’s sales price sales were frequently ignored for purposes of the fair value determination.\textsuperscript{39} Where practicable, however, the Commerce Department now investigates eighty-five percent of the merchandise sold to the United States so as to preserve the option to suspend an investigation pursuant to section 734.\textsuperscript{40} The inclu-
sion of such a high percentage of sales in the fair value investigation generally will necessitate that exporter's sales price and purchase price sales both be included in the analysis unless such sales individually represent eighty-five percent or more of total sales.

Another complication exists where the merchandise subject to an investigation enters the United States but is sold to a related party who further manufactures the item before reselling it. Prior to 1974 such merchandise fell outside the coverage of the antidumping law. However, the Trade Act of 1974 corrected that deficiency. The law as amended in 1979 now provides that "any increased value . . . resulting from a process of manufacture or assembly performed on the imported merchandise after the importation and before its sale to [an unrelated purchaser]" must be deducted from the exporter's sales price. This provision requires that all costs of further processing of the merchandise be netted out in determining the U.S. price. The present provision, like the 1974 language, would be inapplicable where the product sold to the unrelated person contains an insignificant amount in quantity or volume of the imported merchandise.

Although this provision speaks specifically only of subtracting the value of additional material and labor used in further processing the merchandise, provision is made for the deduction of any increase in value. In the proposed regulations published by the Treasury Department prior to transfer of the antidumping function to the Commerce Department, profit was included as an additional element to be deducted. A deduction for the amount of profit attributable to any further processing has been made in only one proceeding to date. Failure to deduct this profit element would artificially eliminate or diminish any possible LTFV margins. The administrative difficulty, however, of attempting to ascertain what profit is attributable to further processing suggests that the most pragmatic approach is to limit the deduction to those instances where the value of the merchandise as imported represents less than eighty percent of the value of the finished product sold in

43 Id. at § 321(c), amended the Antidumping Act of 1921, supra note 2, at § 204 by adding paragraph 5 so as to extend the coverage of the law to this situation, see S. REP. NO. 1298, 93d Cong., 2d Sess. 173 (1973) reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7310. [hereinafter cited as S. REP. NO. 1298].
44 Tariff Act of 1930, supra note 2, at § 772(e)(3) (codified at 19 U.S.C. § 1677a(e)(3) (Supp. III 1979)).
46 Tariff Act of 1930, supra note 2, at § 772(e)(3) (codified at 19 U.S.C. § 1677a(e)(3) (Supp. III 1979)).
the United States. Only then is the profit element allocable to further processing likely to have an impact on the outcome of the investigation.

As already indicated, section 772 provides that the selling expenses of a related party in the United States will be deducted from the price paid by the independent customer in calculating exporter's sales price. Since 1976, the antidumping regulations have provided for a comparable adjustment to foreign market value for indirect selling expenses. The allowance of the exporter's sales price offset has been criticized as inconsistent with the antidumping law. The offset practice, however, developed as a Treasury Department response to the apparent inequity in making certain statutory deductions from exporter's sales price, but not allowing a similar adjustment to foreign market value. The offset provision was intended to reduce, if not eliminate, all artificially created dumping margins.

III. Foreign Market Value

The old scheme for determining foreign market value was modified by the 1979 Act. Under the priority scheme of the new legislation, the home market is the preferred benchmark. If, however, a value cannot be

49 See note 47 supra. One change made by the Trade Agreements Act of 1979 which, although not frequently applicable, could have significant impact in those cases where it does apply, is the clarification of the provision for adding to the U.S. price the amount of any countervailing duty imposed on the merchandise as the result of the bestowal of an export subsidy. Compare Tariff Act of 1930, supra note 2, at § 772(d)(1)(D) (codified at 19 U.S.C. § 1677a(d)(1)(D) (Supp. III 1979)), with 19 U.S.C. § 203 (repealed); see also S. REP. No. 249, supra note 6, at 94 reprinted in [1979] U.S. CODE CONG. & AD. NEWS at 480. This modification of the law removes any doubt that both an antidumping and a countervailing duty may be imposed on merchandise which benefits from a domestic subsidy and is sold at LTFV. The amount of an export subsidy is added to U.S. price, however, to avoid twice penalizing the same action.

50 See note 35 supra, and accompanying text.

51 Customs Service Regulations, 19 C.F.R. § 153.10(b) (1976) now codified in Commerce Department Regulations, 19 C.F.R. § 353.15(c) (1981). The amount of the offset adjustment permitted is limited to an amount equal to the selling expenses incurred by the related party of the foreign producer/exporter in the United States. In calculating the adjustment, first, the total expenses in the U.S. are divided into two categories: (1) directly related variable selling expenses and (2) fixed overhead type selling expenses. The expenses in the home market of the foreign producer are similarly divided. Then the directly related expenses in the two markets are compared and the foreign market value adjusted downward if such expenses are greater in the home market and upward if the expenses in the U.S. are greater. Id. The adjustment is the amount of the differential between the respective market expenses. Commerce Department Regulations, 19 C.F.R. § 353.15(a) (1981). The exporter's sale price offset which is subtracted from the foreign market value consists of the indirect expenses in the home market. The home market expenses considered in these calculations include only selling expenses—not general and administrative expenses unrelated to selling. The offset permitted is always the lesser of the total amount of the indirect selling expenses in the United States or in the home market.

52 This criticism stems from the fact that the exporter's sales price offset will result in the derivation of a foreign market value different from that which would be computed by using the same sale in a purchase price comparison. This is because adjustments to foreign market value for certain types of expenses are permitted as part of the exporter's sales price offset which are not allowable where the sales in the United States are purchase price transactions.

derived from the home market, the Commerce Department is free to use either an appropriate third country price or a constructed value.

A. Home Market Price

The "home" market is the domestic market of the exporter. The law requires a narrow view of "home market" even when the exporter is located in a country which is a member of a customs union. Thus, where a case is commenced against a producer located within the European Communities, the criteria for defining home market require that sales within the member state in which the producer is located be examined before proceeding to utilize the producer's sales to any third country, including other member states of the Communities.54

The adequacy of the home market for fair value comparison purposes must be determined at the outset of each investigation. Adequacy is generally judged by whether at least five percent of the units sold in all non-United States markets were sold in the home market.55 The standard is purely discretionary and is intended merely as a rule of thumb. What the provision does not point out is that a viable home market may exist where the five percent cutoff is not met, as for example where sales in both the home and U.S. markets are small but comparable to each other. The five percent cutoff is a rough guide, subordinate to the inquiries of whether the U.S. and home market sales quantities are comparable and whether the home market sales quantity can be considered sufficient in absolute terms. It should be noted that adequacy can be established by including in the home market sales transactions with related parties, so long as it is clearly shown that those transactions were arms' length transactions. A transaction is deemed to be prima facie arms' length when the price to the related party is not lower than the prices to unrelated parties. The term "price" in this regard is the price net of discounts and other reductions. This inclusion constitutes an exception to the normal practice of excluding transactions between related parties.

With one exception, once it is found that the home market is adequate for fair value comparison purposes, that determination will stand throughout the investigation. An otherwise adequate home market cannot be lost through the absence of sales in the home market at the same level of trade as that in the United States. Nor can it be lost through the lack of identical goods sold in the home market, as long as similar goods were sold for home consumption. An adequate home market can only be lost through operation of the provision on sales below cost of production.

55 See Portable Elec. Typewriters, 45 Fed. Reg. 18,416 (1980). Even though § 353.4 of the commerce regulations indicates that the benchmark is five percent of third country sales, the Commerce Department has indicated here that the five percent is actually computed by reference to all non-United States sales.
Where home market sales are made at prices below the cost of production, they must be disregarded. The remaining home market sales at or above cost may be inadequate to constitute a viable home market. In cases involving possible sales below cost, the issue of the adequacy of the home market can arise for decision twice, at the outset of the investigation and later after a determination that some home market sales are made below cost. Procedures for determining whether a viable home market exists after exclusion of sales below the cost to produce are the same as those utilized in the first instance.

While the rules governing the determination of adequacy of home market appear straightforward, the problems posed in actual practice are often more complex and trigger a number of pragmatic considerations. For instance, when the five percent cutoff is applied, “similar” merchandise is included along with identical merchandise. In a typical case there exists a significant gray area in the determination of whether merchandise sold in the home market is similar or dissimilar. Because fair value comparisons based upon merchandise as nearly identical as possible yield more accurate results, there is consequently a practical interest in avoiding comparisons between highly disparate goods. Where the only goods sold in the home market are significantly different from those sold to the United States, requiring substantial adjustments to achieve comparability of merchandise, a determination may be made that the home market goods are dissimilar. If such a determination is made, then there will not be an adequate home market. Since the “class or kind” of merchandise subject to investigation may be rather broad, it is not unusual for the class or kind to encompass several product categories within which “similar” goods exist and outside which dissimilar goods exist. Thus, a single investigation may involve several foreign market values determined on different bases. For example, one product category may involve the use of home market price, another the use of third country price, and yet another, constructed value.

A second pragmatic consideration is the level of trade. For example, if distribution networks of the exporter in his home market and in the United States are vastly different, but the U.S. distribution network and third country networks are similar, this factor will militate toward the use of third country price rather than the home market price. This factor is generally less important than merchandise comparability.

B. Adjustments to Foreign Market Value

1. Adjustments for Quantity Differences: Twenty Percent Value, Cost of Production Justification

Under Commerce Regulation section 353.14, a quantity discount granted by the exporter in a portion of its home market sales may be applied to the entirety of its sales in the home market, where necessary to
create a fair comparative analysis.\textsuperscript{56} Thus, a ten percent discount given on twenty percent of units sold may justify a ten percent adjustment to prices of the remaining eighty percent of units sold. The prerequisites to this adjustment are as follows:\textsuperscript{57}

1. the sales transaction quantity for which the discount is given in the home market must not be significantly larger than the quantities sold in transactions with U.S. buyers;
2. twenty percent of the home market merchandise sold must have received this discount; and
3. the discount must have been available during a six month period.

Clearly where the U.S. buyers are purchasing in much smaller quantities than home market buyers, no adjustment in favor of the exporter is called for under this provision. In fact, an adverse adjustment might be applied.\textsuperscript{58} This provision can provide a means of granting equitable relief where an exporter in a small country sells to a multitude of small volume home market buyers and a large volume distributor in the United States.

