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# The Defense of Antidumping and Countervailing Duty Investigations Under the Trade Agreements Act of 1979

by Noel Hemmendinger\*  
William H. Barringer\*\*

## I. Introduction

The enactment of the Trade Agreements Act of 1979<sup>1</sup> had an immense impact on the defense of antidumping and countervailing duty investigations. Antidumping investigations which were formerly divided into two distinct phases—one conducted by the Department of the Treasury, the other before the International Trade Commission (ITC)—now involve three, often concurrent, phases. These include the preliminary and final investigations of injury by the ITC and the investigation by the Department of Commerce of the existence of less than fair value sales. Countervailing duty investigations have also expanded to include preliminary and final injury investigations by the ITC in addition to the investigation of the existence of subsidization. Moreover, Congress has expanded the opportunities for appeal to the Court of International Trade for both petitioners and respondents.

While the addition of these investigative phases and the increased access to court appeals undoubtedly have increased the complexity of mounting a successful defense, procedural changes in the conduct of investigations introduced by the Trade Agreements Act of 1979 have had an even more important impact. Provisions in the law granting increased access by “interested parties” to the confidential information on which determinations are based, requiring officials at the decisionmaking level of the administering authority to report *ex parte* contacts, and providing for reversal of determinations by the courts if decisions are not supported by substantial evidence on the record, have brought about major changes in the investigatory process. Under prior law, the defense of antidumping and countervailing duty investigations principally was

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<sup>1</sup> Pub. L. No. 96-39, 93 Stat. 144 (1979). Section 101 of the Trade Agreements Act of 1979 added §§ 701-778 to the Tariff Act of 1930, ch. 497, 46 Stat. 599; these sections have been codified in 19 U.S.C. at §§ 1671-6779.

limited to factual submissions and presentation of legal arguments to the Treasury Department. Procedural changes in the new law, however, encourage the domestic industry to take an active adversarial role in each stage of the investigation, creating new tactical considerations in structuring the defense. In addition, both the Commerce Department and International Trade Commission are constrained by the increased access of all parties to the Court of International Trade, and that court's expanded scope of review. As a result of these and other changes, the defense of investigations today approaches in cost and intricacy the defense of other complex litigation.

## II. Defense of an Antidumping Investigation

### *A. Preliminary Considerations*

The defense of an antidumping investigation may begin at various points in time, even prior to the actual filing of a petition by a U.S. industry. It is not uncommon, for example, for a U.S. petitioner contemplating the filing of an antidumping petition to signal its intention well in advance of filing. This might be done to influence decisions by the U.S. Government or in the hope that respondents will raise the price of their U.S. imports in the face of a threatened antidumping investigation. The defense of an antidumping investigation, however, normally does not begin until a petition has been formally filed.

The first step in the defense of a case is to make an overall assessment of the various factors and parties involved in the investigation. First and foremost, one must ask what the case is really about. Does the petitioner have a legitimate grievance which will be resolved by the investigation, or is petitioner's true goal broader than or tangential to the likely outcome? Is the case directed at a specific party which has presented intense price competition to the petitioner or is the petitioner aggrieved by the behavior of the entire foreign industry? Is the petitioner likely to politicize the case, and does it have a history of vigorously pursuing investigations? Is the particular product or subcategory of the industry being investigated the real focus of the investigation or is the investigation aimed at the broader industry? What is the volume of trade involved? What is the size of the U.S. industry? Is a single petitioner involved or does the petition have the support of the entire industry?

Answers to these questions are particularly important in devising a strategy and a budget for the defense. If the volume of business involved is significant, the petitioner litigious, or the case politically sensitive, a strong defense must be mounted and the foreign respondents should be prepared for a lengthy and expensive proceeding. If the objectives of the petitioner are broader than can be encompassed under the antidumping law, then it may be possible to relate the investigation to a broader settle-

ment.<sup>2</sup> If the target is a particular product or subcategory of products produced by the industry or a particular foreign company, various alternatives in terms of settlement or pursuit of the investigation are available. For example, an early and significant price adjustment by the target company might lead to a withdrawal of the petition. Similarly, attempts might be made to define the product category more narrowly to focus on the target product rather than the broader industry.

### *B. Defense at the Initial Stages of the Investigation*

The first step for the defense in any investigation is seeking to have the petition rejected. This is not an easy task. Under the Trade Agreements Act of 1979 the petitioners are only required to include in the petition information which is "reasonably available"<sup>3</sup> to support allegations of less than fair value sales and material injury to the domestic industry. Furthermore, the Senate Finance Committee Report on the Act has admonished the Commerce Department to work with petitioners before a petition is filed to assure its adequacy.<sup>4</sup> Nevertheless, a thorough analysis of the petition should be done upon its receipt by the defending lawyer to assure that the elements required by the regulations are included in the petition.

This analysis should include consideration of three major points. First, does the petition allege and provide factual support for each element required for inclusion in a petition by the regulations?<sup>5</sup> Second, is a change in the product definition appropriate or, more importantly, would such a change be advantageous to the defending client?<sup>6</sup> Third, is there any element of the petition, or the circumstances surrounding its filing, which indicates steps which could be taken to obtain withdrawal of the petition? If the petition is vulnerable in any of these respects, it is

<sup>2</sup> See, e.g., Carbon Steel Cold Rolled Sheet, Hot Rolled Sheet, Galvanized Sheet, Plate and Structural Shapes from Belgium, The Federal Republic of Germany, France, Italy, Luxembourg, The Netherlands, and the United Kingdom, 45 Fed. Reg. 66,833 (1980) (termination of antidumping investigation). This investigation was terminated when U.S. Steel Corp. withdrew its petition after protracted negotiations with the U.S. Government. In exchange for withdrawal of the petition, U.S. Steel obtained the reinstatement of the Trigger Price Mechanism for steel imports, 45 Fed. Reg. 66,833 (1980), as well as a commitment by the Carter Administration to take steps to eliminate the burdens of government regulation on the industry, particularly environmental standards, and to support tax measures to assist in capital formation. See A Presidential Report on the American Steel Industry, 16 WEEKLY COMP. OF PRES. DOC. 1959 (Sept. 30, 1980). See also Carbon Steel Bars, Carbon Steel Strip, Carbon Steel Plates, and Certain Structural Carbon Steel Shapes from the United Kingdom, 43 Fed. Reg. 47,041 (1978).

<sup>3</sup> 19 U.S.C. § 1673a(b)(1) (Supp. III 1979). The Report of the Senate Finance Committee on the Trade Agreements Act of 1979 states that "reasonably available" information is to be determined "in light of the circumstances of each petitioner" and the resources available to it. S. REP. NO. 249, 96th Cong., 1st Sess. 63 (1979), reprinted in [1979] U.S. CODE CONG. & AD. NEWS 381.

<sup>4</sup> The Senate Finance Committee has indicated that it "expects the authority to advise and to assist private parties . . . before they file a petition." S. REP. NO. 249, 96th Cong., 1st Sess. 63 (1979), reprinted in [1979] U.S. CODE CONG. & AD. NEWS 381.

<sup>5</sup> 19 C.F.R. § 353.36(a) (1980).

<sup>6</sup> See 19 U.S.C. § 1677(10) (Supp. III 1979).

advisable to challenge it and seek its rejection well in advance of the initiation of an investigation. Once an investigation has been initiated it is always more difficult to convince the Commerce Department to terminate the case, alter the product definition, or have the petition withdrawn.

The second area of concern once a petition has been filed is the ITC's preliminary investigation into the existence of a "reasonable indication" of injury.<sup>7</sup> This issue is the first real battleground in the investigation and it must be approached carefully. The respondents are at a disadvantage during this stage of the investigation for several reasons. First, the petitioner has had ample time to prepare its case for the ITC, while the respondent will have less than forty-five days for its preparation.<sup>8</sup> Second, the "reasonable indication" of injury standard used at this stage of the investigation is significantly more favorable to the petitioner than the "material injury" standard used in the final injury determination.<sup>9</sup> Third, the statistical base which is available to the ITC at the preliminary injury phase is normally incomplete. Fourth, the alleged dumping margins, an important element in the ITC's analysis, are generally taken as a given and are often substantially higher than the margins that ultimately will be found by the Commerce Department investigation. The combination of these factors makes success at this stage of the investigation difficult for respondents.

Nevertheless, an appearance at the preliminary investigation is often advisable. In a few cases, there are substantial grounds to argue, and statistical evidence to support, the absence of a "reasonable indication" of injury to a U.S. industry.<sup>10</sup> The likelihood of success, and therefore the effort which should be undertaken at this stage, will depend upon the availability of a reliable statistical base and the possibility of showing an absence of the requisite injury.

More frequently, the responding attorney will find that the preliminary ITC injury investigation can be used to seek a narrower product definition, where such a narrower definition may be advantageous in the final injury or fair value investigations.<sup>11</sup> Efforts also should be made to suggest areas which the ITC should explore in gathering statistics and undertaking interviews within the industry prior to the final injury inves-

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<sup>7</sup> *Id.* § 1673b(a).

<sup>8</sup> The Trade Agreements Act of 1979 requires that the ITC preliminary decision be made within 45 days of the date the petition is filed. *Id.*

<sup>9</sup> The difficulty which import interests will have in obtaining a negative preliminary determination is evident from the interpretation of "reasonable indication" by the House Ways and Means Committee. The Committee states: "It is the intention of the Committee that a reasonable indication will exist in each case in which the facts reasonably indicate that an industry in the United States *could possibly* be suffering material injury, threat thereof, or material retardation." H.R. REP. NO. 317, 96th Cong., 1st Sess. 52 (1979), [emphasis added].

<sup>10</sup> *See, e.g.*, Pipes and Tubes of Iron or Steel from Japan, 43 Fed. Reg. 27,581 (1980), in which the ITC found no reasonable indication of injury.

<sup>11</sup> *See, e.g.*, Portable Electric Nibblers from Switzerland, 45 Fed. Reg. 80,209 (1980).

tigation.<sup>12</sup> This phase can also be useful in giving the respondents a preview of the arguments which will ultimately be used by the domestic industry in the final injury determination. The responding attorney must undertake an assessment of the possible objectives to be achieved at the ITC and the likelihood of success in achieving them prior to considering the respondent's participation at this phase of the investigation.

### *C. Preliminary Fair Value Investigation*

The period between the initiation of an investigation by the Department of Commerce and its preliminary determination is by far the most important phase of an antidumping proceeding. This phase revolves around the foreign manufacturers' responses to the Department of Commerce antidumping questionnaire. It is often the most difficult stage of the investigation for the lawyer, because he must explain to the client the substantive issues of the investigation and how to defend on the merits. Most foreign companies are neither familiar with the procedural and substantive aspects of U.S. antidumping law nor comfortable with the process of verification which follows the submission of a response. It is the lawyer's task at this point to familiarize the client with the substance of what constitutes less than fair value sales, to inform himself adequately with respect to the responding company's sales practices, and to develop the relevant facts necessary to the formulation of a defense strategy in the investigation.

This phase of the investigation generally involves three extensive meetings with the foreign producer in connection with preparing the response and its verification.

