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The Prosecution of Antidumping Actions under the Trade Agreements Act of 1979

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The Prosecution of Antidumping Actions under the Trade Agreements Act of 1979

By Charlene Barshefsky*
Richard O. Cunningham**

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The Trade Agreements Act of 1979¹ (TAA or Act) effected substantial changes in the administration of the U.S. antidumping laws. Significant procedural reforms, including provisions for expedited relief, availability of confidential information pursuant to administrative protective order, and abbreviated investigatory periods have greatly altered the manner in which antidumping actions are prosecuted. Important

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¹ 19 U.S.C. §§ 1673, 1673a-1673i, 1675, 1677, 1677a-1677g, 1516a (Supp. III 1979).

substantive changes have also been made, most notably in the criteria for determining whether a U.S. industry has been injured by dumped imports. While certain of these changes tend to favor foreign exporters—for example, the requirement that the International Trade Commission conduct preliminary injury investigations in all cases—substantial concessions under the TAA were demanded and appear to have been won by U.S. domestic interests. Reduction in the overall length of antidumping proceedings, the required deposit of estimated antidumping duties, the imposition of strict time limits on the actual assessment of such duties, and the transfer of antidumping investigations from the Treasury Department to the assumedly tougher Department of Commerce represent major changes designed to benefit domestic industries adversely affected by unfair import pricing. This article will explore the practical and legal aspects of initiating and prosecuting antidumping proceedings under the Trade Agreements Act of 1979 in light of these substantial changes and the apparently strengthened hand of petitioners seeking relief.

I. Assessing Prospects for an Antidumping Action

A. Introduction

Dumping is traditionally defined as price discrimination between national markets;² that is, the practice of selling the same or similar merchandise at different prices in different regions. This term applies both to price discrimination between a producer's home and export markets as well as to discrimination among the producer's export markets. The exporter which dumps its merchandise in foreign markets seeks to maximize its profits or gain a competitive advantage in the marketplace by charging different prices in different countries for the same or similar merchandise.³ It should be noted, moreover, that the U.S. antidumping law also encompasses import pricing which, even though not lower than

² The spiritual father of this formulation is J. Viner in his standard work *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 3 (1923, reprinted 1966). The distinctions between different forms of dumping and their respective economic motivations fall beyond the scope of this article. See W. WARES, *THE THEORY OF DUMPING AND AMERICAN COMMERCIAL POLICY* 3-12 (1977). For a comprehensive recent survey of the major issues in antidumping law, see 1 MICH. Y.B. INT'L LEGAL STUD., *ANTIDUMPING LAW: POLICY AND IMPLEMENTATION* (1979).

³ See C. KINDLEBERGER & P. LINDERT, *INTERNATIONAL ECONOMICS* 166-67 (6th ed. 1978).

Although dumping is often described as selling at a lower price in one national market than in another, this description is both over- and under-inclusive. A lower export price, compared to the home market price, may well be justified by more favorable credit terms, sales conditions, and the like, for export transactions. On the other hand, a producer that sells at a higher price abroad than at home may still be vulnerable to dumping charges if the export price does not fully reflect the extra costs of the export transaction. Compare Viner, *Memorandum on Dumping*, annexed to *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 347 (1966 ed.). The underlying concept is that the prices compared must be adjusted to compensate for differences in the cost of manufacturing and marketing before adequate price comparisons among national markets can be made. See notes 192-208 and accompanying text *infra*.

prices charged by the exporter in other countries, is below the exporter's cost of producing the merchandise.

While "dumping" is often used synonymously with "price discrimination," the prosecution of an antidumping action actually consists of two elements:⁴ first, assuming the simplest case, a determination by the Department of Commerce⁵ that the foreign exporter has, in fact, discriminated in price between its home market sales and sales to the United States;⁶ and second, a determination by the International Trade Commission⁷ (ITC or Commission) that a domestic industry has been materially injured, threatened with material injury, or that the establishment of an industry in the United States has been materially retarded by reason of the alleged sales at less than fair value (LTFV).⁸ Since both of these statutory criteria must be met before a finding of dumping can be issued,⁹ the assessment of whether a dumping action can successfully be brought depends, in the first instance, upon an analysis of available price and injury related data. At the same time, however, certain strategic considerations will bear upon the advisability of pursuing such a course in light of the limited remedy obtainable under the antidumping law and the alternative avenues of relief open to an industry injured by import competition.

B. Does a Client Have an Antidumping Case?

The nature and extent of actual pricing information available to and initially presented by a particular corporate client to international trade counsel will vary greatly depending upon the size and sophistication of that client. Rarely is the practitioner presented, at first meeting, with solid data concerning "home market" (the country of exportation) prices or costs. Even more unusual is the situation where the client is

⁴ Section 731 of the TAA, 19 U.S.C. § 1673 (Supp. III 1979).

⁵ Pursuant to Presidential Reorganization Plan No. 3 of 1979, *reprinted in* 5 U.S.C. app., at 370 (Supp. III 1979) the Department of Commerce was vested with the authority to conduct antidumping proceedings formerly within the jurisdiction of the Treasury Department.

⁶ 19 U.S.C. § 1673(1) (Supp. III 1979). To the extent home market sales are inadequate in number to form a basis for price comparison, whether by reason of a simple dearth of home market sales or because a significant portion of those sales have been made at prices below the cost of production, the computation of a true home market price may not be possible. In such a case, sales to third countries are examined, or a constructed value approach is utilized. *See* notes 71-79 and accompanying text *infra*.

⁷ The International Trade Commission (ITC) is empowered to render decisions on the question of injury to domestic industries by reason of sales at less than fair value (LTFV). *See generally* 19 U.S.C. §§ 1330-1341 (1976 & Supp. III 1979); 19 U.S.C. § 2482 (1976).

⁸ The term "fair value" is used during the investigative phase of an antidumping proceeding and refers, in essence, to the ex-factory price of the merchandise in the home market, assuming the simplest case. If sales in the United States when worked back to an ex-factory basis are priced below fair value, an LTFV determination is made. "Fair value" is analogous to the term "foreign market value," which is the "standard used in assessment of antidumping duties." Preamble to Proposed Revision of the Customs Regulations Relating to Antidumping Duties, 44 Fed. Reg. 59,742, 59,742 (1979) [hereinafter cited as Preamble to Proposed Treasury Regulations].

⁹ *See* 19 U.S.C. § 1673 (Supp. III 1979).

able to work the exporter's home market and U.S. prices back to a single ex-factory level in order to arrive at a proper price comparison in antidumping law terms.¹⁰

In most cases, the client will initially present to counsel data relating to the foreign exporter's prices in the U.S. market. What the client knows all too well is that the imported product is being sold at a price below that at which U.S.-produced merchandise is being sold. While the presence of significant price undercutting is of critical importance in the injury phase of an antidumping proceeding,¹¹ the initial inquiries of counsel should be directed to ascertaining whether the client has any evidence (1) that foreign sales in the United States are made at prices below those in the exporter's home market;¹² (2) that export prices are below the client's own cost of production for such or similar merchandise;¹³ or (3) that U.S. prices of the imported product are significantly below prevailing world market prices.¹⁴ This type of pricing and cost information may be readily available to the client from intracorporate sources or through analysis of published pricing data, such as Commerce

¹⁰ Two factors should be noted which may cloud the practitioner's assessment of any pricing data which is presented by the client. First, the manner in which antidumping price comparisons are made can be affected by the product line or merchandise involved in the proceeding. While the statute itself does not distinguish between various product sectors, in at least one area—that involving perishable agricultural commodities—the Department appears recently to have significantly altered its pricing methodology. See *Certain Fresh Winter Vegetables from Mexico*, 45 Fed. Reg. 20,512 (1980). Second, to the extent the country of exportation is considered a state-controlled-economy-country within the meaning of the statute, 19 U.S.C. § 1677b(c) (Supp. III 1979), the manner in which price comparisons are ultimately made differs radically from that in the ordinary case. See Note, *Dumping From Controlled Economy Countries: The Polish Golf Car Case*, 11 LAW & POL. INT'L BUS. 777 (1979); note 67 *infra*.

¹¹ See notes 251-253 and accompanying text *infra*. If under-selling is not present, a condition termed "technical dumping" arises; that is, if there are sales at less than fair value but those sales have not undercut domestic price levels, the causal connection between LTFV imports and material injury becomes somewhat attenuated. See S. REP. NO. 1298, 93d Cong., 2d Sess. 179 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186; *Asphalt Roofing Shingles from Canada*, 45 Fed. Reg. 68,803, 68,806-07 (1980, preliminary); *Countertop Microwave Ovens from Japan*, 44 Fed. Reg. 56,993, 56,995 (1979, preliminary under Trade Act) (Comm'r's Alberger and Stern), 45 Fed. Reg. 11,612, 11,614 (1980, preliminary under Trade Agreements Act) (Chairman Alberger).

¹² Data of this sort may ultimately give rise to the standard form of price comparison in which the ex-factory home market price, the foreign market value, is compared to the ex-factory U.S. price. See generally 19 U.S.C. §§ 1677a, 1677b (Supp. III 1979). The dumping margin consists of the difference between the two ex-factory prices, expressed as a percentage of the U.S. price.

¹³ Evidence of this type may be used as a basis for initiating an antidumping investigation if actual data concerning the foreign producer's costs are not available to the petitioning U.S. firm or firms. Moreover, where the exporter fails to furnish cost data during the investigation, the U.S. producer's costs have been used by the Treasury Department in determining whether sales in the home market have been made at less than the cost of production. See note 79 and accompanying text *infra*.

¹⁴ To the extent no home market exists for the merchandise in question, resort to third country sales or to constructed value is appropriate in determining foreign market value. See 19 U.S.C. §§ 1677b(a)(1)(B), (a)(2) (Supp. III 1979); Department of Commerce Antidumping Duties Regulations, 19 C.F.R. § 353.4 (1981).

Department import statistics and official home market publications.¹⁵ Such data should always be carefully examined, however. It may be months old, or cover an exceedingly short and perhaps unrepresentative time frame. It may compare prices at different levels of distribution in the two markets or may reflect entirely different circumstances of sale in those markets for which adjustments must be made. The data may also be based upon a home market wholly insignificant in size to form an adequate basis of price comparison or may reflect isolated transactions not made in the "ordinary course of trade."¹⁶

While an informal collection of data may exhibit a number of these deficiencies, it nonetheless may be possible for the practitioner to assess, at least within some broad range, the presence or absence of LTFV margins. However, such an assessment at this stage should be qualified, and it should be made clear to the client that detailed pricing (and, in some cases, cost) data must be obtained before making a final judgment as to whether the action should proceed. It is especially important at this stage to avoid any but the most tentative projection of the dumping margins—the degree of price discrimination—likely to be found by the Commerce Department investigation.¹⁷

In addition to a review of the available pricing information, the practitioner must make a preliminary determination of whether there is sufficient evidence of material injury or likelihood of injury caused by dumping to justify the action. At the outset, evidence of such injury will typically focus on the recent level of business activity experienced by the particular client. Such current activity may reflect declining production, declining sales volume, depressed prices, increasing inventories, lost sales, unemployment, depressed profitability, and declining capital investment. The client may further perceive these trends as industry-wide phenomena.¹⁸ To the extent poor economic performance can be attributed,

¹⁵ See, e.g., Cold Rolled & Galvanized Carbon Steel Sheets from Certain European Countries, 42 Fed. Reg. 61,348, 61,348 (1977) (official European Community published price list and certain minimum prices established by "Davignon Plan" used by petitioners in calculating home market price levels); Carbon Steel Wire Rod from France, 42 Fed. Reg. 55,858, 55,858 (1977) (Davignon Plan guidance prices used to establish foreign market value); Certain Steel Wire Rod from the United Kingdom, 42 Fed. Reg. 64,173, 64,173 (1977) (same).

¹⁶ See generally 19 U.S.C. § 1677b(a)(1)(A) (Supp. III 1979).

¹⁷ The statute and Commerce Department regulations should be consulted for the types of additions, deductions, and other adjustments to price which can or must be made. See generally 19 U.S.C. §§ 1677a, 1677b (Supp. III 1979); 19 C.F.R. §§ 353.1-.23 (1981); notes 192-211 and accompanying text *infra*.

A forecast of dumping margins at any point prior to obtaining the exporter's price and cost data pursuant to protective order, can be fraught with peril. See notes 29-31 and accompanying text *infra*.

¹⁸ Since the International Trade Commission must determine that an *industry* in the United States is materially injured, threatened with such injury, or prevented from being established by reason of the LTFV imports, 19 U.S.C. § 1673 (Supp. III 1979), the Commission will collect relevant information from all industry members, regardless of whether they have joined in the petition. While petitioner does not have to involve other members of the industry in the presentation of the case—or necessarily represent a significant percentage of, for example, industry-wide production or sales, but see notes 101, 102 and accompanying text *infra*—both client

at least in significant part,¹⁹ to less than fair value sales, the presence of all or merely some of these factors may tend to support an allegation of injury to the domestic industry.²⁰

In addition to its own current economic difficulties, the client may be aware of significant capacity expansion in the country of exportation, a shift in the overall export pattern of the foreign producer, or the availability to that producer of low cost raw material resources.²¹ Such factors may indicate that a threat or likelihood of future injury exists by reason of imports at LTFV. Although initiation of a case based solely on a likelihood of injury without more is generally not recommended,²² evidence of threatened future injury can be a persuasive addition to a case predicated primarily upon existing injury.

Although the standard indicia of injury can be readily ascertained

and practitioner alike must consider whether the trends exhibited by the client firm have been caused by factors peculiar to that firm or whether those trends are common to the industry as a whole.

¹⁹ Material injury, threat thereof, or prevention of establishment must have occurred "by reason of" imports at LTFV. The causation requirement in dumping cases is far less stringent than in other types of trade proceedings:

Current law does not, nor will section 735, contemplate that the effects from less-than-fair-value [sic] imports be weighed against the effects associated with other factors (e.g., the volume and prices of imports sold at fair value, contraction in demand or changes in patterns of consumption, trade, restrictive practices of and competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry) which may be contributing to overall injury to an industry. Nor is the issue whether less-than-fair-value imports are the principal, a substantial, or a significant cause of material injury. Any such requirement has the undesirable result of making relief more difficult to obtain for industries facing difficulties from a variety of sources; industries that are often the most vulnerable to less-than-fair-value imports.

S. REP. NO. 249, 96th Cong., 1st Sess. 71, 74-75 (1979), *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 381; S. REP. NO. 1298, 93d Cong., 2d Sess. 180 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186. *See also* Spun Acrylic Yarn from Japan & Italy, 45 Fed. Reg. 19,682, 19,685 (1980); Parts for Self-Propelled Bituminous Paving Equipment from Canada, 42 Fed. Reg. 36,321, 36,322 (1977) (merchandise sold at LTFV must contribute to more than inconsequential injury to domestic industry); Birch Three-Ply Door Skins from Japan, 41 Fed. Reg. 2,690, 2,691 (1976).

²⁰ For an enumeration of injury related factors, *see* 19 C.F.R. § 353.36(a) (1981); International Trade Commission Procedures for the Conduct of Investigations, 19 C.F.R. §§ 207.26, 207.27 (1981).

²¹ *See* Methyl Alcohol from Canada, 44 Fed. Reg. 40,734, 40,735 (1979) (exporter's access to cheap natural gas noted).

²² Few ITC opinions rest wholly on the issue of likelihood of injury. *See, e.g.,* Anhydrous Sodium Metasilicate from France, 45 Fed. Reg. 46,255 (1980, preliminary), 46 Fed. Reg. 176 (1981, final); Methyl Alcohol from Canada, 44 Fed. Reg. 40,734 (1979); Polyvinyl Chloride Sheet & Film from the Republic of China, 43 Fed. Reg. 16,429 (1978); Impression Fabric of Man-Made Fiber from Japan, 43 Fed. Reg. 14,143 (1978); Metal-Walled Above-Ground Swimming Pools from Japan, 42 Fed. Reg. 35,231 (1977); Primary Lead Metal from Australia & Canada, 41 Fed. Reg. 17,628 (1976).

Further, no ITC opinions have ever found "prevention of establishment" of an industry (referred to under the new Act as "material retardation"). Indeed, only two recent opinions have considered the question; *see* Motorcycles from Japan, 43 Fed. Reg. 52,295, 52,297 (1978); Sorbates from Japan, 43 Fed. Reg. 42,313, 42,314 (1978).

from an examination of ITC regulations²³ and prior Commission decisions, the quantum of evidence needed to establish injury is much more difficult to discern. Predictive analysis is complicated by the fact that the Commission has given widely varying weight to specific indicia—market penetration, price undercutting, lost sales, U.S. producers' operating results, and the like—in different cases.²⁴ For example, an affirmative determination was reached where imports represented as little as 1.1 percent of domestic consumption.²⁵ In other cases, the Commission has found no injury despite consistently large margins of underselling.²⁶ The existence of lost sales is not necessarily dispositive,²⁷ nor is a decline in profitability always indicative of injury.²⁸ Such varying results may flow from the Commission's view of the quantum of evidence necessary to show material injury to the industry in question. Alternatively, the difference in outcome between cases with apparently similar statistical data may turn on the issue of causation: whether the injury, even if sufficient to be deemed material, was caused by LTFV imports to an extent sufficient to satisfy the statute. While it is thus most difficult, if not impossible, to predict accurately the strength of a particular injury case or to pinpoint those factors which will be of key importance to an injury determination, the creative practitioner has great flexibility in formulating an ITC presentation, notwithstanding the absence of one or more particular indicia of injury.

C. Some Strategic and Commercial Considerations

Assuming that sufficient preliminary information exists to suggest the possibility of a successful antidumping action, certain strategic and commercial considerations may nevertheless militate against the filing of such a case. At least two general questions should be addressed before proceeding. First, does the relief likely to be obtained under this statute justify the expense of the proceeding? Second, are more effective alternative avenues of relief available?

Dumping cases are among the most expensive proceedings in the

²³ See note 20 *supra*.

²⁴ Such variance results primarily from the inherent complexity of analyzing "material injury" to an industry and from the fact that each industry's economic situation is unique. Changes in the composition of the Commission also contribute to differences in analysis.

²⁵ Printed Vinyl Film from Brazil & Argentina, 38 Fed. Reg. 19,878, 19,878-79 (1973) (likelihood of injury).

²⁶ Welded Stainless Steel Pipe & Tubing from Japan, 43 Fed. Reg. 32,468, 32,469 (1978).

²⁷ Titanium Dioxide from Certain European Countries, 44 Fed. Reg. 66,997, 66,999 (1979). In ITC terminology, a "lost sale" is one which had previously been made by a U.S. producer but which is "lost" on a subsequent repurchase to a seller of LTFV imports. A sale to a customer which previously had not been buying from U.S. producers, even where the customer is making its first purchase of the product in question, is not regarded by the Commission as a lost sale even though the importer of the LTFV merchandise may have been in direct head-to-head competition with U.S. producers.

²⁸ Certain Steel Wire Nails from Canada, 44 Fed. Reg. 7,840, 7,842 (1979) (Comm'r Stern).

U.S. trade law arsenal. The cost to the petitioner of an antidumping investigation in even the simplest case will run into six figures. While provisions in the TAA for mandatory preliminary injury determinations, protective orders, expedited relief, and judicial review constitute major improvements in the investigative process, they have greatly raised the cost of the action to the petitioning U.S. firm or industry and can be used by the foreign exporter to increase this expense still further. The potential cost of the proceeding therefore must be weighed against the degree of relief anticipated through the imposition of antidumping duties, taking into account the risks of failure in the form of either a negative determination or an inadequate duty.

In balancing the expense against the relief obtainable, it should never be assumed that the LTFV margins disclosed by pre-petition investigation and thus alleged in the petition will be the same as the final LTFV margins found by Commerce. While the final margins may on occasion significantly exceed the alleged margin,²⁹ it is far more usual for the alleged margins to exceed those found in the final determination.³⁰ This discrepancy may be attributable in part to legal arguments which could not be anticipated prior to filing the petition or to facts peculiarly within the exporter's control which could not be unearthed prior to a formal Commerce Department investigation. Also, the Department is understandably reluctant to resolve issues against the exporter where facts are unclear or in dispute. Obviously, a thorough pre-filing pricing investigation can minimize such margin slippage. Nevertheless, when estimating the LTFV margins likely to be found by Commerce, a useful "rule of thumb" in advising clients is to apply a discount factor of between thirty-three percent where the pre-filing investigation has been ex-

²⁹ *Compare* Perchloroethylene from Belgium, 43 Fed. Reg. 32,009, 32,009 (1978) with 44 Fed. Reg. 6,821, 6,822 (1979) (margin alleged was approximately 43%; final margin found was 150% on a weighted-average basis over all sales compared).

³⁰ *Compare* Melamine in Crystal Form from the Netherlands, 44 Fed. Reg. 25,555, 25,555 (1979) with 45 Fed. Reg. 20,152, 20,153 (1980) and 45 Fed. Reg. 29,619, 29,620 (1980) (30% margin alleged; final weighted-average margin of 2.18%; amended final determination found no margin); Melamine in Crystal Form from Austria & Italy, 44 Fed. Reg. 25,555, 25,555 (1979) with 45 Fed. Reg. 18,415, 18,416 (1980) and 45 Fed. Reg. 20,151, 20,152 (1980) (alleged Italian margin of 38% with final margin of 31.05%; alleged Austrian margin of 52% with final margin of 12.16%); Countertop Microwave Ovens from Japan, 44 Fed. Reg. 50,668, 50,668 (1979) with 45 Fed. Reg. 47,456, 47,459 (1980) (margins alleged ranged from 27% to 107%; preliminary weighted-average margin of 5% found by Commerce); Nylon Yarn from France, 43 Fed. Reg. 3,470, 3,470 (1979) with 43 Fed. Reg. 31,257, 31,258 (1979) (margins alleged ranged up to 40%; final margin of 22.5% on a weighted-average basis); Sugar from Certain European Countries, 43 Fed. Reg. 36,746, 36,747 (1976) with 44 Fed. Reg. 8,949, 8,950 (1979) (margin of 170% alleged; final weighted-average margins of 102%, 103% and 121% on French, Belgium and West German imports, respectively).