The operation of the quantity discount provision must be distinguished from the treatment of other discounts or rebates paid in connection with home market sales. Every actual reduction in net price is taken into account; e.g., a discount paid to a buyer is deducted from the gross price. Unless, however, the discount is a true quantity discount, meeting the requirements of section 353.14, it cannot be used to justify an across-the-board reduction of home market price. Where, for instance, loyalty discounts are given certain home market purchasers, the amount of the discount is deducted from the original price only with respect to those purchasers. The same is true of "turnover discounts" which cross product lines.\textsuperscript{59} Adjustments for differences in quantities purchased in individual transactions may also be made based on differences in the costs of production attributable to those different quantities. Adjustments based on cost of production savings are exceedingly rare, however. The burden of proof is on respondent to show the connecting link between individual transaction quantities and actual cost savings. This burden is rarely met.

2. Adjustments for Differences in Circumstances of Sale
   a. The Fixed v. Variable Cost Dichotomy: "Directly Related"

The circumstances of sale adjustment are grounded in a long history of precedent and policy but remain the subject of acute controversy. Since 1958, the Antidumping Act\textsuperscript{60} has specifically permitted adjust-

\textsuperscript{56} 19 C.F.R. § 353.14(a) (1981).
\textsuperscript{57} Id. § 353.14(b) (1981).
\textsuperscript{58} Such an adverse adjustment does not appear to have been applied in any determination thus far.
\textsuperscript{59} See Microwave Ovens from Japan, 45 Fed. Reg. 47,456 (1980).
\textsuperscript{60} Antidumping Act of 1921, ch. 14, § 202(b), 42 Stat. 11 (1921), as amended by Pub. L. No. 85-630 § 2, 72 Stat. 583 (1958), (repealed 1979). See Baier, Substantive Interpretations under the
ments for differences between the circumstances of sales in the United States and the fair value comparison market. Such adjustments were first established in the Antidumping Regulations published in 1955.\textsuperscript{61} Since 1960 the practice has been to define rather narrowly the catalog of expenses for which adjustments might be made. The parameters of the adjustment were defined to exclude pre-sale expenses, general overhead expenses such as rents, salaries and the like, research and development costs, and other expenses not directly connected with a particular sale. As originally formulated in 1960, the adjustment was based upon the selling expense’s direct link with one particular transaction or one specific contract of sale, whether as an express or implied term thereof. During the succeeding years, the Treasury Department, and later the Commerce Department, have used language in their regulations requiring that circumstances of sale, as a prerequisite to allowability, be “reasonably directly related”\textsuperscript{62} or “directly related”\textsuperscript{63} to the sale under consideration. While this language was clearly intended to limit the circumstances under which adjustments might be made, considerable ambiguity still exists as to whether an expenditure by the seller must be directly related to a particular sale or merely to sales of the class of merchandise under investigation.\textsuperscript{64} Consistent treatment of this issue has been an elusive goal in terms of whether expenditures must be related to a particular sale, the extent to which the burden of proof is to be borne by the exporter, and, where allocation has been permitted, the extent to which the expenditure must be related to the class or kind of merchandise under consideration and to the individual market to which the expense is intended to be ascribed. In addition to these problems there has been a tendency in some instances to confuse this category of expense with what might better be termed general or administrative expenses. This confusion has been particularly acute in applying the purchase price/exporter’s sales price dichotomy.

The purpose of the circumstances of sale adjustment is to ensure comparability by allowing adjustment for differences in selling expenses in the two markets. The underlying assumption is that the value of these goods and services are generally reflected in the price charged in the two referent markets. To the extent that levels of trade differ in the two markets, these deviations in levels of trade are thought to be reflected in the selling expenses in the two markets.

Commonly adjusted selling expenses under current practice include sales commissions, warranties, technical services, interest on accounts receivable, and “assumed” advertising. The following test questions illus-

\textsuperscript{61} 19 C.F.R. § 14.7(b)(1) (1955).
\textsuperscript{62} Id. § 14.7(b) (ii) (1964).
\textsuperscript{63} Id. § 153.10 (1976).
\textsuperscript{64} See, e.g., F.W. Myers & Co., Inc. v. United States, 72 Cust. Ct. 219 (1974).

trate some of the key factors considered in determining the appropriateness of the particular circumstance of sale adjustment:

1. Was the expense a fixed or a variable expense?
2. What was the market served by the expense?
3. What was the merchandise served by the expense?
4. Was the expense a pre-sale expense or one made necessary by a particular sale, i.e. can the expense be traced to a specific sale transaction?
5. Who was the beneficiary?

Generally a "fixed" expense is disallowed even though it meets other tests. An expense which benefits all markets equally cannot be the subject of an adjustment, whether the constituent expenses are fixed or variable. To receive an adjustment, the merchandise served by the expense clearly must be within the "class or kind" under investigation, but if a broader group of products is also benefitted, e.g. advertising some portion of the expense may still be allowed. In the case of certain adjustments, the expense must be traced to a particular sale or group of sales. In other cases, it is only necessary to trace the expense to all sales of the merchandise in a particular market. The identity of the beneficiary is critical because of the Department's refusal to allow claims for expenses involving intra-corporate payments.

Since 1977, the Treasury and Commerce Departments have disallowed claims for expenses for sales commissions paid to related corporate entities. Such payments are considered nothing more than a transfer of corporate funds. Sales commission payments to corporate employees, however, are considered expenditures from the corporate family treasury and are allowed as adjustments. The sales commission offsets represent one of the few instances under current practice where a fixed expense, e.g. salesmen's salaries, may be the subject of an adjustment. Because sales commission expenses are so clearly related to a particular sale, there is never any difficulty in determining whether the commission is related to the appropriate market and merchandise.

Warranties have been considered allowable adjustments for a number of years. Warranty expenses, including costs of repair or replacement, are allowed, even where warranty expenditures directly related to the specific sales transactions under examination have not yet been incurred. This is necessary as the investigatory period is normally so recent that defects in the products have not yet been discovered. The amount of the warranty expense is estimated on the basis of the historical experience of the respondent company. Proof of the market and merchandise involved in the expense is treated in a more conservative manner. The warrantor company carries the burden of proving that the

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66 19 C.F.R. § 353.15 (1981) allows these sales commission offsets. For instance, it allows the selling expense offsets allowed in the other market under consideration.
historic expenditures can be tied to the specific goods under investigation and that warranty experiences in the United States and home markets are accurately depicted. Where, for instance, significant warranty expenses are reported in the home market, and few or no comparable expenses are reported with respect to the U.S. market, the Department may reject the claim altogether, pending further explanation by the respondent and examination by verifiers of the absence of such an expense in the United States.

Unlike warranty claims, technical service claims and research and development activities rarely result in adjustments. Technical service claims involve technical advice and assistance to customers, such as the commitment to run tests concerning the application of the product. The "directly related" requirement in the context of technical service claims is interpreted to limit the adjustment to expenses that are variable in nature and that would not have been incurred but for the sale in question. Thus salaries of technicians cannot be the subject of an adjustment, whereas the travel expenses and materials used by those technicians can be. Because of this limitation, the actual amounts involved in these adjustments tend to be extremely small. Even variable expenses cannot be the subject of an adjustment when incurred in consequence of continuing research and development activities. Research and development activities are not directly related to a particular sale but are considered overhead expenditures in the opening of new markets for a product. Because of the similarity of technical services and research and development activities, the Commerce Department is extremely conservative in allowing these adjustments. When a company is unable to show that technical services are required by a written agreement or is an implied term of sale, amounts spent are considered attributable to the normal research and development activities of the firm in benefit of all markets equally.

It is a longstanding practice of the administering authorities to make adjustment for differences in credit expenses of the sales in the two referent markets, as they relate generally to interest on accounts receivable. Adjustment is not based on the specific payment terms in the contracts between seller and buyers, but rather on the credit experience in the two referent markets, i.e., the length of time in fact that payment is outstanding. The differential is normally multiplied by the actual interest rate experience during the appropriate time frame. The time during which payment is outstanding is computed from the date the merchandise is packed and ready for shipment or is actually sold, whichever occurs later, to the time payment is actually made. The Commerce Department is considering whether a limit should be imposed on the credit expense equal to the total interest expense experienced by the firm on short term

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debt during the period in question. Where the expense reported exceeds short term interest costs, it is clear that at least some portion of the potential adjustment is an imputed cost. Imputed or opportunity costs have never been included in cost of production cases nor in cases involving constructed value. In a number of such cases, inclusion of an opportunity cost has been specifically requested and denied.68

In 1979, the Treasury Department proposed a new regulation69 governing adjustments for differences in circumstances of sale that would have allowed adjustment for salesmen’s salaries, by far the most important fixed selling expense, and an expense which has been considered an impermissible basis for adjustment for at least twenty years. This remains under consideration by the Commerce Department. The proposed rule would accomplish a significant liberalization of the concept of circumstances of sale, although in practice changes might be rather conservative, depending on the Department’s application of concepts relating to burden of proof, validity of allocation schemes and the like. Adoption of this regulation would clearly compel allocation of additional resources in order to examine the costs and activities of U.S.-based subsidiaries of the exporters under investigation. At the current time, such subsidiaries are generally not scrutinized adequately except in cases involving exporter’s sales price.

3. Adjustment for Differences in the Level of Trade

Section 353.19 of the Regulations provides that fair value comparisons may be made at the same, or the nearest equivalent level of trade, and allows an adjustment for any differences in the levels of trade at which comparisons are made. Generally, the selection of the proper level for comparison purposes is itself the adjustment called for in the regulation.70 In selecting the proper level of trade for comparison, the Commerce Department is guided by the type of purchaser and the quantity bought by that purchaser.71 The name accorded a particular purchaser by a respondent, however, is not determinative of the issue and may, in

68 See Viscose Rayon Staple Fiber from Belgium, 43 Fed. Reg. 32,195 (1978) (Modification of Determination of Sales at Less Than Fair Value); Silicon Metal from Canada, 43 Fed. Reg. 57,371 (1978) allocation over various product lines. But see Countertop Microwave Ovens from Japan, 45 Fed. Reg. 47,456 (1980) (Preliminary determination of sales at less than fair value, suspension of liquidation and exclusions from suspension of liquidation): “... We have decided that an allowance should be made for direct advertising and promotional expenses by allocating total range advertising or promotional costs over total range sales. This decision is based on our opinion that the product category covering ranges is sufficiently close to the merchandise under investigation as to render any tighter standard of acceptability unreasonable and unrealistic.” 45 Fed. Reg. at 47,459.