#### *1. Preparation of the Response*

To prepare the response, the foreign producer must have a sufficient understanding of the substance of the law and regulations to be able to determine what information with respect to both foreign market value<sup>13</sup> and United States price<sup>14</sup> may be relevant to the Commerce Department questionnaire. Respondents' attorney must be sufficiently familiar with the sales practices involved to spot all possible adjustments<sup>15</sup> to foreign

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<sup>12</sup> This is particularly true where respondents wish to make arguments with respect to consumer perceptions of product quality, market segmentation, or other nonprice related factors which are important to commercial success in a given industry but which may not be reflected in a statistical analysis. Furthermore, if the respondents intend to segment the market in analyzing injury, it will be necessary for the ITC staff to gather statistics which reflect that segmentation.

<sup>13</sup> See 19 C.F.R. §§ 353.3-.9 (1980).

<sup>14</sup> See *id.* § 353.10.

<sup>15</sup> The comparison of foreign market value and United States price is based on the gross price in each market minus certain adjustments to arrive at a net price which reflects differences in circumstances of sale and other costs and charges which affect price comparability. See *id.* §§ 353.14-.23.

market value and United States price and to make the strategic decisions as to the best approach for the response.

In preparing the response, four initial determinations must be made. First, what will be the basis of foreign market value—home market sales, third country sales, or constructed value? Second, in light of the product definition of the merchandise being investigated, what merchandise sold in the foreign market is “such or similar merchandise” to that exported to the United States? Third, what will be the basis of United States price? Fourth, which sales, both foreign and for export to the United States, fall within the investigative period?

Whether sales in or to the United States are compared to home market sales, third country sales, or constructed value,<sup>16</sup> can lead to vastly different results. In many situations, no choice will be available because the size of the foreign manufacturer's home market is so substantial as to preclude the choice of third countries or constructed value. There are numerous cases, however, in which the choice of market is not obvious, particularly where there are significant differences between the merchandise sold in the home market and that sold to the United States. Naturally, the attorney wishes to choose the foreign market value which results in the most favorable outcome for the client. In cases where it is possible to argue for markets other than the home market, this choice requires a preliminary determination of which market is most favorable and which statutory or regulatory criteria might support use of the more favorable market.<sup>17</sup> It also requires a determination of what merchandise sold in the United States is identical with or similar to merchandise sold either in the home market or to third countries.<sup>18</sup>

The choice of the basis for foreign market value is determined in the first instance by a comparison of the quantities sold in the home market and those sold to the United States. Even where there are significant quantities of similar merchandise sold in the home market, however, the degree of similarity of merchandise sold in various foreign markets can be relevant to the choice of foreign market and can ultimately be used for a foreign market value other than home market sales. Furthermore, although third countries are preferred over constructed value as the basis of comparison, if constructed value turns out to be the most favorable method of comparison, a means for excluding third country markets must be explored.<sup>19</sup> It is advisable to resolve the choice of market with

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<sup>16</sup> Constructed value is an alternative to foreign market value based on home market or third country prices. Its use is governed by 19 U.S.C. § 1677b(a)(2) (Supp. III 1979). Constructed value is the sum of cost of the materials, cost of fabrication, general expenses of not less than 10% of material and fabrication costs and profit of not less than 8% of all costs. 19 U.S.C. § 1677b(e)(1)(A) and (B).

<sup>17</sup> See 19 C.F.R. § 353.5(c) (1980). For background on this regulation see 45 Fed. Reg. 8,182, 8,183 (1980).

<sup>18</sup> 19 U.S.C. § 1677(16) (Supp. III 1979).

<sup>19</sup> Although the statute does not express any preference between use of third country sales or constructed value in determining foreign market value, *id.* § 1677(a)(2) (Supp. III 1979), the

the Department of Commerce prior to completion of the response; this avoids the burdensome submission of identical information on several markets.<sup>20</sup>

The second step in responding to the Commerce Department questionnaire is related to the first, the determination of which merchandise sold in the foreign market is identical or similar to the merchandise sold in the United States. This determination, important in the choice of the foreign market itself, is equally important in terms of its effect on the fair value calculations. If identical merchandise is sold in sufficient quantities in the foreign market, it is always used as the basis of comparison. Frequently, however, the merchandise sold in foreign markets is not identical to that sold in the United States. In this situation, the most similar merchandise must be compared and price adjustments allowed to reflect the differences between the merchandise. Under Commerce Department regulations, such adjustments are generally limited to differences in the cost of producing the compared merchandise.<sup>21</sup>

The Department of Commerce generally does not allow adjustments based on the differences in total costs of the merchandise, but will allow adjustments arising out of differences in the features or qualities of the merchandise being compared.<sup>22</sup> Moreover, adjustments are seldom permitted for differences which affect market value in excess of the differences in cost. Where more than one choice of merchandise is possible as the basis of comparison, the alternatives must be analyzed both in terms of the degree of similarity and the effect on choice of the foreign market to be used as the basis of foreign market value, and the impact on the fair value comparison of the price adjustments allowed.

A third major consideration in the initial stages of preparing the response is whether the United States price will be based on purchase price or exporter's sales price. As a general rule, the purchase price is used unless the U.S. importer is related to the foreign manufacturer. The exporter's sales price often is a more favorable basis of calculating fair value because, unlike purchase price, the profit of the U.S. importer is included in the net adjusted price, resulting in a higher United States

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Commerce Department regulations clearly express a preference for use of third country sales, 19 C.F.R. § 353.4(b) (1980).

<sup>20</sup> There is no procedure provided for such pre-response negotiation. It is, however, often advisable at the initial stages of the Commerce Department investigation to submit information relevant to the criteria set out in 19 C.F.R. § 353.5(c) (1980) and to request a determination as to the relevant third country market to avoid the submission of information covering several markets.

<sup>21</sup> 19 C.F.R. § 353.16 (1980).

<sup>22</sup> In the case of Motorcycles from Japan, 43 Fed. Reg. 35,140 (1978), this issue was a point of major contention with respondents arguing that the adjustments should be based on the difference in total costs of producing similar merchandise and the petitioner arguing that the adjustments should be limited to the cost differences of identified differences in the merchandise. The Treasury Department, opting for petitioner's position, allowed only adjustments reflecting the costs of "objective differences" in the merchandise; this in effect meant specific differences in features or qualities of the merchandise.



price. Use of exporter's sales price is dictated by the facts, although in some circumstances the statutory criteria are sufficiently ambiguous to create possible arguments to support the use of either price.<sup>23</sup>

Having made the determination as to the foreign market, the merchandise to be compared, and the prices to be used in the fair value comparison, the next step in preparing a response is to determine which sales in each market are relevant to the investigation. There are basically two issues which must be explored. First, must all the sales during the investigative period be included or can some sales be excluded as being not in the "normal course of trade,"<sup>24</sup> at a different level of trade,<sup>25</sup> or in insignificant quantities?<sup>26</sup> Second, which sales fall within the period of the investigation?<sup>27</sup>

Excluding some sales from the response is often possible if the quantities of certain subcategories of the merchandise as broadly defined by the investigation are insignificant, or if the merchandise is obsolete, damaged, or otherwise not sold in the normal course of trade.<sup>28</sup> Furthermore, if all the sales to the United States are at a given level of trade, such as the retail or wholesale level, and there are sufficient sales in the foreign market at this same level of trade, sales at a different level of trade in the foreign market may be disregarded in determining foreign market value.

Which sales fall within the investigated time period is often a complex question. In comparing foreign market value with the exporter's sales price, the foreign market value is defined as the price *at the time of exportation* to the United States at which such or similar merchandise is sold in the principal foreign market.<sup>29</sup> When using purchase price as United States price, foreign market value is the price in the foreign market *as of the date of purchase* or agreement to purchase the merchandise under investigation.<sup>30</sup> Either definition leaves a degree of flexibility in the determination as to when a sale is concluded. Because prices on sales may vary depending on the time period used, the definition of price "at the time of exportation" or price "on the date of purchase" could have a

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<sup>23</sup> 19 U.S.C. § 1677a(b), (c) (Supp. III 1979) define "purchase price" and "exporter's sales price." Their application, however, is governed by the criteria of 19 U.S.C. § 1677(13) which attempts to create objective criteria. Words such as "agent" and "controls," however, are not always subject to precise interpretation.

<sup>24</sup> 19 U.S.C. § 1677(14), (15), (16) (Supp. III 1979).

<sup>25</sup> 19 C.F.R. § 353.19 (1980). *See, e.g.*, Steel Wire Nails from Canada, 43 Fed. Reg. 51,743, 51,744 (1978).

<sup>26</sup> In some instances the preponderance of sales (80%-90%) by an individual company are concentrated in a few models or subcategories of the larger definition of the merchandise being investigated; sales of the more numerous models or subcategories may not have to be reported since they represent only a small portion of the total volume of sales. This is often a matter of discussion with the administering authority.

<sup>27</sup> The period of time investigated is normally the six month period immediately preceding initiation of the investigation. *See* 19 C.F.R. § 353.38 (1980).

<sup>28</sup> *See, e.g.*, Methyl Alcohol from Canada, 43 Fed. Reg. 59,196 (1978), where the Treasury Department disregarded so-called "swap" transactions.

<sup>29</sup> 19 U.S.C. § 1677b(a)(1) (Supp. III 1979).

<sup>30</sup> *Id.*

substantial impact on the foreign market value used in the fair value calculation. The impact of the exchange rate used may be even more important. For example, where the foreign currency has strengthened significantly during the investigatory period, it is possible that dumping margins may be created or enlarged, merely because the foreign currency has appreciated against the U.S. dollar.<sup>31</sup>

Once the merchandise and the sales of that merchandise to be included in the investigation have been determined, the next step is the identification of adjustments to the foreign market value and to the United States price. The law itself indicates only broad categories of permitted adjustments. Although the statutory language is somewhat ambiguous,<sup>32</sup> the intent of the law is to allow a comparison between the United States price and the ex-factory foreign market value.<sup>33</sup> Of the numerous possible adjustments, the most important and usually the most difficult to obtain are those relating to differences in circumstances of sale<sup>34</sup> and differences in merchandise.<sup>35</sup> These adjustments are treated differently in the purchase price and exporter's sales price situations.

In the purchase price situation, adjustments are not permitted for selling expenses, either in the foreign market or for export to the United States, unless it can be shown that the adjustments requested bear a direct relationship to sales of the merchandise under investigation.<sup>36</sup> Respondent's objective in seeking adjustments is to reduce the adjusted foreign market value below the adjusted U.S. price by obtaining allowances for adjustments to the foreign market price in excess of the adjustments to the U.S. price. The regulations as interpreted by the Commerce Department require that a direct relationship exist between

<sup>31</sup> The effect of exchange rates on dumping is recognized by the Department of Commerce, and exporters subject to investigation are permitted a reasonable period of time to adjust prices. 19 C.F.R. § 353.56(b) (1980). On at least one occasion a three-month period has been found to constitute a "reasonable period." *Motorcycles from Japan*, 43 Fed. Reg. 48,754 (1978).

<sup>32</sup> The statute speaks in terms of the broad category "differences in circumstances of sale," but does not define these differences. 19 U.S.C. § 1677b(a)(4)(B) (Supp. III 1979).

<sup>33</sup> The statute does not explicitly state that comparisons between foreign sales and U.S. sales are intended to be made at the ex-factory level, and the interpretation of the regulations has often not appeared to reflect comparisons at comparable levels. *See* text at notes 36 to 43 *infra*. The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (relating to antidumping measures), however, clearly imposes this requirement on parties to the Agreement in Article II(6). *Agreement on GATT*, *infra* note 114, at 311. Sections 1, 2, and 3 of the Trade Agreements Act of 1979 indicate that except where in conflict with U.S. law, the Act is intended to implement, along with other trade agreements listed at section 2(c), the agreement relating to antidumping measures. *See* Trade Agreements Act of 1979, Pub. L. No. 96-39, §§ 1, 2, 3, 93 Stat. 144 (1979).

