SAFEGUARDING CONFIDENTIAL INFORMATION IN ITC INJURY PROCEEDINGS: PROPOSALS TO REDUCE THE RISKS OF DISCLOSURE

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The practice of dumping products in the United States and the subsidization of exports by foreign governments are considered unfair methods of international trade. U.S. companies threatened by these practices may seek relief through antidumping and countervailing duty proceedings administered by the International Trade Administration of the Department of Commerce (ITA) and the International Trade Commission (ITC).

This article examines the procedures for disclosing confidential information which competing U.S. companies submit in proceedings conducted by the ITC to determine whether the dumped or subsized imports are causing or threatening injury to an industry in the United States. The article discusses the problems of leakage of confidential information to competitors, and the chilling effect of possible leakage on the voluntary submission of needed information, and proposes measures to reduce the risks and safeguard the disclosure process.

The Trade Agreements Act of 1979[1] authorizes the United States International Trade Commission to make available, under protec-

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1. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified in scattered sections of 19 U.S.C.).

tive order, confidential business information that is submitted to it in antidumping and countervailing duty proceedings. Under this authority, the ITC may release one party's confidential information to counsel for other parties. In almost all cases those other parties, to whose counsel the confidential information is disclosed, are business competitors of the party that submitted the information. The only companies whose confidential information is disclosed are the U.S. companies who allege injury from unfair import practices. These parties' confidential data concerning prices and cost of production can be released to counsel for both their domestic competitors and their foreign competitors.

One concern is that such confidential information will be passed, willfully or inadvertently, by a lawyer to his client, who can then make competitive use of it against the U.S. company that submitted it. Though there is little hard evidence of such improper disclosure, there is much suspicion that it occurs.

A more significant concern is that the mere possibility of wrongful disclosure generates a chilling effect which, by discouraging voluntary submission of essential information, hampers the ITC's ability to do its job.[2] The ITC's responsibility is to determine whether the allegedly unfair imports are threatening or causing "injury" – not simply injury to individual U.S. companies but injury to the entire "industry" affected by competition from the imports.[3] If U.S. companies fear that their confidential business data will leak to competitors, and so refuse to submit such information, the Commission will be unable to assemble the complete industry figures it needs for a sound determination of injury.

This article will assess these and related concerns arising from the ITC's protective orders practice, and will consider ways to alleviate them. Proposals to broaden the classes of data disclosed under ITC protective orders in these cases will also be considered.

This article will recommend that the ITC establish, by regulation, a series of measures intended to reduce risks, protect submitters, and safeguard the process of disclosing price and cost of production data. In some circumstances, these measures would preclude disclosures that are now permitted.[4] If this is done, it would not be recommended that statutory amendment be sought to

2. *See infra* notes 145-153 and accompanying text.
3. *See* 19 U.S.C. §§ 1673(2), 1673b(a), 1673d(b) (1982).
4. *See infra* notes 222-224 and accompanying text.

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cut down the categories of information that are now disclosed. Indeed, the ITC might appropriately consider enlargement of the classes of information released under protective order, particularly to facilitate better analysis of the kinds of information that are now disclosed. Broader disclosure should be provided only if it would improve the Commission's investigative and decisional processes, and should be accompanied by the safeguards recommended herein. Both existing and any enlarged disclosures should be available to domestic producers on the same terms as they are to importers and foreign producer parties.

THE PROCEDURES UNDER STUDY

The Setting: Antidumping and Countervailing Duty Proceedings

Dumping, the export to the United States of goods at less than their fair value, is treated by American law as an unfair method of international trade.[5] If dumped imports are found to cause or threaten material injury[6] to an industry in the United States, the law provides for imposition of an "antidumping duty" in an amount intended to offset the margin of dumping.[7] There must be two determinations: (1) that the imports in question have been dumped,[8] which is decided by the International Trade Administration of the Department of Commerce (ITA),[9] and (2) that the

5. On the antidumping law, see generally Barshefsky & Cunningham, *The Prosecution of Antidumping Actions Under the Trade Agreements Act of 1979*, 6 N. C. J. OF INT'L L. & COM. REG. 307 (1981); Note, *Technical Analysis of the Antidumping Agreement and the Trade Agreements Act*, 11 LAW & POL'Y INT'L BUS. 1405 (1979). On the prior antidumping law, see generally Anthony, *The American Response to Dumping from Capitalist and Socialist Economies—Substantive Premises and Restructured Procedures After the 1967 GATT Code*, 54 CORNELL L. REV. 159 (1969); Barcelo, *Antidumping Laws as Barriers to Trade—The United States and the International Antidumping Code*, 57 CORNELL L. REV. 491 (1972).