70 See Hollow or Cored Ceramic Brick and Tile, not including Refactory or Heat Insulating Articles, from Can., 41 Fed. Reg. 18,542 (1976).

fact, be totally irrelevant. The Commerce Department will determine independently what type of purchaser is involved on the basis of the purchaser's function in the market or distribution network. The Commerce Department will also look at the quantities involved in the individual transactions. Through the related application of the level of trade and the quantity discount provisions, it appears that many, if not all, of the inequities wrought by differences in market size and structure may be remedied in making fair value comparisons.

If equivalent levels of trade do not exist, some other type of adjustment may be made. When, for example, virtually all sales in the home market are made to end-users, and most sales to the United States are made to distributors, some discounts may be available in the home market to end-users but not to distributors. In this case adjustment might be based on the denial of the discount adjustment.

It is important to note that the Commerce Department will be alert to double counting of adjustments under the quantity discount, level of trade, and circumstance of sale provisions. Once a level of trade adjustment has been made, the added costs cannot be the subject of a second adjustment under another provision. When numerous selling expenses were incurred in sales to buyers at a secondary level of trade, and adjustments are made under the circumstance of sale provision, then additional adjustment for level of trade differences will not be granted.

4. Adjustment for Differences in Similar Merchandise

When identical merchandise is sold in both the U.S. and the home markets, merchandise that is similar but not identical cannot be used in the comparison. This is a legal requirement that places "identical merchandise" first in the priority scheme by which the Commerce Department seeks to determine merchandise, level of trade, and transactional quantity comparability. A weighted average home market price which includes some identical and some merely similar merchandise is normally not used by the Commerce Department. Rather, the Commerce Department requires that respondents submit information on a transaction-by-transaction basis, grouping home market and U.S. transactions according to identical, or if necessary, the most comparable merchandise. Merchandise is considered identical whenever the difference is de minimis or inconsequential. The rules applicable to the term de minimis elsewhere in the antidumping area are applied here as well.

Whenever adequate sales of such or similar goods have occurred in the home market, only the home market may be used for fair value comparison. When there is not an adequate home market, the Commerce Department considers the sale of identical merchandise to be the para-

72 Id.
mount factor to be applied in seeking an appropriate third country market for comparisons.

When identical merchandise is not sold in the comparison market, the authorities will select the merchandise most similar to that sold in the United States. Commerce Regulation 353.16 provides in such a case for an adjustment for differences in the physical characteristics of the merchandise being compared. In most cases the value of the differences will be measured by the difference in the cost to produce, including material, fabrication, and direct factory overhead costs. In rare cases, market value of the difference may be used. In all cases the adjustment claim must set forth the precise physical differences in the merchandise that are the basis for the claim for an adjustment. When cost to produce is the method used to quantify the claim for adjustment, the respondent must show the differences in the cost that are directly attributable to the physical difference. Differences in the cost of producing identical merchandise cannot be the basis for an adjustment under this provision. Neither can adjustment be granted for cost differences resulting from the age or technological characteristics of the plant in which goods were produced, rather than the differences in the physical characteristics of the merchandise. This provision of the regulations was amended in 1980 to make it clear that adjustments are not permissible where an exporter produces goods for home consumption in plants which are less efficient than those used to produce goods for export to the United States unless

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74 The question whether merchandise is similar or dissimilar can be a frustrating one for the investigators, who are not product experts. The "class or kind" of merchandise definition which defines the scope of the fair value investigation may be, and generally is, broader than the product breadth intended by the definition of "such or similar" merchandise in the Tariff Act of 1930, supra note 2, at § 771(16) (codified at 19 U.S.C. § 1677(16) (Supp. III 1979)). For instance, in the case of Certain Elec. Motorcycles from Japan, 45 Fed. Reg. 73,723 (1980), the Treasury Department investigated motorcycles ranging from 90 to 1000 cc. Cycles were characterized by size into three categories: small, intermediate, and large. No cycle in any of the three categories was considered similar merchandise vis-a-vis a cycle in one of the other categories. But see the troublesome language in the case of Portable Elec. Typewriters from Japan, 45 Fed. Reg. 18,416 (1980): "Nakajima contended that the physical differences between U.S. model 7500 and home market model 8800R were so extensive as to preclude a finding of the two models as "such or similar." However, since both models under consideration are of the same class or kind produced by the same person in the same country of exportation, all the criteria laid down in § 771(16)(c) of the Tariff Act of 1930, supra note 2 (codified at 19 U.S.C. § 1677(16)(c) (Supp. III 1979)) are satisfied. Therefore, Nakajima's claim that the home market model 8800R is not "such or similar" merchandise is denied." 45 Fed. Reg. at 18,417.


77 See Portable Elec. Typewriters from Japan, 45 Fed. Reg. 53,853 (1980) (Determination of Duty). The Department of Commerce stated: "[S]ilver Seiko also claimed an adjustment based upon the costs associated with changeover of production lines between home market and export models. This claim is not based upon savings in production costs associated with economies of scale. The costs associated with changes in the production line are costs in the nature of general manufacturing overhead which should be allocated over total production. Since the merchandise being compared is substantially identical, this claim has been denied." Id. at 53,854.
the increased cost for the home market goods is directly attributable to a physical difference in the merchandise.\textsuperscript{78}

\textbf{C. Exclusion of Home Market Sales That Are Below the Cost of Production}

The 1974 amendments to the antidumping law introduced the concept of sales below the cost of production,\textsuperscript{79} providing generally that sales below cost made over an extended period of time, in substantial quantities, and at prices which will not permit recovery of all costs over a reasonable period of time will be disregarded. The remaining sales will be used to determine fair value if the referent market remains viable. The term "substantial quantities" has been the subject of decision in several cases. In cases involving nonperishable goods, a quantity less than three percent of the total merchandise sold in the home market during the investigatory period has been considered insubstantial.\textsuperscript{80} At the same time, ten percent of the home market sales has been considered substantial.\textsuperscript{81} In a case involving perishable merchandise, however, the dividing line was quite different, viz. approximately fifty percent of sales.\textsuperscript{82}

The issue of what is "an extended period of time" under this provision has also been the subject of several decisions. In most cases the six month period of investigation has been used for selection of the prices to be compared to cost, and an annual accounting period, encompassing the price period, has been selected for examination of cost itself.\textsuperscript{83} In one case, however, a three month period for review of prices was utilized.\textsuperscript{84} In a case involving carbon steel products the cost period was one year for variable costs and several years for fixed costs.\textsuperscript{85} In an investigation of stainless steel products, an extended cost investigation also was utilized,\textsuperscript{86} based upon the business cycle concept. The interpretation of this provision will undoubtedly be the subject of discussion in future cases in which its application hopefully will be clarified.

\textsuperscript{78} Id.
\textsuperscript{80} Pressure Sensitive Plastic Tape from Italy, 42 Fed. Reg. 27,705 (1977).
\textsuperscript{81} Id.
\textsuperscript{82} Certain Winter Vegetables from Mex. (I.T.C. and Dept. of Commerce Final Determination of sales at not less than fair value), 45 Fed. Reg. 20,512 (1980), it was stated that: In the fresh winter vegetable market, in contrast to markets for industrial products or for agricultural products with longer "shelf life," a relatively high level of sales below cost is normal and to be expected.\ldots{} In this case, it would be appropriate to disregard below-cost Canadian sales only if such sales constituted 50\% or more of a grower's total sales to Canada of the type of produce under consideration. \textit{Id.} at 20,515.
\textsuperscript{83} See Knitting Machs. for Ladies' Seamless Hosiery from Italy. 41 Fed. Reg. 52,726 (1976).
\textsuperscript{84} Birch 3 Ply Doorskins from Japan, 40 Fed. Reg. 48,383 (1975).
\textsuperscript{85} Carbon Steel Plate from Japan, 43 Fed. Reg. 12,780 (1978).
The 1979 legislation amended the foreign market value provision to enable the Commerce Department to use constructed value as the foreign market value whenever it finds that, after exclusion of sales below cost, an adequate home market does not exist. This frees the Department from having to examine sales in every third country to which respondent sells the class or kind of merchandise involved, as was necessary under the old law. The old requirement had been a formidable obstacle to meeting statutory deadlines in cases where home market sales below cost negated the use of the home market.

1. The Definition of Fully Loaded Cost To Produce

The statute defines the cost to produce as including "all" costs. This has been consistently interpreted to mean the fully loaded costs (both fixed and variable) of both the costs of manufacture and of distribution of the merchandise under investigation. A reasonable allocation of parent or affiliated corporate costs is also necessary to achieve the fully loaded cost of production of the merchandise.

2. The Definition of a Cost to Produce the Class of Merchandise

There remains controversy as to which merchandise should be used in determining the cost of production. It is clear that the cost of production is to be compared to the home market prices. It is less clear whether the home market prices must be compared to the cost of producing the specific merchandise sold in the home market or compared to the entire class of merchandise under investigation. While the problem is infrequently encountered, a firm in a highly capitalized industry in a state of constant transition may employ a technologically obsolete, high cost facility for sales to one market and a newer, more efficient facility for sales to a different market, or some mixture of the two for sales in each market. In this situation, the Department must determine whether the Act requires that cost of production be determined by using average costs of several facilities, by tracing sales back to the facilities in which the home market goods were produced and calculating the cost based upon those facilities, or by relying on a weighted average cost using the mix of destinations. The better view is the weighted average cost approach since it is consistent with the Department's rule on adjustments for differences in merchandise and will avoid anomalous interpretations of the Act. Otherwise, home market goods produced in a highly inefficient facility might be found to be priced at less than the "cost to produce," requiring the use of a constructed value computed on the basis of a different, and more efficient facility designated for export goods. This method could

87 Tariff Act of 1930, supra note 2, at § 773b (codified at 19 U.S.C. § 1677(b) (Supp. III 1979)).
88 Id. at § 773 (codified at 19 U.S.C. § 1677b(e) (Supp. III 1979)).
89 See note 92 supra.
result in a constructed value that is lower than the home market price that had been deemed to be "too low" to be utilized for fair value purposes. Attempting to trace merchandise to a particular production facility is clearly difficult in practice, requiring a review of factory order documentation and invoices. It is also at odds with the notion embodied in section 353.16 of the regulations that price adjustments for differences in merchandise cannot be based merely on differences in cost of productions in different facilities.