<sup>34</sup> 19 C.F.R. § 353.15 (1980).

<sup>35</sup> *Id.* § 353.16.

<sup>36</sup> While the statute speaks only of "differences in circumstances of sale" without limitation, the Department of Commerce regulation limits adjustments "to those circumstances which bear a direct relationship to the sales which are under consideration." *Id.* § 353.15(a). In determining whether a direct relationship exists, the Department of Commerce has generally denied adjustments for expenses which would have been incurred "whether or not specific sales were made." *Portable Electric Typewriters from Japan*, 45 Fed. Reg. 18,416, 18,418 (1980).

the sale and the expenses for which an adjustment is granted, making it extremely difficult to qualify for such adjustments. For example, the "directly related" language has been used to prohibit adjustments for differences in the per unit cost of general selling expenses in foreign markets above those selling expenses maintained on U.S. sales.<sup>37</sup> It has also been used to limit other more specific selling expenses which may differ between markets such as warehousing expenses, servicing expenses, and promotional programs.<sup>38</sup> Adjustments generally will not be granted unless it is shown that the expenses in question vary directly with the quantity of merchandise sold, in much the same fashion in which a selling commission would function.<sup>39</sup>

Although the regulations have been interpreted more liberally in recent investigations, it is still extremely difficult to qualify for adjustments with respect to differences in circumstances of sale. Adjustments have only recently been granted for differences in advertising costs, and then only if it can be shown that the advertising expenses were related specifically to the category of merchandise investigated and that they amounted to assumption by the seller of the purchaser's advertising expenses,<sup>40</sup> warranty costs where they differ between markets,<sup>41</sup> after-sales service which is shown to be offered in connection with specific sales of the merchandise in question and which can be traced to specific sales,<sup>42</sup> and differences in interest costs.<sup>43</sup>

With respect to the exporter's sales price, adjustments for differences in selling expenses are always made because the statute specifically requires that adjustments be made for sales commissions in the United States, general selling expenses in the United States, and any increase in

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<sup>37</sup> See generally *Countertop Microwave Ovens from Japan*, 45 Fed. Reg. 80,157 (1980).

<sup>38</sup> See, e.g., *Ice Hockey Sticks from Finland*, 43 Fed. Reg. 9,912 (1978); *Steel Wire Strand for Prestressed Concrete from Japan*, 43 Fed. Reg. 38,495 (1978).

<sup>39</sup> The Department of Commerce is continuing the practice of its predecessor, the Department of the Treasury, in limiting adjustments for differences in circumstances of sale despite Treasury's admission that it was "aware of, and sensitive to, the possibility that present regulations and Treasury policy regarding these . . . issues may not have in the past properly recognized all expenses which may warrant adjustments." *Motorcycles from Japan*, 43 Fed. Reg. 17,900, 17,901 (1978). In fact, before authority over antidumping investigations was transferred from the Treasury to the Commerce Department the former had proposed regulations which would have permitted three new adjustments—for salesmen's salaries, bad debt reserves, and warehousing expenses. See Proposed Revision of the Customs Regulations Relating to Antidumping, 44 Fed. Reg. 59,742 (1979), and accompanying explanatory text on section 353.15. *Id.* at 59,744.

<sup>40</sup> 19 C.F.R. § 353.15(b) (1980). See, e.g., *Motorcycles from Japan*, 43 Fed. Reg. 17,900 (1978).

<sup>41</sup> 19 C.F.R. § 353.15(b) (1980). See, e.g., *Portable Electric Typewriters from Japan*, 45 Fed. Reg. 18,416 (1980).

<sup>42</sup> 19 C.F.R. § 353.15(b) (1980). See, e.g., *Steel Wire Strand for Prestressed Concrete from Japan*, 43 Fed. Reg. 38,495 (1978). For example, the salaries of servicing personnel will not qualify for adjustment, but the expenses incurred in connection with the servicing, such as travel, may qualify.

<sup>43</sup> 19 C.F.R. § 353.15(b) (1980). See, e.g., *Anhydrous Sodium Metasilicate from France*, 45 Fed. Reg. 77,498 (1980).

value of the merchandise which takes place in the United States.<sup>44</sup> Normal practice where an exporter's sales price is used is to grant an adjustment to the foreign market value for selling expenses only up to the amount of the selling expenses in the United States.<sup>45</sup> Any additional adjustments for differences in circumstances of sale must meet the same direct relationship requirements as in the purchase price situation.

A related problem exists with respect to claiming adjustments for differences in level of trade<sup>46</sup> and differences in the quantities sold in the markets in question.<sup>47</sup> While the statute and regulations clearly contemplate adjustments for differences in level of trade, such adjustments are very difficult to obtain. In practice, it is virtually impossible to qualify for the adjustment unless there is more than one level of trade in the foreign market. This would commonly result in using the price at the level of trade in the foreign market which is comparable to the level of trade of sales to or in the United States. Where all sales in one market are at one level of trade, for example retail, and sales in the other market are at a different level of trade, such as wholesale, it is difficult to qualify for any level of trade adjustment.<sup>48</sup>

Similarly, although the quantities sold in the two markets are often significantly different, it is difficult to obtain an adjustment to reflect these differences. For example, sales in the home market may be ten units per sale, while those to or in the United States may be one thousand units per sale. No adjustment is generally made for the lower transaction cost of selling larger quantities to U.S. purchasers. An adjustment for differences in quantities is limited to situations where the seller either has a practice of providing quantity discounts,<sup>49</sup> in which case the sales at the discounted price are generally used, or where it can be shown that the differences in quantities sold also result in a difference in production costs.<sup>50</sup> Even in the latter case, however, it is difficult to qualify for an adjustment; the Department of Commerce has denied an adjustment based on added per unit cost resulting from shorter production runs on the investigated merchandise.<sup>51</sup>

The success or failure in obtaining appropriate adjustments normally is the difference between a favorable and an unfavorable result to an investigation. Counsel should, therefore, examine every element of

<sup>44</sup> 19 U.S.C. § 1677a (Supp. III 1979).

<sup>45</sup> 19 C.F.R. § 353.15(c) (1980).

<sup>46</sup> *Id.* § 353.19.

<sup>47</sup> *Id.* § 353.14.

<sup>48</sup> *See generally* Countertop Microwave Ovens from Japan, 45 Fed. Reg. 80,157 (1980); Portable Electric Typewriters from Japan, 45 Fed. Reg. 18,416 (1980); Methyl Alcohol from Canada, 44 Fed. Reg. 19,090 (1979); Steel Wire Nails from Canada, 43 Fed. Reg. 41,743 (1978).

<sup>49</sup> 19 C.F.R. § 353.14 (1980). *See, e.g.*, Melamine in Crystal Form from the Netherlands, 44 Fed. Reg. 65,517 (1979).

<sup>50</sup> 19 C.F.R. § 353.14 (1980). *See, e.g.*, Portable Electric Typewriters from Japan, 45 Fed. Reg. 18,486 (1980).

<sup>51</sup> *See, e.g.*, Portable Electric Typewriters from Japan, 45 Fed. Reg. 53,853 (1980).

the sales practices of the foreign manufacturer to determine what adjustments are appropriate and to develop arguments which have a reasonable opportunity of success. It is particularly important to develop strong arguments where it is claimed that differences in circumstances of sales bear a direct relationship to sales of the merchandise being investigated. Claimed adjustments must be specifically defined, shown to include expenses relating only to the merchandise being investigated, and precisely valued according to reasonable accounting methods. Counsel must avoid approximations, allocations, and general statements that certain adjustments are directly related. Frequently, in order to qualify for an adjustment, a vast amount of information must be submitted as to both its nature and value even if the effect of the adjustment on the fair value calculation is insubstantial.

After reviewing all of the above matters with the client, the attorney will require several weeks to prepare a full response. On the basis of the initial meetings, the attorney will advise the client which information to develop, how to present that information, and the most reasonable way to calculate any adjustments to be claimed. A further meeting is usually required to perfect the response prior to its submission to the Department of Commerce.

## 2. *Verification*

An extremely important element in the antidumping investigation is the verification of the foreign manufacturer's response. The concept of verification is generally unfamiliar to foreign manufacturers; there is little appreciation of the degree of proof which is required. One should always keep in mind that the Commerce Department official who verifies the response must be satisfied that each element of the response has in fact been verified. In addition, the verification itself, the verifying officer's report and the verification documents must be detailed enough to persuade the decision makers in the Department of Commerce. The verified response must ultimately withstand challenges by petitioner's attorney and scrutiny by the Court of International Trade. The burden is on respondent's attorney to develop an adequate record in support of all the facts in the response and particularly the adjustments claimed. The burden is always on the foreign manufacturer to establish the validity of matters claimed in the response. Failure to do so may result in the denial of claimed adjustments or refusal to consider unverified information. Defense counsel must anticipate criticism which may be raised by either the decision maker or the attorneys for petitioners. It is advisable to review with the client all documents to be used for the verification prior to the verification.

The verification process itself resembles an audit. Each element of the response is verified against company records and/or audited financial statements. The verifying official will attempt to check all categories of

figures in the response against one or more source documents used in compiling the respondent's normal accounting records. Where certain adjustments are requested, particularly those relating to differences in circumstances of sale or merchandise, explanatory information must be submitted in addition to accounting records and source documents. Typical examples are service manuals illustrating differences in merchandise and samples of advertising to demonstrate the relationship of advertising accounts to the investigated merchandise. The verification report prepared by the Commerce Department official and the documentary evidence submitted in the course of the verification constitute the principal factual record of the investigation upon which the final decision will be based.

### 3. *Post Verification*

Once the response has been verified, there is usually little, if any, official action until the preliminary determination. During this phase, the team working on the investigation, and particularly the case analyst in the Office of Investigations, analyzes the response and prepares his recommendation. It is important during this phase of the investigation to maintain close contact with the team working on the case for several reasons. First, clarification of submitted information is likely to be necessary. Second, while the case handler may have verified the response, other members of the team may not have been present at the verification and, particularly where foreign language documents are involved, may not fully understand the method of verification. Finally, the attorneys for petitioners may raise questions based on the nonconfidential summaries submitted<sup>52</sup> or, if a protective order is granted, the confidential submission,<sup>53</sup> which require response.

Ex parte contacts<sup>54</sup> with the higher level decision makers at this stage of the investigation are generally neither necessary nor advisable; deliberations on the investigation will not have reached that level. If major issues are involved, however, it may be advisable to seek recourse to the decision making level to avoid the difficulty of reversing a case analyst's adverse decision after a recommendation to the decision makers has been made. Such contacts should, however, be reserved for important issues involved in the investigation.

It is at this stage of the investigation that counsel may consider obtaining a suspension agreement.

### 4. *Suspension Agreements*

The Trade Agreements Act of 1979 introduced into the antidumping law a procedure for the suspension of investigations prior to a final

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<sup>52</sup> 19 C.F.R. § 353.28(a) (1980).

<sup>53</sup> *Id.* § 353.30.