Of course, cases are filed in which no margins are found, often because the bases of petitioner's price comparisons are themselves incorrect. *Compare* Certain Steel I-Beams from Belgium, 44 Fed. Reg. 8,408, 8,409 (1979) with 44 Fed. Reg. 54,579, 54,580-81 (1979) (while alleged margins ranged from 23% to 49% on third country basis, no margins found in final determination and home market price was used as basis of comparison).

tremely thorough and fifty percent where it has been less thorough.³¹

In a similar vein, the antidumping duty ultimately imposed may fall below the final LTFV margins. The LTFV margins found in the initial investigation only establish the existence of sales at LTFV; the actual assessment of antidumping duties depends upon a reevaluation of home market and export prices over a time period more recent than that covered by the LTFV investigation.³² In this later period, the margins, and thus the duties imposed, may be less than originally found by Commerce. To the extent this reduction in margins is produced by an upward revision of the exporter's U.S. prices subsequent to the initial LTFV determination, there is no diminishing of relief for the aggrieved U.S. industry. The margins can also be reduced, however, by a downward revision in the exporter's home market price, thereby depriving the domestic industry of the full benefits of the action. Even worse, the Commerce Department may reduce the final margins based on post-investigative arguments or facts presented by the exporter. In either of the latter situations, the LTFV margin found in the initial investigation will have overstated the degree of relief ultimately obtainable.

After making the best possible assessment of the likelihood of success and the amount of duty obtainable, counsel must consider whether duties in that amount will be sufficient to solve the U.S. industry's import problem. This issue turns on a comparison of the probable LTFV margins, and hence the duties to be imposed, with the margins by which the imported merchandise is underselling the competing U.S. product. When the imposition of duties, no matter how substantial, still leaves the duty-paid import price well below the prices offered by U.S. producers, the remedy is likely to be ineffective.³³

Some antidumping proceedings, however, are not brought solely with a view toward obtaining the imposition of duties. Some businessmen and a few trade law practitioners believe that the bringing of a case will achieve the desired commercial result, limitation of import volumes or increase in import prices, by "sending a signal" to the foreign exporters or through the *in terrorem* effect of filing. Cases should not be brought solely for *in terrorem* effect, however. Such cases not only constitute an abuse of the antidumping law, but are risky and largely ineffective for the following reasons.

First, such tactics raise serious antitrust questions. While the bring-

³¹ The necessity for such substantial discounting obviously militates against filing the case unless significant margins can be alleged at the outset. In *Steel Wire Coat & Garment Hangers from Canada*, 44 Fed. Reg. 23,623, 23,623 (1979), the *alleged* margins ranged from approximately 2.3% to 4.9%. Margins of this size are certainly among the smallest alleged in recent years and leave no room for error or attrition. The case was terminated in the preliminary injury phase.

³² For a general discussion of the duty assessment stage, see notes 175-180 and accompanying text *infra*.

³³ The comparison of LTFV margins with "margins of underselling" is also an important factor in the ITC's injury analysis. See notes 251-253 and accompanying text *infra*.

ing of meritorious trade cases is generally sheltered under the antitrust laws by the *Noerr-Pennington* doctrine,³⁴ no such shelter exists where cases are brought frivolously or without regard to their merit.³⁵ Moreover, the use of antidumping cases to send a signal raises issues similar to those involved in "price signalling" antitrust liability theories endorsed by the Antitrust Division of the Justice Department.³⁶

Second, in the authors' experience, the reaction of many foreign exporters to the filing of dumping cases against them, even where the case appears to have merit, tends to be outrage and intransigence rather than a willingness to raise prices or withdraw from the U.S. market. Where that reaction occurs, the tactic of sending a signal will be counterproductive.

Third, the Trade Agreements Act may itself discourage the filing of a nonmeritorious case for *in terrorem* purposes. Under the new law, all cases are now subject to preliminary review by the International Trade Commission to determine whether the action presents at least "a reasonable indication" of material injury, threat of injury, or material retardation of the establishment of a U.S. industry.³⁷ If a case lacks merit on the injury issue, the Commission is quite willing to reach a negative determination at this early stage, thereby ending the case within 45 days after filing.³⁸

A petitioner who files a nonmeritorious case runs one final serious risk. The signal conveyed to foreign exporters by a dumping case that fails is a most powerful one. An exporter that had been careful of its U.S. pricing and volume is likely to become bolder after the failure of a dumping case because that exporter will assume that the U.S. industry will be loathe to file a second action. Furthermore, the subsequent filing of another case, even a meritorious one under changed economic circumstances, is likely to be met with considerable skepticism on the part of Commerce Department and ITC staffmembers and policy level officials. In this type of administrative proceeding, such a loss of credibility can be crippling.

³⁴ See *Eastern R.R. Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 365 U.S. 138 (1961).

³⁵ See 365 U.S. at 144; *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), *aff'd after remand*, 417 U.S. 901 (1974); *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972); *Associated Radio Serv. Co. v. Page Airways, Inc.*, 414 F. Supp. 1088 (N.D. Tex. 1976).

³⁶ See, e.g., Remarks of Thomas E. Kauper, former Assistant Attorney General in charge of the Antitrust Division, before the ABA Section of Antitrust Law (April 14, 1977), *reprinted in* 46 ANTITRUST L.J. 435; Address of Attorney General Griffin B. Bell before the *Harvard Law Review* Annual Banquet (March 19, 1977), *reprinted in* 806 ANTITRUST & TRADE REG. REP. (BNA) at F-1 (Mar. 22, 1977). See also *United States v. General Electric Co.*, 5 TRADE REG. REP. (CCH) ¶ 50,298 (E.D. Pa. 1976); *United States v. Westinghouse Electric Co.*, 5 TRADE REG. REP. (CCH) ¶ 50,299 (E.D. Pa. 1976).

³⁷ 19 U.S.C. § 1671b(a) (Supp. III 1979).

³⁸ Since January 1980, the Commission has reached negative preliminary determinations in some 40 to 50% of the cases heard.

This is not to say, however, that a meritorious, credible dumping case will never have a positive *in terrorem* impact. In the *Large Power Transformer* cases,³⁹ for example, every exporter in each of the six countries covered by the action withdrew entirely from the U.S. market immediately upon the filing of the petitions. This occurred in part because of the nature of trade in heavy electrical equipment, which involves the sale of very expensive merchandise in competitive bid situations with a long lead time between date of contracting and delivery. In such a commercial context, the foreign sellers were unwilling to risk entering into these large contracts given the possibility of substantial dumping duties. But an equally important factor bearing on the *in terrorem* impact of the *Transformer* cases was the fact that these actions were credible, meritorious, and resulted in findings of substantial LTFV margins as to five of the six countries involved.⁴⁰

Although some dumping cases may produce this sort of effect on the commercial activities of foreign sellers either at the time of filing⁴¹ or, more frequently, at the time of the Commerce Department's preliminary determination that LTFV margins exist,⁴² many other dumping cases have no such effect.⁴³ In particular, foreign exporters of consumer products generally have not reduced their U.S. sales volume in response to the filing of antidumping actions.⁴⁴ In some consumer product cases, in fact, foreign firms actually step up their U.S. selling after the case is initiated in an effort to enter an increased volume of merchandise into the United States before the merchandise becomes subject to a possible adverse preliminary LTFV determination.⁴⁵

Other factors to be considered in evaluating prospects for an an-

³⁹ 35 Fed. Reg. 9,934 (1970).

⁴⁰ See 37 Fed. Reg. 960 (1972).

⁴¹ See, e.g., *Spun Acrylic Yarn from Japan & Italy*, 45 Fed. Reg. 19,682, 19,685 n.3 (1980) (Chairman Alberger) (imports decreased after petition was filed); *Countertop Microwave Ovens from Japan*, 45 Fed. Reg. 11,612, 11,613 (1980, preliminary) (decline in imports while antidumping proceedings "were underway").

⁴² See generally *Portable Electric Typewriters from Japan*, 45 Fed. Reg. 30,186, 30,188 (1980) (imports declined after the latest Commerce withholding of appraisement); *Viscose Rayon Staple Fiber from France & Finland*, 44 Fed. Reg. 10,437, 10,438 (1979) (withdrawal from the market of Belgian imports following withholding of appraisement in similar case); *Condenser Paper from Finland & France*, 44 Fed. Reg. 52,046, 52,048 (1979) (imports from France declined after withholding of appraisement); *Bicycle Tires & Tubes from the Republic of Korea*, 44 Fed. Reg. 20,308, 20,309 (1979) (two Korean manufacturers reduced imports in year Treasury began to withhold appraisement).

⁴³ See COMPTROLLER GENERAL, REPORT TO THE CONGRESS ON U.S. ADMINISTRATION OF THE ANTIDUMPING ACT OF 1921, 9 (1979).

⁴⁴ In the illustrative case of *Color Television Receivers from Japan*, Japanese exporters maintained their U.S. sales, not only during the investigation, but even after the entry of the dumping finding. *Television Receiving Sets, Monochrome & Color, from Japan*, 36 Fed. Reg. 4,597 (1971).

⁴⁵ See, e.g., *Motorcycles from Japan*, 43 Fed. Reg. 52,295 (1978), where imports of motorcycles increased substantially after the case was initiated.

Following an affirmative preliminary determination, the suspension of liquidation is ordered for all merchandise entered or withdrawn from warehouse for consumption on or after the date of the determination. In addition, the importer must post a bond or other security, and

tidumping case and especially in weighing the benefits of a dumping proceeding against alternative trade law remedies are the urgency of the client's need for relief and the type of relief needed. Although the investigatory time limits under the TAA have been shortened considerably from those under the Antidumping Act of 1921,⁴⁶ the standard noncomplex case will proceed for approximately nine months.⁴⁷ If all of the various extensions of time are granted or invoked, a case can last almost fourteen months.⁴⁸ Furthermore, the only remedy available under the antidumping law is the imposition of duties; quotas, orderly marketing agreements, and the like are not alternative avenues of relief.

If time is of the essence to the client, or if the potential antidumping duties would be insufficient to eliminate the competitive advantage of the imported merchandise, consideration should be given to an effort to obtain quota restrictions under section 201 (the escape clause) or section 406 (dealing with market disruption by imports from Communist countries) of the Trade Act of 1974.⁴⁹ It should be cautioned, however, that relief under either of these statutes is subject to presidential discretion, unlike relief under the antidumping law.

II. Preparation and Filing of an Antidumping Case

A. Principal Information Needed for the Petition

1. Sources of Pricing Data

The heart of any antidumping petition is data showing that the foreign exporter's prices in the United States, after making certain computations required by the antidumping law, are lower than that exporter's home market prices or, if appropriate, its third country prices or constructed value. While the client in most cases will be the key source for the petition's injury data,⁵⁰ the reliability, timeliness, and completeness of the client's LTFV pricing data will often be questionable, particularly with regard to foreign market value and cost information. Accordingly, it is important to consider briefly the alternative sources from which accurate pricing data may be obtained.

Pricing information may sometimes be available from attorneys or businessmen operating in the country of exportation. While these indi-

the merchandise becomes subject to any antidumping duty order ultimately issued. See notes 133-135, and accompanying text *infra*.

⁴⁶ Under the Antidumping Act of 1921, as amended, 19 U.S.C. §§ 160-171 (1976), the standard noncomplex case (and one which had not been referred to the ITC on the question of "reasonable indication" of injury), took 13 months from date of filing to date of completion.

⁴⁷ The length of these proceedings can be shortened if, for example, waiver of verification is invoked. See notes 146-149 and accompanying text *infra*. Time limits specified in the new Act (as under the old law) are phrased "within 20 days" or "within 160 days" and so on, leaving the precise date of decision within the discretion of the Commerce Department. In few cases if any, however, are decisions reached by either Commerce or the ITC before the statutory deadline.

⁴⁸ See, e.g., note 120 and accompanying text *infra*.

⁴⁹ See 19 U.S.C. §§ 2251-2253, 2436 (1976 & Supp. III 1979).

⁵⁰ See generally 19 C.F.R. § 353.36 (1981); *id.* § 207.26.

viduals may not be employed by or directly connected with the targeted producer, they may have contacts within that company, such as a disgruntled employee, which could be utilized as a source of data. Alternatively, these individuals may be employed by or have significant contact with competitors of the foreign producer, or industry-wide trade associations, through which pricing information may be obtained. To the extent pricing data are available from such sources, documentation relating to recent sales, including copies of invoices, price lists, customer lists, and the like, is extremely valuable.⁵¹

Should it be necessary to allege that home market sales are being made at prices below the cost of production, a petitioning attorney must seek information relating to such items as principal raw material costs, processing costs, packing costs, general expenses, and profit of a particular producer or for the foreign industry as a whole.⁵² Such cost of production data is generally much more difficult to obtain than pricing data regardless of the information gathering technique employed.

Official publications from the country of exportation may provide a supplementary or alternative basis on which home market prices or costs can be calculated. For example, in *Cold Rolled and Carbon Steel Sheets from Certain European Countries*,⁵³ home market prices of cold rolled sheet alleged in the petition were based on the minimum guidance prices established by the Davignon Plan for intra-European Community sales of steel mill products.⁵⁴ In the same case, home market prices for galvanized sheet were based on an official European Community published price list.⁵⁵ While these prices did not necessarily represent the prices at which actual transactions were made, such information was accepted as sufficient evidence of LTFV sales to initiate the proceeding. Similarly, in *Sugar from Certain European Countries*,⁵⁶ purchase price information was ultimately obtained from Customs entry documents, and home market prices were calculated on the basis of the European Community raw sugar intervention price as published in the Official Journal of the Euro-

⁵¹ The type of information required becomes more complicated to the extent there is no home market for the product. In such a case, third country prices should be sought; in the absence of sufficient sales to third countries, a constructed value approach (which entails the gathering of cost of production data) should be used. See 19 C.F.R. § 353.4 (1981); notes 71-75 and accompanying text *infra*. Complications also arise depending on whether purchase price or exporter's sales price is used as the basis for comparison. See notes 81-88 and accompanying text *infra*.

⁵² But see note 79 and accompanying text *infra*.

⁵³ 42 Fed. Reg. 61,348 (1977).

⁵⁴ *Id.* at 61,348. See note 15 *supra*.

⁵⁵ *Id.* These published prices exceeded the cost of production as calculated by petitioner. Petitioner, however, asserted that the published prices did not represent actual transaction prices because of alleged discounting by the European producer and, thus, that a cost of production investigation should be undertaken. Treasury concluded that if actual transaction prices were found to be below the published minimum prices, a comparison of those lower prices would be made with the cost of production. The cases were withdrawn, however, before this issue was resolved.

⁵⁶ 44 Fed. Reg. 8,949 (1978).

pean Communities.⁵⁷ And, in *Certain Carbon Steel Galvanized Sheet from Certain European Countries*⁵⁸ cost of production was calculated on the basis of exporters' published financial statements. While these cases are atypical in their heavy reliance on published data as the basis for the petitions' price and cost allegations, official sources of information often provide meaningful backup documentation of market price levels and production costs.

Pricing and, where appropriate, cost data may also be obtained through certain international research organizations. These economic analysts or market research organizations gather various forms of corporate intelligence, from production and marketing plans to actual transaction prices and cost data. While the information gathered through such organizations can be complete and reliable, the use of international consultants can be exceedingly expensive, adding considerably to the cost of bringing the action. Cost aside, however, these consultants often prove to be the only avenue through which sufficient information can be obtained.

2. *Preparation of the Petition*

As Commerce and ITC regulations specify,⁵⁹ an antidumping petition must contain a wide variety of pricing and injury information. Although the degree of detail presented in the petition may depend upon a variety of factors including the complexity of the issues involved, the extent of pricing information actually collected, and the resources of the client, the regulations provide a general standard against which the sufficiency of the petition is measured. Accordingly, information relating to each of the following issue areas should be provided "to the extent reasonably available to the petitioner."⁶⁰

The petition must, of course, contain certain routine information such as the name and address of the petitioner,⁶¹ the industry on whose behalf the petition is filed,⁶² a statement indicating whether import relief

⁵⁷ *Id.* at 8,950. It is instructive to examine those cases in which the Treasury and Commerce Departments have been forced to rely on the "best information available" in reaching a determination, as was done in the *Sugar* cases. The administering authority has always had the power to decide cases on the basis of such information whenever the foreign exporter refused to provide data or provided data which could not be verified. See 19 U.S.C. § 1677e(b) (Supp. III 1979); 19 C.F.R. §§ 353.51(b), 153.31(a) (1981). At times, the data presented by petitioner may constitute the best information available, particularly at the time of the preliminary determination. See, e.g., *Polyvinyl Chloride Sheet & Film from the Republic of China*, 42 Fed. Reg. 54,490 (1977); *Certain Steel Wire Nails from Canada*, 43 Fed. Reg. 29,654 (1978). Often, however, the best information is obtained through other sources. See *Carbon Steel Plate from Taiwan*, 44 Fed. Reg. 29,734 (1979) (best information taken from Special Steel Summary Invoice (SSSI) which accompanied steel products entered into the U.S.).

⁵⁸ 45 Fed. Reg. 26,110, 26,110 (1980).

⁵⁹ See 19 C.F.R. § 353.36 (1981); *id.* § 207.26.

⁶⁰ *Id.* § 353.36(a).

⁶¹ *Id.* § 353.36(a)(1).

⁶² *Id.* § 353.36(a)(2). For guidance on the industry issue, see 19 U.S.C. § 1677(4) (Supp. III 1979); notes 230-240 and accompanying text *infra*.

is or will be sought under other statutory provisions,⁶³ a detailed description of the imported merchandise,⁶⁴ the name of the country (or countries) of exportation, and the names and addresses of all foreign enterprises which produce or export the merchandise in question.⁶⁵ Additionally, petitioner must provide the names and addresses of all importers of the merchandise, the volume and value of imports of that merchandise during the most recent two-year period, and the names and addresses of all U.S. enterprises engaged in the production or sale of like merchandise.⁶⁶

The heart of the petition on the pricing side of the case is comparative data reflecting the exporters' prices and, where appropriate, costs.⁶⁷ Commerce Department regulations require the submission of

[a]ll pertinent facts as to the price at which the foreign merchandise is sold or offered for sale in the United States and in the home market in which produced or from which exported, including information con-

⁶³ 19 C.F.R. § 353.36(a)(3) (1981); see note 49 and accompanying text *supra*.

⁶⁴ 19 C.F.R. § 353.36(a)(4) (1981). Typically, the detailed description or definition of the merchandise involved will conform to that contained in the Tariff Schedule category under which the product is imported. A refining of the product definition as the investigation proceeds is not uncommon. See, e.g., Certain Steel Wire Nails from the Republic of Korea, 44 Fed. Reg. 61,722, 61,722 (1979); Pressure Sensitive Tape from West Germany, 42 Fed. Reg. 10,085, 10,085 (1977); Hollow or Cored Ceramic Brick from Canada, 41 Fed. Reg. 26,037, 26,037 (1976); Polymethyl Methacrylate from Japan, 41 Fed. Reg. 12,233, 12,233 (1976).

⁶⁵ 19 C.F.R. §§ 353.36(a)(5), .36(a)(6) (1981).

⁶⁶ *Id.* §§ 353.36(a)(10), .36(a)(11), .36(a)(12). Volume and value figures ordinarily will be contained in the injury information presented and should cover a period in excess of two years.

⁶⁷ If the merchandise in question is exported from a state-controlled-economy-country, petitioner must submit:

any information pertaining to the price or prices at which such or similar merchandise of a non-state-controlled-economy-country or countries, considered to be comparable in terms of economic development to the state-controlled-economy-country, is sold for consumption in the home market of that country or countries (including the United States), or the constructed value of such or similar merchandise in a non-state-controlled-economy-country, determined in accordance with § 353.8

Id. § 353.36(a)(8); 19 U.S.C. § 1677b(c) (Supp. III 1979). Comparability of economic development is to be "determined from generally recognized criteria, including per capita gross national product and infrastructure development (particularly in the industry producing such or similar merchandise)." 19 C.F.R. § 353.8(b)(1981). The regulations provide further that if no country of comparable economic development can be found, then prices or constructed value as determined from another non-state-controlled-economy-country other than the United States are to be used after being adjusted for certain cost differences. *Id.* § 353.8(b)(2). To the extent no adequate bases of comparison exist, "prices or constructed value, determined from the sale or production of such or similar merchandise in the United States, shall be used." *Id.* § 353.8(b)(3) (emphasis added). Section 353.8(c) outlines the appropriate constructed value calculation in this latter instance. For cases which raise the state-controlled-economy issue, see Natural Menthol from the People's Republic of China, 46 Fed. Reg. 3,258 (1981); Unrefined Montan Wax from the German Democratic Republic, 46 Fed. Reg. 16,287 (1981); Certain Carbon Steel Plate from Poland, 44 Fed. Reg. 23,619 (1979); Standard Household Incandescent Lamps (Bulbs) from Hungary, 43 Fed. Reg. 34,561 (1978); Inedible Gelatin & Animal Glue from Yugoslavia, 42 Fed. Reg. 39,287 (1977); Clear Sheet Glass from Romania, 42 Fed. Reg. 3,242 (1977). See also Condenser Paper from Finland, 43 Fed. Reg. 35,138 (1978) (Finnish government's ownership of producer's capital did not constitute state control). The issue of dumping from state-controlled economies is now under active review, both by the Commerce Department and by Congress.

cerning transportation and insurance charges, and if appropriate, information regarding sales in third countries or the cost of producing the merchandise.⁶⁸

The calculation of the home market price, and thus the information which must be contained in the petition, may take any one of several forms. Foreign market value is ordinarily determined by the wholesale price of the merchandise in the principal markets in the exporting country.⁶⁹ If, however, during the relevant investigatory period,⁷⁰ the quantity of merchandise sold in the country of exportation is "so small in relation to the quantity sold for exportation to countries other than the United States (normally less than five percent of the amount sold to third countries), as to be an inadequate basis for determining the foreign market value," then foreign market value is to be determined by reference to third country prices or constructed value.⁷¹ "Third country [prices] generally will be preferred to . . . constructed value if adequate information is available and can be verified within the time required."⁷²

The third country to be selected typically will be that single country which meets the following criteria in order of preference: (1) similarity of the third country product to that sold in the United States; (2) largest sales volume of the product in the third market outside of sales to the United States; and (3) similarity of market organization and development in the third country to that of the United States.⁷³ Should sales to the chosen third country not provide an adequate sample, sales to addi-

⁶⁸ 19 C.F.R. § 353.36(a)(7) (1981).