3. The Role of Generally Accepted Accounting Principles in Defining Costs

Generally accepted accounting principles (GAAP) in the country of manufacture may be employed by the Department to determine a foreign producer's cost of production, so long as the Secretary is satisfied that the application of these principles reasonably reflects costs. The GAAP referred to is that utilized in the preparation of financial statements. Respondent's calculation of its cost to produce the merchandise subject to investigation must follow from the accounting principles and logic in the financial and profit and loss statements. Beyond this, the legislative history gives little guidance.

4. The Treatment of "Extraordinary" Costs

The issue of whether extraordinary costs are properly includable in the cost of production under the Act remains undecided. Costs of this type include costs of shutdown and start-up, disruptions caused by weather conditions, acts of terrorism, explosion, strikes, and normal operating costs during a period when no goods are being produced. It is quite possible that the Commerce Department will treat these costs differently. A company under investigation may categorize costs of this nature specifically as "extraordinary costs." It is possible that a failure to categorize a cost as extraordinary might automatically cause its inclusion in the cost of production, although so categorizing the cost element might not insure its exclusion. Since it is permissible to exclude many such costs from cost of production under U.S. accounting principles, it is

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90 XYZ Corporation produces the same widgets in two facilities, #1 producing for home consumption and having a cost of production of $400 and #2 producing for export and having a cost of production of $300, and equal numbers of widgets are produced in each facility. Home market sales occur at the uniform price of $350. Is the fair value $350 or $324 (cost of production + 8 percent statutory profit minimum)? Under the first view, fair value is the home market price, or $350. Under the second view, fair value is $324, because home market prices were below the cost of production of $400 and must be disregarded.

91 19 C.F.R. § 353.16 (1981); see note 77 supra.

92 H.R. REP. No. 571, 93d Cong., 1st Sess. 67, 71 (1973): Additionally, in determining whether merchandise has been sold at less than cost, the Secretary will employ accounting principles generally accepted in the home market of the country of exportation if he is satisfied that such principles reasonably reflect the variable and fixed costs of producing the merchandise; see Viscose Rayon Staple Fiber from Belgium, 43 Fed. Reg. 32,915 (1978).
likely that a respondent's exclusion of costs of this nature would be accepted by the Commerce Department.

5. **The Normalization of Costs over a Business Cycle**

The first reference to a "business cycle" occurred in a case where the Treasury Department computed the cost of production of carbon steel plate based upon several years' average utilization rate to take account of the cyclical nature of the steel industry. If the concept is adopted by the Commerce Department there will likely be a lively discussion about its application in specific situations. For instance, should it be applied only to capital intensive industries? How broadly should the industry be defined for purposes of determining a capacity utilization rate? Should the cycle be identified on a world, multi-country, or single country basis? How should the cycle be measured, e.g., peak-to-peak or trough-to-trough?

6. **The Treatment of "Related Company" Costs**

Whenever, in an investigation of the cost of production, it appears that a component was supplied by a company related to the producer, the transfer price cannot be considered acceptable as a measure of the value of that element without further examination. In determining the cost of production, related companies may be treated as a single entity, whether the issue is one of transfer pricing of components or of failure of the parent company to fully allocate the corporate burden of general and administrative costs to its production subsidiaries. There is no question of "imputing" costs of production. Rather the Department may insist that the actual costs of production be fully allocated to the corporate family members.

When intracorporate transfer pricing occurs in a cost of production case, the question arises whether market value or cost of production of the component should be used in lieu of transfer price. The transfer price will not always be lower than either cost or market value. The question arises because of the analogous constructed value provision, section 773(e)(2), and the Department's objective of making the applica-

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94 The question whether two apparently related entities will be treated as related companies for this purpose is not solely dependent upon proportion of common stock ownership or other factors such as enumerated in § 773 of the Act. Even where 50% ownership is involved, the Department may, taking into account factors such as the presence or absence of common marketing aims, sharing of production facilities, joint research and development, common pricing and discount structures for the sale of similar goods, commonality of purpose, and independence of management decisionmaking, determine that two entities are not related for this purpose. Even where there is no common stock ownership, two parties may be considered related based upon one or more of these factors.
96 The pertinent language of § 773(c)(2) states that: "... a transaction ... between
tion of the constructed value and cost of production provisions as consistent as possible. Section 773(e)(2) may be read as requiring the substitution of market value for transfer price in any case, even when market value is lower than actual cost of production. On the other hand, the provision could be read to give the Department discretion to increase or reduce transfer price to a level equal to cost without profit on the ground that profit is not an "element of value" between related companies. This view would be consistent with treatment of intracorporate profit transfers in other areas, e.g., selling commissions. If this view is adopted, then the Department has two options. If the cost of producing the component element is also under investigation, then the cost of production of the component is ascertained and used in place of the transfer price, whether the price is higher or lower than cost. If the cost of producing the component is not under investigation and would be difficult to ascertain within statutory time limits, then the market value of the component might be used in place of the transfer price as the best evidence of the "elements of value" in the component. Market value might be determined by reference to the price of the component from unrelated companies to the producer under investigation, or by reference to the price paid by other companies under investigation in the same or a companion case. The first view discussed above, which would require differing treatment for divisions of one company than for wholly-owned subsidiaries, is subject to criticism for according related firms the disadvantages but not the benefits of that corporate structure. Accounting theory may require the use of a market value test ab initio but would allow the intracorporate "profits" to serve as an offset to the statutorily required addition for profit in constructed value cases. In cases involving cost of production under section 773(b), profit is not intended to be included. To the extent that it is included, the delineation between cost of production and constructed value may be blurred, if not eliminated.

7. The Theory of Opportunity Cost

An opportunity cost is the cost of foregoing financial benefits which could have been earned if internally generated corporate funds had not been devoted to some element of the cost of production of the merchandise under investigation. Whenever, for instance, a company uses its earnings to finance new plant and equipment, the company will avoid interest expenses it would have incurred had it borrowed funds to finance plant and equipment, and it has also foregone income it might have earned from investing its earnings in some other venture. No opportunity cost is added to the cost of production of a firm utilizing internally persons . . . may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of the merchandise under consideration."

generated funds. This may, and often does, result in a finding of a lower cost to produce by a firm which is not as highly leveraged as its competitors. At one point it was suggested that only short term capital costs should be included in the cost of production to avoid preferences in treatment of companies, such as those in Japan, which may finance through debt rather than equity.\footnote{98}

While the economic theory of the cost of capital may be valid, the opportunity cost approach would result in virtually identical treatment of the cost of production and constructed value provisions since profits would be treated as costs. Such a result is inconsistent with the legislative intent. The attribution of current market value to inputs utilized in the production process, and the implicit rejection of the producer's accounting methodology for valuation of inventory, also appears to place companies on an artificially equivalent footing. This too appears to be in conflict with the legislative intent.\footnote{99} The only current deviation in practice from the principle that all costs are to be included in the cost of production but that no costs are to be imputed to the cost of production is the treatment of credit terms in the context of making circumstance of sale adjustments to price. There the practice for many years has been to make an adjustment for different credit costs. Where the short term debt of the company is less than the amount claimed for adjustment in this context, it is clear that an opportunity cost has been imputed.

It has been urged on several occasions that the Department impute to the cost of production any bounties or grants received from the producer's government. The administering authority has refused to do this. Where a producer receives an outright grant or other bounty from its government, the amount of the benefit is not included as a cost to the producer. This is correlative to the principle that costs will not be imputed and is entirely consistent with practice in analogous areas, with the exception of credit adjustments noted above. Only actual costs of the producer, as reflected in its financial statements and traced down to its accounts, is included in its costs of production.

\section*{D. Constructed Value as a Measure of Fair Value}

The 1979 legislation eliminates the old priority scheme for the use of home market price, third country price, and constructed value, leaving the Commerce Department free to decide whether to use third country price or constructed value where the home market is inadequate. The regulations express a preference for the use of third country price over constructed value, except where home market sales have been investigated and found to be below the cost of production.\footnote{100} For a number of years, the rarely-invoked constructed value provision was applied with-

\footnote{98} This notion surfaced in the consideration of an earlier case, see note 93 supra.  
\footnote{99} See the discussion of constructed value in text accompanying notes 100-101 infra.  
\footnote{100} 19 C.F.R. §§ 353.4(b), .7b (1981).
out in-depth consideration of the meaning of its terms. However, the increasing application of the constructed value provision has lead the Commerce Department to a new awareness of the issues lurking there.

To obtain a constructed value, the Commerce Department must determine whether cost is computed based upon all facilities or only those producing for the U.S. market. Another important issue is the determination of the appropriate time period for computing costs. During the long history of application of the constructed value provision, the Treasury and Commerce Departments have normally collected cost data for an annual period, generally the accounting period of the company under investigation. This practice continues, but questions have been raised concerning the propriety of the standard, particularly as it applies to input costs. Dicta in the F.W. Myers case seem to suggest that costs of this type should be pegged to a specific, and extremely short, period of time immediately preceding the production and exportation of the goods in question, even if such an inquiry would require rejecting the producer's actual costs in favor of a market value approach. This decision, however, has been construed by the Commerce Department as limited to the facts of the case. Although the matter is not entirely clear, it is unlikely that the Commerce Department will seek a market value of materials at the time immediately prior to the manufacture of the goods. Rather, the Department will probably utilize the real cost to the producer under investigation, unless there is cogent evidence that the producer's cost suffers some inadequacy. Whether the Commerce Department will seek to divide a company's accounting period into quarters or in some other way for purposes of determining costs, is also unclear.

The Commerce Department's application of the constructed value as it relates to general expenses and profits is also an open issue. A recent decision indicates that the Department will use profits and expenses drawn from sales to the United States rather than the average expenses and profits applicable to all the producer's markets. This decision is being reexamined, and it is unlikely that the Commerce Department will continue to follow it. Using profits on U.S. sales to determine the profit element of constructed value is a tautology, since it is the U.S. market which is under examination for the existence of dumping. General expenses and profits should be based upon experiences in a market other than the United States, with appropriate adjustments for differences in circumstances of sale in the United States.

103 Somewhat less latitude is generally accorded the authorities in the assessment phase, but an acceptance of GAAP to define costs should negate any distinction between the Fair Value and assessment phases of proceedings.
104 The term "general expenses" includes general, administrative, and selling expenses.
Two approaches are being considered. The first would utilize a profit figure from the home market sales of the producer under investigation, and if none existed, the profit figure of members of the same industry from their home market sales, and if none existed, the profit figure from the third country sales of the producer under investigation. The second approach relies on the experience of the individual producer, first in its home market and then, if necessary, its third country market(s).