<sup>54</sup> *Id.* § 353.26.

determination.<sup>55</sup> The suspension provision of the new law significantly changed the administrative practice under the Antidumping Act of 1921 of discontinuing cases on the basis of minimal less than fair value margins.<sup>56</sup> Under the new law, specific criteria must be met in order for an investigation to be suspended and, if it is suspended, the Department of Commerce has an affirmative duty to monitor periodically the observance of any price assurances given by respondent in connection with the suspension.<sup>57</sup>

Suspension agreements are useful to foreign manufacturers for a variety of reasons. These include elimination of the uncertainty created by a continuing investigation, elimination of the expense of pursuing an investigation to its final decision, and elimination of the potential liability for antidumping duties after liquidation is suspended.<sup>58</sup> The process of obtaining a suspension agreement, however, is quite difficult. Although suspension does not depend on the degree to which there have been sales at less than fair value as did the discontinuance practice under the Antidumping Act of 1921, the new provision imposes other conditions. In many instances the most difficult condition to meet will be the requirement that "substantially all" of the imported merchandise under investigation be included in the suspension.<sup>59</sup> In effect, this permits a single large foreign manufacturer to block suspension of an investigation by refusing to enter into an agreement. Additional factors which may inhibit use of the suspension provision include the requirement that the public interest be considered, the necessity to determine the Department of Commerce's ability to monitor effectively the suspension, and the petitioners' likely position with respect to the suspension.<sup>60</sup>

In view of the monitoring requirements under a suspension agreement and the stiff penalties for its violation,<sup>61</sup> seeking a suspension may

<sup>55</sup> 19 U.S.C. § 1673c (Supp. III 1979).

<sup>56</sup> 19 C.F.R. § 153.33(a) (1980) provides that investigations under the Antidumping Act of 1921 can be discontinued under the following circumstances:

- (1) The possible margins of dumping involved are minimal in relation to the volume of exports of the merchandise in question; price revisions have been made which eliminate any likelihood of present sales at less than fair value, and assurances have been received which eliminate any likelihood of sales at less than fair value in the future; or
- (2) Sales to the United States of the merchandise have terminated and will not be resumed and assurances have been received to this effect; or
- (3) There are other circumstances on the basis of which it may no longer be appropriate to continue an antidumping investigation . . . .

<sup>57</sup> 19 U.S.C. § 1673c(b), (d) (Supp. III 1979).

<sup>58</sup> *See id.* § 1673c(f).

<sup>59</sup> *Id.* § 1673c(b). The Senate Finance Committee has indicated that "substantially all of the imports" means no less than 85 percent of the imports by volume of the investigated merchandise. S. REP. NO. 249, 96th Cong. 1st Sess. 71 (1979), *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 381.

<sup>60</sup> 19 U.S.C. § 1673c(d), (e) (Supp. III 1979). For a complete discussion of the suspension provisions *see* TRADE AGREEMENTS ACT OF 1979—STATEMENTS OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 153, 96th Cong. 1st Sess. 418-23 (1979).

<sup>61</sup> 19 U.S.C. § 1673c(i) (Supp. III 1979). Under the Trade Agreements Act of 1979 which

often not be the best course of action. If the foreign manufacturer is concerned, however, about the length of the investigation and the uncertainty it creates, or it appears that the ultimate result will be an Antidumping Duty Order, it may be prudent to seek a suspension. Because the monitoring requirements under a suspension agreement are unlikely to be as stringent as administrative review of Antidumping Duty Orders under the Trade Agreements Act of 1979, and because the foreign manufacturers can both enter into a suspension agreement and pursue the investigation to its conclusion,<sup>62</sup> a suspension agreement is an alternative which should be seriously considered. Although suspension agreements cannot be granted until there is a preliminary less than fair value determination, it is advisable that counsel indicate interest in this possibility to the Department of Commerce prior to the preliminary determination both to assure adequate time to satisfy the statutory requirements and to facilitate suspension at the earliest possible time.

### 5. *Preliminary Determination*

The Commerce Department's preliminary determination sets forth the results of its preliminary investigation. Publication of the preliminary determination will be followed closely by a disclosure conference<sup>63</sup> during which the investigation team will explain to all interested parties how the published results were reached. Subsequent to the disclosure conference, there is an opportunity for a hearing before the decision maker,<sup>64</sup> as well as more informal contacts with the team working on the case.

As soon as the preliminary determination is announced and disclosure made, the attorney and his client should discuss the results of the investigation. If there is a determination of no sales at less than fair value, immediate price adjustments may not be necessary. If sales at less than fair value are determined to have been made, however, an analysis should be done to determine how and whether to adjust prices to eliminate the margin of dumping on future sales.<sup>65</sup> The urgency in this matter is twofold. First, once a preliminary affirmative determination is

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added § 734(i) to the Tariff Act of 1930, violation of a suspension agreement will lead to possible retroactive suspension of liquidation and the immediate recommencement of an investigation. *Id.* An intentional violation can, under § 734(i), subject the violator to civil penalties under § 592(a) of the Tariff Act of 1930 (codified as amended at 19 U.S.C. § 1592 (Supp. III 1979)). *Id.*

<sup>62</sup> *Id.* § 1673c(g).

<sup>63</sup> *See* 19 C.F.R. § 353.44(d) (1980).

<sup>64</sup> *See id.* § 353.44(e).

<sup>65</sup> The elimination of less than fair value sales will require the application of the Commerce Department's methodology in calculating dumping margins, as disclosed pursuant to 19 C.F.R. § 353.44(d) (1980), to the exporter's foreign market and U.S. prices. Dumping margins can be eliminated either through raising U.S. prices or lowering foreign market prices. An important consideration, however, in lowering foreign market prices is that it not invite allegations of sales below cost pursuant to § 773(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(b) (Supp. III 1979).



announced, liquidation is suspended on all entries of the merchandise under investigation and imports entering after the date of the determination become subject to antidumping duties if an Antidumping Duty Order is later issued.<sup>66</sup> Second, because cash deposits of estimated antidumping duties will be required after the Antidumping Duty Order is issued in the amount of the weighted average dumping margin found during the investigation, or during an expedited review under section 736 of the law,<sup>67</sup> it is advisable for clients, particularly those with significant dumping margins, to adjust their prices immediately. This will provide them with the option of seeking review under section 736, and the possibility of obtaining a lower cash deposit rate based on the results of the section 736 investigation.

#### *D. Final Fair Value Determination*

One or more parties generally request an Antidumping Conference to discuss issues raised in the disclosure conference. The Antidumping Conference is usually not used to point out mechanical errors or omissions in calculations or to provide minor clarifications. These matters are usually taken up directly with the case analyst and, in certain circumstances, remedied through the submission of additional information. The Antidumping Conference itself should be restricted to legal and factual arguments on major issues in the investigation, arguments in support of the adequacy of submitted information and its verification, and questions of factual interpretation. The Antidumping Conference should be used to focus the investigation on the crucial issues and to support one's position on those issues. In its most general form, the Conference is a critique of the case analyst's determination and provides counsel the opportunity to present legal and factual arguments in support of the client's position.

An important consideration throughout the final phase of the fair value investigation is whether additional facts which might alter the results of the preliminary investigation can and should be submitted and verified prior to the final determination. An evaluation should be made on the basis of the disclosure conference, written submissions by the attorneys for petitioners, and questions or remarks made by decision makers at the Antidumping Conference. A decision should also be made at

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<sup>66</sup> 19 U.S.C. § 1673b(d)(1) (Supp. III 1979).

<sup>67</sup> *Id.* § 1673e(c). This provision provides for an expedited review and assessment of duties by the Administering Authority (Department of Commerce) within 90 days of the publication of an Antidumping Duty Order. This expedited review is based on entries subject to the suspension of liquidation which takes effect at the time of a Preliminary Affirmative Determination. Since a cash deposit of estimated dumping duties in the amount of the weighted average dumping margin found during the Commerce Department investigation is required after an Antidumping Duty Order is issued, *see id.* § 1673e(a)(3), exporters may wish to seek expedited review to obtain a lower rate for the cash deposit of estimated dumping duties. The results of the expedited review under § 736, rather than the results of the Final Determination by the Commerce Department, will govern the amount of estimated dumping duties required.

this point whether to seek an extension.<sup>68</sup> An extension is probably advisable if significant new information must be submitted, although an early final determination is usually in the interest of the foreign manufacturer to restore stability to the market. Where complex factual or legal issues remain to be resolved, it is usually advisable to seek an extension.

### *E. Injury Determination by the International Trade Commission*

If the Department of Commerce issues a final affirmative determination of sales at less than fair value, the ITC must investigate and determine if the U.S. industry has been materially injured, or threatened with material injury, prior to the issuance of a final Antidumping Duty Order.<sup>69</sup> If the preliminary determination by the Department of Commerce was affirmative, the ITC will have started its investigation prior to the final determination by Commerce. It is advisable at the early stages of this investigation to consult with the ITC staff. This consultation is particularly important if respondent wishes to influence the formulation of the ITC's questionnaires to foreign manufacturers, importers, and the U.S. industry. The statistical base which the ITC compiles from responses to questionnaires will be crucial to its ultimate determination. In addition, there may be nonstatistical issues which the ITC should explore. These include questions as to whether the foreign merchandise competes directly with petitioners' merchandise, what are the crucial elements in the consumer's choice of product, the possible impact on competition of differences in quality or features between the foreign and domestic merchandise, and factors other than imports that might be affecting the health of the U.S. industry.

How respondents will use expert witnesses in an ITC investigation will depend on the factual context. If a defense is to center around the absence of material injury or threat of material injury to the U.S. industry, rather than the elements of injury causation, an economist may be the appropriate expert upon which to rely. Where causation appears to be the major issue, however, an industry expert may be more knowledgeable and persuasive than an economist.<sup>70</sup> Furthermore, where the cause of injury is a more important element in the defense than the existence of injury, counsel must ensure that the ITC staff is broadly exposed to the industry and has a thorough understanding of the competitive factors leading to success in that industry.

Determining the best line of defense, as well as the experts to be

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<sup>68</sup> *Id.* § 1673d(a)(2).

<sup>69</sup> *Id.* § 1673d(b).

<sup>70</sup> *See, e.g.*, Weighing Machinery and Scales from Japan, USITC Pub. No. 1063 (May 1980); Portable Electric Typewriters from Japan, USITC Pub. No. 1062 (May 1980); Motorcycles from Japan, USITC Pub. No. 923 (November 1978). The ITC determinations in all of these cases revolved principally around causation issues, which in turn raised questions of market segmentation, the relative quality of competing products, and other nonquantifiable factors unique to the products being investigated.

used, is a complex process. It involves intense consultations with the client, with customers in the United States, and with industry experts, as well as analysis of written information on the industry. The actual injury hearing at the ITC can be critical in a close case, but most cases will be decided on the basis of a more extensive factual record than that presented at the hearing. Thus, it is essential to create an adequate factual record through responses to the Commission's questionnaires, interviews by the Commission staff, letters from interested parties, affidavits, information from the trade press, market studies and market surveys, and other sources.

With respect to the hearing itself, counsel should concentrate on bringing crucial issues into focus rather than trying to cover every detail of the case. The essential objective is to persuade the Commissioners and staff to accept respondent's perspective and to encourage an analytic process favorable to the client's position.