⁶⁹ *Id.* § 353.3(a); 19 U.S.C. § 1677b(a)(1)(A) (Supp. III 1979). These provisions specify that such home market sales must have been made in the ordinary course of trade for home market consumption and in usual wholesale quantities. If not included in the price, the cost of all packing and other charges incident to placing the merchandise in condition packed ready for shipment to the United States must be added to the home market price.

⁷⁰ See note 84 and accompanying text *infra*.

⁷¹ 19 C.F.R. § 353.4(a) (1981); 19 U.S.C. §§ 1677b(a)(1)(B), (a)(2) (Supp. III 1979). Note that the "five percent rule" outlined in the regulations is only a guideline. See *Certain Steel Wire Nails from the Republic of Korea*, 45 Fed. Reg. 34,941, 34,942 (1980). The five percent rule had been used by the Treasury Department as well. See, e.g., *Condenser Paper from Finland*, 44 Fed. Reg. 32,063, 32,063 (1979).

⁷² 19 C.F.R. § 353.4(b) (1981). See *Melamine in Crystal Form from the Netherlands*, 45 Fed. Reg. 20,152, 20,152 (1980) (use of third country price). Under the prior law, a statutory preference existed for the use of third country prices over constructed value. Trade Act of 1974, Pub. L. No. 93-618, § 321(d), 88 Stat. 2046 (repealed 1979, previously codified at 19 U.S.C. § 164(a)). See *Certain Fresh Winter Vegetables from Mexico*, 44 Fed. Reg. 63,588, 63,589 (1979, tentative determination); *Cumene from the Netherlands*, 43 Fed. Reg. 57,370, 57,370 (1979); *Bicycle Tires & Tubes from the Republic of Korea & China*, 43 Fed. Reg. 61,066, 61,066 (1978); *Motorcycles from Japan*, 43 Fed. Reg. 35,140, 35,140 (1978); *Railway Track Maintenance Equipment from Austria*, 42 Fed. Reg. 41,339, 41,340 (1977); *Metal-Walled Above-Ground Swimming Pools from Japan*, 41 Fed. Reg. 17,558, 17,559 (1977).

⁷³ 19 C.F.R. § 353.5(c) (1981). Under prior practice, volume of sales, rather than similarity of the merchandise, was generally regarded as the key determinant in selecting the appropriate third country market. See, e.g., *Steel Wire Strand for Prestressed Concrete from Japan*, 43 Fed. Reg. 38,495, 38,498 (1978). But see *Motorcycles from Japan*, 43 Fed. Reg. 35,140, 35,142 (1978), where sales to Canada of a particular model were used as the basis of comparison for that model since "the GL 1000K2 sold to Canada was virtually identical to the U.S. model"

tional countries may be aggregated.⁷⁴ Failing this, a constructed value approach is to be used.⁷⁵

Alternatively, where a viable home market for the merchandise exists, but home market sales have been made below the cost of production of that merchandise, those below-cost sales are to be disregarded in the determination of foreign market value if those sales:

- (1) have been made over an extended period of time and in substantial quantities, and
- (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade⁷⁶

Should the remaining above-cost sales in the home market or third countries "be inadequate as a basis for the determination of foreign market value," constructed value is to be used.⁷⁷

Cost of production is calculated in the same manner as constructed value⁷⁸ except that profit and packing costs are not included and no minimum general expense figure is mandated. Although, as noted earlier, foreign producers' cost of production information is very difficult and sometimes impossible to obtain, a petitioner may nonetheless allege sales at less than the cost of production on the basis of "information concerning *U.S. domestic producers'* costs adjusted for differences in the foreign country in question from information publicly available."⁷⁹

⁷⁴ 19 C.F.R. § 353.5(d) (1981).

⁷⁵ *Id.* § 353.6; 19 U.S.C. § 1677b(a)(2) (Supp. III 1979). See *Railway Track Maintenance Equipment from Austria*, 42 Fed. Reg. 41,339, 41,340 (1977); *Tantalum Electrolytic Fixed Capacitors from Japan*, 41 Fed. Reg. 31,240, 31,241 (1976); *Automobile Body Dies from Japan*, 41 Fed. Reg. 53,385, 53,385 (1976). But see *Certain Fresh Winter Vegetables from Mexico*, 45 Fed. Reg. 20,512, 20,515 (1980) (third country price rather than constructed value used since constructed value would have yielded a unitary price in a market where prices fluctuated by the moment).

Foreign market value based on constructed value is calculated by adding the costs of materials and fabrication or processing, an amount for general expenses and profit of not less than ten percent and eight percent respectively, and the cost of all packing and incidental expenses incurred in placing the merchandise in condition packed ready for shipment to the United States 19 C.F.R. § 353.6 (1981). See *Strontium Nitrate from Italy*, 46 Fed. Reg. 25,496, 25,496-97 (1981) for the calculation of profit in constructed value cases.

⁷⁶ 19 U.S.C. § 1677b(b) (Supp. III 1979); 19 C.F.R. § 353.7 (1981). The phrase "substantial quantities" has not been defined. See, e.g., *Pressure Sensitive Plastic Tape from Italy*, 42 Fed. Reg. 27,705, 27,706 (1977). With regard to the "recovery of costs" test, see *Welded Stainless Steel Pipe & Tubing from Japan*, 43 Fed. Reg. 17,439, 17,440 (1978): the question whether all costs can be recovered over a reasonable period of time "must be interpreted in this case to require a determination of whether all costs can be recovered over a normal business cycle." The business cycle applicable to the Japanese steel industry included "the latest trough-to-trough in utilization from 1972 through 1976." Thus, the average capacity utilization rate during this period "must be applied to certain elements of the cost of production . . . , namely labor, depreciation, interest and other fixed expenses."

⁷⁷ 19 U.S.C. § 1677b(b) (Supp. III 1979); 19 C.F.R. § 353.7(b) (1981).

⁷⁸ See note 75 *supra*; notes 213-224 and accompanying text *infra*. It should be noted, however, that cost of production is to be calculated as to the exporter's home market (or third country) sales, whereas constructed value relates to the cost of producing the merchandise sold in the United States.

⁷⁹ 19 C.F.R. § 353.36(a)(7) (1981) (emphasis added). See *Viscose Rayon Staple Fiber from Belgium*, 43 Fed. Reg. 32,915, 32,915 (1978) (best evidence of cost of production drawn from costs of U.S. rayon staple fiber industry with adjustments for differences in costs of materials

As is the case with foreign market value,⁸⁰ the price at which the exported merchandise is sold in the United States, the "United States price,"⁸¹ may take one of several forms. If the merchandise is purchased or agreed to be purchased from the producer of the merchandise prior to the date of importation into the United States, the purchase price formula is used to calculate the U.S. price of the merchandise.⁸² If, however, the merchandise is sold or agreed to be sold in the United States after exportation by or for the account of the exporter, exporter's sales price (ESP) is used.⁸³ This occurs when, for example, the exporter inventories merchandise in the United States with a related distributor, which then resells the merchandise to unrelated retail purchasers. There are significant differences from a price comparison standpoint, and therefore from the standpoint of information to be supplied by petitioner, between these two types of U.S. price.

The standard period covered by an LTFV investigation is six months.⁸⁴ In a purchase price case, the period during which U.S. sales

and labor between the United States and Western Europe, as corroborated by published sources of information).

⁸⁰ For foreign market value based on sales in a third country by a related company, see 19 U.S.C. § 1677b(d) (Supp. III 1979); 19 C.F.R. § 353.9 (1981).

⁸¹ 19 U.S.C. § 1677a(a) (Supp. III 1979); 19 C.F.R. § 353.10 (1981).

⁸² See 19 U.S.C. § 1677a(b) (Supp. III 1979); 19 C.F.R. § 353.10(b) (1981). Purchase price will typically be used when the exporter and purchaser/importer are unrelated parties. See, e.g., Audible Signal Alarms from Japan, 43 Fed. Reg. 30,956, 30,956 (1978) (purchase price used since ninety-nine percent of all export sales were made to unrelated U.S. purchasers). Even when the initial sale is made in the *home market* for later resale to the United States, purchase price is used if the initial purchaser is an unrelated party. See Sorbates from Japan, 43 Fed. Reg. 26,175, 26,176 (1978) (purchase price used was that to unrelated home market trading companies which exported the merchandise to the United States); Saccharine from the Republic of Korea, 42 Fed. Reg. 46,091, 46,091 (1977) (sale to unrelated home market trading company which then resold to unrelated U.S. firms); Fully Automated Digital Scales from Japan, 42 Fed. Reg. 1,327, 1,328 (1977) (sale to unrelated trading company which then resold to related U.S. firm). See also Carbon Steel Plate from Poland, 44 Fed. Reg. 23,619, 23,620 (1979). Even when the exporter and importer are related, however, a purchase price transaction may still occur where the related importer acts merely as a purchasing agent for the U.S. customer, the contract between the customer and exporter is consummated prior to the importation of the merchandise, and the related importer does not hold inventory for later resale of the merchandise to as yet unidentified U.S. purchasers. See, e.g., Certain Carbon Steel Products from Certain European Countries, 45 Fed. Reg. 26,109 (1980).

⁸³ 19 U.S.C. § 1677a(c) (Supp. III 1979); 19 C.F.R. § 353.10(c) (1981).

⁸⁴ 19 C.F.R. § 353.38(a) (1981) specifies that pricing information submitted should cover a period of at least 150 days prior to, and 30 days after, the first day of the month in which the petition was received in acceptable form. See also *id.* § 153.31(b) for the period of investigation previously utilized by Treasury. Often, however, the period of investigation differs from the six month standard. See Viscose Rayon Staple Fiber from Austria, 43 Fed. Reg. 57,999, 58,000 (1978) (five month period of investigation); Motorcycles from Japan, 43 Fed. Reg. 35,140, 35,140 (1978) (eight month period); Railway Track Maintenance Equipment from Austria, 42 Fed. Reg. 41,339, 41,340 (1977) (ten month period). Cf. Certain Carbon Steel Plate from Poland, 44 Fed. Reg. 23,619, 23,620 (1979) (two months of pricing data gathered in "fast-track" proceeding for violation of steel trigger price mechanism).

Where sales below the cost of production are alleged, costs incurred in the production of the merchandise sold during the period of investigation are to be supplied. See note 219 *infra*; Silicon Metal from Canada, 43 Fed. Reg. 57,371, 57,371 (1978). This means that the time lag between production and sale must be estimated and then, on the basis of that lag, the time

are examined is virtually identical to the time period examined in the home market, thus greatly simplifying the petitioner's task of price investigation.⁸⁵ If ESP is used, however, the home market sales investigated are those made between the first and last dates on which the merchandise sold to unrelated U.S. purchasers was exported from the foreign country.⁸⁶ The data gathering process is thus far more complex, involving a significantly expanded time frame.

The use of ESP is generally more advantageous for the foreign exporter than purchase price. The ESP analysis begins with the resale price in the United States, which is normally a higher price than the import price, thus tending to minimize LTFV margins. Moreover, the adjustments made to U.S. and home market transaction prices in order to work those prices back to a single ex-factory basis differ depending on whether purchase price or ESP is involved.⁸⁷ While the issue of price adjustments will be discussed below, suffice it to say here that a foreign exporter typically has somewhat more room in which to manipulate price in the ESP situation than in the purchase price situation.⁸⁸

The importance of price adjustments cannot be over-emphasized.⁸⁹ In numerous cases, these adjustments greatly diminish or totally eliminate what at first appeared to be substantial dumping margins. The prudent practitioner therefore will attempt to compile as much information as possible on adjustments to price, whether or not that information is actually included in the petition.⁹⁰

In addition to the relevant foreign market value, U.S. price, and, where appropriate, cost of production data,⁹¹ the petition must contain a

period for cost analysis must be correlated with the time period for price analysis. In *Certain Steel Wire Nails from the Republic of Korea*, 45 Fed. Reg. 53,924 (1980), a change in the time period for production costs produced a significant change in the LTFV margins. Compare 44 Fed. Reg. 61,722, 61,723 (1979, preliminary) with 45 Fed. Reg. 34,941, 34,944 (1980, final).

⁸⁵ A petitioner's data on foreign market prices may be accepted by Commerce as the basis for instituting an investigation even if that data relates to a time frame which precedes the period of investigation. The Department's LTFV determination, however, will be based on its own time period and thus may yield a different result.

⁸⁶ See, e.g., *Titanium Dioxide from the Federal Republic of Germany*, 44 Fed. Reg. 47,200, 47,201 (1979) (in exporter's sales price situation, home market data was provided for the period corresponding to the dates of export of the merchandise to the United States).

⁸⁷ 19 C.F.R. §§ 353.10(d), .10(e) (1981) specify the standard deductions from and additions to purchase price and exporter's sales price needed to arrive at an ex-factory price of the merchandise. Further adjustments are contained in §§ 353.14-.19.

⁸⁸ For example, *id.* § 353.10(e) provides for adjustment to exporter's sales price for commissions, selling expenses incurred in the U.S. by or for the account of the exporter, and any increased value resulting from manufacture or assembly in the United States prior to resale.

⁸⁹ The most critical adjustments are those arising from physical differences in the merchandise and differences in circumstances of sale. See notes 196-208 and accompanying text *infra*.

⁹⁰ While the filing of a complete and detailed petition is typically in the interest of the petitioner, particularly when the foreign exporter refuses to provide Commerce with any data or with verifiable data, petitioner should not actually suggest the existence of possible adjustments to the foreign exporter.

⁹¹ In addition, the petition must provide any evidence supporting an allegation of critical circumstances, if such evidence is known to petitioner at the time of filing. To the extent there

summary presentation of injury-related information. ITC regulations set forth with some particularity the indicia of injury which the Commission will examine in making determinations of material injury or threat thereof or material retardation of establishment.⁹² Petitioner should make every effort to provide at least some information on each of the relevant issue-areas,⁹³ including the volume of imports; the effect of imports on domestic prices, including the presence of price undercutting, price suppression, or price depression; the impact of imports on the operating results of petitioner and, if possible, on domestic producers as a whole, including actual or potential declines in output, sales, market share, profits, productivity, return on investment, capacity utilization, employment, wages, and so on; and, if threat of material injury is alleged, an analysis of foreign capacity, the availability of alternative export markets, and the rate of increase of dumped imports.⁹⁴ As noted

have been massive imports over a relatively short period of time and there is either a history of dumping the subject merchandise or the exporter knew or should have known that the sales were at LTFV, petitioner may be entitled to a retroactive suspension of liquidation. 19 C.F.R. § 353.36(a)(14) (1981); see notes 150-152 and accompanying text *infra*. The petition should also be accompanied by any documentary evidence available. 19 C.F.R. § 353.36(a)(15) (1981).

⁹² See 19 C.F.R. § 207.26 (1981).

⁹³ *Id.* §§ 207.26(a)(1), .26(b). Although the regulations do not specify a time frame, the Commission will generally examine the indicia of injury over a three to five year period. The Commission's questionnaire to all domestic producers normally asks for data over such a time frame.

⁹⁴ The threat of injury must "rest on evidence showing that the likelihood is real and imminent and not on mere supposition, speculation or conjecture." S. Rep. No. 1298, 93d Cong., 2d Sess. 180 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186. See also S. REP. NO. 249, 96th Cong., 1st Sess. 71, 88-89 (1979) *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 381. In *Methyl Alcohol from Canada*, 44 Fed. Reg. 40,734 (1979), Chairman Alberger and Commissioner Stern, dissenting in this affirmative injury determination, stated:

In analyzing the body of Commission precedent, two preconditions for finding likelihood of injury, which are consistent with the "real and imminent" standard emerge: (1) the industry is—and will continue to be—vulnerable to injury (2) the foreign producers have the capacity and the need to export significant amounts of goods at less than fair value.

44 Fed. Reg. at 40,737. This 2-pronged approach entails first, a finding of sluggishness in industry growth and second, an analysis of foreign capacity, including an examination of foreign home market consumption trends. 44 Fed. Reg. at 40,737-38. In *Alberta Gas Chemicals, Inc. v. United States*, 15 Cust. B. & Dec. 10 (June 24, 1981) (U.S.C.I.T. Slip Op. 81-48 (May 28, 1981)), the ITC's 3-2 likelihood of injury determination in *Methyl Alcohol from Canada*, *supra*, was reversed on the ground that a finding of "a mere possibility that injury might occur at some remote future time," based primarily on speculation that the exporter might expand its capacity, did not satisfy "the 'real and imminent' standard enunciated by Congress." 15 Cust. B. & Dec., at 23. See also *Anhydrous Sodium Metasilicate from France*, 46 Fed. Reg. 176, 178 (1981) (threat based on exporters' success in a portion of one geographic market and the possibility that the geographic market could be expanded); *Condenser Paper from Finland & France*, 44 Fed. Reg. 52,046, 52,048 (1979) (imports from France had fallen due to the dumping action but could be expected to rise again if a negative determination were rendered); *Bicycle Tires & Tubes from the Republic of Korea*, 44 Fed. Reg. 20,308, 20,309 (1979) (foreign capacity had been underutilized; the Korean manufacturers were thus in a position to increase exports in the event of a negative determination); *Impression Fabric of Man-Made Fiber from Japan*, 43 Fed. Reg. 14,143, 14,144 (1978) (depressed condition of Japanese home market synthetic fiber industry noted); *Metal-Walled Above-Ground Swimming Pools from Japan*, 42 Fed. Reg. 35,231, 35,232 (1977) (continued LTFV imports would exacerbate a trend of declining profits within the domestic industry). But see *Acrylic Sheet from Japan*, 41 Fed. Reg. 32,294, 32,296-97 (1978)

earlier, no precise pattern regarding the quantum of evidence needed to establish material injury emerges from prior Commission decisions.

In addition to the indicia of injury or likelihood thereof, petitioner should present evidence demonstrating that the injury complained of is caused, at least in significant part, by LTFV imports.⁹⁵ The Commission in recent years has given careful scrutiny to this causation issue. Respondents will routinely present detailed information aimed at demonstrating that the harm suffered by the U.S. industry is attributable to such non-import related factors as intra-industry competition and new developments in technology.⁹⁶ In establishing the necessary causal link, however, the effects of LTFV imports on the domestic industry "will not be weighed against the effect associated with other factors which may be contributing to overall injury to an industry."⁹⁷ The petition is thus sufficient from a causation standpoint if it can relate the alleged injury in significant part to imports at LTFV even if other factors unrelated to LTFV sales may also have contributed to that injury.

B. Timing and Other Pre-Filing Considerations

The question when to file an antidumping action can be nearly as important as the decision whether to file. Yet, in the majority of cases, the date on which the petition is to be filed is never raised as an issue. Because preparation of a petition, including data collection, can easily take a number of months, the client is normally anxious to file as soon as the petition is completed. Such a rush to file, however, can severely prejudice the outcome of the proceeding.

On the pricing side of the case, fluctuations in the exchange rate of the relevant exporting country can have an important impact on the

(dissent noted that economic recovery in the home market and certain structural factors in the United States would prevent any sudden increase in import penetration); Tantalum Electrolytic Fixed Capacitors from Japan, 41 Fed. Reg. 47,604, 47,605 (1976) (no likelihood of injury despite planned capacity expansion in home market and indication from one producer that its U.S. exports would increase; growth in U.S. demand was anticipated); Polymethyl Methacrylate from Japan, 41 Fed. Reg. 26,278, 26,279 (1976) (although excess foreign capacity existed, import penetration was not expected to increase given economic recovery underway in both Japan and the United States following the recession).

⁹⁵ See note 19 *supra*.

⁹⁶ See 19 C.F.R. § 207.27 (1981). The Commission has often traced injury to factors other than sales at LTFV. See generally Sodium Hydroxide from Certain European Countries, 45 Fed. Reg. 11,617, 11,620 (1980) (Comm'r Stern) (price suppression and price depression caused by large domestic producers' price undercutting); Titanium Dioxide from Certain European Countries, 44 Fed. Reg. 66,997, 66,998-99 (1979) (domestic firms unable to compete with dominant U.S. producers); Uncoated Free Sheet Offset Paper from Canada, 43 Fed. Reg. 12,389, 12,390 (1978) (domestic price weakness due to intra-industry competition); Motorcycles from Japan, 43 Fed. Reg. 52,295, 52,296-97 (1978) (domestic motorcycles did not have the quality or performance characteristics of Japanese motorcycles); Knitting Machinery for Ladies' Seamless Hosiery from Italy, 41 Fed. Reg. 52,726, 52,727 (1976) (imported machinery outperformed existing domestic model and petitioner's inability to market newer machinery due to machine's unreliability and inefficiency).

⁹⁷ 19 C.F.R. § 207.27 (1981). "Nor will the petitioner be required to bear the burden of proving the negative, that is, that material injury is not caused by such other factors." *Id.*

LTFV margins. The exchange rate used by Commerce in making its price comparisons will depend upon the period of investigation chosen. In some cases, a delay in filing will ensure the use of a more favorable rate of exchange to such an extent that postponement of the filing date should be considered.

The premature filing of an antidumping petition also can be severely harmful to the petitioner's injury case. Unless the impact of imports has reached the point where material injury to the domestic industry and causation are reasonably clear, the success of the case is highly doubtful. Rarely, if ever, will a case based solely on the threat of future injury achieve an affirmative determination.

It also may be useful to time the filing of the petition so that the ITC's injury investigation will coincide with the declining phase of the domestic industry's business cycle.⁹⁸ Where the industry is currently experiencing severe economic problems,⁹⁹ it becomes substantially easier for the petitioner to argue successfully that some material part of that clear injury is caused by LTFV imports. Moreover, several of the present Commissioners have expressed the view that a U.S. industry that is already suffering injury from factors other than LTFV imports is particularly vulnerable to additional injury caused by dumped imports.¹⁰⁰

A further factor to be considered is whether other U.S. producers will support the petition at the International Trade Commission. The Commission has, on occasion, commented adversely on the lack of industry support.¹⁰¹ Although the absence of such support has never been characterized as the single decisive factor by any Commissioner, it clearly has had a substantial influence in a number of negative determinations.¹⁰² Accordingly, efforts should be made to obtain the support of all

⁹⁸ The domestic steel industry has been particularly successful with this strategy in escape clause cases. *See, e.g.*, Stainless Steel & Alloy Tool Steel, U.S.I.T.C. Pub. No. 756 (Jan. 1976).