The second approach appears the sounder one. In 1974, the Antidumping Act was revised to require that sales of the individual producer under investigation, rather than sales of the industry as a whole, be utilized to determine foreign market value. In amending the law, the Finance Committee offered these salient comments:

Subsection (e) of section 321 of the Committee bill would amend the Antidumping Act to provide that companies will be deemed to have sold merchandise to the United States at less than its foreign market value only if their sales to the United States are at prices lower than their own prices in the home market or, as appropriate, to third countries. If no sales, or an insignificant number of sales, are made by the company in both the home market and to third countries, comparison would be made with the constructed value of the merchandise produced by the company in question. Under present law, the Treasury Department is required to resort, for comparison purposes, to sales made by a different company in the home market if the company in question makes no sales, or an insignificant number of sales of such or similar merchandise in the home market. This produces occasional inequities by subjecting companies to dumping findings when their prices to the U.S. are not lower than their prices in all other markets in which they sell and further, by rendering them liable to the imposition of dumping duties on the basis of prices which they cannot control and may not even know about. The reverse can also be true and companies may escape liability for dumping duties when—although their prices to third countries, if used as a basis for comparison, would show dumping margins. The amendment will remedy this situation and allow the practices of each producer to stand on their own.

(Emphasis added)

The issue of whether to use profit figures of members of the same industry or rely solely on the profit experience of the individual producer under investigation is clearly analogous to that addressed in the 1974 revision, i.e., is the presence or absence of dumping to be determined by reference to other producers’ experiences? It is incongruous to suppose such an interpretation would be intended, particularly since profits can only be calculated as a function of costs and revenues, either of the producer under investigation or of another producer. The use of other producers’ profits in preference to the third country profits of the producer under investigation would achieve the very result which the legisla-

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ture sought to avoid; the consequence would be to remove from the effective control of the producer the ability to avoid dumping of his merchandise in the United States market.

IV. Transparency of Procedures: Access to Information

Because of the potentially grave impact of each step of the proceeding on the parties, the Trade Agreements Act provides for both "transparency" of procedures and immediate access to judicial review. In order to afford a full opportunity for participation to interested parties, the Commerce Department is required, upon request, to hold hearings. The Commerce Department must also accept comments on its final LTFV determination, during an annual review, before an investigation may be suspended and when an order is revoked.

The Trade Agreements Act also provides parties with greater access to both nonconfidential and confidential information submitted by other parties participating in the investigation. Under section 777 of the Act, the ITC or the Commerce Department must now, upon request, inform the parties of the progress of the investigation. Summaries of all ex parte meetings between any person providing factual information in connection with an investigation and the decision-maker (or the individual charged with making the final recommendation to that person) must also be placed in the official record. Moreover, all nonconfidential information submitted by interested parties must be served by the submittor on all other parties to the proceeding. This information is also available to the public.

More importantly, however, parties now may obtain access to confidential information submitted by other parties to the proceeding. Any confidential information that does not identify or that cannot be used to identify the operations of a specific person may be disclosed. Disclosure under this provision is unlikely in all but the most innocuous situations, however, because it is difficult to ascertain exactly what type of

110 Tariff Act of 1930, supra note 2, at § 774 (codified at 19 U.S.C. § 1677c (Supp. III 1979)).
111 Id. § 751(d) (codified at 19 U.S.C. § 1675(d) (Supp. III 1979)).
112 Id. § 734(e) (codified at 19 U.S.C. § 1673c(e) (Supp. III 1979)).
113 19 C.F.R. § 353.54(e) (1981).
115 Tariff Act of 1930, supra note 2, at § 777 (codified at 19 U.S.C. 1677f(a) (Supp. III 1979)).
information will enable a party to identify the operations of its competitors. Therefore, it is the second avenue for the release of such information, administrative protective orders, which is likely to result in disclosure and which, as a result, has stirred considerable controversy.

A. Administrative Protective Orders

The new protective order procedures contained in section 777(c) of the Act provide for the release, upon request, of confidential information submitted by a party to the investigation. While the decision to release such information is completely within the discretion of the administering authority, if disclosure is denied a party may seek a court order directing the disclosure of the data. The only explicit condition which the statute imposes upon the discretion of the Department and the ITC in releasing confidential data is that all requests for disclosure describe with particularity the information sought and the reasons for the desired release. Both the Commerce Department and the ITC have issued regulations, however, that make the procedures for release more definitive and establish sanctions for the violation of a protective order.

Both ITC and Commerce Department regulations provide that the party submitting the information must be notified upon receipt of a request for disclosure. Upon notification of the disclosure request the submitting party is then given an opportunity to comment upon the appropriateness of the release of the confidential materials. Moreover, if the Commerce Department ultimately decides to grant the request, the submitting party has the opportunity to withdraw the materials rather than have them released. The withdrawal of the information will, however, result in a refusal to consider it for purposes of the proceeding.

There has been, however, much uncertainty as to how the vague standards governing the adequacy of a particular request will be interpreted. For example, it has not yet been determined who will bear the burden of persuasion regarding the appropriateness of release. The con-

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120 Id. § 777c (codified at 19 U.S.C. § 1677f(c) (Supp. III 1979)).
121 Id.
122 Id. § 777c(2) (codified at 19 U.S.C. § 1677f(c)(2) (Supp. III 1979)).
123 Id. § 777(c)(1)(A) (codified at 19 U.S.C. § 1677f(c)(1)(A) (Supp. III 1979)).
127 Id.
128 Id. § 353.30(a)(4).
129 Id.
130 The first protective order requests by the domestic steel industry in the carbon steel investigation were received by the Department of Commerce in mid-June 1980. See Carbon Rolled Sheet from Belgium, 45 Fed. Reg. 26,109, 26,114 (1980). When the investigations were
Confidential business nature of the information submitted by foreign parties, the foreign party's extreme sensitivity to release of such information, and the Commerce Department's dependence on such information for an effective and equitable administration of the law represent persuasive arguments for imposing the initial burden of proof upon the party seeking access.131 This approach is particularly appropriate inasmuch as the submitting party presumably has already demonstrated to the Department that the information warrants confidential treatment.132 Recently, however, the Commerce Department has begun to more routinely grant release of documents under protective orders. This practice is largely the result of the lessening of resistance by submitting parties to the release of information as confidence has grown in the ability of the Department to safeguard the information within the protective order mechanism. This movement toward more frequent release is at least in part a realization of the importance such information has for a party desiring to fully participate in a proceeding and a reflection of the court's routine grant of access to such matters under protective order in the context of litigation. In fact, the legislative reports emphasize the importance of access to information and make clear that the issuance of protective orders was not to be severely limited when release of the information was unlikely to endanger its confidentiality.133 Furthermore, in order to assure reasonable access to information, where appropriate, the Act provides for judicial review of the denial of a request.134 Quite significantly, no separate cause of action was created for a party contesting the release of information.

In addition to determining the appropriateness of a particular request, the administering authorities must determine which parties are to be privy to information released under a protective order. Because the petitioner and respondents are so intimately involved in the investigation it is appropriate to make access more readily available to them than it is to other interested parties who later become a party to the proceeding.135 A party to the proceeding, who is neither a petitioner nor a respondent,

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131 Unfortunately, protective order requests generally have constituted little more than cursory statements that the release of information regarding prices, cost of production, and other competitive type information is necessary to enable the domestic party to assure the accuracy of the submitted information and of the Department's calculations. Such requests provide little basis for distinguishing between a legitimate need for access and what is essentially a fishing expedition.


133 See H.R. REP. No. 317, supra note 54, at 77.

134 Tariff Act of 1930, supra note 2, at § 777(c)(2) (codified at 19 U.S.C. § 1677f(c)(2) (Supp. III 1979)).

135 An interested party may become a party to the proceeding merely by filing with the Department the requisite statement of intent. 19 C.F.R. § 353.12(f) (1981). The petitioner and the foreign manufacturers, producers, and exporters are automatically parties to the proceeding. Id.
should be required to demonstrate at least some significant involvement in the investigation before being given access equivalent to that granted to the principal parties in the investigation. Adopting such a position, however, may undercut the rights conferred on such parties by the Act. Inasmuch as the Act permits all parties to the investigation to contest administrative determinations, and to intervene in any litigation arising out of such determinations, a denial of all access to information relevant to the administrative determinations would be unreasonable. To release confidential information to all parties to the proceeding automatically, however, raises so many other potential problems regarding the ability to protect the confidentiality of the information and the possible antitrust implications of shared market and price data that the Department has been properly reluctant in expanding such access. 136

Subsection 777(c)(2) empowers the Court of International Trade to review an administrative denial of a request for release of information under a protective order and further empowers the court to disclose such portions of the confidential information as it deems proper. 137 This provision, like section 777(c)(1), was intended to assure parties challenging administrative determinations access to information necessary to fully participate in the administrative proceedings. Such participation is particularly necessary in light of the standard of judicial review now applicable to "final" determinations by the administering agencies. 138 The legislative history indicates that the court should balance the need for access with the interest in confidentiality in determining whether to grant the release of such information under a protective order. 139 Section 2631(j)(1)(c) of the Customs Courts Act of 1980 assures the representation of all parties in a section 772(c)(2) action by providing the right to intervene to a party which having supplied information would be adversely affected by its release. 140

Because only a limited number of actions have to date been brought before the court under section 777(c)(2), it is difficult to predict whether a predisposition toward release exists. In challenges of administrative ac-

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136 See LEGAL TIMES, Nov. 3, 1980, p. 12, col. 1. Disclosure of confidential information submitted by one manufacturer or exporter will not be released to another company which produces comparable merchandise in the same country.

137 Customs Courts Act of 1980, Pub. L. No. 96-417, § 301, 94 Stat. 1727 (codified at 28 U.S.C.A. § 2643(c)(3) (West Supp. 1981)) reemphasizes the limitation, first stated in § 777(c)(2) of the Tariff Act of 1930, supra note 2, on court ordered release of information supplied by the petitioner to the ITC. The court is precluded, in an action brought under § 777(c)(2) against the Commission from releasing anything other than domestic price and cost of production information.