#### *F. Post Antidumping Duty Order*

If the ITC decision is affirmative, an Antidumping Duty Order will be issued.<sup>71</sup> Thereafter, provided there is no suspension agreement, the foreign manufacturers found to have been selling at less than fair value will be required to post a cash deposit of estimated antidumping duties based on the results of the Department of Commerce determination. Suspension of liquidation will continue and the amount of the cash deposit will remain fixed until an annual review under section 751 of the Act has determined the precise amount of antidumping duties to be paid.<sup>72</sup> Where the cash deposit of estimated duties is substantial, it is advisable to seek an early review under section 736.<sup>73</sup> Such a review permits the Department of Commerce to allow entries into the United States under bond, rather than cash deposit of estimated duties, for a period of ninety days. During this time an investigation is conducted to determine dumping margins on entries made during the period of suspension of liquidation.<sup>74</sup> The results of the section 736 investigation, rather than the results of the original investigation, will then be used to determine the required cash deposits of estimated duties.

In order to obtain a review under section 736, information sufficient to permit the Department of Commerce to conclude that it can conduct an investigation within a ninety day period must be submitted within one week of an affirmative ITC determination.<sup>75</sup> Therefore, a decision to seek a review under section 736 must be made by respondents well in

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<sup>71</sup> 19 U.S.C. § 1673e(a) (Supp. III 1979).

<sup>72</sup> *Id.* § 1675(a).

<sup>73</sup> See text accompanying note 67 *supra*.

<sup>74</sup> Normally the period of suspension of liquidation begins when the administering authority issues an affirmative preliminary determination of sales at less than fair value. 19 U.S.C. § 1673b(d)(1) (Supp. III 1979).

<sup>75</sup> 19 C.F.R. § 353.49(a) (1980).

advance of the final ITC determination. This decision will permit respondent to begin preparing information to be submitted in the review immediately after the final less than fair value determination. If a decision to seek review under section 736 is postponed until the ITC determination has been made, there will be insufficient time to compile the required information, and the Department of Commerce will reject the request for review under section 736.

The review under section 736 proceeds essentially in the same manner as the investigation which led to an Antidumping Duty Order. The time limits, however, are far shorter than those in the original investigation and, because of these limitations, there is little opportunity to alter the methodology used by the Commerce Department in the original investigation.

### *G. Special Issues*

#### *1. Cost of Production*

The Trade Act of 1974 introduced into the antidumping law the possibility of conducting investigations to determine whether foreign market value adequately reflects the fully distributed cost of production.<sup>76</sup> This provision, reenacted in the Trade Agreements Act of 1979, provides that, if below cost sales are properly alleged, the Department of Commerce must determine whether the foreign market sales used as the basis of foreign market value have been made at prices which permit recovery of "all costs within a reasonable period of time."<sup>77</sup> Sales below cost made over an extended period of time and in substantial quantities must be disregarded.<sup>78</sup> Investigations involving cost of production add a significant additional issue to the defense.

Although the cost of production provisions are not triggered unless sales below cost are in substantial quantities over an extended period of time, indicating an intention that the cost of production provisions be applied only in unusual circumstances, the contrary has been true. In fact, cost of production related cases have been the norm in some industrial sectors.<sup>79</sup> The problems presented by these cases range from difficulty in obtaining and verifying highly sensitive cost of production information,<sup>80</sup> to disputes over the language of the law. For example, the

<sup>76</sup> Antidumping Act of 1921, ch. 14, § 205(b), 42 Stat. 11, as added Trade Act of 1974, Pub. L. No. 93-618, § 321(d), 88 Stat. 1978 (repealed 1979). Now § 773(b) of the Tariff Act of 1930, ch. 497, § 773(b), 46 Stat. 590, as added Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (codified at 19 U.S.C. § 1677b(b) (Supp. III 1979)).

<sup>77</sup> 19 U.S.C. § 1677b(b) (Supp. III 1979).

<sup>78</sup> See 19 C.F.R. § 353.7 (1980).

<sup>79</sup> In the basic carbon steel sector, most of the investigations in the past three years have involved cost of production issues. See, e.g., Carbon Steel Cold Rolled Sheet, Hot Rolled Sheet, Galvanized Sheet, Plate and Structural Shapes from Belgium, The Federal Republic of Germany, France, Italy, Luxembourg, The Netherlands, and the United Kingdom, 45 Fed. Reg. 66,833 (1980); and Carbon Steel Plate from Japan, 43 Fed. Reg. 2,032 (1978).

<sup>80</sup> THE COMPTROLLER GENERAL, U.S. ADMINISTRATION OF THE ANTIDUMPING ACT OF

law offers no guidance as to what constitutes "an extended period of time" or "a reasonable period of time," the statutory terms essential to any determination. Does the time period vary by industry, by company, or by country; does it depend on business cycles, product cycles, seasonal markets, or types of merchandise?<sup>81</sup> Similarly, are sales below cost in "substantial quantities" if they constitute one percent, five percent, ten percent or even twenty-five percent of the sales in the investigatory periods?<sup>82</sup> If clients will not disclose sensitive cost data, a responding attorney must further determine what information can be relied upon as the "best information available."<sup>83</sup>

The imprecision of the statutory cost of production standards and the absence of clarifying legislative history afford foreign respondents in antidumping cases significant latitude in preparing cost of production information. The two principal constraints on respondents are the requirements that cost information be prepared in accordance with generally accepted accounting principles and that the costs fully reflect all elements of the production process, related direct and indirect overhead expenses, and applicable general and administrative expenses.<sup>84</sup> Cost of production may vary significantly according to business or product cycles, the method of allocating fixed costs, and the valuation of key elements of cost. Normally, however, cost of production information submitted by foreign manufacturers will be accepted if the Department of Commerce is satisfied with respect to two major elements. First, the cost response must be consistent with the company's accounting system and accepted national accounting principles. Second, the method used in developing the response must ensure that all costs of production for the products being investigated are included and that key production factors such as yield, capacity utilization, man-hours per manufacturing process or per unit, and materials cost are adequately verified.

Because cost accounting is a complex and specialized area, company cost accountants normally have the most active role in preparing the cost

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1921, REPORT TO CONGRESS BY THE COMPTROLLER GENERAL 28-29 (General Accounting Office No. ID-79-15 1979).

<sup>81</sup> See, e.g., Fresh Winter Vegetables from Mexico, 45 Fed. Reg. 20,512 (1980); and Carbon Steel Plate from Japan, 43 Fed. Reg. 12,780 (1978).

<sup>82</sup> See, e.g., Pressure Sensitive Plastic Tape from Italy, 42 Fed. Reg. 27,705 (1977); and Welded Stainless Steel Pipe and Tubing from Japan, 43 Fed. Reg. 2,031 (1978). The Senate Finance Committee Report on the Trade Act of 1974 speaks of sales "uniformly" below cost and a pattern of "systematically" selling below cost, but it offers no guidance as to how these standards should be applied. S. REP. NO. 1298, 93d Cong., 2d Sess. 163, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7310.

<sup>83</sup> 19 C.F.R. § 353.51(b) (1980) provides for the use by the Department of Commerce of the "best information . . . available" when information submitted is not verified adequately, not submitted in a timely fashion, or not submitted in the required form. The last sentence of this paragraph of the regulation, however, expresses the Commerce Department policy of discriminating against uncooperative foreign respondents in determining what is the best information available.

<sup>84</sup> See, e.g., Silicon Metal from Canada, 43 Fed. Reg. 57,371 (1978); and Viscose Rayon Staple Fiber from Austria, 43 Fed. Reg. 40,095 (1978).

response. The attorney, however, must be sensitive to the problems of verification, Department of Commerce policies in applying the cost of production provision, and the necessity of defending cost accounting methodology which relies on costing based upon business or product cycles, seasonal variations, or other bases reflecting prevailing practices or circumstances which are unique to a given industry.

## 2. Access to Information

Section 777 of the Act<sup>85</sup> has greatly expanded access to information for interested parties, thereby adding a new dimension to the defense of antidumping investigations. Under prior law and practice, access to confidential information was limited to nonconfidential summaries of the actual information submitted.<sup>86</sup> While such summaries are still required, current law provides for disclosure of confidential information under administrative protective order<sup>87</sup> and requires that Commerce Department officials either making the determination or the final recommendation make a public record of any meetings with interested parties.<sup>88</sup>

The liberalized rules governing access to information have affected antidumping investigations in two major respects. First, increased access to information by interested domestic parties has made the investigative process more adversarial. Second, the degree to which access to information will be permitted often becomes a major issue in investigations.

The disclosure of information under protective order gives interested domestic parties a much larger role in an antidumping investigation. In the past, where only a nonconfidential summary of confidential information was available and there was no record of *ex parte* contacts, the domestic industry was limited in its ability to challenge factual information, legal conclusions based on information only partially known to them, or decisions reached in meetings which went unreported. The effect of liberalized access to information, whether or not the information is actually obtained under protective order, has been to force respondents to be more attentive to the development of a factual record in support of their positions and to make the Department of Commerce more responsive to input on the record by all interested parties.<sup>89</sup> In

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<sup>85</sup> 19 U.S.C. § 1677f (Supp. III 1979).

<sup>86</sup> 19 C.F.R. § 153.22 (1980).

<sup>87</sup> 19 U.S.C. § 1677f(c) (Supp. III 1979).

<sup>88</sup> *Id.* § 1677f(a)(3).

<sup>89</sup> In the case of Portable Electric Typewriters from Japan, 45 Fed. Reg. 58,355 (1980), for example, the Commerce Department received an independent market research report from petitioners disputing information submitted by respondents. The Department conducted additional verifications to determine the reliability of allegations in the petitioner's report. Nevertheless, petitioner and two of the respondents have appealed various aspects of the Commerce Department decisions in this case to the Court of International Trade. See *Smith-Corona Group, Consumer Products Division, SCM Corp. v. United States*, No. 80-9-01343 (C.I.T. 1980) and *Brother Industries, Ltd. v. United States*, No. 80-9-01436 (C.I.T. 1980).

effect, interested domestic parties now can participate fully as parties to the investigations because of their access to information.

The extent to which access to information will be granted has become a hotly contested issue in both ITC and Commerce investigations. At the ITC, a major issue has been whether in-house counsel of domestic corporations will be entitled to access under protective order.<sup>90</sup> At the Department of Commerce, legal issues have been raised in connection with the interpretation of regulations governing access under protective order. Most foreign parties oppose disclosure of information under protective order because of the sensitivity of the confidential information submitted and because disclosure, by encouraging greater participation by all parties, inevitably makes it more difficult to meet strict statutory time limits. Although 19 C.F.R. § 353.30 requires parties applying for protective orders to describe with particularity the information requested and to show "good cause,"<sup>91</sup> these terms remain largely undefined. The Commerce Department has recently tended to grant disclosure to petitioners and other interested parties on a fairly routine basis and has, in at least one case, granted disclosure to in-house counsel of petitioner. However, the standards for disclosure may still be challenged in the courts before their scope is clarified.<sup>92</sup>

### III. Defense of a Countervailing Duty Case

#### A. Preliminary Considerations

As in antidumping cases and, indeed, all other forms of litigation, the first step in the defense of a countervailing duty investigation is an overall assessment of the situation. For instance, a responding attorney must ask how much trade is at stake, why this particular proceeding has been brought, what are the real grievances against imports from the country in question, and whether the petitioner correctly assessed its own interests in pursuing this particular remedy.