⁹⁹ The Commission, however, in a number of cases has reached negative determinations on the theory that injury was caused by a recession and not by LTFV imports. *See, e.g.*, Tantalum Electrolytic Fixed Capacitors from Japan, 41 Fed. Reg. 47,604 (1976). *See also* Acrylic Sheet from Japan, 41 Fed. Reg. 32,194 (1978) (3-3 affirmative determination with dissenters arguing that injury was due to recession); Melamine in Crystal Form from Japan, 41 Fed. Reg. 56,865 (1976) (same).

¹⁰⁰ *See, e.g.*, Certain Carbon Steel Products from Certain European Countries, 45 Fed. Reg. 31,814, 31,815 (1980) (Comm'rs Bedell, Moore and Calhoun) (domestic industry susceptible to effects of LTFV imports because of high fixed costs of steelmaking); Spun Acrylic Yarn from Japan & Italy, 45 Fed. Reg. 19,682, 19,685 n.2 (1980) (Chairman Alberger) (accepted "increased vulnerability" concept); 45 Fed. Reg. at 19,683 (Comm'rs Stern and Calhoun) (U.S. industry experiencing "some difficulty, perhaps making the industry particularly vulnerable" to LTFV imports).

¹⁰¹ *See, e.g.*, Sodium Hydroxide from Certain European Countries, 45 Fed. Reg. 11,617, 11,619 n.3 (1980) (Comm'r Stern) (largest domestic producer, Dow Chemical, neither supported the petition nor alleged injury). In Photographic Color Paper from Japan & West Germany, 43 Fed. Reg. 20,875, 20,876 (1978), a unanimous preliminary determination of no injury, the Commission discussed in detail the fact that only a small segment of the U.S. industry supported the petition.

¹⁰² *See* Weighing Machinery & Scales from Japan, 45 Fed. Reg. 30,190, 30,193 (1980), where Chairman Alberger and Commissioner Calhoun stated:

major producers, either individually or through a trade association. Failing this, petitioner must be prepared to explain why particular segments of the industry do not support, or may actually oppose, the petition.

The political realities of a given case also deserve some pre-filing consideration. While antidumping actions are not overtly political in nature,¹⁰³ the availability of congressional, labor, or administration support in the extreme case can affect the substantive result. The U.S. steel industry, for example, has always marshalled strong political support well in advance of filing petitions for antidumping relief. That support has not only added force to the efforts of the industry to halt allegedly unfair competition, but has also enhanced the industry's bargaining position with the Commerce Department, aiding the favorable settlement of those actions.¹⁰⁴

In the more normal case, political support often can be helpful to petitioner with respect to certain procedural issues. To the extent the Commerce Department or ITC may delay in responding to protective order requests, for example, the presence of such support may be useful. Where critical circumstances are alleged in a petition,¹⁰⁵ the presence of political support may enhance petitioner's opportunity for the desired retroactive suspension of liquidation.

Political support is more or less readily obtainable by petitioners in antidumping cases. The actual or potential loss of jobs to import competition is a matter of intense concern to the congressman or Senator in whose constituencies the affected production facilities are located. Even those legislators with a strong free trade bias will generally be receptive to an antidumping case, based as it is upon allegations of unfair pricing.

In major actions such as the 1980 cases involving European steel imports, strong and effective political support is important to counterbalance the Administration's inevitable concern over the potential impact of

Since the Commission's staff made reasonable but unsuccessful attempts to obtain data from the two firms, the domestic industry (collectively) should not benefit from their own failure to cooperate and provide data necessary to accurately assess the state of the industry.

See also Countertop Microwave Ovens from Japan, 45 Fed. Reg. 11,612, 11,614 (1980) (Comm'rs Stern and Calhoun) (petitioner trade association and one of its larger members failed to supply complete information); Perchloroethylene from Belgium, France & Italy, 43 Fed. Reg. 37,772, 37,774 (1978) (Comm'rs Alberger and Ablondi, dissenting) (no explanation given by petitioners why two companies did not join the petition); Standard Household Incandescent Lamps (Bulbs) from Hungary, 43 Fed. Reg. 40,937 (1978) (petitioner, during hearing, questioned about dominant bulb producer's failure to support petition).

¹⁰³ Escape clause and section 406 proceedings, note 49 *supra*, traditionally have been regarded as politically sensitive actions because the ultimate decision is discretionary with the President.

¹⁰⁴ The 1980 carbon steel cases were settled, *inter alia*, by the reinstatement of the trigger price mechanism (TPM) at revised levels. Certain Carbon Steel Products from Certain European Countries, 45 Fed. Reg. 66,833 (1980). The TPM, in practical effect, sets a minimum price floor below which imports of major steel mill products cannot enter the United States without "triggering" private or administrative action.

¹⁰⁵ *See* notes 150-152 and accompanying text *infra*.

the proceeding upon international relations. In such circumstances, it is prudent to begin the political campaign perhaps a year or more before the petition is filed. All local and national labor unions whose members' jobs have been lost or threatened should be contacted, educated as to the nature of the import problem, and urged to communicate with Administration officials and Members of Congress. A public relations firm may be useful in bringing the issue to the attention of the news media and informing public opinion. All U.S. producers of the merchandise in question also should be enlisted in the effort. On Capitol Hill, particular attention should be paid to members of the Senate Finance Committee and the House Committee on Ways and Means, both of which have direct oversight responsibility in the trade law area. Examples of effective political efforts in connection with recent trade cases are the widely publicized campaigns waged by the steel, specialty steel, footwear, and automobile industries.

Finally, pre-filing review of the petition by both the Commerce Department and ITC staff personnel can be extremely useful.¹⁰⁶ Not only can petitioner educate each agency about the action in advance of filing, but the agencies themselves will generally offer useful comments on the sufficiency of the data presented, highlighting potentially difficult areas of investigation or issues on which additional information will be required. Through the process of pre-filing review, petitioner not only establishes a rapport with the staff which will be assigned to the matter, but also is alerted to some of the issues which will be of greatest substantive concern during the Commerce and ITC investigations.

III. Prosecuting the Case

A. *Timetable for Determinations*

An antidumping action is initiated by the simultaneous filing of the petition¹⁰⁷ with both the Commerce Department and the International Trade Commission.¹⁰⁸ Within twenty days from the date of filing, the

¹⁰⁶ See Preamble to Department of Commerce Antidumping Duties Regulations, 45 Fed. Reg. 8,182, 8,187 (1980) [hereinafter cited as Preamble to Commerce Regulations]. See also 19 C.F.R. § 353.36(h) (1981) which provides that additional information concerning requirements for petitions may be obtained by contacting the Office of the Assistant Secretary for Trade Administration.

¹⁰⁷ See 19 U.S.C. § 1673a(b)(2) (Supp. III 1979); 19 C.F.R. §§ 353.36(c), 207.10 (1981). The Act provides that Commerce can self-initiate an antidumping investigation "whenever the administering authority determines, from information available to it, that a formal investigation is unwarranted . . ." 19 U.S.C. § 1673a(a) (Supp. III 1979); 19 C.F.R. § 353.35 (1980).

¹⁰⁸ During the course of the investigation thus initiated, petitioner should maintain close contact with the staffs of both agencies, and should be ready and willing to provide the Commerce and ITC casehandlers with any and all information needed. Note that records are maintained of all *ex parte* contacts with the staff. See 19 U.S.C. § 1677f(a)(3) (Supp. III 1979); 19 C.F.R. §§ 353.26, § 207.5 (1981).

All confidential material submitted in the petition or subsequent to its filing must be accompanied by a non-confidential summary. See 19 U.S.C. § 1677(b) (Supp. III 1979); 19 C.F.R. §§ 353.28-.29, 201.6 (1981).

Commerce Department will rule on the sufficiency of the petition and will determine whether the petition alleges all facts "necessary for the imposition of a duty."¹⁰⁹ At the same time, the ITC must assess whether there is a "reasonable indication" of material injury, threat thereof, or material retardation of establishment of an industry in the U.S. by reason of the alleged LTFV imports.¹¹⁰ This ITC determination must be rendered within forty-five days of the date on which the petition is filed.¹¹¹

Unlike final injury determinations which are preceded by a full scale hearing before the Commission, a preliminary injury conference takes place before the ITC Director of Operations.¹¹² Despite the relative informality of the conference approach, testimony is heard, a transcript maintained, and staff cross examination of witnesses allowed.¹¹³ Post-hearing briefs are also submitted. The Director then prepares a re-

¹⁰⁹ 19 U.S.C. §§ 1673a(c), 1673a(d) (Supp. III 1979); 19 C.F.R. §§ 353.37, 207.12, -13 (1981).

In *Certain Carbon Steel Pipes & Tubes from Japan*, 42 Fed. Reg. 56,403 (1977), the Treasury Department discussed, for the first time, the standard to be employed in assessing the adequacy of the petition. In that case, the petition contained a pricing count and a cost of production count. Certain respondents suggested that the sample of sales used in the pricing count was too small and that the cost of production methodology employed by petitioner was erroneous. In determining that the information provided was sufficient to warrant initiation of the investigation, Treasury stated:

In determining whether to initiate an investigation . . . the Secretary must act affirmatively if he receives "information alleging" that a particular class of merchandise is being sold at less than its fair value. No quantum of evidence is specified. The law must be presumed to permit a negative determination if the allegations received are of merely de minimis sales at less than fair value—in terms of their quantity or the margins of dumping alleged. However, . . . allegations which, on their face, appear to establish the existence of more than insubstantial dumping margins on a not significant [sic] volume of imported merchandise suffice to permit (if not require) the Secretary to proceed with an investigation.

It may be difficult for a petitioner to determine whether a foreign producer's sales in its home market or to third countries are at prices establishing dumping margins. It is likely to be even more difficult for a petitioner to determine a foreign producer's cost of production and the other data relevant to a determination under Section 205(b) of the Act. The threshold the petition must cross is necessarily low.

42 Fed. Reg. 56,403-04. 19 C.F.R. § 353.36(a) (1981) specifies, however, that petitioner must present all evidence reasonably available to it.

¹¹⁰ See 19 U.S.C. § 1673b(a) (Supp. III 1979); 19 C.F.R. § 207.12 (1981). Such preliminary injury investigations are now required in all antidumping proceedings. Previously, the preliminary reference to the ITC was discretionary with the Treasury Department. See Trade Act of 1974, Pub. L. No. 93-618, § 321(a), 88 Stat. 2046 (repealed 1979), previously codified at 19 U.S.C. § 160(c)(2)).

¹¹¹ See 19 U.S.C. § 1673b(a) (Supp. III 1979); 19 C.F.R. § 207.17 (1981).

¹¹² See 19 C.F.R. §§ 207.13-.15 (1981). While the ITC is authorized to hold a hearing in lieu of the Director's conference, *id.* § 207.15, it is doubtful that hearings will be held in preliminary investigations. No hearing was held in the 1980 European steel cases, surely among the most momentous cases the Commission has seen. See *Certain Carbon Steel Products from Certain European Countries*, 45 Fed. Reg. 21,404 (1980, preliminary).

¹¹³ Cross examination among the parties generally is not allowed unless the case is exceptional, as in *Certain Carbon Steel Products from Certain European Countries*, 45 Fed. Reg. 31,814 (1980, preliminary). Nor are witnesses or their attorneys sworn in prior to testifying.

port of the investigation for the Commission, together with a recommendation as to the preliminary determination.¹¹⁴

The preliminary injury phase is punctuated, much like the final injury phase, by the issuance of ITC injury questionnaires to all importers and domestic producers of the merchandise under investigation.¹¹⁵ While many areas of inquiry such as production, sales, pricing, capacity utilization, and employment data are standardized, petitioner can and should work with the staff to adapt the questionnaire to the particular industry involved. For example, in *Motorcycles from Japan*,¹¹⁶ the ITC questionnaire was greatly modified to take into account certain inventory procedures and interim price reductions common among importers of Japanese motorcycles. From the petitioner's standpoint, sufficiently detailed questionnaires are of vital importance. Although the petition contains some injury data, it is the questionnaire responses along with published statistical information that are principally used by the staff in preparing its report.¹¹⁷ Therefore, petitioner must attempt to ensure that the questionnaire covers all relevant areas of inquiry.¹¹⁸

At the conference itself, petitioner is expected to give a somewhat abbreviated review of the indicia of injury alleged in the petition and the role played by LTFV imports in causing that injury. Such a presentation will entail the preparation of witness testimony, exhibits, and the like, much in the same way evidence is prepared for purposes of a final injury hearing. In "big cases," such as the conference held in *Certain Carbon Steel Products from Various European Countries*,¹¹⁹ economists' formal statements may also be presented along with congressional and labor testimony. In the standard case, however, petitioner and all those in support of the petition on the one hand, and all respondents on the other, typically are given only one hour per side within which to make presentations. The level of detail that can be presented in such a confer-

¹¹⁴ See 19 C.F.R. § 207.16 (1981). "The Commission may choose to accept or reject this recommendation in whole or in part." Preamble to International Trade Commission Procedures for the Conduct of Investigation, 44 Fed. Reg. 76,458, 76,463, at § 207.16 (1979) [hereinafter cited as Preamble to Final ITC Regulations].

¹¹⁵ These questionnaires can have the force of a subpoena, "provided they are labeled as subpoenas and signed by a Commissioner." 19 C.F.R. § 207.8 (1981). Note further that the Director of Operations is authorized to conduct "such audits as he deems necessary." *Id.* § 207.4(b).

¹¹⁶ 43 Fed. Reg. 52,295 (1978). Although this questionnaire was issued for use in the final injury determination, much the same opportunity for input exists for the petitioner in the preliminary injury phase.

¹¹⁷ In the event requested information is not provided, the Commission may "use the best information otherwise available in making its determination." 19 C.F.R. § 207.8 (1981). Presumably, such information could include that presented in the petition.

¹¹⁸ Injury information relating to domestic prices and U.S. producers' costs of production (if provided), which is contained in the petition and in domestic questionnaire responses is subject to disclosure pursuant to administrative protective order. See notes 169-172 and accompanying text *infra*.

¹¹⁹ 45 Fed. Reg. 31,814 (1980, preliminary). In that case, the preliminary injury conference proceeded for two full days.

ence thus falls significantly below that which would be expected in a final injury hearing. In view of these time limitations, it is generally advisable to prepare detailed written testimony and economic analyses, submit that data to the staff in advance of the conference, and utilize the conference itself for presentation of a brief summary of major points and arguments.

While the ITC preliminary injury phase proceeds, the clock has already begun to run on the Commerce Department's preliminary determination of sales at LTFV. A preliminary LTFV determination must be made within 160 days from the date on which the petition is filed, 210 days from that date if the case is declared "extraordinarily complicated" or if petitioner so requests.¹²⁰ While a negative ITC preliminary injury determination would terminate the case,¹²¹ Commerce must nonetheless proceed with its pricing investigation during the initial forty-five day ITC period if the statutory deadlines are to be met.

Once the petition has been accepted by Commerce within the initial twenty day time frame, a full-scale investigation is thus instituted by the department.¹²² Commerce will issue pricing questionnaires and, if appropriate, cost of production questionnaires, usually within two weeks from the date of initiation to those foreign exporters which account for a significant percentage of the merchandise allegedly sold at LTFV.¹²³ As with the ITC injury questionnaire, petitioner's principal role at this stage

¹²⁰ The 160 day rule is set forth in 19 U.S.C. § 1673b(b)(1) (Supp. III 1979). 19 U.S.C. § 1673b(c)(1) (Supp. III 1979) sets forth the 210 day exception. The "complex case" criteria set forth in the statute—number and complexity of the transactions, novelty of issues, and number of firms to be investigated—parallel prior Treasury practice. *See generally* Titanium Dioxide from Certain European Countries, 44 Fed. Reg. 25,967, 25,968 (1979) (numerous individual transactions, and questions concerning the scope of the investigation and applicable market for fair value comparisons); Certain Carbon Steel Products from the United Kingdom, 43 Fed. Reg. 32,343, 32,344 (1978) (thousands of transactions and complex issues relating to claimed adjustments); Motorcycles from Japan, 43 Fed. Reg. 2,968, 2,969 (1978) (unresolved questions concerning comparability of merchandise and use of third country sales).

Petitioner may also request an extension of time within which the preliminary determination must be made, and should do so in the event additional information becomes available that may influence the outcome of the preliminary determination. *See* 19 U.S.C. § 1673b(c)(1)(A) (Supp. III 1979).

¹²¹ *See* 19 U.S.C. § 1673b(a) (Supp. III 1979). ITC preliminary and final determinations are made at a public staff briefing and vote. Following an affirmative ITC preliminary injury determination, the Director of Operations "may continue such investigative activities as he deems appropriate pending notice of an affirmative preliminary determination or a final determination" from the Commerce Department. 19 C.F.R. § 207.18 (1981).

¹²² *See* 19 C.F.R. § 353.38(a) (1981).

¹²³ *Id.* § 353.38(a) provides that the Department will normally examine at least 60% of the dollar volume of exports to the United States. *See also id.* § 353.38(b). If an exporter wishes to be excluded from an affirmative determination on the ground that none of its merchandise is sold at LTFV, however, at least 75% of its sales made in the United States must be examined. *Id.* § 353.45. For that reason, an exporter not specifically named in the investigation may submit a voluntary questionnaire response. *See, e.g.,* Tantalum Electrolytic Fixed Capacitors from Japan, 41 Fed. Reg. 31,240, 31,240 (1976) (one exporter accounting for 10% of the merchandise produced and sold submitted a voluntary questionnaire response). Since a dumping finding covers *all* of the subject merchandise which is exported from the named country or countries, a producer can only be excluded from such a finding if it can demonstrate that none of its sales

is to suggest avenues of investigation for Commerce, including, for example, a possible shift in or extension of the standard investigatory time period,¹²⁴ a requirement that the exporter submit on-going pricing data, or a request for the reporting of particular categories of sales or cost items. Because the petition is merely a triggering device for the initiation of the proceeding, the data contained therein are not used by Commerce absent a lack of cooperation from the exporters. Thus, as with the ITC questionnaire, petitioner must work with the staff to ensure that the scope of the Commerce Department investigation is adequate.

In most cases, Commerce Department officials will visit the exporters' headquarters in the foreign country for formal presentation of the questionnaire to the exporters involved. At this presentation, every effort is made to identify immediately and resolve any difficulties that may be encountered in responding to the requested information.¹²⁵ This consultation procedure, which was initiated under the TAA, has become almost imperative given the shorter time frame within which determinations must be rendered.¹²⁶ Formal presentation also allows for the use of more sophisticated data gathering techniques, such as the newly required submission of computer tapes containing price and cost information.¹²⁷

The formal presentation of the questionnaire and use of computerized responses are but two of the changes in antidumping investigative procedures which may lead to more effective prosecution of antidumping actions. In light of frequent criticisms of the Treasury Department's handling of antidumping cases¹²⁸ and the press of tight deadlines within which determinations must be issued, Commerce has significantly revamped the investigation of antidumping cases in several other significant respects. First, Commerce now utilizes investigative teams rather than single casehandlers.¹²⁹ This team concept is designed to identify and resolve key issues early in the case as well as to provide more manpower and greater coordination.

Second, Commerce has significantly tightened its verification proce-

were made at LTFV. If the manufacturer has not been served with a questionnaire in which it can demonstrate this fact, a voluntary submission must be made.

¹²⁴ See note 84 *supra*.

¹²⁵ This procedure was followed, for example, in *Certain Carbon Steel Products from Certain European Countries*, 45 Fed. Reg. 31,814 (1980, preliminary), but is by no means confined to the larger cases. Under Treasury Department practice, questionnaires were delivered to the respondent companies by an official stationed in the nearest U.S. Embassy. There was thus little or no analysis of the questionnaires at the time of presentation.

¹²⁶ Under current practice, questionnaire responses typically are due within 30 days from the date of issuance, with a single extension of no more than 15 days possible absent exceptional circumstances.

¹²⁷ Computerized responses generally will be required of all respondents that have computer capability.

¹²⁸ Jurisdiction over antidumping actions was shifted from Treasury to Commerce in large part because of these criticisms.

¹²⁹ Typically the team consists of a casehandler from the Office of Investigations, an attorney from the General Counsel's Office, and a member of the Office of Import Policy.

dures.¹³⁰ Under Treasury practice, verification of a foreign producer's questionnaire response normally was handled by a Customs attache stationed at the U.S. Embassy in the country of exportation. The Commerce approach, however, is to send a verification team consisting of the casehandler, an attorney, and, where necessary, an accountant or technical expert to the country of exportation in order to conduct a thorough verification of the responses.¹³¹ Although petitioner cannot be present at the verification, there is now greater assurance that complex issues identified by the petitioner will be aired and pertinent data gathered during the verification process.

At the preliminary determination stage, the only information typically submitted by the exporter, and therefore available to the petitioner under protective order procedure, is the exporter's confidential pricing and cost questionnaire responses.¹³² Information generated during the course of the verification itself ordinarily is not subject to disclosure because such information constitutes the work product of the Department's personnel. If the questionnaire response is verified in its original form, (petitioner can learn this from the casehandler) petitioner can analyze the data presented in the questionnaire, suggest alternative ways in which that data should be interpreted, and actively press its case forward toward an affirmative preliminary determination. If, however, the questionnaire response does not withstand verification in its original form, leading to a situation where much of the data accepted by Commerce is that submitted during verification itself, petitioner may be placed in the frustrating position of having to wait for disclosure of the verification report before being able to address specific issue areas meaningfully. Under such circumstances, petitioner must do its best with whatever information is provided by the casehandler. In any event, petitioner should make every effort to obtain all relevant data as early as possible under the statute's protective order procedures.

¹³⁰ 19 U.S.C. § 1677e (Supp. III 1979) states that unless a waiver of verification has been accepted (notes 146-149 and accompanying text *infra*), Commerce must "verify all information relied upon in making a final determination. . . ." Commerce must state "the methods and procedures used to verify such information." 19 U.S.C. § 1677e(a) (Supp. III 1979). *See, e.g.*, Countertop Microwave Ovens from Japan, 45 Fed. Reg. 47,456, 47,459 (1980) (verification procedures included on-site inspection of randomly selected source documents as well as the inspection of promotional materials, advertisements and specific models).