139 Id.

140 Section 301 of the Customs Courts Act, supra note 137, amended Chapter 169 of 28 U.S.C. An action contesting the administrative denial of a protective order request is barred unless filed with the court within ten days of the denial, 19 U.S.C.A. § 2636(g) (West Supp. 1981).
tions, however, the court has frequently granted discovery of confidential business information generally by fashioning an appropriate protective order.141

V. Judicial Review

A. Expansion of Judicial Review under Title X of the Trade Agreements Act

Although section 777(c)(2) of the Tariff Act of 1930 provides for the judicial review of administrative denials of protective order requests, the judicial review provisions of the Trade Agreements Act are primarily contained in Title X.142 These provisions substantially changed the judicial review procedures governing antidumping proceedings. Title X not only expanded the class of individuals with standing,143 but also enlarged the number of administrative actions subject to judicial review144 and clarified the scope of the Customs Court's145 review powers.146 These changes reflect the efforts of Congress to expedite the resolution of issues to assure the greatest protection possible to parties involved in an investigation.147

Title X not only expanded access to judicial review, but also made that access more immediate. The number of parties now possessing access to the Court of International Trade was increased to include U.S. unions or groups of workers representative of an industry producing merchandise like that under investigation; trade associations, a majority of whose members manufacture, produce, or wholesale a like product in the United States; and any foreign manufacturer or exporter of such or similar merchandise.148 Section 516A of the Act does require, however, that a party must have an interest in the investigation in order to bring an action. Thus, only those interested parties designated in section 771(9) of the Tariff Act of 1930 which have become a party to the proceeding may bring an action.149

Title X similarly expands the scope of judicial review of actions of

145 The United States Customs Court was renamed the United States Court of International Trade. 28 U.S.C.A. § 251 (West Supp. 1981).
the Department and the ITC.150 All postdecisional administrative review has been eliminated so as to enable parties with standing to proceed directly to court. Section 516A of the Tariff Act now provides two standards of judicial review.151 For those administrative actions or decisions of a preliminary nature (viz., a determination not to initiate an investigation, a changed circumstances review, a determination that a case is extraordinarily complicated or a negative preliminary determination by either the Department or the ITC) judicial review is based on whether the decision is arbitrary, capricious, abusive of discretion, or otherwise not in accordance with the law.152 Access to judicial review for such determinations is intended to provide the opportunity for quick relief to adversely affected parties during the course of an investigation. Such litigation is, however, essentially "interlocutory" and may disrupt an investigation even though the investigation technically continues.153 Consequently, the summons and complaint must be filed simultaneously within thirty days after notice of the administrative decision has been published in the Federal Register.154 Where a negative LTFV determination or a decision that an investigation is extraordinarily complicated is challenged, the summons and complaint must be filed within ten days of the official determination.155

Final injury and less than fair value determinations, as well as determinations to suspend an investigation and section 751 annual review determinations are reviewable on the basis of the record under the substantial evidence test.156 The record explicitly includes, unless otherwise stipulated by the parties, a copy of all information presented to or obtained by the Department or the ITC during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of all ex parte meetings required under the Act.157 A copy of the determination, all transcripts or records of confer-

150 Id.
151 Tariff Act of 1930, supra note 16, at § 516A(b) (codified at 19 U.S.C. § 1516a(b) (Supp. III 1979)).
152 Id. § 516A(b)(1)(A) (codified at 19 U.S.C. § 1516a(b)(1)(A) (Supp. III 1979)).
153 Such litigation is necessarily disruptive because it can place severe demands upon those persons responsible for the conduct of the investigation—an investigation which normally will not be stayed during the pendency of the litigation. See generally H.R. REP. No. 1235, 96th Cong., 2d Sess. 41, 61 (1980) [hereinafter cited as H.R. REP. No. 1235]. A challenge to a "preliminary" administrative action such as a preliminary determination of no sales at LTFV will have a major impact on the investigation because an adverse court ruling, in effect, will require the Department to reanalyze all determinations made subsequently in the proceeding. See Barriinger & Dunn, Antidumping and Countervailing Duties Investigations Under the Trade Agreements Act of 1979, 14 J. Int'l L. & Econ. 1, 34 (1979).
155 Customs Courts Act, supra note 137, at § 608.
156 Tariff Act of 1930, supra note 16, at § 516A(b)(1)(B) (codified at 19 U.S.C. § 1516a(b)(1)(B) (Supp. III 1979)). "Preliminary" determinations are also reviewable on the record but are subject to a different standard of review.
ences or hearings, and all notices published in the Federal Register must also be included in the record transferred to the court.158

Moreover, the legislative history of section 516A(a)(1) states that review of preliminary determinations will be “upon the basis of information before the relevant decision-maker at the time the decision was rendered including any information that has been compiled as part of the formal record.”159 The language of the Senate Report clearly precludes the possibility of trial de novo.160 Prior to the enactment of the Trade Agreements Act, the scope of judicial review was in controversy.161 Indeed, a number of countervailing duty determinations (previously contested under section 516 prior to 1980) were reviewed by the Customs Court on the basis of de novo review.162

The explicit elimination of de novo review for all matters arising under section 516A rectifies a problem which had long beset the administration of the antidumping law.163 The absence of an opportunity for parties to retry their cases before the court, complete with arguments and evidence which may never have been presented to the administering authority previously, should result in a more comprehensive presentation of positions at the administrative level. Now, parties who are not forthcoming with information at that time will not have another opportunity to present that information.164 Because those parties who are unwilling to provide information or who submit inadequate data during the investigation will be precluded from introducing new evidence at trial,165 the use by the administering agencies of the best available evidence166 during the course of an investigation will be much more meaningful.

B. Extension of Equitable Remedies

Title X also broadened the powers available to the Customs Court to include equitable remedies in limited circumstances. The Customs Courts Act of 1980 clarified the extent of the equitable powers available

163 Under §§ 514 and 515, an importer had three separate opportunities to present information: (1) during the investigation; (2) as part of the protest procedure, and; (3) in court. See H.R. REP. NO. 317, supra note 54, at 181. The opportunity to submit new information at each successive stage made the initial proceedings less meaningful.
166 Tariff Act of 1930, supra note 2, at § 776(b) (codified at 19 U.S.C. § 1677e(b) (Supp. III 1979)). If the manufacturer or exporter under investigation fails to provide information adequate to enable the Secretary to make a fair value determination, the Department may use the “best available information” in making such determination.
to the Court of International Trade. The court is no longer confined to reversing or affirming an administrative action, but now possesses equitable powers co-extensive with those of the federal district courts. Subsection 516A(e) explicitly instructs that, unless enjoined, entries covered by a determination challenged under section 516A shall be liquidated consistent with the administrative determination if such entries are made before notice of a relevant court decision sustaining a challenge to the agency determination has been published in the Federal Register. Subsection 516A(c)(2), the exception to the general rule, provides for enjoining the liquidation of entries where a party challenges an administrative action identified in section 516(a)(2). As a practical matter, however, injunctive relief will be granted only in extraordinary circumstances.

Given the respective positions of the foreign and domestic parties and the fact that the importing party must pay duties assessed in accordance with an administrative action, it is likely that a foreign party or an importer will be better situated to satisfy the criteria necessary for the issuance of an injunction. The Department has, in fact, implicitly adopted the position that liquidation should normally only be enjoined when it is necessary to preclude the assessment of what a foreign party or an importer contends is an excessive duty. Thus, with regard to countervailing duties the Department has chosen not to contest an importer’s request for an injunction of liquidation pending judicial review of the countervailing duty order. In contrast, the Department vigorously opposed a domestic producer’s request for an injunction in litigation challenging a section 736 determination involving typewriters from Japan. This position was premised on the principle that the domestic industry is not irreparably harmed if liquidation is not enjoined because the merchandise subject to liquidation had already been entered and those sales irretrievably lost by the domestic producer. The stance adopted by

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168 Id.
169 In the case of annual reviews conducted pursuant to § 751, where the amount of duties for merchandise already entered is determined, domestic parties would be able to challenge the proposed assessment of entries made during the preceding 12 to 18 months. 19 U.S.C. § 1516a(e), relating to the liquidation of entries in accordance with the final decision of the court, was virtually unchanged by the Customs Courts Act.
171 S. REP. NO. 249, supra note 6, at 253.
173 Smith Corona Group v. United States, No. 80-9-01343 (Cust. Ct. 1980) (Response of the United States, defendant, to plaintiffs’ application for injunctive and incidental relief and to cross-motion to dismiss action for lack of jurisdiction).
174 Id. at 34-38.
the Department is unlikely to be any different with respect to an injunction sought by a domestic party in other situations.

Thus, for example, unless a domestic party can demonstrate that the difference between the estimated duty or duty rate set by the Department under either section 736 or section 751 and the higher rate alleged by the party to be correct is substantial, the complainant would be unable to demonstrate the likelihood of irreparable injury. A small difference in rates is not likely to have a major impact on purchasing decisions particularly if the foreign producer is still undercutting the domestic price after an adjustment is made to the United States price to reflect the amount of the applicable antidumping duties. The domestic industry is protected in such circumstances, moreover, by section 778 which requires the payment of an additional duty if the rate initially established is determined in an annual review to have been inadequate. Interest will be charged on the difference between the estimated duty deposited and the amount of duty ultimately determined to be owed. To grant equitable relief every time a domestic party desired to challenge the amount of the applicable estimated duties would contravene the express congressional intent that injunctive relief be confined to egregious circumstances.

This is not to say that equitable relief might not be appropriate in other circumstances. Where a domestic party contests the termination of an investigation on the basis of a final determination of no sales at less than fair value, for example, it might be appropriate for the court to order the reinstatement of any suspension of liquidation earlier issued in the proceeding if the party has demonstrated a likelihood to prevail on the merits. The relief, of course, could be structured so as not to unfairly prejudice the interests of the importer or the foreign manufacturer. Thus, for example, the suspension of liquidation might be ordered to continue without requiring that a bond or some other security be posted.