On the defense side, it is assumed that some party in interest has retained counsel. That attorney must determine the identity of other interested parties, decide whether a united defense should be organized, and assess what forms of cooperation are available. It is important to consider in this connection both exporter and importer interests. The attorney also must determine his total budget and how to allocate it to each phase of the investigation.

A countervailing duty case almost always involves an attack upon the measures of a foreign government. While a private subsidy can be, in theory, the object of a complaint, the authors are not aware of any case that actually has been pursued against a private subsidy. This means

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<sup>90</sup> See Proposed Revisions of Procedural Rules, United States International Trade Commission, 46 Fed. Reg. 28,673, 28,673-74 (1981).

<sup>91</sup> 19 C.F.R. § 353.30 (1980).

<sup>92</sup> See 19 U.S.C. § 1671 (Supp. III 1979).

that, unlike antidumping cases and most other cases that come to a lawyer's office, it is necessary to sort out the role of the foreign government and the role of private counsel in the defense. Ideally, counsel will be retained by an industry or industrial association of the exporting country with the cooperation of importing interests, and the defense will be accomplished in close cooperation with the government concerned or possibly with joint representation of industry and government. There are many possible variations on this model. The officials of the government concerned may lack time or interest. On the other hand, they may be entirely competent and desirous of handling the matter without the help of an attorney hired by the export industry.<sup>93</sup> Because the government is closely involved, the private parties may be reluctant to pay legal fees for the initial stage of the case. Since the question of subsidy involves pre-eminently the actions of the foreign government, it is necessary that the government take an active role. Because the ITC injury investigation involves the effect of foreign subsidized sales in the U.S. market, however, the foreign government is usually neither the most appropriate nor knowledgeable party to handle the defense. In fact, it is unusual for governments to make an appearance before the ITC.

An important initial consideration in a countervailing duty case is whether the country involved can be considered a "country under the Agreement" as provided for in section 701(b).<sup>94</sup> In general, a country qualifies if it has signed the Agreement on Subsidies and Countervailing Measures (the Subsidies Code) or has assumed similar obligations. If the country qualifies as a "country under the Agreement," the investigation will be governed by all of the provisions of the Trade Agreements Act of 1979, including the injury provisions. If the country does not qualify, the investigation is conducted pursuant to 19 U.S.C. § 1303 and certain provisions of the Trade Agreements Act are not applicable, including those relating to injury, critical circumstances, and certain provisions with respect to suspension of investigations.<sup>95</sup> At this writing most developing countries have not subscribed to the Code or assumed equivalent obligations and, therefore, are not entitled to an injury test.<sup>96</sup>

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<sup>93</sup> In investigations prior to the enactment of the Trade Agreements Act of 1979 foreign governments did on occasion handle the Treasury Department phase of the investigation without the assistance of counsel. Because of the transformation of the investigation into more of an adversarial proceeding (e.g., disclosure, hearing, *ex parte* rules), however, foreign governments are finding it more difficult adequately to prepare a defense without the assistance of legal counsel.

<sup>94</sup> 19 U.S.C. § 1671(b) (Supp. III 1979).

<sup>95</sup> Provisions of the Trade Agreements Act of 1979 which are not applicable to countries which are not "countries under the Agreement" are set forth in section 103 of the Act. 19 U.S.C. § 1303(b) (Supp. III 1979).

<sup>96</sup> The developing countries which have signed the Subsidies Code are Brazil, Chile, Hong Kong, India, Korea, Pakistan, and Uruguay. Other signatories are Australia, Austria, Canada, the European Economic Community, Finland, Japan, New Zealand, Norway, Sweden, Switzerland, and the United States. U.S.T.R., Status of the Tokyo Round MTN Agreement-Signatures and Acceptances as of December 15, 1981 (Jan. 4, 1982) (memorandum).



An injury test may be applicable under the terms of the Trade Act of 1974 if the product is duty free, notwithstanding that the country is not a country under the agreement.<sup>97</sup> The standard of injury, however, is that provided in the old law, that is, injury rather than material injury. It is doubtful that there is any practical difference.<sup>98</sup>

A final area of consideration at the very beginning of the investigation is the date on which entries of the merchandise being investigated may become subject to special duties. It must be assumed that shipments are in jeopardy if they enter the United States eighty-five days or more after the date of the filing of the petition, because that is when a preliminary finding is required by law and when suspension of liquidation may take effect. If the case is extraordinarily complicated, the period is extended to 150 days. The issue of complexity, however, is not known initially.<sup>99</sup> Exporters and importers would therefore be well advised to maintain their shipments during this period and to do their best to enter any marginal shipments prior to the eighty-five day deadline.

Exporters and importers should not, however, engage in any significantly increased trade for two reasons. One is that a sudden increase in shipments entered could prejudice the injury determination; the other is that under section 703 of the Trade Agreements Act of 1979, the suspension of liquidation can be retroactive for ninety days before the date of suspension if there is reason to believe or suspect that "critical circumstances" exist.<sup>100</sup> These circumstances, as defined by the statute, include substantial and abnormal increases in imports over a relatively short period. The petitioner may request a determination as to the existence of critical circumstances either in its petition or in an amendment thereto.<sup>101</sup> Therefore, extraordinary shipments during the period of initial investigation run the risk of incurring a finding of critical circumstances through an amended petition.<sup>102</sup> This remedy is expected to be used, however, only in exceptional cases.<sup>103</sup>

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<sup>97</sup> 19 U.S.C. § 1303(a)(2) (Supp. III 1979).

<sup>98</sup> The Report on the Trade Agreements Act of 1979 by the House Ways and Means Committee indicates that the ITC should interpret the "material injury" standard of the current law in the same manner as it has interpreted the "injury" standard under preexisting law. H.R. REP. NO. 317, 96th Cong., 1st Sess. 87 (1979), *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 473.

<sup>99</sup> 19 U.S.C. § 1671b(c) (Supp. III 1979). The grounds for obtaining such an extension are outlined in the provision. Since the extension will delay the point at which there is a suspension of liquidation, counsel should consider making such a request in all cases.

<sup>100</sup> 19 U.S.C. § 1671b(e) (Supp. III 1979).

<sup>101</sup> *Id.* § 1671b(e)(1).

<sup>102</sup> Note that the provisions regarding critical circumstances do not apply to countries which are not "countries under the agreement." 19 U.S.C. § 1303(b)(3) (Supp. III 1979). *See* Preliminary Determination Leather Wearing Apparel from Mexico, 46 Fed. Reg. 3,256, 3,256-57 (1981).

<sup>103</sup> Under § 201 of the Antidumping Act of 1921, ch. 14, § 201, 43 Stat. 11 (repealed 1979), the Secretary of Treasury had authority to suspend liquidation on entries made up to 120 days before the date on which a notice of withholding of appraisement was issued. This authority was virtually never exercised.

*B. Defense at the Initial Stages of the Investigation*

The first legal issue to be addressed by a responding attorney is whether the petition is sufficient under the law and the regulations. For a petition to be acceptable, petitioners are required to provide information that is "reasonably available" to the petitioner on fourteen specified items.<sup>104</sup> Experience to date indicates that the Commerce Department will entertain objections from interested parties directed to the sufficiency of the petition, but will not hold petitioners to an overly strict standard. The petition may be insufficient in terms of factual assertions required by regulation or it may be in error by ignoring or contradicting matters that are on public record. Under the statute and 19 C.F.R. § 355.27, the determination of a petition's sufficiency must be made within twenty days of its filing, so it is necessary to act quickly. Because the law and the regulations do not contemplate notice at this phase, it is possible that the attorney or the client will not be apprised of a petition having been filed.

In addition to exploring possible rejection of a petition by the Commerce Department, it may be possible to persuade petitioners to withdraw their petition pursuant to section 704(a) of the Trade Agreements Act of 1979.<sup>105</sup> It is a long shot at the beginning of the case, but well worth exploring. The possibilities are too varied to enumerate. Two examples will suffice. The petitioner may be persuaded either of the ultimate failure of the investigation or that its own interests in the country in question are being jeopardized to a greater extent than any possible gain from the particular proceeding. Possibilities of obtaining withdrawal of the petition may exist throughout the case if withdrawal at the outset cannot be obtained.<sup>106</sup>

The first real contest in the case is usually the preliminary injury determination by the ITC.<sup>107</sup> This determination must be made within forty-five days of the filing of the petition and, as in the case of antidumping investigations, effective participation on behalf of a respondent requires unusually rapid action. In countervailing duty cases, this may be especially difficult because decisions with respect to retaining

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<sup>104</sup> 19 C.F.R. § 355.26(a) (1980).

<sup>105</sup> 19 U.S.C. § 1671c(a) (Supp. III 1979).

<sup>106</sup> A communication intended to facilitate withdrawal of a petition is most useful if it comes from the Department of Commerce. Usually it is based on the Department's knowledge of actions taken by foreign governments to reduce or eliminate their subsidy programs. *See* Certain Firearms and Parts Thereof from Brazil, and Certain Ferroalloys from Brazil, 45 Fed. Reg. 19,593 (1980); Leather Handbags from Brazil, 45 Fed. Reg. 33,964 (1980). Reduction of subsidy benefits may occur in connection with other investigations being pursued by the Department or result from negotiations which have been completed pursuant to § 701 of the Act. 19 U.S.C. § 1671 (Supp. III 1979). Initiatives to secure withdrawal of a petition should be carefully reviewed for potential antitrust problems, particularly if the Department of Commerce and/or the foreign government are not the principals involved.

<sup>107</sup> 19 U.S.C. § 1671b(a) (Supp. III 1979).

counsel are slow in coming due to the mixture of private sector and foreign government involvement.

The techniques of an economic defense before the ITC in countervailing duty investigations are similar to those used in injury investigations under the antidumping law<sup>108</sup> and section 201 of the Trade Act of 1974 (the escape clause).<sup>109</sup> The amount of subsidization will have a critical bearing upon the decision because, under long standing precedents, not only the volume and pricing of imports are considered but also the extent of subsidization. Unfortunately for the respondents in this phase of the case, the amount of subsidy is taken as alleged because there is as yet no official determination. There are few precedents so far for the interplay between the role of Commerce and the ITC at this phase. It is possible that, if the information on file in Commerce discloses the existence of subsidies significantly different from those alleged, the ITC could be induced to consider such information. It would be important in such cases to make sure that the Commerce Department officially communicates such information to the ITC.<sup>110</sup> Extraneous information relating to the amount of the subsidies, such as information from the government concerned, probably would not be given any significant weight at this point because the Commerce Department would not have investigated its veracity as required by the law.

The standard of "a reasonable indication" of injury is a minimal standard for a petitioner to meet, but it can be rebutted. Again, the degree of participation by counsel for foreign respondents at this stage will depend on the likelihood of success.<sup>111</sup>

### *C. Preliminary Investigation by the Commerce Department*

The short statutory time period for the Commerce Department's preliminary investigation will make it difficult for a respondent to resolve legal and factual issues at this stage. As indicated earlier, to assist the client effectively counsel will have to work closely with the foreign government concerned. To coordinate with the foreign government and to develop an adequate factual record normally requires more than the 85 to 150 days provided by law for the preliminary investigation, particu-

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<sup>108</sup> See *id.* §§ 1673b(a), 1673d(b).

<sup>109</sup> Pub. L. No. 93-618, § 201, 88 Stat. 1978 (1979) (codified as amended at 19 U.S.C. § 2251 (Supp. III 1979)).