An exporter may resubmit data prior to verification so long as the "resubmission is made within a period which permits adequate analysis and verification of the information." Preamble to Commerce Regulations, *supra* note 106, at 8,189, para. 47.

¹³¹ A verification manual, prepared for use during the 1980 carbon steel investigations, and emphasizing accounting and cost of production issues, is a public document available from Commerce. *See* ANTI-DUMPING VERIFICATION GUIDE: PRODUCERS, MANUFACTURERS & EXPORTERS, prepared by Alexander Grant & Co., Contract No. TA-80-SAC-01182.

In *Certain Carbon Steel Products from Certain European Countries*, 45 Fed. Reg. 26,109 (1980), an outside accounting firm was retained by the Department to aid in data analysis and in the verification process. Eventually, Commerce plans to develop its own in-house accounting and technical expertise.

¹³² *See* notes 166-167 and accompanying text *infra*.

An affirmative preliminary determination by Commerce¹³³ triggers the suspension of liquidation of all merchandise entered or withdrawn from warehouse for consumption on or after the publication of the preliminary determination.¹³⁴ In addition, the exporter is required to post a bond or other security for each entry equal to the estimated LTFV margin.¹³⁵

A final Commerce Department determination normally is issued within seventy-five days of the preliminary determination.¹³⁶ The time within which a final determination is rendered may be extended to 135 days if so requested by the petitioner prior to the seventy-five day point if the preliminary determination was negative or by exporters accounting for a significant portion of the subject imports if the preliminary determination was affirmative.¹³⁷ After the preliminary determination, a disclosure conference is held with each of the parties at which all computations leading to the preliminary LTFV margins are revealed and all adjustments discussed.¹³⁸ If not already disclosed, the casehandler's verification report is also available. Subsequently, a hearing is held at which the parties may challenge any and all aspects of the LTFV calculations, most notably the propriety of allowing or disallowing price adjustments.¹³⁹ Following the hearing, post-hearing briefs and additional information may be submitted. A final Commerce LTFV determination is then

¹³³ See 19 U.S.C. § 1673b(d) (Supp. III 1979). All relevant information gathered during the course of the investigation is then transmitted to the ITC. 19 U.S.C. § 1671b(d)(3) (Supp. III 1979); 19 C.F.R. § 353.39(f) (1981).

The preliminary determination can be amended after issuance. See, e.g., Melamine in Crystal Form from the Netherlands, 45 Fed. Reg. 20,152 (1980), where the preliminary determination was based upon a weighted average *de minimis* dumping margin of 0.18%. Due to a computational error stemming from the failure to make proper adjustments in bulk packing costs between the two markets, the weighted average margin was revised to 1.93%, which was not considered *de minimis*. As a result, rather than a preliminary negative determination, an affirmative determination was issued. Such revisions will be made where errors in computation are found but will not be made on the basis of changes in the interpretation of law or facts. Those matters will be resolved in the final LTFV determination.

¹³⁴ See 19 U.S.C. § 1673b(d)(1) (Supp. III 1979). The suspension of liquidation may be retroactive if "critical circumstances" are present. See notes 150-152 and accompanying text *infra*.

¹³⁵ See 19 U.S.C. § 1673b(d)(2) (Supp. III 1979). No such suspension of liquidation or the posting of a bond is required in the event of a negative preliminary determination. See note 140 *infra*. The case nonetheless proceeds toward a final Commerce determination.

¹³⁶ See 19 U.S.C. § 1673d(a)(1) (Supp. III 1979); 19 C.F.R. § 353.44(a) (1981).

¹³⁷ See 19 U.S.C. § 1673d(a)(2) (Supp. III 1979); 19 C.F.R. § 353.44(b) (1981).

¹³⁸ 19 C.F.R. § 353.44(d) (1981) provides:

Promptly after making the preliminary determination there shall be disclosed to each interested party . . . all non-confidential information and, if made available [pursuant to protective order], confidential information on the basis of which the preliminary determination was made.

The disclosure conference is conducted by the casehandler.

¹³⁹ *Id.* § 353.44(e). The hearing normally is held within 30 days of the preliminary determination. A request for such a hearing must be accompanied by an outline designating the issues to be discussed. Pre-hearing briefs are required one week before the hearing. *Id.* § 353.47. The hearing is not subject to the requirements of the Administrative Procedure Act (APA). *Id.* § 353.47.

issued.¹⁴⁰

During the course of the final Commerce investigation, the ITC will issue a more comprehensive injury questionnaire to all members of the domestic industry in order to prepare for the final injury determination. The final ITC determination generally must be made within forty-five days of Commerce's affirmative final determination where Commerce's preliminary determination was affirmative, or within seventy-five days after an affirmative Commerce final determination where the Commerce preliminary determination was negative.¹⁴¹ As in the earlier ITC investigation, petitioner should make every effort to work with the staff in formulating the final version of the injury questionnaire and in data collection generally.

Unlike the preliminary injury stage, the final injury determination is preceded first, by a preliminary staff report and the parties' pre-hearing statements,¹⁴² and second, by a full-scale hearing before the Commission itself.¹⁴³ At this hearing, a transcript is maintained, and the parties are afforded the opportunity for cross examination. Testimony typically will be given by petitioner, other members of the domestic industry, labor organizations, economists or other consultants, and, in larger cases, Senators, congressmen, or appropriate local officials. Once again, the most effective presentations are those submitted in advance to the Commission in full written form and then briefly summarized in open hearing, leaving the maximum time for responses to questions posed by the Commis-

¹⁴⁰ If that determination is negative, the case is terminated and any suspension of liquidation then in effect is halted. All estimated antidumping duties are to be refunded and all bonds or other security released. *Id.* § 353.44(h); 19 U.S.C. § 1673d(c)(2) (Supp. III 1979). If that determination is affirmative, all relevant information on which that determination was based is forwarded to the ITC. 19 U.S.C. § 1673d(c)(1)(A) (Supp. III 1979). In addition, if the preliminary determination was negative, Commerce must order the suspension of liquidation and the posting of a cash deposit or bond upon the affirmative final determination. 19 U.S.C. § 1673d(c)(1)(B) (Supp. III 1979).

Petitioner should be on the alert for any modification or amendment of the final Commerce determination. Such amendments are not infrequent and, to the extent the LTFV margins are substantially changed, may seriously impact petitioner's ITC presentation. *See, e.g.*, Marine Radar Systems from the United Kingdom, 45 Fed. Reg. 3,675, 3,675 n.2 (1980) (final weighted average LTFV margin of 5.2% for one exporter changed two months later to no margin at all); Motorcycles from Japan, 43 Fed. Reg. 48,754 (1978) (final Treasury determination modified one day before the ITC hearing to *exclude* one of the four exporters covered by the investigation and reduce the LTFV margins found for the other three producers); Viscose Rayon Staple Fiber from Belgium, 43 Fed. Reg. 35,122 (1978) (ITC terminated injury investigation and instituted new investigation because margins were increased from 6.7% on a weighted average basis to 57.6%). Last minute changes such as these have exasperated the Commission. *See* Viscose Rayon Staple Fiber from France & Finland, 44 Fed. Reg. 10,437, 10,439 n.1 (1979) (Comm'r Stern).

¹⁴¹ *See* 19 U.S.C. § 1673d(b) (Supp. III 1979); 19 C.F.R. § 207.25 (1981).

¹⁴² The ITC notice of final investigation is published following an affirmative preliminary Commerce determination or, if negative, an affirmative final Commerce determination. Subsequently, the Director of Operations prepares a staff report containing preliminary findings of fact. This report is then placed on the public record and, within 15 days thereafter, pre-hearing statements are due. *See* 19 C.F.R. § 207.21 (1981).

¹⁴³ The hearing is not subject to the requirements of the APA. *Id.* § 207.23(b).

sioners and staff. Subsequent to the hearing, post-hearing briefs are filed.¹⁴⁴ The staff briefing of the Commission and Commission vote then follow. If the determination is affirmative, an antidumping duty order will issue.¹⁴⁵ If negative, the case is terminated.

B. Procedures for Expedited Relief

The Trade Agreements Act contains several provisions under which the relief available to a petitioner may be expedited or enhanced. As yet, these provisions remain essentially untested.

The first innovation, the waiver of verification provision,¹⁴⁶ states that within seventy-five days after initiation of the Commerce investigation (ninety-five days after the petition is filed), Commerce must disclose to the petitioner and any other party requesting such disclosure all information obtained during the first sixty days of the investigation. This disclosure takes place only if Commerce determines that "there appears to be sufficient information available upon which the preliminary determination can reasonably be based."¹⁴⁷ Within three working days after such disclosure, each party to whom disclosure was made may furnish an irrevocable written waiver of verification and an agreement that the preliminary determination be issued within ninety days of initiation (110 days after filing the petition). A preliminary determination will be rendered within this ninety-day constraint if all such waivers and agreements are received in a timely manner.¹⁴⁸

To date, only one petitioner has ever waived verification¹⁴⁹ and it is not known whether Commerce has, at other times, been in a position to make the requisite determination that enough data exists at the sixty day point on which to base a preliminary determination. The provision is, however, theoretically available to a petitioner for whom time is of the essence, and is of potential utility where the preliminary margins found are sufficient to remedy any injury to the domestic industry.

In addition to the waiver of verification provision, petitioner may, at any time up to twenty days before a final determination, allege the existence of "critical circumstances."¹⁵⁰ If the Department finds "a reasonable basis to believe or suspect" that such critical circumstances exist, it

¹⁴⁴ There is a 10 page limit on such briefs. *Id.* § 207.25. "Post-hearing submissions which do not accord with this rule will not be accepted." *Id.*

¹⁴⁵ See 19 U.S.C. § 1673e(a) (Supp. III 1979); 19 C.F.R. § 353.48 (1981). The ITC is authorized specifically to "issue an appropriate modification, clarification, or correction of a determination within a reasonable time of its issuance." *Id.* § 207.46. See, e.g., Pipes & Tubes of Iron & Steel from Japan, 45 Fed. Reg. 42,898 (1980, reconsideration of preliminary determination) (use of incorrect import statistics in earlier determination).

¹⁴⁶ See 19 U.S.C. § 1673b(b)(2) (Supp. III 1979); 19 C.F.R. § 353.39(d) (1981).

¹⁴⁷ 19 U.S.C. § 1673b(b)(2) (Supp. III 1979); 19 C.F.R. § 353.39(d) (1981).

¹⁴⁸ One difficulty with this provision is that foreign exporters can prevent its use simply by refusing to furnish adequate data within the first 60 days of the Commerce investigation.

¹⁴⁹ See Anhydrous Sodium Metasilicate from France, 45 Fed. Reg. 58,929 (1980).

¹⁵⁰ See 19 U.S.C. § 1673b(e) (Supp. III 1979); 19 C.F.R. § 353.40(a) (1981).

may suspend liquidation retroactively to encompass all unliquidated entries which were entered or withdrawn from warehouse for consumption within a ninety day period preceding the date on which the suspension of liquidation was first ordered. Critical circumstances can exist under one of two conditions: either there is a history of dumping of the merchandise in the United States or elsewhere, *or* the person by whom or for whose account the merchandise was imported knew or should have known that the merchandise was sold at LTFV, *and* there have been massive imports of the merchandise over a relatively short period of time.¹⁵¹

The existence of critical circumstances has been alleged in only a small handful of cases. There are thus a number of unresolved questions which attend this provision of the law, including the manner in which a history of dumping is to be demonstrated, the evidence needed to show that the LTFV seller knew or should have known that the sales were made below fair value, the import volume or market share which will be deemed "massive," and the meaning of "a relatively short period" within which such massive imports must have entered the United States.¹⁵² While these issues remain open, the practitioner should be alert for facts which suggest that a critical circumstances allegation may be appropriate.

Finally, the suspension provisions of the TAA may be used to settle the entire case at some point prior to a final Commerce determination.¹⁵³ Two types of suspension agreements are authorized under the Act, provided the agreement covers exporters who account for substantially all of the imports of the subject merchandise.¹⁵⁴ First, an investigation may be suspended if the exporters agree to completely eliminate the LTFV margins,¹⁵⁵ or cease exports of the subject merchandise to the United States.¹⁵⁶ Alternatively, an agreement to eliminate the injurious effects of sales at LTFV constitutes grounds for suspension.¹⁵⁷ The latter agreements may only be accepted upon a determination that extraordinary circumstances exist,¹⁵⁸ such as when the investigation is complex and sus-

¹⁵¹ The ITC must also rule upon any critical circumstances allegation. *See id.* § 207.25(d).

¹⁵² *See e.g.*, Natural Menthol from the People's Republic of China, 46 Fed. Reg. 3,258 (1981) (price cutting in a declining market does not establish knowledge of dumping); Unrefined Montan Wax from the German Democratic Republic, 46 Fed. Reg. 16,287 (1981) (massive imports do not establish a history of dumping).

¹⁵³ 19 U.S.C. §§ 1673c(b)-1673c(j) (Supp. III 1979); 19 C.F.R. §§ 353.42, 207.40-44 (1981).

¹⁵⁴ 19 C.F.R. § 353.42(c) (1981) defines "substantially all" as "exporters who have accounted for no less than 85 percent by volume of the . . . merchandise imported . . . during the period of investigation, or other, recent representative period determined appropriate."

¹⁵⁵ *See* 19 U.S.C. § 1673c(b)(2) (Supp. III 1979).

¹⁵⁶ *Id.* § 1673c(b)(1). Cessation of the exports in question must take place within six months after the date on which the investigation is suspended. The agreement must also provide a means of ensuring that imports will not increase during the six month interim period. *Id.* § 1673c(d)(2).

¹⁵⁷ *Id.* § 1673c(c).

¹⁵⁸ *Id.* § 1673c(c)(2)(A). The term "complex" means that there is a large number of trans-

pension would be more beneficial to the U.S. industry than continuation of the investigation. Where such extraordinary circumstances are found, Commerce can suspend an investigation by accepting price revisions which do not fully eliminate the LTFV margins, but which completely eliminate injury to U.S. producers by preventing the undercutting of domestic prices.¹⁵⁹

The acceptance of any suspension agreement is conditional upon a determination that the agreement is in the public interest and that effective monitoring is possible.¹⁶⁰ In the case of an agreement to eliminate injurious effects, the petitioner may ask the ITC to rule on whether such injury would be eliminated.¹⁶¹ Moreover, either the foreign exporters or petitioner may ask that the investigation be continued by Commerce and the ITC after acceptance of the agreement; a negative final determination by either body would nullify that agreement.¹⁶²

Should petitioner wish to reach a settlement in a case which would not otherwise meet the requirements of any of the suspension provisions noted above, a non-statutory settlement may be possible through a negotiated withdrawal of the petition. A petition may be withdrawn if termination of the investigation is found to be in the public interest.¹⁶³ This withdrawal procedure can be used in one of two ways: as a means of negotiation between petitioner and the U.S. Government, as in the recent steel settlement,¹⁶⁴ or as a means of indirect negotiation between petitioner and the foreign exporters for the upward revision of the exporters' U.S. selling prices.¹⁶⁵ In either instance, the goal is generally a

actions, the issues raised are novel, or the number of firms involved is large. *Id.* § 1673c(c)(2)(B).

¹⁵⁹ *Id.* §§ 1673c(c)(1)(A), 1673c(c)(1)(B). The agreement must eliminate at least 85% of the LTFV margin. *Id.* § 1673c(c)(1)(B).

¹⁶⁰ *Id.* § 1673c(d)(1). Thirty days' notice of any such agreement must be given to all parties and the Commission and a copy of the agreement must be given to petitioner. *Id.* § 1673c(e). The role of petitioner in the monitoring process is extremely important. Petitioner must analyze import trends and, more importantly, the foreign exporter's U.S. price levels. In this way, petitioner can alert the Department to any potential violation of the agreement.

¹⁶¹ *Id.* § 1673c(h).

¹⁶² *Id.* § 1673c(g). Violation of a suspension agreement will lead either to a retroactive suspension of liquidation and resumption of the investigation if final LTFV and injury determinations had not previously been made, or to issuance of an antidumping order retroactive for 90 days if the entire investigation had previously been completed. An intentional violation will result in civil fraud penalties. *See generally id.* § 1673c(i); 19 C.F.R. § 353.43 (1981).

¹⁶³ *See* 19 U.S.C. § 1673c(a) (Supp. III 1979); 19 C.F.R. § 353.41(a) (1981).

¹⁶⁴ *See* Certain Carbon Steel Products from Certain European Countries, 45 Fed. Reg. 66,833 (1980) (reinstatement of steel trigger price mechanism). For prior domestic steel industry settlements based on the withdrawal of the petition, *see* Carbon Steel Plate from Certain European Countries, 44 Fed. Reg. 37,105 (1979); Stainless Steel Round Wire from Japan, 44 Fed. Reg. 25,966 (1979); Certain Carbon Steel Products from the United Kingdom, 43 Fed. Reg. 47,041 (1978); Cold Rolled & Galvanized Carbon Steel Sheets from Certain European Countries, 43 Fed. Reg. 37,052 (1978); Carbon Steel Wire Rod from France & the United Kingdom, 43 Fed. Reg. 30,956 (1978); Certain Carbon Steel Pipes & Tubes from Japan, 43 Fed. Reg. 9,212 (1978).

¹⁶⁵ In Nylon Yarn from Japan, 43 Fed. Reg. 22,480 (1978), a letter was sent to the Treasury Department from the exporters offering to revise their U.S. selling prices. Subsequently, Treas-

price revision or quantitative restraint by the foreign exporters which is satisfactory to the U.S. industry. Only upon such an undertaking by the exporters involved should withdrawal of the petition be considered.

C. Access to Information

Protective order procedures established for the first time under the Trade Agreements Act have the potential for providing petitioners' counsel, and to a more limited extent, exporters' counsel, with valuable confidential information heretofore denied those parties.¹⁶⁶ In the Commerce Department investigation, the release under protective order restrictions of confidential data submitted by one party to an attorney or other representative of another party is authorized in order to enable that attorney or a representative such as an economist or technical consultant to assist the Department in analyzing that data.¹⁶⁷ Protective order procedures can be used by petitioner to gain access to such materials as respondents' pricing questionnaire responses, additional confidential submissions made to the Department, and the Department's verification report. In contrast, the foreign exporter can only request disclosure of the pricing and/or cost data relied upon in the petition itself along with any further confidential submissions made by petitioner to Commerce during the course of the proceeding.

If fully utilized, protective order procedures promise to enhance petitioners' effective participation in the Commerce Department investigation. It enables a petitioner familiar with the technologies and

ury received a letter from petitioner stating that because, in petitioner's opinion, the "revised prices proposed by [the exporters] would substantially reduce the dumping margins alleged," it was withdrawing its petition. *Id.* at 22,481.

¹⁶⁶ See 19 U.S.C. § 1677f(c) (Supp. III 1979); 19 C.F.R. §§ 353.30, 207.7 (1981). Under Treasury practice, confidential information was not subject to disclosure. Rather, the parties received only nonconfidential summaries of whatever confidential information had been submitted. See 19 C.F.R. §§ 153.21-23 (1980). While those summaries were to be complete, in practice it was impossible to use nonconfidential data by a party in any meaningful way. Under the new law, nonconfidential summaries are still mandated. See 19 C.F.R. §§ 353.28-29, 201.6 (1981); with the advent of protective order procedures, however, those nonconfidential summaries are no longer the only source of information to the opposing party.

¹⁶⁷ The phrase "attorney or other representative of a party" has been the subject of efforts by importer counsel to exclude the in-house counsel of a petitioner from obtaining access to confidential data through protective order. See *Certain Carbon Steel Products from Certain European Countries*, 45 Fed. Reg. 26,109 (1980). Importers have also argued that counsel for U.S. companies other than petitioner should not be eligible for protective orders. *Id.* Other unresolved issues center on the showing which a party must make to justify disclosure. The Act states that a protective order request must describe "with particularity the information requested and . . . the reasons for the request." 19 U.S.C. § 1677f(c)(1)(A) (Supp. III 1979). Commerce Regulations provide further that the party must "[i]ndicate the procedures to be followed to avoid unauthorized disclosure . . . and demonstrate good cause for the release of such information." 19 C.F.R. § 353.30(a) (1981). While procedures to be used to avoid unauthorized disclosure have been formulated by the Department, no hard and fast rules have yet been developed with respect to the other criteria noted above.

A protective order form can be obtained from the Department. The form sets forth in detail the restrictions under which the material will be disclosed and provides a format within which reasons for the request and good cause can be stated.

commercial intricacies of the product in question to scrutinize the data submitted to Commerce by the foreign exporters. Based upon that scrutiny, petitioner can identify for Commerce the inadequacies, errors, and omissions in the exporters' submissions, as well as identify additional information that should be demanded from the foreign firms. For this to be done effectively, however, petitioner must obtain protective order disclosure promptly after the submission of the exporters' questionnaire responses. In that regard, the Commerce Department's long delay in considering the U.S. producers' protective order requests in the 1980 European steel investigations is disturbing.¹⁶⁸ In view of this potential delay, one of the major focuses of petitioner's efforts should be to press hard for early disclosure.

In contrast to the procedures employed by the Commerce Department, the benefits of the ITC protective order rules extend only to counsel for the foreign exporters, although the benefits themselves are not great. Under ITC protective order procedures, confidential domestic price data and, to the extent provided, domestic cost of production data, "which have been submitted by the petitioner or an interested party in support of the petition,"¹⁶⁹ are the only information subject to disclosure.¹⁷⁰ Information other than price or cost data may be disclosed only upon filing with the Commission an agreement among all interested parties which requests the release under protective order of such other information.¹⁷¹ While this limited use of protective order authority by the Commission may change over time,¹⁷² a petitioner is not particularly dis-

¹⁶⁸ Although the questionnaire responses were submitted in early June 1980, the protective order requests remained unresolved at the time the petitions were withdrawn almost four months later.