C. Customs Courts Act of 1980

Although section 516A made substantial progress toward eliminating many of the problems affecting judicial review of antidumping determinations, some of the problems respecting jurisdiction and the remedies available in the Customs Court were not addressed in the Trade Agreements Act. Instead Congress sought to rectify these problems by enacting the Customs Courts Act of 1980. The principal provisions of the Act result in an expansion of the jurisdiction and au-

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175 See notes 18-52 supra and accompanying text.
176 Tariff Act of 1930, supra note 2, at § 778(a) (codified at 19 U.S.C. § 1677g(a) (Supp. III 1979)).
179 Id.
authority of the Customs Court, now renamed the U.S. Court of International Trade.\textsuperscript{180}

The Customs Courts Act resolves several problems which had been left outstanding by Title X. Because the Customs Court's jurisdiction was not clearly defined previously, it was unclear when jurisdiction over a particular subject relating to international trade was vested in the district courts and when jurisdiction was vested in the Customs Court.\textsuperscript{181} This often resulted in the dismissal of a suit for lack of jurisdiction.\textsuperscript{182} Because of the inconsistent determinations with respect to jurisdiction, matters affecting import law were not infrequently decided by the district courts. By empowering the Customs Court with national jurisdiction in 1956, Congress had intended to avoid any such inconsistencies.\textsuperscript{183} The inability of the Customs Court to provide equitable relief, however, encouraged litigants to seek relief in the district courts where the existence of an adequate remedy was assured.\textsuperscript{184}

The Customs Courts Act of 1980 corrected many of these problems by providing expedited access to judicial review, and by providing the Court of International Trade with all of the equitable powers possessed by the federal district courts.\textsuperscript{185}

The Customs Courts Act of 1980 vests exclusive jurisdiction in the Court of International Trade over any civil action involving the United States that is based on federal law governing import transactions. The legislative history makes clear, however, that the Customs Courts Act does not create any new cause of action.\textsuperscript{186} Therefore, section 516A of the Tariff Act of 1930 remains the exclusive basis for review of those so-called preliminary determinations made during an antidumping investigation.\textsuperscript{187} It is important to note that any administrative action not enumerated in section 516A(a) but which is incorporated in or superseded by one of the listed determinations is also only reviewable pursuant to section 516A.\textsuperscript{188} Any party adversely affected or aggrieved by final agency action, however, may obtain judicial review of those administrative actions not encompassed within the provisions of section 516A. Thus, the failure of the Department to conduct an annual review of an antidumping order would be reviewable under 28 U.S.C. § 1581(i).


\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{H.R. Rep. No. 1235, supra} note 153, at 18.

\textsuperscript{184} \textit{Id.} at 19.

\textsuperscript{185} \textit{Id.} at 20.

\textsuperscript{186} \textit{Id.} at 21.


\textsuperscript{188} 126 CONG. REC. H. 9340, 9340-49 (daily ed. Sept. 22, 1980); Royal Business Machs., Inc. v. United States Court of Int'l Trade, No. 80-16 (Dec. 29, 1980); PPG Indus., Inc. v. United States Court of Int'l Trade, No. 81-83 (Sept. 28, 1981).
The other provisions of the Customs Courts Act relevant to review of antidumping duty determinations pertain largely to procedural matters. Section 2635\(^{189}\) requires that the record which forms the basis for court review be prepared within forty days or within such period as the court may specify. The Customs Courts Act also changes the time limits within which certain actions must be filed. A challenge to an extension of the period permitted for the making of a preliminary determination in a complex investigation must now be filed within ten days of the publication of the Federal Register notice.\(^{190}\) The Court of International Trade is also empowered to prescribe rules governing the form, style, and the timing of the notice which complainants must give to all interested parties.\(^{191}\) Section 2646(b) continues the precedence on the court calendar for matters reviewable under subsections 516A(a)(1)(B) and 516A(a)(1)(E) of the Tariff Act of 1930. Equally important, provision is made for the transfer without dismissal from the federal district courts to the Court of International Trade of all matters properly within the jurisdiction of that court.\(^{192}\)

VI. The Suspension of Investigations

Congress amended the Tariff Act of 1930 to add section 734,\(^{193}\) which provided for the suspension of investigations, prior to either a preliminary or a final determination.\(^{194}\) This provision is intended to afford early relief to a domestic industry and to permit a return to normal conditions of trade without the prosecution of the investigation to its final conclusion.\(^{195}\) The suspension of an investigation also has certain advantages for the exporter. Cooperating exporters, who fulfill the prerequisites for a suspension, are thereby assured that an antidumping order will not be issued and that any existing suspension of liquidation will be terminated.\(^{196}\) Moreover, by restoring a certain measure of predictability to the market place, the suspension of an investigation may help an importer or exporter to prevent excessive disruption of its sales efforts.

The suspension mechanism, like other provisions of the Trade Agreements Act, judiciously balances the competing interests of the parties to the investigation. An investigation may be suspended on the basis

\(^{189}\) Customs Courts Act, supra note 137, at § 301 (codified at 28 U.S.C.A. § 2635 (West Supp. 1981)).

\(^{190}\) Customs Courts Act, supra note 137, at § 301 (codified at 28 U.S.C.A. § 2636(d)(2) (West Supp. 1981)).

\(^{191}\) Id (codified at 28 U.S.C.A. § 2632, 2633 (West Supp. 1981)).

\(^{192}\) Customs Courts Act, supra note 137, at § 704 (codified at 28 U.S.C.A. § 251 note (West Supp. 1981)).

\(^{193}\) Tariff Act of 1930, supra note 2, at § 734 (codified at 19 U.S.C. § 1673c (Supp. III 1979)).


\(^{195}\) Id

of a cessation of all exports, an elimination of all sales at LTFV, or the elimination of the injurious effect of sales at LTFV.

Where an investigation is suspended on the basis of the cessation of all exports into the United States, the entry of merchandise normally must cease within a six month period beginning on the date of the suspension of the investigation. During this six month transition period the volume of merchandise shipped to the United States is not permitted to exceed the level of exports entered during a representative six month period. The selection of a representative period requires attention to such factors as the seasonality of the merchandise and past levels of import penetration or import surges.

The requirements for a suspension based on an elimination of sales at LTFV are less precisely formulated in the statute. There is no fixed time limit within which the margins must be eliminated. For administrative purposes the Commerce Department has adopted a six month period but is not necessarily wedded to a period of that particular duration. For example, the Commerce Department might permit an extension in the case of long-term contracts or might require that those contracts be renegotiated.

The suspension of an investigation which is predicated upon the elimination of the injurious effect of LTFV sales is a complicated undertaking. The requirements are several fold. First, a determination that "extraordinary circumstances" exist must be made. This term is defined in the statute as that situation where the suspension of an investigation is more beneficial, viz. that suspension would provide faster relief to the domestic industry than would continuation of the investigation where the investigation is complex. The concept of a complex case as one in which the issues are novel, the number of firms involved is large, and many transactions or adjustments exist, is not a new one. Consequently, although the term itself is not precise, past precedent under the extension of investigations provisions makes it possible to predict in which situations the term will apply. In providing for the suspension of

197 Id. § 734b(1) (codified at 19 U.S.C. § 1673c(b)(1) (Supp. III 1979)).
198 Id. § 734(b)(2) (codified at 19 U.S.C. § 1673c(b)(2) (Supp. III 1979)).
199 Id. § 734(c) (codified at 19 U.S.C. § 1673c (Supp. III 1979)).
200 Id. § 734(b)(1) (codified at 19 U.S.C. § 1673c(b)(1) (Supp. III 1979)).
201 Id. § 734(d)(2) (codified at 19 U.S.C. § 1673c(d)(2) (Supp. III 1979)).
204 Tariff Act of 1930, supra note 2, at § 734(c) (codified at 19 U.S.C. § 1673c(d)(2) (Supp. III 1979)).
205 Id.
investigations, Congress created a mechanism which in some respects is much more flexible than the administrative practice which it supplants. Thus, whereas the discontinuance of an investigation, under the earlier Treasury practice\(^{207}\) generally never occurred until the investigation had almost been concluded,\(^{208}\) section 734 provides for the possibility of a much earlier suspension. Moreover, while discontinuances were permitted only where the LTFV margins were relatively small,\(^{209}\) investigations now may be suspended regardless of the original size of the margins.

Unfortunately, all suspension agreements now require the participation of exporters who account for eighty-five percent of the imported merchandise.\(^{210}\) The eighty-five percent requirement is likely to make a suspension impossible except in those circumstances where only a small number of exporters account for the vast majority of trade, or where the exporters involved, although numerous, have truly common interests. A manufacturer who accounts for a sizeable percentage of the imports and who has made few or no sales at LTFV would not normally be interested in participating in a suspension agreement when he is probably also eligible for an exclusion from any affirmative determination which the Commerce Department may make.\(^{211}\)

The requirement that those exporters accounting for eighty-five percent of the exports join in the agreement poses a number of technical administrative problems for the Department. Because the market share of individual companies rarely remains static, especially that of the companies not participating in the agreement, and which represent the remaining fifteen percent of the exports,\(^{212}\) the percentage of exports covered by the agreement will be subject to continuing review. The voluntary withdrawal from the U.S. market by manufacturers or exporters who are party to the suspension agreement will not in itself cause the Department to conclude that the agreement has been violated, even though the exporters not party to the agreement thereby become responsible for one hundred percent of the imported merchandise. To ascribe such an interpretation to section 734(b)(1) would, of course, effectively nullify the provision. Nonetheless, where the volume of imports attributable to those exporters outside the agreement substantially increases, it will be necessary to modify the agreement so as to restore coverage of a

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\(^{209}\) Id.

\(^{210}\) H.R. REP. No. 317, supra note 54, at 64.

\(^{211}\) Pursuant to 19 C.F.R. § 353.45 (1981), a producer or exporter may be excluded from an affirmative LTFV determination where such person can demonstrate that sales made during the investigatory period were not made at less than fair value.

\(^{212}\) The law does not require those exporters not participating in the investigation to fulfill the requirements established in a suspension agreement. Consequently, those exporters may continue to ship merchandise to the United States and need not eliminate their LTFV sales so long as the agreement is in effect.
full eighty-five percent of the imports.\textsuperscript{213}

The eighty-five percent requirement has other consequences as well. Under both prior practice and current regulations manufacturers and exporters accounting for sixty percent of the imported product were included in the investigation.\textsuperscript{214} In order to preserve the suspension option, however, the number of exporters included in an investigation may have to be substantially increased so as to provide for the requisite eighty-five percent representation.\textsuperscript{215}

In allowing the petitioner and other parties the right of full participation in the suspension process, Congress directed that the petitioner be given notification of a proposed suspension no less than thirty days before the investigation was suspended.\textsuperscript{216} As innocuous as this provision may appear, it has already frustrated at least one attempt to suspend an investigation.\textsuperscript{217} Because a suspension can only occur before a final determination, notification of the petitioner must occur at least thirty days prior to the due date of the final determination.\textsuperscript{218}

The Trade Agreements Act also affords parties to an investigation certain procedural protections related to the suspension of an investigation. For example, either exporters or domestic parties to the proceeding may request that the investigation be continued.\textsuperscript{219} Because continuation of the investigation frequently may be in the interest of either the exporting or the domestic parties, the Department and ITC may find themselves completing many otherwise suspended investigations.\textsuperscript{220}

Moreover, where an investigation is suspended on the basis of complete elimination of the injurious impact of the sales made at LTFV, the domestic party may request the ITC to review the facts to determine whether all injury has been eliminated.\textsuperscript{221} If the ITC determines that the injurious effect has not been eliminated, the investigation will be resumed.