6. "The term 'material injury' means harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7) (1982). For factors to be considered by the ITC in making its injury determination, see 19 C.F.R. § 207.26 (1985).

7. 19 U.S.C. §§ 1673, 1673e (1982).

8. Dumping exists when foreign merchandise is "sold in the United States at less than its fair value." 19 U.S.C. § 1673(1) (1982). The margin of dumping is calculated by comparing the "United States price" (as defined in 19 U.S.C. § 1677a (1982)) with the "foreign market value" (as defined in 19 U.S.C. § 1677b (1982)).

9. 19 U.S.C. §§ 1673(1), 1673b(b), 1673d(a) (1982). As a reorganization plan was pending at the time of enactment of the Trade Agreements Act of 1979, the Act provided

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imports are causing or threatening injury to an industry in the United States, which is decided more or less simultaneously by the ITC.[10]

Subsidization by foreign governments of their exports to the United States is similarly treated as an unfair method of international trade.[11] If subsidized imports are found to cause or threaten injury to an industry in the United States, the law provides for the imposition of a "countervailing duty" in an amount intended to offset the subsidy.[12] Again, there must be two determinations: (1) whether the imports have been subsidized, decided by the ITA,[13] and (2) whether they are causing or threatening injury, decided by the ITC.[14]

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that the determination of sales at less than fair value or of the existence of a subsidy was to be made by "the administering authority," 19 U.S.C. § 1671(a) (1982). The administering authority is defined as "the Secretary of the Treasury, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this subtitle are transferred by law." 19 U.S.C. § 1677(1) (1982). The functions of the Secretary of the Treasury under Title VII were transferred to the Secretary of Commerce. Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69,275 (1979), 93 Stat. 1381, effective Jan. 2, 1980, as provided by Exec. Order No. 12188, 45 Fed. Reg. 993 (1980).

10. 19 U.S.C. §§ 1673(2), 1673b(a), 1673d(b) (1982). The ITC was previously known as the United States Tariff Commission, 39 Stat. 795 (1916). The name was changed to United States International Trade Commission by the Trade Act of 1974, § 171, 19 U.S.C. § 2231 (1982). As an alternative to determining that "an industry in the United States (i) is materially injured, or (ii) is threatened with material injury," the Commission may decide that "the establishment of an industry in the United States is materially retarded" by reason of imports. 19 U.S.C. § 1673(2) (1982).

11. On countervailing duty law, see generally de Kieffer, *When, Why and How to Bring a Countervailing Duty Proceeding—A Complainant's Perspective,* 6 N. C. J. OF INT'L L. & COM. REG. 363 (1981); Hemmendinger & Barringer, *The Defense of Antidumping and Countervailing Duty Investigations Under the Trade Agreements Act of 1979,* 6 N. C. J. OF INT'L L. & COM. REG. 427 (1981); Feller, *Preface—Observations on the New Countervailing Duty Law,* 11 LAW & POL'Y INT'L BUS. 1439 (1979).

12. 19 U.S.C. § 1671e (1982).

13. *Id.* §§ 1671(a)(1), 1671b(b), 1671d(a) (1982).

14. *See supra* note 10; a few cases are still governed by prior law because the exporting nations have not yet made deposits of their ratifications of the 1979 Multilateral Trade Agreements, a precondition for imports to receive more favorable treatment made available under the 1979 Act. 19 U.S.C. §§ 1303(a), 1671(b) (1982). In these cases if the imported products are dutiable, no injury investigation by the ITC is required; a countervailing duty can be imposed simply upon the finding of a subsidy. In contrast, if the products of such countries are regularly admitted free of duty, the ITC must conduct an injury investigation and make a final determination of injury before a countervailing duty may be imposed. *Id.* § 1303(b) (1982). The ITC's procedures for these investigations are identical to those governing the more common cases involving the products of countries that are parties to the trade agreements. *Id.*