¹⁶⁹ This phrase has been interpreted narrowly by the Commission in at least two instances. *See, e.g.*, *Electric Golf Cars from Poland*, 45 Fed. Reg. 39,581 (1980) (protective order request denied on grounds that the U.S. industry was not a "petitioner or interested party in support" thereof in a review of a previous injury determination under the Act. Refusal was upheld in the Customs Court, 14 Cust. B. & Dec. 13 (May 28, 1980) (C.D. 4854 (Apr. 30, 1980)); *Certain Steel Wire Nails from the Republic of Korea*, 45 Fed. Reg. 53,924 (1980) (since no "petitioner" exists in a fast-track steel trigger price investigation self-initiated by Treasury, disclosure denied).

¹⁷⁰ *See* 19 C.F.R. § 207.7(a) (1981). Under current rules, in-house counsel cannot obtain any such information. *Id.* This rule, however, is under reconsideration. *See* 45 Fed. Reg. 57,147, 57,148 (1980); 46 Fed. Reg. 28,673 (1981). As with the Commerce Department, the reasons for the protective order request must be set forth, the information sought must be described with particularity, and "a substantial need for the information must be demonstrated." In addition, the attorney must state that "he is unable without undue hardship to obtain the substantial equivalent of the information by other means." 19 C.F.R. § 207.7(a) (1981). As a practical matter, the protective order form available from the ITC sets forth in full the required showings; the attorney need only fill in name, address, name of the party represented, and sign an oath page.

¹⁷¹ *See* 19 C.F.R. § 207.7(b) (1981). The release of confidential information is, however, discretionary with the Commission. *Id.*

¹⁷² The Commission stated that it:

is not going to exercise the full range of its authority to release confidential information dealing with data other than domestic prices or cost of production until it has accumulated administrative experience with these protective order requests.

Preamble to ITC Regulations, *supra* note 114, 44 Fed. Reg. at 76,462.

advantaged, nor the foreign exporter greatly benefitted, by the release of the data thus subject to disclosure.

D. Duty Assessment and Review

One of the main concerns expressed by petitioners over previous antidumping law enforcement was the often inordinate delay in assessing duties after the entry of a dumping finding.¹⁷³ In order to prevent such delay, the Trade Agreements Act provides for an elaborate duty assessment system.¹⁷⁴

Upon entry of the merchandise subject to an antidumping duty order,¹⁷⁵ a deposit of estimated duties pending liquidation is required.¹⁷⁶ The amount of the deposit in the first year is based upon the margins reflected in the final LTFV determination.¹⁷⁷ The deposit required during each subsequent year is based upon the average duty assessed on the merchandise entered during the preceding year.¹⁷⁸ Final liquidation of the merchandise and assessment of duties must be completed each year within six months after receipt of satisfactory data by Commerce, but in no event later than twelve months after the end of the annual accounting period of the exporter during which the merchandise was imported in a purchase price case, or sold in the United States to an unrelated purchaser in an exporter's sales price case.¹⁷⁹

The Commerce Department must conduct annual reviews of each dumping finding in order to determine the amount of duties.¹⁸⁰ The

¹⁷³ In *Television Receiving Sets, Monochrome & Color, from Japan*, 36 Fed. Reg. 4,597 (1971), a dumping finding was entered in 1971. The entry of that finding, however, merely marked the beginning of an endlessly protracted dispute over the amount of duties to be assessed. As a result of administrative delay and indecision, diplomatic protests, and appeals to the Customs Court, not a single dollar of dumping duties has been collected as of December 1, 1981 even though estimates of the collectible duties have ranged as high as \$700,000,000. The *Television Receiver* case represents an extreme, but not isolated, example of the long delays that formerly plagued the duty assessment process. In *Large Power Transformers from France*, 37 Fed. Reg. 11,772 (1972), duties on transformers entered in the 1970's had not been assessed as of December, 1981. See generally COMPTROLLER GENERAL, REPORT TO THE CONGRESS ON U.S. ADMINISTRATION OF THE ANTIDUMPING ACT OF 1921, 34-37 (1979).

¹⁷⁴ See 19 U.S.C. §§ 1673e-1673g (Supp. III 1979); 19 C.F.R. §§ 353.48-.50 (1981).

¹⁷⁵ The order is published within seven days of notification by the Commission of an affirmative final injury determination. See 19 U.S.C. § 1673e(a) (Supp. III 1979).

¹⁷⁶ See *id.* § 1673e(a)(3); 19 C.F.R. § 353.48(a)(3) (1981).

¹⁷⁷ During the initial 90-day period after entry of a final determination, however, an exporter who believes that the original LTFV margins were too high may furnish full data to the Commerce Department, post a bond or other security in lieu of a deposit of estimated duties, and seek an early determination within that period of the amount of dumping duties. See 19 U.S.C. § 1673e(c) (Supp. III 1979); 19 C.F.R. § 353.49 (1981). This approach has effectively reduced the amount of estimated dumping duties required to be deposited by the importer in at least one case. Compare *Portable Electric Typewriters from Japan*, 45 Fed. Reg. 18,416, 18,418 (1980) (37.12% weighted average margin) with 45 Fed. Reg. 53,853, 53,855 (1980) (weighted average margins of 14.91% for one exporter, 5.31% for the other) and 46 Fed. Reg. 14,006 (1981) (4.33% for second exporter).

¹⁷⁸ See note 180 *infra*.

¹⁷⁹ See 19 U.S.C. § 1673e(a)(1) (Supp. III 1979); 19 C.F.R. § 353.48(a)(1) (1981).

¹⁸⁰ See 19 U.S.C. § 1675(a) (Supp. III 1979); 19 C.F.R. § 353.53(a) (1981). The Depart-

status of and compliance with suspension agreements are to be similarly reviewed. After such a review by Commerce, or upon a review initiated on the basis of changed circumstances,¹⁸¹ a finding may be revoked or modified, or a suspended investigation terminated following notice and an opportunity to present views.¹⁸² Revocation will be granted only where the Commerce Department determines that LTFV sales are no longer being made and where there is no likelihood that such LTFV sales will be resumed.¹⁸³ An application for revocation, usually filed by the importer, will ordinarily not be considered unless there have been no sales at LTFV for two years from the date of the antidumping duty order or notice of suspension.¹⁸⁴ The Department itself will raise the revocation question only after there have been no sales at LTFV for a three year period.¹⁸⁵

In revocation cases, the Department requires that the exporter agree in writing "to an immediate suspension of liquidation and reinstatement

ment must determine the foreign market value and U.S. price of each entry of merchandise and the amount, if any, by which the foreign market value of each entry exceeds the U.S. price. The results of this determination must be published. The determination then acts as the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and the average duty assessed sets the amount of deposit of estimated duties during the succeeding year. 19 U.S.C. § 1675(a)(2) (Supp. III 1979).

¹⁸¹ 19 U.S.C. § 1675(b)(1) (Supp. III 1979). Under this section, the Commission may also review determinations based on changed circumstances. 19 C.F.R. § 207.45 (1981) provides that upon receipt of information which "shows changed circumstances sufficient to warrant a review" of a suspension agreement or final determination, the Commission shall institute an investigation under section 751 to determine:

- (1) whether, in light of the alleged changed circumstances, the agreement continues to completely eliminate the injurious effect of imports of the merchandise; or
- (2) whether an industry in the United States would not be materially injured, or would be threatened with material injury, or the establishment of such an industry in the United States would not be materially retarded . . . if the . . . [antidumping] order were to be modified or revoked.

See Potassium Chloride from Canada, 46 Fed. Reg. 22,083 (1981) for application of this regulation. In *Electric Golf Cars from Poland*, 45 Fed. Reg. 39,581 (1980), three Commissioners grappled with the standard of review to be applied in section 751 cases. Chairman Alberger and Commissioner Calhoun stated that under section 751, the Commission is "to view the relevant facts as they currently exist to determine whether an industry . . . would suffer material injury . . . if the existing antidumping duty were not in effect." 45 Fed. Reg. at 39,585. Commissioner Stern, on the other hand, took the position that the standards for initial investigations are equally appropriate in review cases. She further stated that the Commission could not determine that its earlier decision was incorrect; rather, it must find a change in circumstances in order to justify a determination to revoke. 45 Fed. Reg. at 39,587 n.61.

As with Commerce Department reviews, no review will be conducted by the ITC within two years of the publication date of the determination or suspension notice in the absence of good cause shown. *See* 19 U.S.C. § 1675(b)(2) (Supp. III 1979); 19 C.F.R. § 207.45(a) (1981). For the procedures to be followed during the review phase, *see* 19 C.F.R. § 207.21(b)(2) (1981).

¹⁸² *See* 19 U.S.C. §§ 1675(c), 1675(d) (Supp. III 1979).

¹⁸³ *See* 19 C.F.R. § 353.54(a) (1981).

¹⁸⁴ The application for revocation must be submitted in writing together with detailed information demonstrating that the imported merchandise is no longer being sold at LTFV. *Id.* § 353.54(b); 19 U.S.C. § 1675(b)(2) (Supp. III 1979).

¹⁸⁵ 19 C.F.R. § 353.54(c) (1981). This determination is based on a finding of (1) no likelihood of resumption of the imports; or (2) the sales at LTFV have been eliminated; or (3) other changed circumstances warrant such revocation or termination. *Id.*

of the finding if circumstances develop which indicate that the merchandise . . . is being sold at less than fair value."¹⁸⁶ This requirement represents a major advance over previous Treasury practice, which placed no restrictions on an exporter after a revocation. It should be emphasized, however, that the Department of Commerce does not monitor post-revocation imports. Accordingly, petitioner should be alert for any evidence of renewed dumping after revocation. If LTFV sales resume, petitioner must present evidence of that fact, including both U.S. import and home market prices, to the Department.

During the duty assessment and review phases, petitioner should attempt to assist Commerce in the data collection process by continually monitoring both import prices and import volumes as well as foreign market value data to the extent possible. Access should be sought under protective order to any data submitted by the foreign exporter during the annual review procedure. Petitioner thus may act as a supplemental source of pricing information for Commerce and of course can monitor potential errors in Commerce's own calculations. In addition, petitioner's monitoring activities will prepare it to oppose effectively any unjustified requests for revocation or termination based upon allegedly changed circumstances.

IV. Current Issues Before the Commerce Department and the International Trade Commission

A. Pricing and Cost Issues

There remain unresolved a number of issues pertaining to the computation of price-to-price comparisons and the preparation of cost of production data in calculating LTFV margins. A brief review of these issues should be useful to potential petitioners.

1. *Sampling and Insignificant Adjustments.* Two general provisions relating to the manner in which price computations are to be made appear for the first time in the Trade Agreements Act. First, where "a significant number of sales is involved or a significant number of adjustments to price is required," Commerce is authorized to "use averaging or generally recognized sampling techniques" instead of the normal practice of constructing a weighted average of all home market or third country sales.¹⁸⁷ Sampling, although used infrequently by the Department, has proved to be useful in large, extremely complex cases.¹⁸⁸

A second provision authorizes Commerce to disregard insignificant

¹⁸⁶ See *id.* § 353.54(e); Calcium Pentothenate from Japan, 45 Fed. Reg. 41,995, 41,995 (1980); Portland Cement from Sweden, 45 Fed. Reg. 36,102, 36,103 (1980).

¹⁸⁷ See 19 U.S.C. § 1677b(f)(1) (Supp. III 1979); 19 C.F.R. § 353.23(b) (1981).

¹⁸⁸ See, e.g., Certain Fresh Winter Vegetables from Mexico, 45 Fed. Reg. 20,512, 20,513 (1980) (sample used was statistically representative of all transactions across all growers and throughout the season in light of the fungibility of the produce of different growers); Certain Carbon Steel Products from Certain European Countries, 45 Fed. Reg. 26,109 (1980) (sampling

adjustments.¹⁸⁹ The regulations establish the following quantitative guidelines in determining whether adjustments are insignificant.

Ordinarily, individual adjustments having an *ad valorem* effect of less than 0.33 percent or any group of adjustments having an *ad valorem* effect of less than 1.0 percent will be disregarded. For purposes of this section, the groups of adjustments consist of: differences in the quantities sold, differences in circumstances of sale, differences in the physical characteristics of the merchandise, and differences in the level of trade in the markets being compared.¹⁹⁰

As a practical matter, the disregarding of such adjustments should not affect the outcome of the action.¹⁹¹

2. *Level of Trade.* Generally, price-to-price comparisons are made at the same commercial level of trade in each market, for example, retail to retail or wholesale to wholesale. If there are no sales in the foreign market at the particular level of trade at which sales to the United States are made, or if such comparable sales are "insufficient in number to permit an adequate comparison," the price-to-price comparison will be made at the "nearest comparable level of trade and appropriate adjust-

approach per product line encompassed at least 50% of the sales of that line in the United States as well as the thinnest, thickest, and mid-range gauges of the steel mill product lines thus sold).

¹⁸⁹ See 19 U.S.C. § 1677b(f)(2) (Supp. III 1979); 19 C.F.R. § 353.23(a) (1981).

¹⁹⁰ 19 C.F.R. § 353.23(a) (1981). Dumping margins themselves are often treated as *de minimis* when those margins fall below a certain level. An exporter will be excluded from an affirmative determination if no margins are present, or if its margins are *de minimis*, provided that at least 75% of that exporter's sales were examined. *Id.* § 353.45. See generally Titanium Dioxide from the Federal Republic of Germany, 44 Fed. Reg. 47,200, 47,202 (1979) (weighted average margin of 0.1%); Countertop Microwave Ovens from Japan, 45 Fed. Reg. 47,456, 47,459 (1980) (weighted average margins of 0.006% and 0.0005%); Cumene from the Netherlands, 43 Fed. Reg. 57,370, 57,370 (1978) (weighted average margin of 0.0016%); Steel Wire Rope from the Republic of Korea, 43 Fed. Reg. 55,306, 55,307 (1978) (weighted average margins of 0.27%, 0.06% and 0.08%); Bicycle Tires & Tubes from the Republic of China, 43 Fed. Reg. 61,066, 61,067 (1978) (weighted average margin of 0.23%); Impression Fabric of Man-Made Fiber from Japan, 43 Fed. Reg. 65,344, 65,345 (1977) (weighted average margin of 0.15%); Portland Hydraulic Cement from Mexico, 41 Fed. Reg. 37,609, 37,610 (1976) (no margins as to one exporter). Currently, the *de minimis* cutoff point appears to be a weighted average LTFV margin of 0.37%. See Certain Steel Wire Nails from the Republic of Korea, 45 Fed. Reg. 34,941 (1980). The weighted average margin may be characterized as *de minimis* despite the fact that a particular sale within that weighted average may have been made at a large margin. See, e.g., Steel Wire Rope from the Republic of Korea, 43 Fed. Reg. 55,306, 55,307 (1978).

Under Treasury practice, margins falling below a certain level (but greater than *de minimis*) could be characterized as "minimal." A minimal margin, coupled with price assurances that no future sales would be made at LTFV, resulted in a discontinuance of the investigation as to the exporter involved. See 19 C.F.R. § 153.33(a) (1980); Certain Steel Wire Nails from the Republic of Korea, 44 Fed. Reg. 61,722, 61,724 (1979, preliminary) (weighted average margin of 0.65% considered minimal in relation to the volume of exports involved); Certain Steel Wire Nails from Canada, 43 Fed. Reg. 51,743, 51,744 (1978) (weighted average margins of 1.5% and 0.9% considered minimal). The minimal margin/price assurances discontinuance is not available under the TAA, and exporters with "minimal" but more than *de minimis* margins will be included in any affirmative determination.

¹⁹¹ 19 C.F.R. § 353.23(a) (1981). Adjustments cannot be disregarded pursuant to this section "if it is determined that such disregarding would significantly affect the results of the calculations." *Id.*

ments will be made for differences affecting price comparability."¹⁹² No such adjustment will be allowed if respondent fails to submit an "acceptable quantification or formulation of price differentials based on level of trade."¹⁹³ Although there may be substantial uncertainty over what constitutes a given level of trade and although respondent may not be able to quantify the level of trade adjustment with sufficient precision to qualify for that adjustment,¹⁹⁴ petitioner should be on the alert for adjustments which may be claimed by the exporter relating to quantity discounts or circumstances of sale which may reach results similar to a level of trade adjustment.¹⁹⁵

3. *Circumstances of Sale.* Adjustments for differences in circumstances of sale are among the most common raised by foreign exporters to reduce significantly the alleged LTFV margins. Under Treasury Department regulations, a circumstance of sale adjustment was permitted for differences in credit terms, guarantees, warranties, technical assistance, servicing, commissions, assumption by a seller of a purchaser's advertising costs, and certain selling expenses,¹⁹⁶ to the extent those differences bore a direct relationship to the sales under consideration.¹⁹⁷ In antidumping regulations proposed by the Treasury Department in 1979,¹⁹⁸ three new circumstances of sale adjustments were suggested:¹⁹⁹

¹⁹² *Id.* § 353.19. A provision in the proposed Treasury Regulations which suggested a method for effecting such price comparability was not accepted by Commerce. See Proposed Revision of the Customs Relating to Antidumping Duties, 44 Fed. Reg. 59,742, 59,751, at § 153.19 (1979) [hereinafter cited as Proposed Treasury Regulations].

¹⁹³ Melamine in Crystal Form from Austria, 45 Fed. Reg. 20,151, 20,151 (1980). See also Countertop Microwave Ovens from Japan, 45 Fed. Reg. 47,456, 47,457 (1980, preliminary) (difference affecting price comparability necessitates a showing that "cost differences to the seller . . . result from the differences in the two levels of trade involved"); Marine Radar Systems from the United Kingdom, 44 Fed. Reg. 49,322, 49,323 (1979); Condenser Paper from Finland, 44 Fed. Reg. 32,063, 32,064 (1979).

¹⁹⁴ See, e.g., Portable Electric Typewriters from Japan, 45 Fed. Reg. 18,416, 18,418 (1980) (U.S. sales to original equipment manufacturers compared over respondents' objection with sales to retailers in Japan, because both classes of purchaser bought in large wholesale quantities).

¹⁹⁵ See Condenser Paper from Finland, 44 Fed. Reg. 32,063, 32,064 (1979).

¹⁹⁶ See 19 C.F.R. § 153.10(b) (1980).

¹⁹⁷ *Id.* § 153.10(a). In determining the amount of the difference in circumstances of sale, "the Secretary will be guided primarily by the cost of such differences to the seller but, where appropriate, may also consider the effect of such difference upon the market value of the merchandise." *Id.* § 153.10(e); 19 C.F.R. § 353.15 (1981).

Additional types of circumstances of sale adjustments beyond those in the regulations have been recognized. See, e.g., Certain Fresh Winter Vegetables from Mexico, 45 Fed. Reg. 20,512, 20,516 (1980) (fact that different prices prevail at different times within a day represents a circumstance of sale); Motorcycles from Japan, 43 Fed. Reg. 35,140, 35,141 (1978) (alleged discounting of prior year motorcycle models in United States may constitute circumstance of sale).

¹⁹⁸ Preamble to Proposed Treasury Regulations, *supra* note 8, at 59,744, para. 14.

¹⁹⁹ The circumstances of sale provision had been under review by the Treasury Department as early as 1976. In Polymethyl Methacrylate from Japan, 41 Fed. Reg. 12,233, 12,233 (1976), Treasury disallowed adjustments for warehousing costs and salesmen's salaries as expenses borne regardless of whether particular sales are made. The Secretary concluded "that pending a comprehensive review of the circumstances of sale, policies and regulations, adjust-

- (1) salesmen's salaries;
- (2) reserves for bad debts where "established on the basis of actual experience;" and
- (3) warehousing expenses.

These proposals were not incorporated into the Commerce Department Regulations "[b]ecause of the number and range of comments" received.²⁰⁰ It should be noted, however, that in price comparisons made on an exporter's sales price basis, claimed adjustments for salesmen's salaries, warehousing, personnel assistance, and the like are treated as indirect home marketing selling expenses which, under the circumstances of sale provision, may be deducted from foreign market value up to the amount of such indirect selling expenses incurred in the United States.²⁰¹ These types of claimed adjustments are referred to as "ESP offset" expenses.

4. *Physical Differences in Merchandise.* Adjustments for differences in physical characteristics of the merchandise compared, under Commerce Regulations as well as prior Treasury practice, are to be based primarily on differences in the cost of production to the extent the amount of any price differential is due, at least in part, to such differences.²⁰² When appropriate, however, "the effect of such differences upon the market value of the merchandise may also be considered."²⁰³ Under no circum-

ments for expenses which are incurred regardless of whether a particular sale is made would be inappropriate." The necessity for such review was reiterated in 1977 and 1978. *See* Ice Hockey Sticks from Finland, 42 Fed. Reg. 65,345, 65,346 (1977), 43 Fed. Reg. 9,912, 9,912 (1978).

²⁰⁰ Preamble to Commerce Regulations, *supra* note 106, at 8,185, para. 16. The proposed changes remain under active consideration by Commerce. *Id.*

²⁰¹ *See, e.g.,* Certain Electric Motors from Japan, 45 Fed. Reg. 41,687, 41,688 (1980, preliminary). The selling expenses adjustment has been discussed in Motorcycles from Japan, 43 Fed. Reg. 17,900, 17,902 (1978, preliminary) (in exporter's sales price situation, indirect expenses in home market may be offset against selling expenses incurred in the U.S. and need not be offset on an item-by-item basis). The subject of advertising expenses also was discussed extensively in the final determination in that case. *See* 43 Fed. Reg. at 35,141-42 (advertising expenses must have been incurred with respect to the particular product in question, the expense must relate to the particular geographic market and to materials or advertising media directed to purchasers in later sales; in effect, advertising expenses must represent an assumption by the producer of a cost that otherwise would be borne by the customer of the producer). For the calculation of such advertising expenses, *see* 43 Fed. Reg. at 35,142 (since respondents did not maintain records which would enable determination of advertising expenses incurred with respect to each motorcycle model sold, allocation of expenses held appropriate); Countertop Microwave Ovens from Japan, 45 Fed. Reg. 47,456, 47,458-59 (1980, preliminary) (since respondents did not maintain records of expenses incurred on behalf of countertop microwave ovens as distinct from those incurred for "ranges," allocation of total range advertising and promotional expenses over total range sales appropriate; allocation of credit rebate paid for installment purchases of all "kitchen products," not appropriate).