Suspension agreements, like final orders, are reviewable annually under section 751\textsuperscript{222} and will be carefully monitored to assure compliance with the agreement. The judicial review provisions apply not only

\begin{footnotes}
\item 213 See 19 C.F.R. § 353.43(b) (1981).
\item 214 Id. § 353.38(a) (1981).
\item 215 Id. § 353.38(b) (1981) requires the Secretary to notify interested exporters with respect to the percentage of the total imports being investigated and the identity of those exporters involved—to enable additional manufacturers or exporters to request inclusion so as to satisfy the 85% representation requirement.
\item 216 Tariff Act of 1930, supra note 2, at § 734(e)(1) (codified at 19 U.S.C. § 1673c(e)(1) (Supp. III 1979)).
\item 218 Tariff Act of 1930, supra note 2, at § 734(e)(1) (codified at 19 U.S.C. § 1673c(e)(1) (Supp. III 1979)).
\item 219 Id. § 734(g) (codified at 19 U.S.C. § 1673c(g) (Supp. III 1979)).
\item 220 The cost is likely to discourage frequent requests for the continuation of investigations.
\item 221 Tariff Act of 1930, supra note 2, at § 734(h) (codified at 19 U.S.C. § 1673c(h) (Supp. III 1979)).
\item 222 Tariff Act of 1930, supra note 2, at § 751 (codified at 19 U.S.C. § 1675 (Supp. III 1979)).
\end{footnotes}
to the acceptance of a suspension agreement, but also to the reviewable administrative determinations made if the investigation is continued under section 734(g).

**VII. Annual Review Procedures Under Section 751**

The annual review procedures contained in section 751 reflect, in part, Congressional dissatisfaction with the Treasury Department/Customs Service's administration of the antidumping law, and more particularly, with their failure to promptly assess duties under antidumping orders. In fashioning a provision that requires the annual review of outstanding findings and new orders, Congress assured that duties would be assessed on a current basis and that antidumping orders could be revoked.

In order to enable all parties to fully participate in the determination of the amount of the applicable duties, section 751 provides both for a notice of review and an opportunity for a hearing upon request. Title X, moreover, explicitly states that section 751 reviews are subject to judicial review. Although no cause of action for failure to conduct a timely annual review is provided in Title X, it is arguable that section 751 establishes a right, the denial of which creates a cause of action.

Section 751 is primarily a procedural provision. By establishing a time limit for the review of antidumping orders, it assures that the administering agencies will devote at least as many resources to the administration of existing orders as they do to the conduct of investigations. The provision makes it more likely that a comprehensive review will be conducted by enabling all interested parties to participate. Equally important, under subsection 751(b), a party now has the right to request an interim review on the basis of changed circumstances rather than having to await the annual review.

Section 751 also gives the Department the authority to revoke an

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225 *Tariff Act of 1930, supra* note 2, § 751(c) (codified at 19 U.S.C. § 1675(c) (Supp. III 1979)).

226 *Id.* § 751(b)(1) (codified at 19 U.S.C. § 1675(b)(1) (Supp. III 1979)).


228 See 5 U.S.C. § 702 (1976); see *Customs Courts Act, supra* note 137.

229 *Tariff Act of 1930, supra* note 2, at § 751(b) (codified at 19 U.S.C. § 1675(b) (Supp. III 1979)).

230 The term "changed circumstances" is not defined in either the law of the Commerce Department regulations and has been applied to date only by the ITC with respect to changes in market conditions which impact on the continued existence of injury. *See Electric Golf Carts from Poland, 45 Fed. Reg. 39,581 (1980).* Unless good cause is shown the administering author-
order or to terminate a suspension investigation. The law is silent with respect to the prerequisites for a revocation or a termination and, consequently, the administering authority has broad discretion. The Commerce Department regulations establish the bases upon which a revocation will be granted. Two separate mechanisms are provided: (1) revocation upon the request of an applicant, and (2) revocation on the initiative of the Secretary. To obtain a revocation the producer or exporter must demonstrate its ability to sell in the U.S. market at prices not below fair value—mere withdrawal from the U.S. market will not suffice. To assure that a party who petitions for revocation does not revert to unfair methods of competition, the requesting party is required under current practice to consent to the immediate reimposition of the order if it is later determined that sales at LTFV have been resumed and the level of imports have substantially increased.

VIII. Streamlining the Investigative Phase

A. Improvement in and Harmonization of Verification Techniques

With the enactment of the 1979 law, verification became a prerequisite to utilization in a final determination of information submitted by a respondent. The verification which the law requires does not necessarily demand that each individual constituent item in all claims be separately examined. No claims, however, including those which appear de minimis in nature, will be overlooked entirely. Even rather small claims may be given disproportionate attention where the expertise of the analyst indicates that the claim, either on factual or conceptual grounds, deserves more careful examination. Verifiers will, however, normally review the elements to each claim in conjunction with a common sense appreciation of the importance of the claim to the likely outcome in the case.

\(^{232}\) Tariff Act of 1930, supra note 2, at § 751(c) (codified at 19 U.S.C. § 1675(c) (Supp. III 1979)).

\(^{233}\) See 19 C.F.R. § 353.54 (1981).

\(^{234}\) Id. § 353.54(b) (1981).

\(^{235}\) Id. § 353.54(c) (1981).

\(^{236}\) The Commerce Department and the Department of the Treasury have viewed the mere absence of sales in the U.S. market as not necessarily indicative of a commitment to sell at or above fair value. In fact, the non-existence of U.S. sales is arguably as much an indication of inability to sell in the U.S. at other than prices below fair value as otherwise. Consequently, actual sales in the U.S. demonstrating an ability to sell at fair value normally will be a prerequisite for the issuance of a revocation.


\(^{238}\) Tariff Act of 1930, supra note 2, § 776(a) (codified at 19 U.S.C. § 1677e(a) (Supp. III 1979)). Verification of information utilized in annual reviews during the assessment phase is not required under the 1979 law although the Department intends to verify information in as many of those proceedings as budget constraints permit.

It is not settled whether, or to what extent, the verification requirement would impose separate responsibilities where one class or kind of merchandise under investigation from one producer in one country is produced and sold by separate but related corporate entities. The Department has followed a cautious course in this situation, separately committing to verification each company's books and records. This course seems particularly desirable, if not mandatory, where the companies involved appear to operate independently of each other in their pricing techniques, terms of sale, or production, or where they utilize different accounting methods.

The added legal requirement for verification has focused attention on the need for harmonization in verification techniques and for training of personnel to achieve that objective. Programs are underway to harmonize on-site verification techniques and to integrate the verification process as an element in the ongoing analysis of the case. During the recent investigations of European steel imports, all members of the task force were trained together and were given uniform guidelines to be employed during the on-site verification process. Each verification team was required to have one member with expertise in cost accounting and one member with expertise in antidumping theory and policy.

Results may be expected to further improve with the increasing emphasis on each staff member developing skills in areas other than his or her area of primary expertise. There is also an increasing awareness of the need to view the verification process as an integral part of the fact-finding/analytical process. The current trend is toward preliminary analysis of respondent's information, verification, and later, a more comprehensive analysis of information; rather than the verification of a response prior to any real analysis as had been the earlier practice. The pre-analysis of a response should enable the analyst/factfinder to determine which elements of the response are de minimis in nature and to establish priorities for the entire verification process; taking into account the apparent importance of each claim to the disposition of the case, together with prior practice and precedent.

B. Use of Abbreviated Analytical Techniques

1. Application of the De Minimis Provision

The new legislation permits the Department to utilize most effectively the short time allocated to antidumping investigations by disregarding insignificant adjustments in price, and by using averaging or sampling techniques.\textsuperscript{240} Section 353.23 of the Commerce Department Regulations provides that de minimis adjustments, defined as aggregate adjustments less than 0.33 percent, will be disregarded unless this would

significantly affect the results of the calculations. While the determination as to what constitutes a significant effect has not been formally decided, the Department has followed a conservative approach. Verifiers are expected to verify adjustments which appear at the early phase of the case to be de minimis in nature. Verification of these adjustments, however, will be of a lower priority than other, more significant adjustments.

To determine whether an adjustment is de minimis, a cut-off number is calculated by multiplying price by 0.33 percent. The "price" which serves as the multiplier is the foreign market value, less the net of the standard deductions set forth in section 773(a)(1) of the Act, discounts, and rebates. The only confusion that still exists in determining this multiplier price is whether all rebates are to be deducted, or whether only those rebates that are certain to be received and that are certain in terms of amount at the time the sale transaction is concluded, are to be deducted. It is possible that so-called "turnover rebates," i.e., those subject to fulfillment of a condition subsequent to the sale, will not be deducted from the multiplier price. This issue is important not only for the clear impact of the multiplier price, but also because deductions which must be made to arrive at the multiplier price are not themselves subject to exclusion using the de minimis provision. It may be expected that the language of section 353.23 of the regulations will be clarified to define the multiplier price with greater precision.

IX. Conclusion

Title I of the Trade Agreements Act was intended to improve the administration of the antidumping law. Indeed, in many respects it has accomplished that objective. Accelerated investigative time tables and the mandatory prompt assessment of duties should provide more effective relief to domestic industries. In addition, the opportunity for all interested parties to participate in the administrative proceedings guarantees that all interests will be heard. The extra demands that these procedures and the verification requirement have imposed on the Commerce Department have been satisfied through expansion in the size of the investigative staff and increase in the use of data processing techniques.

The effect of other changes is more difficult to predict. The Commerce Department's authority to suspend investigations is so narrowly drawn that its usefulness may be limited. The administrative protective order mechanism is only now beginning to be fully implemented, but the uncertainty and concern initially expressed by foreign companies regarding the confidentiality of their submissions is already diminishing. The modifications in the scope of judicial review and the access to court,

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which were intended to promote the early resolution of issues, may, because of frequent and lengthy litigation, instead delay such action.

In general, the administration of the new law is still in a period of transition. The first few investigations initiated under the amended Tariff Act have now been completed, but only limited experience has been developed with many of the new provisions. Any final judgment on the effectiveness of the Act and its impact on trade must, therefore, be deferred.