<sup>110</sup> Recent or ongoing investigations of the Department of Commerce provide the most useful information on existing subsidy practices in the country under investigation. Another source of information may be the Department's library of foreign subsidy practices, if maintained on a current basis pursuant to its regulation § 355.44, 19 C.F.R. § 355.44 (1980). If the Commerce Department is aware of subsidy practices alleged in the petition which since have been eliminated or reduced in amount, an effort should be made to have this information officially communicated to the ITC. Because Commerce may be reluctant to make such a communication, counsel should consider having the foreign government involved urge the Department to do so where the amount of the subsidies alleged in the petition will be called into question.

<sup>111</sup> See text at notes 7-12 *supra*.

larly when developing countries are involved. There are cases where it easily may take ninety days to arouse sufficient concern for the foreign government and export interests to take proper note of the problem and begin to address their defense.

The primary focus at this stage of the investigation is on developing information on the true impact of the alleged subsidies, which can be a very simple or a very complicated task. The initial step is to obtain a copy of the questionnaire that the Commerce Department will give to the foreign government. Three major questions are involved. First, what foreign government programs are available under the laws and regulations of the foreign country which might be construed to confer countervailable benefits on the industry in question? Second, what is the legal basis under U.S. law to determine that these programs are countervailable? Third, to what extent have the exporters actually benefited from such programs? Even where countervailable subsidies exist, it must not be assumed that exporters benefited to the maximum amounts allowed under the program. Discovering the actual value of any benefits, however, may require interviews with and questionnaires to a large number of companies. The attorney may decide to develop a more detailed questionnaire than that prescribed by the Commerce Department to collect additional data for a defense. The information will usually be collected by the foreign government in cooperation with an industrial association, with or without advice of private U.S. counsel. If the industry is very large, it may be necessary to choose a sampling technique; this will involve negotiation with the Commerce Department as to an acceptable sampling method.

The problem of developing the relevant facts will vary with the type of incentive involved. For instance, if preferential financing for working capital is in issue, one must obtain from the books of each company a statement with respect to the financing that it actually received, the period in which it was utilized, the goods involved, and so forth. If preferential financing for capital equipment is involved, a period of amortization must be determined. In both cases, the normal cost of money, and therefore the amount of subsidization, can be an elusive issue. If the subsidy relates to the exemption from income tax of profits derived from exportation, for example, it is necessary to work with data for the year preceding the year in which the investigation takes place because corporate income taxes are normally prepared on a fiscal year basis. This in turn may require an effort to project current utilization, if the base year used is abnormal. In all of these situations, the pursuit of precision can be self-defeating. It is more important to convey the feeling that good faith efforts are being made to reach approximations that are as accurate as possible.

The Trade Agreements Act of 1979 has introduced new substantive

standards in a number of important respects.<sup>112</sup> These standards limit the offsets that may be used in calculating the net subsidy to: (1) payments made in qualifying for the subsidy, (2) losses from deferred receipt of the subsidy, and (3) export taxes or charges specifically intended to offset the subsidy.<sup>113</sup> This list is intended to exclude indirect taxes not functionally related to the alleged subsidy as described in the legislation of the country concerned. Rebates of indirect taxes will not be regarded as properly remitted so as to avoid countervailing duties, as is permissible under the GATT and the Subsidies Code,<sup>114</sup> unless a nexus between the benefit actually received and the indirect tax can be demonstrated.<sup>115</sup>

As in antidumping cases, counsel should maintain close contact with the case analyst in the Commerce Department to be sure that he correctly interprets the data submitted and is provided with necessary clarification. The regulation as to records of *ex parte* contacts<sup>116</sup> does not apply at the case analyst's level, and although anything he uses must be on the record, there is no legal limit to the amount of discussion permitted with the case analyst. Case analysts, however, tend to classify attorneys as either helpful or annoying. One should thus take pains to fall into the former category.<sup>117</sup>

In a complicated case, there often may be good reason to seek an extension to 150 days and to make full use of that period if the Commerce Department agrees to extend. This should be considered early in the investigation.

The Trade Agreements Act introduced into the countervailing duty field a new and potentially troublesome problem, verification.<sup>118</sup> The requirements are the same as those under the antidumping provisions of the law. Verification by U.S. agents acting in a foreign country under the antidumping provisions of the U.S. law has been challenged in the

<sup>112</sup> See generally, S. REP. NO. 249, 96th Cong., 1st Sess. 85-86, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 381, 471-72; and Statements of Administrative Action, note 61 *supra* at 432-33, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 665, 697-99.

<sup>113</sup> 19 U.S.C. § 1677(6) (Supp. III 1979).

<sup>114</sup> See generally the Agreement on Interpretation and Application of Article VI, XVI, and XXII of the General Agreement on Tariffs and Trade, reprinted in MESSAGE FROM THE PRESIDENT, AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTINATIONAL TRADE NEGOTIATIONS, H.R. DOC. NO. 153, pt. 1, 96th Cong., 1st Sess. 257 (1979) [hereinafter cited as Agreement on GATT].

<sup>115</sup> See 19 C.F.R. Part 355, Annex 1(2) (1980). The standard by which such a nexus can be established has been clarified in the investigation involving Certain Fasteners from India, 45 Fed. Reg. 48,607 (1980) and Certain Iron Metal Casting from India, 45 Fed. Reg. 55,502 (1980).

<sup>116</sup> 19 C.F.R. § 355.16 (1980).

<sup>117</sup> It should be noted that the Commerce Department has adopted a team concept for conducting countervailing duty investigations. The general counsel's office, the office of policy and the office of investigations are all involved in the investigation. Therefore, depending on the nature of this issue, there may be more than one individual in the Commerce Department who must be contacted.

<sup>118</sup> See 19 U.S.C. § 1677e (Supp. III 1979). While verification consistently has been required in antidumping investigations, until the Trade Agreements Act of 1979 no verification was necessary for information submitted in countervailing duty investigations.

past by various countries. Such touchiness is augmented in countervailing duty investigations because verification involves scrutiny of government programs.

There have not yet been enough cases to test the problems that may arise, nor is it clear how far the Commerce Department will press its statutory mandate. Heretofore, the U.S. Government had accepted at face value information submitted by a foreign government with respect not only to its own acts, but also its findings on the consequences for the private sector. Verification tended to be conducted with kid gloves and was limited principally to critical examination of the government-submitted data, rather than verification by examination of the books and records of the companies concerned. The Commerce Department now scrutinizes the books and records of private companies and/or the government agencies involved in the investigated practices, as in antidumping investigations.<sup>119</sup> Under traditional diplomatic usage, the formal statement of the foreign government will be accepted without further scrutiny where it relates to the acts of the government itself. Limited experience to date suggests that the Commerce Department in executing its verification responsibilities will do its utmost to verify the accuracy and completeness of the information without unduly ruffling foreign sensibilities, particularly where the country is one with which the United States has an important relationship. Thus, assuring an adequate means of verification in the face of foreign government resistance may often present problems for respondent attorneys.

The problems of confidentiality and disclosure in countervailing duty investigations are similar to those described for antidumping investigations, but again there is the added dimension of foreign government involvement. Commerce Department regulations recognize only one limitation on the confidentiality and disclosure requirement, information that is classified under Executive Order 12065.<sup>120</sup> The extent to which foreign governments may seek to protect information under the Order and the effect it will have on investigations is not yet known. Such information may be exempt from disclosure under protective order, but one can foresee a challenge to a security classification for business confidential information. The requirement that nonconfidential summaries be submitted<sup>121</sup> is also problematical with regard to documents submitted by foreign governments, and the Commerce Department's course in the absence of voluntary compliance is not known.

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<sup>119</sup> 19 C.F.R. § 355.39 (1980).

<sup>120</sup> See 19 C.F.R. § 355.18(d)(3) (1980). Executive Order 12065 applies only to certain types of information submitted by foreign governments to the U.S. Government, the disclosure of which would impair U.S. security interests. Exec. Order No. 12065, 43 Fed. Reg. 28,949 (1978) *reprinted in* 50 U.S.C. § 401, at 1585 (Supp. III 1979). However, the Order is drafted very broadly and could arguably apply to any government-to-government communication chosen for classification under the Order by the Department.

<sup>121</sup> 19 C.F.R. § 355.18(a)(1) (1980).

Once the magnitude of the problem is established—the types of measures and the amount of subsidy that the Commerce Department is likely to find—then prompt attention should be given to any ameliorative steps which might be taken to avoid countervailing duties. The viewpoints of the exporter and the government may well differ on this question because the effective ameliorative steps are ones which eliminate or cancel the subsidy. In consequence, the government will save money and the exporter must assume a greater financial burden. The exporter may, however, be willing to lose the benefits of any subsidy on sales to the United States while retaining benefits for other countries. The government also may be willing to take measures to eliminate subsidies for particular products exported to the United States, while retaining incentives not only for other countries, but also for other products sold to the United States. Techniques available to avoid the imposition of countervailing duties include an export tax to offset the effect of the subsidy,<sup>122</sup> a reduction of the subsidy through governmental measure,<sup>123</sup> and renunciation of the subsidy by particular exporters.<sup>124</sup>

A major, though very seldom used, measure open to a foreign government which is not disadvantageous to the exporter and which deals with the problem in a fundamental way is devaluation of the currency in lieu of subsidization.<sup>125</sup> Comprehensive export subsidy programs usually represent an economic strategy by the foreign government which is equivalent to maintaining dual exchange rates. Legitimizing such split rates through devaluation can, from the standpoint of U.S. Government import policy, quite properly sweep the ground from under a countervailing duty case. Beneficiaries of a subsidy will look for alternatives, and it is almost axiomatic that one cannot substitute one form of incentive for another without still subsidizing. Devaluation, however, is one case where it can be done.<sup>126</sup>

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<sup>122</sup> See 19 U.S.C. § 1677(6)(c) (Supp. III 1979). The export tax method has been used by the Brazilian Government to avoid the imposition of countervailing duties on specific products. See, e.g., Certain Textiles and Textile Products from Brazil (Revocation), 45 Fed. Reg. 12,413 (1980).

<sup>123</sup> See, e.g., 44 Fed. Reg. 17,485, 17,485-86 (1979) (revocation of countervailing duty determinations because of elimination of subsidies by Uruguay). The Uruguayan Government kept an export tax in place and adjusted its domestic legislation to obtain the revocation.

<sup>124</sup> See, e.g., Leather Handbags from Colombia (Revocation), 44 Fed. Reg. 70,138, 70,138-39 (1979).

<sup>125</sup> For example, the Brazilian Government eliminated its IPI credits in December of 1979 and devalued the cruzeiro by 35%. The elimination of the IPI credit is expected to substantially reduce and in some cases virtually eliminate countervailing duty assessments in subsequent reviews.

<sup>126</sup> Under the provisions of 19 U.S.C. § 1671c(b) (Supp. III 1979), the foreign government or the exporters must eliminate or offset completely the subsidy within six months or cease exports to the United States of all the subsidized merchandise within six months. Under the terms of § 1671c(c), however, only the injurious effect must be eliminated. Under certain extraordinary circumstances, this permits the foreign government to offset only part of the subsidy (at least 85%). This second alternative is only available to countries which are "countries under the Agreement."