²⁰² *See* 19 C.F.R. § 353.16 (1981). Under Treasury Regulations, 19 C.F.R. § 153.11 (1980), the operative phrase was "cost of manufacture." This term did not include general and administrative expenses or profit. The costs of materials, direct labor, and direct factory overhead were included. *See* Railway Trace Maintenance Equipment from Austria, 42 Fed. Reg. 41,339, 41,340 (1977).

²⁰³ 19 C.F.R. § 353.16 (1981). The regulation further provides:

In the case of merchandise which does not lend itself to comparison with other merchandise for the purpose of this section, any method reasonably calculated to

stances will adjustment be made for differences in the cost of producing merchandise with identical physical characteristics as end products.²⁰⁴ In an October 1979 proposal, the Treasury Department suggested that in computing adjustments for physical differences in any case where such differences accounted for more than ten percent of the value of the merchandise, an allocation of profit should be made to the costs of creating such differences.²⁰⁵ This proposal was not adopted by Commerce.

Adjustments for physical differences in the merchandise have been claimed in a variety of cases involving consumer goods,²⁰⁶ textiles,²⁰⁷ and even perishable commodities.²⁰⁸ It is in the consumer goods cases in particular, however, that these adjustments have the potential for significantly affecting the LTFV margins. If, for example, product standards in the United States are arguably less stringent from a cost standpoint than in the home market, respondent may use this adjustment to reduce its home market prices by the amount of that cost or value differential; LTFV margins are correspondingly reduced. In such a case, petitioner should use its own costing methods as a check against exorbitant or unjustified claims. This is an area where careful examination of the respondents' submissions under protective order is extremely important. By the same token, if the product as sold in the United States requires uniquely sophisticated or expensive production techniques due to rigid product specifications or consumer demand, resulting in a greater cost to produce the U.S. version than the home market version, petitioner's own costs should be submitted to Commerce as a guide in order to prevent the understatement by the exporter of any potential adjustment for differences in the merchandise.

reflect the impact on cost or value of any differences in the merchandise under consideration may be used.

²⁰⁴ *Id.* See, e.g., Sugars & Syrups from Canada, 44 Fed. Reg. 64,946, 64,947 (1979) (use of lower-cost imported sugar to make exported product cannot support claimed adjustment in the absence of evidence that there is a perceivable difference in the merchandise sold in the two markets); Steel Wire Strand for Prestressed Concrete from Japan, 43 Fed. Reg. 38,495, 38,497 (1978) (claims for differences in raw materials denied since inadequate evidence presented to prove that piano wire rod allegedly used to make strand for domestic consumption results in strand with identifiable physical differences from that sold for export).

²⁰⁵ Preamble to Proposed Treasury Regulations, *supra* note 8, at 59,744, para. 15.

²⁰⁶ See, e.g., Portable Electric Typewriters from Japan, 45 Fed. Reg. 53,853, 53,854 (1980, early determination of duties) (rejected adjustment for costs associated with changeover of production lines between home market and export models); Motorcycles from Japan, 43 Fed. Reg. 35,140, 35,141 (1978) (adjustment granted for cost differences directly attributable to objective differences in the merchandise compared); Bicycle Tires & Tubes from the Republic of Korea, 43 Fed. Reg. 61,066, 61,067 (1978) (adjustment granted for standard differences in tread, color or sidewall, and material on certain tubes); Audible Signal Alarms from Japan, 43 Fed. Reg. 30,956, 30,956 (1978) (adjustment for differences in manufacture of two types of alarms); Metal-Walled Above-Ground Swimming Pools from Japan, 41 Fed. Reg. 17,558, 17,559 (1977) (adjustment for differences in production costs of pools sold in U.S. and to third countries).

²⁰⁷ See, e.g., Viscose Rayon Staple Fiber from Austria, 43 Fed. Reg. 57,999, 58,000-01 (1978) (adjustment granted for additional costs incurred in production of dyed fibers).

²⁰⁸ See Certain Fresh Winter Vegetables from Mexico, 45 Fed. Reg. 20,512, 20,516 (1980) (differences in quality and ripeness represent differences in merchandise for which adjustment is appropriate).

5. *Exchange Rate Fluctuations*. One final pricing issue that bears mentioning is the treatment by Commerce of exchange rate fluctuations.²⁰⁹ Under Commerce Department regulations,²¹⁰ exporters and importers

will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates. Where prices under consideration are affected by temporary exchange rate fluctuations, no differences between the prices being compared resulting solely from such exchange rate fluctuations will be taken into account in fair value investigations.

The question of what is a reasonable period of time within which price revisions must occur so that temporary exchange rate fluctuations will not lead to an LTFV determination has been addressed in only a handful of cases.²¹¹ The outcome for petitioner has generally not been favorable. A time lag is typically applied, or an averaging of exchange rates used, so that respondent is viewed as having adapted to the fluctuation within such a reasonable period. After application of this time lag,

²⁰⁹ See 19 C.F.R. § 353.56 (1981). Any necessary conversion of foreign currency into U.S. dollars is to be made as of the date of purchase or agreement to purchase in a purchase price situation, or as of the date of exportation if exporter's sales price is used. *Id.* § 353.56(a). See Strontium Nitrate from Italy, 46 Fed. Reg. 25,496 (1981). Note, however, that where an exporter's selling price to a U.S. purchaser is subject to an exchange rate agreement, the net selling price "after adjustment for exchange rate fluctuations in accordance with the agreement" has been used. See Portable Electric Typewriters from Japan, 45 Fed. Reg. 53,853, 53,853 (1980, early determination of duties).

²¹⁰ In this area, Commerce adopted Treasury procedures in full. See 19 C.F.R. § 153.56(b) (1980); 19 C.F.R. § 353.56(b) (1981).

²¹¹ See, e.g., Melamine in Crystal Form from the Netherlands, 45 Fed. Reg. 29,619 (1980):

Antidumping investigations are meant to determine whether prices of merchandise sold in the U.S. are at less than "fair value." When exchange rates are fluctuating substantially, a given dollar price of a product in the United States could change technically from fair to "unfair" literally from day to day, even if the foreign price of the product denominated in the foreign currency also remains constant. The result is not called for by the language or purpose of the Act. It would be unrealistic to expect business to change prices instantaneously to take account of fluctuating exchange rates. So too, weekly price changes could create substantial confusion and inconvenience for the customers of that business. [Section 353.56(b)], then, allows a reasonable period in which the business may take sustained exchange rate fluctuations into account. The regulation further instructs that temporary fluctuation should not be the sole basis for determinations of sales at less than fair value. Businesses are to be given time to assess whether one currency has truly appreciated against another before changing their pricing practices.

Id. at 29,620. In this case, the period of investigation was one in which such "volatile" exchange rate fluctuations occurred. When price comparisons were based on the exchange rate for the particular quarter in which sales were made, a margin of 2.18% resulted. When the comparison was based on the exchange rate in the preceding quarter, however, no margins were found. "There seems little doubt that this situation is exactly the type contemplated in Section 353.56(b). The appropriate approach will vary from case to case, depending upon the particular facts of the case." *Id.* See also Motorcycles from Japan, 43 Fed. Reg. 48,754, 48,755 (1978) (one quarter lag applied to sales made by one exporter); New On-The-Highway Four Wheeled Passenger Automobiles from Certain European Countries, 41 Fed. Reg. 34,982, 34,983 (1976) (average of fluctuating exchange rates over a longer period eliminated margins created by factors beyond control of manufacturer and reflected more realistically the commercial environment in which prices were determined).

it is often found that no LTFV margins remain. As yet, no petitioner has pressed the argument for applying the regulation in the opposite manner—that is, the use of a lagged computation to achieve an increase in margins where a foreign exporter has failed to revise prices to compensate for changes in the exchange rate that are adverse to the exporter.

6. *Proposed Changes in Calculating Cost of Production and Constructed Value.* In addition to the pricing issues discussed above,²¹² certain of Treasury's proposed changes in the calculation of cost of production and constructed value have been tabled by Commerce. The Treasury Department's proposed regulations contained a detailed definition of "cost of production,"²¹³ which included all costs, both fixed and variable. Variable costs were to be those incurred during the period of investigation, while fixed costs were to "be allocated to units of merchandise produced during a production period considered representative."²¹⁴ In light of the need for additional analysis, Commerce did not adopt this proposal, although it remains under consideration.²¹⁵

Treasury also proposed that the generally accepted accounting principles to be used in cost of production and constructed value calculations should normally be those followed in the country of exportation.²¹⁶ This proposal conformed to a statement made by the House Ways & Means Committee Report on the Trade Act of 1974.²¹⁷ The Commerce Department did not adopt this provision, however, and it also remains under study.²¹⁸

Apart from the issue of which accounting principles are to be used in a cost of production case, various questions arise with regard to the appropriate calculation of production costs. For example, no hard and fast rule exists regarding the precise time frame within which costs are to be examined.²¹⁹ The time frame used, however, may significantly affect

²¹² Additional pricing proposals made by the Treasury Department remain open for consideration by Commerce: methods of determining economic and commercial comparability in cases involving state-controlled economies; the so-called 80% rule relating to certain allocations of profit in exporter's sales price situations; and certain parallel pricing provisions. See Preamble to Commerce Regulations, *supra* note 106, at 8,186, para. 23.

²¹³ See Proposed Treasury Regulations, *supra* note 192, at 59,748, § 153.7.

²¹⁴ *Id.* § 153.7(b).

²¹⁵ See Preamble to Commerce Regulations, *supra* note 106, at 8,184, para. 8.

²¹⁶ See Proposed Treasury Regulations, *supra* note 192, at 59,749, § 153.12.

²¹⁷ See H.R. REP. NO. 571, 93d Cong., 1st Sess. 71 (1973).

²¹⁸ For verification difficulties in extreme cost of production cases, see Carbon Steel Plate from Japan, 43 Fed. Reg. 2,032 (1978).

²¹⁹ Generally, the administering agency has attempted to ensure that the cost of production information submitted encompasses the period within which the exported merchandise was produced. See, e.g., Certain Steel Wire Nails from the Republic of Korea, 45 Fed. Reg. 34,941, 34,942 (1980) (where period of investigation was from Dec. 1, 1978 to Mar. 31, 1979, Commerce used costs for last months of 1978 on theory that full-year 1978 costs would not match with sales under consideration); Silicon Metal from Canada, 43 Fed. Reg. 57,371, 57,371 (1978) (time frame within which relevant merchandise was manufactured dictated the appropriate period for examining production costs).

the outcome of the case, particularly in periods of high inflation and rapidly escalating raw materials and labor costs. Further, if significant exchange rate fluctuations have occurred, costs may be either understated or overstated depending upon the period of investigation chosen.

The choice of plants from which cost of production information is to be obtained is also a difficult and largely unresolved issue. Assuming that the foreign exporter produces the product in question in a number of different facilities in the country of exportation, should cost information be required of the most efficient and/or least efficient plant, the plant from which the bulk of home market sales of the merchandise in question are made, or the plant from which the bulk of the subject U.S. sales are produced and exported?²²⁰ Logically, the relevant plants for cost of production analysis should be those producing the bulk of the home market sales, whereas the plants relevant to constructed value should be those producing the bulk of the exports to the United States. Because few cost of production cases have ever reached final determinations, however, the issue has never been definitively resolved.

For the petitioner, the issue of which plants to use for cost analysis poses special problems from a data gathering standpoint. Information relating to plant production for U.S. exports in particular is often extremely difficult to obtain; data of this sort may not be kept in the ordinary course of the exporter's business. Verification of any figure which is thus developed by the foreign producer specifically for use in the dumping investigation, as opposed to regular business activities, can be exasperating.

A related question exists regarding the treatment of extraordinary costs incurred at particular plants. Should startup costs or the costs of closing down a facility be included in or excluded from a cost of production calculation?²²¹ No formal decision has ever been rendered on this point.

Finally, the Department has not yet grappled with some of the cost analysis problems which arise in capital intensive industries characterized by high fixed costs and cyclical swings in the level of capacity utilization. In such industries, per unit cost on a fully allocated basis may be

²²⁰ During the investigatory phase of *Certain Carbon Steel Products from Certain European Countries*, 45 Fed. Reg. 26,109 (1980), foreign exporters were asked informally to provide information to Commerce on the percent of home market and U.S. export sales represented by each plant for which cost of production data were submitted. No final decision was rendered on the choice of plant issue, however, because the petitions were ultimately withdrawn.

²²¹ *See Strontium Nitrate from Italy*, 46 Fed. Reg. 25,496, 25,496 (1981). The issue also arises whether general and selling expenses should be included in the cost of production. Treasury had construed cost of production as including all elements pertaining to the manufacture and marketing of the merchandise. The individual home market or third country prices with which those costs were to be compared also included these elements. *See Viscose Rayon Staple Fiber from Sweden*, 43 Fed. Reg. 53,533, 53,534 (1978, preliminary) (cost of producing includes costs of manufacture and marketing which are reflected in the prices with which the costs are being compared).

very low when the industry is operating at full capacity and very high when the industry has substantial unused capacity. In *Certain Carbon Steel Products from the United Kingdom*,²²² the exporter argued that high costs on certain of the product lines should be adjusted to compensate for an abnormally low level of capacity utilization. Because of withdrawal of the petitions, however, the issue was never resolved. Some indication that Commerce may be receptive to an argument of this nature is suggested by the position taken in *Certain Fresh Winter Vegetables from Mexico*.²²³ In *Winter Vegetables*, the Department noted that the normal practice of the industry was to make a substantial percentage of its sales below the cost of production. Therefore, in order to "interpret the language of the statute in light of the normal business practice of the industry subject to the investigation," the Department decided "to disregard below-cost . . . sales only if such sales constituted 50% or more of a grower's total sales to [that market] of the type of produce under consideration."²²⁴ Application of a similar analysis to the issue of capacity utilization would permit a petitioner to argue that costs computed on the basis of peak capacity utilization rates are understated. Conversely, the exporter could argue that costs computed on the basis of a cyclically low level of utilization were overstated.

B. Injury Issues

The adoption of a material injury standard in the Trade Agreements Act²²⁵ was not intended by Congress to increase the burden of proof for the petitioner in an antidumping action. The term "injury" under the Trade Act of 1974 was defined as "a harm which is more than frivolous, inconsequential, insignificant, or immaterial."²²⁶ Under the Trade Agreements Act, the term "material injury" is defined as a "harm which is not inconsequential, immaterial, or unimportant."²²⁷ That this latter standard is meant to parallel the earlier injury standard was made clear by the congressional committees' statement that ITC decisions under the Trade Act "have been on the whole consistent with the material injury criterion."²²⁸

Gradually, however, the Commission appears to be moving toward a more rigorous analysis of the indicia of injury. Recent opinions are characterized by increasingly detailed economic analysis²²⁹ and there seems to be a greater willingness to dispose of cases during the prelimi-

²²² 45 Fed. Reg. 26,109 (1980).

²²³ 45 Fed. Reg. 20,512 (1980).

²²⁴ *Id.* at 20,515.

²²⁵ See 19 U.S.C. § 1673 (Supp. III 1979).

²²⁶ S. REP. NO. 1298, 93d Cong., 2d Sess. 180 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186.

²²⁷ 19 U.S.C. § 1677(7)(A) (Supp. III 1979).

²²⁸ H.R. REP. NO. 317, 96th Cong., 1st Sess. 46 (1979); S. REP. NO. 249, 96th Cong., 1st Sess. 7187 (1979), *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 381.

²²⁹ See, e.g., *Sugars & Syrups from Canada*, 45 Fed. Reg. 19,687 (1980) (Chairman Alberger

nary injury phase. Because Commission determinations typically turn on discrete factual issues, an analysis of specific factors which have led to a finding of material injury in any given case would be of limited usefulness. Nevertheless, a brief review of the major statutory criteria and recent Commission decisions will give the potential petitioner a flavor of current trends in ITC injury analysis.

1. *Definition of the "Industry."* The Trade Agreements Act defines "industry" to mean "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."²³⁰ Separate subsections define "like product," authorize the examination of regional industries, and allow the Commission to exclude from the industry certain producers who are also importers of the LTFV merchandise.²³¹

"Like product" is defined as a "product which is like, or in the absence of like, most similar to in characteristics and uses with, the article subject to an investigation."²³² In addition to examining characteristics and uses, the Commission has continued its historic practice of looking at whether, for example, the products were produced in the same manner, by the same companies, using the same facilities.²³³ The Commission is also authorized to examine the narrowest definition of "like product" for which the necessary statistical data can be obtained in the event the domestic production of the like product has no separate identity in terms of such criterion as production or profitability.²³⁴

and Comm'r Calhoun); Spun Acrylic Yarn from Japan & Italy, 45 Fed. Reg. 19,680 (1980) (Chairman Alberger).

²³⁰ 19 U.S.C. § 1677(4)(A) (Supp. III 1979).

²³¹ *Id.* §§ 1677(10), 1677(4)(C), 1677(4)(B).

²³² *Id.* § 1677(10).

²³³ *See, e.g.*, Weighing Machinery & Scales from Japan, 45 Fed. Reg. 30,190, 30,190 (1980) ("like product" not limited to electronic digital delicatessen scales since domestic firms did not have separate production facilities or records for such scales); Pig Iron from Brazil, 45 Fed. Reg. 19,691, 19,692 (1980) (although two products were produced similarly they served different demands, had different transportability, and producers had not shifted production from one to the other).

²³⁴ *See, e.g.*, Portable Electric Nibblers from Switzerland, 45 Fed. Reg. 80,209 (1980, preliminary) (contrast the negative determination of Chairman Alberger and Comm'rs Moore and Stern based on a United States industry encompassing all sizes of nibblers, 45 Fed. Reg. at 80,209-11, with the affirmative determination of Comm'rs Calhoun and Bedell, based on a United States industry limited to 14-18 gauge nibblers, 45 Fed. Reg. 80,212-13); Certain Steel Wire Nails from the Republic of Korea, 45 Fed. Reg. 53,924, 53,925 (1980) (Chairman Alberger, Comm'rs Calhoun and Stern) (although seven domestic "like products" consisted of major nail varieties, at least one type of these specific nails was produced by every domestic firm, and domestic industry consisted of all producers of steel wire nails); Menthol from Japan & the People's Republic of China, 45 Fed. Reg. 52,273, 52,274 (1980, preliminary) (synthetic and natural L-menthol considered together because they were used interchangeably and had same chemical and molecular formulae; where separate data on L-menthol not available, ITC analyzed total menthol data); Canned Hams and Shoulders from the European Communities, 45 Fed. Reg. 47,763, 47,764-67 (1980) (Comm'rs Moore, Bedell and Stern) (rejected narrow definition of industry because there was no standard definition or consensus within the industry

Regional industry analysis is also specifically authorized by the Act, as follows:

In appropriate circumstances, the United States . . . may be divided into two or more markets and the producers within each market may be treated as if they were a separate industry if—

- (i) the producers within such market sell all or almost all of their production of the like product in question in the market, and
- (ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States.²³⁵

The Act goes on to permit an affirmative injury determination on the basis of such a regional analysis “if there is a concentration of . . . dumped imports into such an isolated market and if the producers of all, or almost all, of the production within that market are being materially injured.”²³⁶ While the criteria for regional industry analysis may be met, regional industry treatment has long been viewed by the Commission as discretionary.²³⁷ Accordingly, the Commission has imposed, and undoubtedly will continue to impose, certain additional standards that must be met before regional industry treatment will be granted.²³⁸

as to product and no separate statistics available); Tomato Products from Certain European Countries, 45 Fed. Reg. 42,899, 42,912 (1980) (statistical data not available on certain tomato types and there were some doubts as to comparability); Butter Cookies from Denmark, 45 Fed. Reg. 42,895, 42,895-96 (1980) (because statistics regarding butter cookies were unavailable, Commission examined impact of butter cookie imports on total cookie production); Certain Carbon Steel Products from Certain European Countries, 45 Fed. Reg. 31,814, 31,823-24 (1980, preliminary) (Comm'r Stern) (questioned separate treatment of five product lines in view of industry's high degree of vertical integration, but noted that demand was product-specific); Pipes & Tubes of Iron & Steel from Japan, 45 Fed. Reg. 27,581, 27,585 (1980, preliminary) (Comm'r Stern) (no breakout of separate product lines due to petitioner's high degree of vertical and horizontal integration).

²³⁵ 19 U.S.C. § 1677(4)(c) (Supp. III 1979).

²³⁶ *Id.* The appropriateness of a regional industry analysis was previously recognized in the Senate Finance Committee Report on the Trade Act of 1974. *See* S. REP. NO. 1298, 93d Cong., 2d Sess. 180-81 (1974). The Report stated, however, that “each case may be unique and [the Committee] does not wish to impose inflexible rules as to whether injury to regional producers always constitutes injury to the industry.” S. REP. NO. 1298 at 181.

For cases considering regional industry analysis prior to the Trade Agreements Act, see Carbon Steel Plate from Taiwan, 44 Fed. Reg. 29,734, 29,738-39 (1979) (Comm'rs Alberger and Stern determined that a “geographic segmentation” principle did not apply since the LTFV imports were not concentrated in any one of the regional competitive markets identified by the domestic industry; accordingly, no regional industry existed); Sugar from Certain European Countries, 44 Fed. Reg. 29,992, 29,992 (1979).

²³⁷ *See* Carbon Steel Plate from Taiwan, 44 Fed. Reg. 29,734, 29,737 (1979) (Comm'rs Alberger and Stern).

²³⁸ In Certain Steel Wire Nails from the Republic of Korea, 45 Fed. Reg. 53,924, 53,925-26 (1980) a seven state Western regional market was found by all five Commissioners although a 3-2 negative decision resulted. Chairman Alberger and Commissioners Stern and Calhoun found subsections (i) and (ii) of section 1677(4)(C) satisfied by the fact that Western producers sold 80% of their production in the region, and that producers outside the region supplied only 1.5% of regional consumption. But noting the section's introductory words (“In appropriate circumstances . . .”), they concluded that regional treatment is discretionary and outlined two factors relevant to the exercise of that discretion. First, “a particular region should account for a significant share of domestic production and consumption.” This requirement “prevents imposition of duties on imports sold in the entire national market when their negative impact is limited to a very small segment of that market.” (In the *Nails* case, the Western states represented 20% of

Finally, the exclusion from the U.S. industry of a producer which also imports the LTFV merchandise is contemplated by the Act.²³⁹ As in the case of regional industry, the exclusion of such a producer from any injury analysis is discretionary with the Commission. Thus far, however, the Commission has never excluded a domestic producer on the ground that it also imported the subject merchandise.²⁴⁰

2. *Indicia of Injury.* The Act and regulations set forth with some particularity the indicia of injury which the Commission must examine

both U.S. consumption and U.S. production.) Second, "the condition of producers of the like product in the region should be worse than that of the industry at large." (In *Nails*, this condition was also met.) Finally, on the issue of concentration of imports, Chairman Alberger and Commissioner Stern found it sufficient that 43% of imports were concentrated in an area which represented only 20% of U.S. consumption.