### *D. Suspension*

Since a countervailing duty proceeding is fundamentally a trade dispute between two governments, it is normal and desirable that there be the possibility of settlement through negotiations. This possibility is recognized and authorized by section 704 of the Trade Agreements Act of 1979,<sup>127</sup> but, as in the case of antidumping, its use is circumscribed. The authority is broader in one respect, however, for countervailing duty cases than for antidumping cases; namely, there can be a quantitative agreement designed to prevent injury to the U.S. industry.<sup>128</sup>

In the case of countervailing duty law, the thrust of the suspension provisions reflects a desire on the part of the United States Government to prod other trading nations into abandoning government intervention in the free market. If a foreign government simply abolishes the subsidy, there may be no need for an agreement because, the subsidy having been abolished, no ground for assessing countervailing duties remains. The occasion for a suspension agreement arises, however, where the foreign government and/or the exporter involved are willing to take some action to mitigate the effect of the subsidies on the U.S. market or are willing to reduce the subsidization partially. The waiver provisions of the Trade Act of 1974<sup>129</sup> were used by the Treasury Department to obtain foreign government agreements to phase out their subsidies; the suspension provisions of the new countervailing duty law provide for a similar resolution of the problem. If an important trade sector is involved, suspension agreements may propel the private practitioner into the middle of major intergovernmental negotiations involving the totality of economic relations between the two countries.

### *E. Final Commerce Determination*

Within seventy-five days after its preliminary determination, the Commerce Department will make its final determination.<sup>130</sup> If the case involves data from many enterprises, this will afford very little time to work with clients and the Commerce Department to obtain the best results. The preliminary determination will have revealed the gaps and weaknesses in the case and the time between the preliminary and final determination should be used to address these problems.

An important service of counsel in this phase is to maintain contact with the Commerce Department case analysts. At this point, however, the whole case normally will be on the record, so that any contact with the officer who will make a recommendation on the final decision must be recorded. Either side may request a hearing on issues which arise out

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<sup>127</sup> 19 U.S.C. § 1671c(b), (c) (Supp. III 1979).

<sup>128</sup> *Id.* § 1671c(c).

<sup>129</sup> *Id.* § 1303(d).

<sup>130</sup> *Id.* § 1671d(a).



of the preliminary determination,<sup>131</sup> and in that connection it may be necessary to file a brief. Procedures and problems related to the hearing are much the same as in the case of antidumping cases.

#### *F. Final ITC Determination as to Material Injury*

If the country concerned is entitled to an injury determination,<sup>132</sup> the investigation moves back to the International Trade Commission for the final injury determination after either a preliminary or final affirmative Commerce Department determination.<sup>133</sup> The defense of a countervailing duty case at the ITC is essentially the same as that in an antidumping case. The amount of the subsidy found often is the critical element in an injury determination. Many antidumping cases have had negative findings because the amount of the dumping margin was comparatively small in relation to the price and therefore could not be shown to be the cause of injury. Numerous countervailing duty determinations in effect when the Trade Agreements Act of 1979 became effective are entitled to injury determinations upon request.<sup>134</sup>

### **IV. Judicial Review**

The judicial review provisions of the law are essentially parallel for antidumping and countervailing duty investigations. While numerous preliminary determinations can be appealed to the Court of International Trade,<sup>135</sup> until the final determination is made the opportunities for appeal by foreign respondents are limited.<sup>136</sup> There are three final decisions that can be appealed. Petitioner can appeal the failure to initiate an investigation, a decision by the Commerce Department that a case is "extraordinarily complicated," and a negative determination by the ITC on whether there is a reasonable indication of injury. In addition, petitioner can appeal a negative preliminary determination by both the ITC and the Commerce Department.<sup>137</sup>

Of these various appeals, the only ones available to the respondent are appeals from a final affirmative determination by both the Commerce Department and ITC, from an adverse antidumping or countervailing duty determination in the annual section 751 administrative review, and from a refusal to grant a review by the Commerce Department or the ITC for "changed circumstances."<sup>138</sup> Accordingly, counsel for exporters or importers is more likely to find himself in court by reason of appeals by the other side. In this case, the government is the defend-

<sup>131</sup> 19 C.F.R. § 355.35 (1980).

<sup>132</sup> 19 U.S.C. § 2503(b)(2) (Supp. III 1979).

<sup>133</sup> *Id.* § 1671d(b).

<sup>134</sup> *Id.* § 1671 note at 41.

<sup>135</sup> *Id.* § 1516a(a)(1).

<sup>136</sup> Compare *id.* § 1516a(a)(1) with § 1516(a)(2).

<sup>137</sup> *Id.* § 1516a(a)(1)(A), (B), (D), and (E), respectively.

<sup>138</sup> *Id.* § 1516a(a)(2)(B)(i) and (iii); *id.* (a)(1)(C).

ant, but counsel for a private party should always consider appearing as an interested party in support of the government's defense.

Counsel may wish to consider using the injunctive relief power granted to the Court of International Trade by the Trade Agreements Act of 1979.<sup>139</sup> The court was recently given full equity powers.<sup>140</sup> The use of equity power by the court will necessitate a more activist role by the defense attorney as will the court's broader review authority. This broader review authority permits the court to consider whether the decision appealed is supported by substantial evidence on the record of the proceeding.<sup>141</sup>

## V. Review and Revocation

Under section 751 of the Trade Agreements Act of 1979, the Commerce Department is required to conduct an annual review of Antidumping and Countervailing Duty Orders to facilitate the assessment of duties, and to review the status of, and compliance with, any suspension agreement.<sup>142</sup> This review is governed by procedures virtually identical to the initial investigation, including the provision allowing comment by interested parties and a hearing.<sup>143</sup> In addition, the law provides for review upon receipt of information which indicates "changed circumstances" sufficient to warrant a revocation.<sup>144</sup> Revocation of Antidumping and Countervailing Duty Orders and termination of suspended investigations must be done in connection with the review provisions of section 751.<sup>145</sup>

These review provisions are of great importance to exporters and importers. In addition to determining the amount of duties to be assessed, the review will determine the cash deposit of estimated duties required until the next review is completed,<sup>146</sup> provide the opportunity for respondents to demonstrate the absence of subsidization or less than fair value sales for a sufficient period to merit revocation by the Department of Commerce, and, if requested, provide for reconsideration by the ITC of its determination of material injury to the petitioning industry.<sup>147</sup> Be-

<sup>139</sup> *Id.* § 1516a(c)(2).

<sup>140</sup> This provision of the Customs Courts Act of 1980, Pub. L. No. 96-417, § 201, 94 Stat. 1730 (codified at 28 U.S.C.A. § 1585 (West Supp. 1981)), conferred on the Customs Court for the first time the full equity powers of a U.S. District Court and renamed it the Court of International Trade.

<sup>141</sup> The standard of review under § 1001 of the Trade Agreements Act of 1979, 19 U.S.C. § 1516a(b) (Supp. III 1979), provides that most final determinations will be unlawful if "unsupported by substantial evidence on the record." This authority should be compared with the more limited judicial review that was provided in § 321(a) of the Trade Act of 1974, Pub. L. No. 93-618, § 321(a), 88 Stat. 1978 (repealed 1979).

<sup>142</sup> 19 U.S.C. § 1675 (Supp. III 1979).

<sup>143</sup> *See* 19 C.F.R. §§ 353.53, 355.41 (1980).

<sup>144</sup> 19 U.S.C. § 1675(b)(1) (Supp. III 1979).

<sup>145</sup> *See* 19 C.F.R. §§ 353.54(e), 355.42(e) (1981).

<sup>146</sup> *See id.* § 353.48(b).

<sup>147</sup> *See id.* § 207.45.

cause the review provides the only opportunity for respondents to demonstrate that prices have been adjusted to eliminate sales at less than fair value or that steps have been taken to reduce the subsidization found during the period of investigation, it is an extremely important phase of the proceedings.

The same efforts should be made during the review to defend respondents' interest as are exerted during the initial investigation. The formulation and execution of the defense at this stage are virtually identical to the initial stages.

When the annual review provisions are read together with the various provisions that cover the initial stages of a proceeding, it becomes apparent that both antidumping and countervailing duty proceedings are subject to incessant review. Suspension of liquidation remains in effect until a review has been completed to determine the actual effect of the subsidies or the extent of the dumping for the period in question.<sup>148</sup> While this has been the normal practice in antidumping proceedings under prior law, it represents a distinct departure from the practice under previous countervailing duty law. Under former practice, duties were assessed and entries were liquidated upon entrance into the United States according to normal duty assessment procedures except in exceptional circumstances. Suspension of liquidation pending annual reviews prevents the importer from closing its books or knowing for certain its liability until more than a year after merchandise is entered. This process continues until a revocation is obtained.

Except for situations of changed circumstances, the Commerce Department will not revoke Antidumping Duty Orders unless there have been no sales at less than fair value for at least a two year period subsequent to the Order or sales have terminated.<sup>149</sup> Similarly, revocation of Countervailing Duty Orders requires a determination that a subsidy is no longer being bestowed on the exported merchandise and is not likely to be reintroduced.<sup>150</sup> Revocation is considered upon request by an interested party; however, after three years the Commerce Department may revoke on its own initiative.<sup>151</sup> Revocation at the initiative of the Commerce Department is governed by the same standards as a revocation pursuant to a request by an interested party except that it also may be based on changed circumstances. The basis for review and revocation based on changed circumstances is unclear.

It is apparent that, as a practical matter, obtaining a revocation by the Commerce Department will depend upon either the elimination of the subsidization found in the investigation or sustained sales at or above fair value over at least a two year period. Revocation by the ITC is

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<sup>148</sup> 19 U.S.C. § 1675(a)(1) (Supp. III 1979).

<sup>149</sup> 19 C.F.R. § 353.54(b) (1980).

<sup>150</sup> *Id.* § 355.42(b).

<sup>151</sup> *Id.* §§ 353.54(b), (c), 355.42(b), (c).

possible, however, if it can be shown that changed circumstances exist which demonstrate that the U.S. industry would not be injured by the revocation.<sup>152</sup> If factors contributing to the ITC's original affirmative injury determination have changed so as to indicate the absence of material injury or threat thereof, a petition for review by the ITC may be appropriate. Where revocation by the Department of Commerce is not possible because of continued sales at less than fair value but the margins of dumping have significantly decreased and there are changed circumstances affecting the U.S. industry favorably,<sup>153</sup> respondents should explore the possibility of revocation by the ITC.

Revocation is the end of a proceeding. For importing interests it is the only way to guarantee continued access to the U.S. market without the uncertainty of suspended liquidation, the deposit of estimated duties, and the contingency of actual antidumping or countervailing duties. While review for changed circumstances provide the possibility of revocation without either elimination of subsidies or, in the case of an Antidumping Duty Order, upward price revisions, the only sure way of ending the lengthy proceedings, and the best defense, is always to eliminate the pricing practices or the subsidies in question.

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<sup>152</sup> *Id.* § 207.45(a).

<sup>153</sup> In considering the factors contributing to material injury, *see* 19 C.F.R. § 207.26 (1980), a major element in the ITC's decision is the degree of subsidization or extent of less than fair value sales by the foreign industry. While "changed circumstances" are not defined by law, the ITC has considered, for example, a sharp decline in the margin of less than fair value selling as a changed circumstance warranting review and ultimately resulting in revocation. *See* *Golf Carts from Poland*, 40 Fed. Reg. 49,153 (1975).