In *Fish from Canada*, 45 Fed. Reg. 34,456, 34,457 (1980), Chairman Alberger and Commissioner Calhoun found a regional industry (but no injury) because producers in the region sold all or almost all of their production in the region, outside producers did not make significant sales in the region, and the imports were concentrated in the region. Commissioner Stern found a regional industry using the same analysis, but also applied a fourth criterion: "In my view, to justify singling out a geographic segment of the country, the region should be significant enough to constitute an industry potentially meriting a remedy which, for constitutional reasons, may only be imposed on a national, rather than a regional, scale . . ." 45 Fed. Reg. at 34,461.

In *Asphalt Roofing Shingles from Canada*, 45 Fed. Reg. 68,803, 68,804-08 (1980, preliminary), petitioners' attempt to focus on a "northern U.S." regional industry worked to its disadvantage. Chairman Alberger and Commissioners Stern and Calhoun, even while expressing doubt that a true regional industry could be shown, found evidence of an absence of price suppression in the fact that price trends in the northern United States, where imports were concentrated, were indistinguishable from price trends in the southern states.

Even where the Commission's regional industry standards are not fully met, an argument focusing on regional imports may have some utility. In *Anhydrous Sodium Metasilicate from France*, 46 Fed. Reg. 176 (1981), the majority based its affirmative threat of material injury determination in part on the conclusion that the foreign exporter's successes in one geographic region was likely to be repeated in other United States markets. Note that the exporter had also established a nationwide distribution system to facilitate such a geographic expansion of its United States sales.

²³⁹ 19 U.S.C. § 1677(4)(B) (Supp. III 1979).

²⁴⁰ See generally *Certain Steel Wire Nails from the Republic of Korea*, 45 Fed. Reg. 53,924, 53,927 (1980) (although U.S. producer had also been a substantial importer of one type of Korean nail, producer not excluded where it had been forced to buy some low priced Korean nails to remain competitive with the LTFV imports); *Unlasted Leather Footwear Uppers from India*, 45 Fed. Reg. 19,678, 19,679 (1980) (Comm'r's Bedell, Moore, and Stern) (exclusion of U.S. producers who also imported Indian uppers "would have the effect of excluding the more important producers"); *Melamine in Crystal Form from Austria & Italy*, 45 Fed. Reg. 31,830, 31,832 (1980) (Comm'r Stern) (exclusion of domestic producer/importer "would severely distort our perception of the domestic industry. By recognizing American Cyanamid's hybrid nature as both an importer and a producer, I am able to place its profits and sales statistics in proper perspective"); *Titanium Dioxide from Certain European Countries*, 44 Fed. Reg. 66,997, 66,999 (1979) (producer/importer not excluded although its inclusion "in the domestic industry's aggregate data often obscured rather than illuminated the implications of the data"); *Motorcycles from Japan*, 43 Fed. Reg. 52,295, 52,297 (1978) (Kawasaki Motors Corp., wholly owned U.S. subsidiary of Kawasaki, Japan, one of the exporters which sold at LTFV, not excluded and Commission examined subsidiary's performance separately from that of petitioner due to fact that the two "U.S." producers differed significantly with respect to the types and sizes of motorcycles produced and amount of fabrication performed in the United States); *Sorbates from Japan*, 43 Fed. Reg. 42,313, 42,313 (1978) (Monsanto not excluded despite fact that 63% of all LTFV imports from Japan were entered for Monsanto's account).

when assessing whether material injury has occurred.²⁴¹ In reaching its preliminary and final determinations, the Commission is to consider, among other factors:

- (i) the volume of imports of the merchandise which is the subject of the investigation,
- (ii) the effect of imports of that merchandise on prices in the United States for like products, and
- (iii) the impact of imports of such merchandise on domestic producers of like products.²⁴²

The volume of imports or increase in volume need only be shown to be "significant," not "substantial" or "rapidly increasing" as required by other trade statutes.²⁴³ Any such increase may be measured either in absolute terms or relative to U.S. consumption or production.²⁴⁴ While import penetration may not be "significant" in a particular case, the volume of imports alone is rarely, if ever, determinative of the outcome of an ITC proceeding. Despite exporters' arguments that a *de minimis* volume exception be adopted,²⁴⁵ the Commission has refused to find that "small import quantities and low rates of market penetration are necessarily sufficient criteria, in and of themselves, for finding no causal connection between imports and injury."²⁴⁶ Even when import volumes are significant, however, recent negative injury determinations have been based on the fact that those volumes had declined over the relevant period.²⁴⁷

²⁴¹ See 19 U.S.C. §§ 1677(7)(B), (C) (Supp. III 1979); 19 C.F.R. § 207.26 (1981). These indicia generally comport with those the Commission has traditionally examined in assessing whether injury has occurred. See, e.g., Sugar from Certain European Countries, 44 Fed. Reg. 29,992 (1979) (Comm'r Stern).

²⁴² 19 U.S.C. § 1677(7)(B) (Supp. III 1979). Although the indicia of injury to be examined are the same in both the preliminary injury and final injury context, the standard of proof required of a petitioner in the preliminary injury phase is necessarily lower than that required in a final injury proceeding. See, e.g., Butadiene Acrylonitrile Rubber from Japan, 40 Fed. Reg. 18,618, 18,619 (1975).

²⁴³ 19 U.S.C. § 1677(7)(C)(i) (Supp. III 1979). Under section 201 of the Trade Act of 1974, *supra* note 49, the merchandise must be imported in "increased quantities" so as to be a substantial cause of serious injury to the domestic industry. 19 U.S.C. § 2251(b)(1) (1976). Section 406 of the Trade Act, *supra* note 49, specifies that imports from the Communist country in question must be "increasing rapidly" so as to be a significant cause of material injury. 19 U.S.C. § 2436(e)(2) (1976).

²⁴⁴ 19 U.S.C. § 1677(7)(C)(i) (Supp. III 1979).

²⁴⁵ Such arguments were made, for example, in Certain Carbon Steel Products from Certain European Countries, 45 Fed. Reg. 31,814 (1980, preliminary).

²⁴⁶ Steel Wire Strand for Prestressed Concrete from India, 43 Fed. Reg. 38,951, 38,951 (1978). Equally important in this case was a consideration of pricing activity associated with Indian strand. Contrast Secondary Aluminum Alloy in Unwrought Form from the United Kingdom, 46 Fed. Reg. 27,586 (1981), where the very low volume and market share of the imports were the major reasons for the unanimous negative determination.

²⁴⁷ In Steel Wire Nails from the Republic of Korea, 45 Fed. Reg. 53,924, 53,927-28 (1980), Commerce had found LTFV sales from some Korean producers, but not from others. Importer counsel was able to produce figures showing that, although total Korean imports into the West Coast region had increased substantially, imports from the LTFV producers had declined sharply. Chairman Alberger and Commissioners Stern and Calhoun based their negative determination in large part on this decline, rejecting U.S. producer arguments that the decline was

Questions of import volume and trends in import penetration are closely allied with the issue of whether the Commission will cumulate imports from all countries as to which simultaneous LTFV determinations are rendered.²⁴⁸ Through cumulation, the Commission has issued affirmative injury determinations in cases in which import penetration from one of the countries involved amounted to only 0.1 percent of domestic consumption.²⁴⁹ There is some recent indication, however, that cumulation in such cases may no longer be appropriate.²⁵⁰

caused in substantial part by the dumping case and that the LTFV producers had substantial excess capacity which posed a threat to the U.S. market:

[T]he decline in LTFV imports began before the initiation of any dumping proceedings, and plausible alternative causes in explanation of the decline were presented While we recognize that these firms may presently have excess capacity, we cannot determine, on the basis of pure conjecture, that this excess capacity will necessarily be directed at the United States upon termination of this investigation. There must be some independent corroborating evidence before we can conclude that this withdrawal from the market has been done in bad faith.

Id. at 53,927. Commissioners Bedell and Moore, in contrast, observed that while the LTFV producers' imports had declined

they still represented more than 7 percent of apparent Western consumption in 1979, a year in which U.S. producers accounted for only about 37% of consumption. Moreover, it was likely that the sharp decline in imports in 1979 was at least partly the result of this antidumping investigation.

Id. at 53,928. *Compare* Anhydrous Sodium Metasilicate from France, 45 Fed. Reg. 176, 178 (1981), where a decline in imports was attributed to the commencement of a countervailing duty case.

A decline in imports (from eight to four percent of U.S. consumption) led again to a negative determination in Melamine in Crystal Form from Italy & Austria, 45 Fed. Reg. 31,830, 31,831 (1980) (the four percent level "is not significant in light of the absence of underselling and generally strong U.S. industry performance"). Also, in Pipes & Tubes of Iron & Steel from Japan, 45 Fed. Reg. 42,898 (1980, reconsideration of final determination at 45 Fed. Reg. 27,581), the Commission had previously reached an affirmative preliminary determination as to one product line. Subsequently, it was discovered that the staff's import figures had been incorrect and that imports of that product line from Japan had declined rather than increased. The Commission reopened the case, and Commissioners Moore and Bedell changed their votes to negative, making a negative majority.

In Strontium Carbonate from the Federal Republic of Germany, 45 Fed. Reg. 73,812 (1980, preliminary), a precipitous decline in import volume and market share were the major reason for the 3-2 negative determination.

However, recent increases or declines in import volume may be disregarded where they are determined to be only a seasonal fluctuation. *See* Snow-Grooming Vehicles from the Federal Republic of Germany, 46 Fed. Reg. 1,049 (1981, preliminary).

²⁴⁸ The decision whether or not to cumulate is a discretionary one which rests with the Commission. *See, e.g.,* Inedible Gelatin & Animal Glue from The Netherlands, Sweden, Yugoslavia & West Germany, 42 Fed. Reg. 57,565, 57,566 (1977).

²⁴⁹ *See* Viscose Rayon Staple Fiber from Italy, 44 Fed. Reg. 31,327, 31,328 (1979) (Chairman Alberger). Indeed, imports from Italy had actually decreased from 0.2% of apparent domestic consumption in 1977 to only 0.1% in 1978.

²⁵⁰ In Certain Carbon Steel Products from Certain European Countries, 45 Fed. Reg. 31,814 (1980, preliminary), the Director of Operations recommended cumulation of imports in each product line from all seven countries, on the following two bases:

The imports of the same class or kind of merchandise are comparable and compete in the same markets, and the factors and conditions of trade show the relevance of such cumulative consideration to the determination of reasonable indication of injury

[T]he history of special joint EC planning with regard to iron and steel products . . . suggests a pattern of attempted joint action worthy of USITC consideration

Next, the statute provides that the Commission must evaluate the effect of LTFV imports on prices. In so doing, the Commission must consider whether:

- (i) there has been significant price undercutting by the imported merchandise as compared with the price of like products of the United States, and
- (ii) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.²⁵¹

The margins of undercutting, price suppression, and price depression have always been viewed by the Commission as key elements in any injury determination; an assessment of some or all of these indicia appear in virtually every Commission decision.²⁵² These factors remain of critical importance under the Trade Agreements Act.²⁵³

as a factor supporting cumulative treatment of imports of the same type of product.

Id. at 31,822. Commissioners Bedell, Moore, and Calhoun accepted the Director's recommendation, but only for the first reason. *Id.* at 31,815. Chairman Alberger's analysis was as follows:

In evaluating the appropriateness of cumulation within each product line, I have considered the volume of imports, marketing practices of each country, market shares, pricing practices, inventory practices and trends of imports. Thus, imports of some of these products from certain EC nations have been found inappropriate for cumulation as having some contributing impact on the reasonable indication of material injury.

Id. at 31,816. The Chairman thus did not cumulate specific products from certain countries, where the country's U.S. market share of that product was in the 0.03-0.5% range and was declining or static. As to some of these, he concluded that the foreign producers were withdrawing from the U.S. market. *Id.* at 31,816-18. Commissioner Stern emphasized that the decision whether to cumulate is discretionary and noted that "there has been no showing that the EC coordinates in any fashion the export behavior of member country steel producers." *Id.* at 31,827-28. Like the Chairman, she reached negative determinations where an individual country's share of a specific product line was "tiny" or "miniscule." *Id.* at 31,828.

In *Menthol from Japan & the People's Republic of China*, 45 Fed. Reg. 52,273 (1980), Chairman Alberger and Commissioner Calhoun rejected the Director's recommendation to cumulate because they concluded that the Japanese were withdrawing from the U.S. menthol market. *Id.* at 52,274. Commissioner Stern also rejected cumulation, *id.* at 52,278, but Commissioners Moore and Bedell cumulated, *id.* at 52,277. See also *Spun Acrylic Yarn from Japan & Italy*, 45 Fed. Reg. 19,682, 19,682 n.2 (1980) (Comm'rs Bedell and Moore cumulated imports from the two countries but Comm'rs Stern and Calhoun did not); *Certain Steel Wire Nails from the Republic of Korea & Yugoslavia*, 46 Fed. Reg. 43,117 (1981, preliminary).

²⁵¹ 19 U.S.C. § 1677(7)(c)(ii) (Supp. III 1979).

²⁵² Where LTFV sales do not undercut domestic prices, "technical" dumping is said to occur. See note 11 *supra*.

²⁵³ See generally *Asphalt Roofing Shingles from Canada*, 45 Fed. Reg. 68,803, 68,806 (1980, preliminary) (no price undercutting); *Snow-Grooming Vehicles from the Federal Republic of Germany*, 46 Fed. Reg. 1,049, 1,050 (1981, preliminary) (no price undercutting; petitioner's argument, that higher import prices did not adequately reflect higher quality of imported machines, was rejected); *Plastic Animal Identification Tags from New Zealand*, 46 Fed. Reg. 15,379, 15,381 (1981) (no price undercutting; price comparison utilized not import prices, but rather importer's resale prices, because that was the level of trade at which imports competed directly with United States-produced tags); *Certain Steel Wire Nails from the Republic of Korea*, 45 Fed. Reg. 53,924, 53,926, 53,939 (1980) (disagreement as to whether price effects had occurred); *Menthol from Japan & the People's Republic of China*, 45 Fed. Reg. 52,273, 52,279 (1980, preliminary) (Comm'r Stern) (price weakness attributed to over-supply and forward-purchase contracts); *Canned Hams & Shoulders from the European Communities*, 45 Fed. Reg. 47,763, 47,765 (1980) (no price undercutting); *Weighing Machinery & Scales from Japan*, 45

The same is true of the indicia of injury that relate to the impact of LTFV imports on the affected industry. The Commission is charged to evaluate "all relevant economic factors which have a bearing on the state of the industry," including "the actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity," and the "actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment."²⁵⁴ The Commission also relies on the presence or absence of domestic sales lost to imports at LTFV,²⁵⁵ and may be influenced to some degree by the extent to which one or more important members of the U.S. industry fails to appear at the hearing, cooperate with the ITC staff, or otherwise refuses to support the petition.²⁵⁶ The presence or absence of any of the volume, price, or general indicia of injury noted herein, however, are not determinative of the outcome of

Fed. Reg. 30,190, 30,191-92 (1980) (Comm'r's Bedell, Moore, and Stern) (U.S. producers' declining prices attributed to technology and increased productivity).

²⁵⁴ 19 U.S.C. § 1677(7)(C)(iii) (Supp. III 1979). The "negative effects" concept played a role in Commissioner Stern's affirmative votes in Certain Carbon Steel Products from Certain European Countries, 45 Fed. Reg. 31,814 (1980, preliminary):

Although the financial picture has improved since 1977, the domestic industry has effectively argued that the period of investigation represents the upside of a business cycle now in a downturn. If the modest profits of the past two years are viewed in this light, one must seriously question whether the fat of these relatively good years will be sufficient to carry the industry through the lean years of this very cyclical industry.

45 Fed. Reg. at 31,826. For classic pictures of industries injured by LTFV imports, see *Portable Electric Typewriters from Japan*, 45 Fed. Reg. 30,186 (1980); *Pig Iron from Brazil*, 45 Fed. Reg. 19,691 (1980).

²⁵⁵ See, e.g., *Certain Steel Wire Nails from the Republic of Korea*, 45 Fed. Reg. 53,924, 53,927, 53,929 (1980) (compare extent to which it must be demonstrated that purchasers bought Korean nails from LTFV producers, rather than from Korean firms); *Sugars & Syrups from Canada*, 45 Fed. Reg. 19,687, 19,688-89 (1980) (Chairman Alberger and Comm'r Calhoun) (several instances of lost sales found as evidence of material injury); *Spun Acrylic Yarn from Japan & Italy*, 45 Fed. Reg. 19,682, 19,684 (1980).

In *Portable Electric Typewriters from Japan*, 45 Fed. Reg. 30,186 (1980), Chairman Alberger commented at some length on a typical lost sale evidentiary problem:

There was sworn testimony proffered at the hearing that the Sears account for portable electric typewriters was switched from SCM to two Japanese manufacturers. The SCM representative stated that price was the primary reason for lost sales to Sears with quality and consumer services being secondary considerations. The sales which SCM had made to Sears represented a considerable portion of the manufacturer's total sales. Submissions were made for the record (but not as sworn statements) by Sears contradicting the sworn testimony offered by SCM.

The weight of the evidence thus seems to balance in favor of SCM.

45 Fed. Reg. at 30,189.

For examples of sales not lost by reason of imports at LTFV, see *Menthol from Japan & the People's Republic of China*, 45 Fed. Reg. 52,273, 52,280 (1980, preliminary) (Comm'r Stern) (domestic purchases from the exporters "did not represent a change in the company's supply patterns" and, in addition, some customers went off-shore to obtain a long-term contract); *Rail Passenger Cars & Parts Thereof from Italy & Japan*, 45 Fed. Reg. 11,942, 11,943 (1980, preliminary) (although petitioner bid unsuccessfully on contracts awarded to exporters, these were found not to be lost sales, because other bidders were lower in price than petitioner and might have won the contracts if the exporters had bid at higher prices).

²⁵⁶ See notes 101, 102 *supra*.

the proceeding.²⁵⁷

C. Judicial Review

Title X of the Trade Agreements Act provides liberal opportunity for judicial review of a number of Commerce Department and ITC preliminary and final determinations as well as for review of a denial of administrative protective orders.²⁵⁸ Any "interested party who is a party to the proceeding"²⁵⁹ may contest in the United States Court of International Trade such antidumping determinations as: a failure to initiate a proceeding, a Commerce Department determination that a case is extraordinarily complicated, a Commerce or ITC determination not to review a suspension agreement or a previous determination based on changed circumstances, an ITC negative preliminary injury determination, or a Commerce negative preliminary LTFV determination.²⁶⁰ With respect to the challenge of these specific determinations, the standard of review to be applied by the court is whether the determination was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁶¹ A party with standing may also contest a final affirmative ITC or Commerce determination, a final negative ITC or Commerce determination, administrative review determinations under section 751 (other than determinations relating to changed circumstances), Commerce's determination to suspend an investigation based on the acceptance of an agreement, and an ITC determination relating to the elimination of injurious effects of an agreement.²⁶² In these instances, the appropriate standard of judicial review is whether such determinations were "unsupported by substantial evidence on the record, or otherwise not in accordance with law."²⁶³ Injunctive relief is available in the case of determinations made after the suspension of liquidation; in the event the decision of the court differs from that of the agency, the case will be remanded for disposition consistent with the court's ruling.²⁶⁴

Two brief observations should be made with regard to the greatly

²⁵⁷ See 19 U.S.C. § 1677(7)(E)(ii) (Supp. III 1979); 19 C.F.R. § 207.27 (1981).

²⁵⁸ See generally 19 U.S.C. § 1516a (Supp. III 1979); 19 C.F.R. §§ 207.50-.51 (1981).

²⁵⁹ The term "interested party" is defined as under 19 U.S.C. § 1677(9) (Supp. III 1979), and includes, *inter alia*, the foreign producer, the U.S. importer, a trade or business association, the foreign government, relevant U.S. producers, relevant labor organizations, and relevant U.S. trade or business associations.

²⁶⁰ See 19 U.S.C. § 1516a(a)(1) (Supp. III 1979). Procedurally, the action is commenced by filing concurrently a summons and complaint within 30 days of the publication in the Federal Register of the challenged determination. *Id.*

²⁶¹ *Id.* § 1516a(b)(1)(A).

²⁶² *Id.* § 1516a(a)(2). Procedurally, within 30 days of the date of Federal Register publication of the determination at issue, the action is commenced by filing a summons and, within 30 days thereafter, a complaint contesting the factual and/or legal conclusions reached by the agency. *Id.*

²⁶³ *Id.* § 1516a(b)(1)(B).

²⁶⁴ *Id.* §§ 1516a(c)(2), 1516a(c)(3).

expanded scope of judicial review. First, as is evident from the number and types of determinations to which the judicial review provisions apply, there is very real potential for procedural chaos in any case where one or more parties decides to utilize fully opportunities for judicial review. Second, it is the view of the authors that judicial review of substantive determinations by Commerce or the Commission is often a fruitless exercise. Determinations under the antidumping law are intensely fact oriented. Generally speaking, only where a clear error in application of law is perceived will an appeal have a significant chance of succeeding.

V. Conclusion

In the wake of changes made by the Trade Agreements Act of 1979, the antidumping law is now a much more effective vehicle for U.S. companies and industries seeking relief from unfair import pricing. It remains, however, a difficult and expensive action, in some respects more so than under prior law. Antidumping relief should thus be considered only in those cases where the need for such relief and the prospects of success are sufficiently strong to warrant the substantial cost and effort involved in proceeding under the Act.