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The Trade Agreements Act of 1979[15] extensively revised the antidumping and countervailing duty laws, and combined them into a new Title VII of the basic customs law, the Tariff Act of 1930.[16] Among other things, the 1979 revisions implemented two pertinent international agreements adopted by the parties to the General Agreement on Tariffs and Trade (GATT) in the 1973-79 round of multilateral trade negotiations (MTN).[17] One of these international agreements included an Anti-Dumping Code;[18] the other established detailed standards for national countervailing duty laws, and also set rules to limit the signatory nations' use of subsidies.[19]

The injury proceeding at the ITC is substantially the same for both antidumping and countervailing duty cases.[20] The 1979 Act laid down almost identical procedural and substantive rules to govern injury determinations in both kinds of case, and the ITC has done the same thing in a unified set of regulations.[21]

ITC Preliminary Investigation

The ITC proceeding is conceived of as an "investigation," and is so denominated.[22] The industry examined is comprised of U.S. producers of the "like product" to the allegedly dumped or subsidized import;[23] all or some of these producers are ordinarily the petitioners in the proceeding. Upon filing of the petition, the ITC institutes a "preliminary investigation" to determine within forty-five days whether there is "a reasonable indication" that the injury test will be met.[24] The Commission typically addresses question-

15. *See supra* note 1.

16. 19 U.S.C. §§ 1671-1677g (1982).

17. AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, H.R. DOC. NO. 153, 96th Cong., 1st Sess., pt. 1 (1979).

18. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, April 12, 1979, 31 U.S.T. 4919, T.I.A.S. 9650, — — U.N.T.S. — —.

19. Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, April 12, 1979, 31 U.S.T. 513, T.I.A.S. 9619, — — U.N.T.S. — —.

20. *Compare* 19 U.S.C. §§ 1671(a)(2), 1671a(b), (d), 1671(a) and 1671(b) (1982) (countervailing duty laws) *with* 19 U.S.C. §§ 1673(2), 1673a(b), (d), 1673b(a), 1673d(b) (1982) (antidumping duty laws).

21. 19 C.F.R. §§ 207-207.46 (1985).

22. 19 U.S.C. §§ 1671a, 1673a (1982); 19 C.F.R. §§ 207.12, 207.20 (1985).

23. 19 U.S.C. § 1677(4) (1982).

24. 19 C.F.R. §§ 207.12, 207.17 (1985). Within 20 days after filing, the ITA determines whether the petition alleges the necessary elements and contains information

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naires to U.S. producers (including those who have not joined in support of the petition), to importers of the products, and to U.S. purchasers of the foreign or domestic products. Members of the Commission's investigative staff pursue information from other sources, and follow up the questionnaires with telephone and field interviews.[25] Through this period, also, parties often will continue to submit information.

As the date for decision approaches, parties may appear at an informal hearing called a "conference," usually held between the twenty-first and twenty-fifth days of the proceeding[26] and presided over by the Commission's Director of Operations.[27] The conference is conducted according to the Commission's rules governing "nonadjudicative hearings."[28] Ordinarily, witnesses present prepared testimony, and then are questioned by members of the Commission staff, typically including the investigator, the economist, the attorney and the commodity-industry analyst assigned to the case. Oral argument and post-hearing briefs are received.[29] The staff prepares a report.

ITC Final Injury Investigation

On the basis of this record, the Commissioners vote on a "preliminary determination" of injury.[30] A negative determination ends the entire antidumping or countervailing duty proceeding (including the portion conducted by the ITA).[31] If the determination is affirmative, the Commission may proceed to the second stage of its investigation, which leads to a final determination of the injury and is commonly called the "final investigation." [32] The ITC may not commence its final investigation until the ITA has made an affirmative determination—either preliminary or final—that the

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reasonably available to the petitioner in support of the allegations. If the determination is negative, the petition is dismissed. 19 U.S.C. §§ 1671a(c), 1673a(c) (1982).

25. *See* 19 C.F.R. § 201.9 (1985).

26. Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (September 24, 1984) [hereinafter cited as Stein Interview I].

27. 19 C.F.R. § 207.15 (1985).

28. *Id.* § 201.13.

29. *Id.* § 201.13(h), (i).

30. 19 U.S.C. §§ 1671b(a), 1673b(a) (1982); 19 C.F.R. §§ 207.17, 207.18 (1985).

31. 19 U.S.C. §§ 1671b(a), 1673b(a) (1982).

32. *Id.* §§ 1671d(b), 1673d(b); 19 C.F.R. §§ 207.20, 207.25 (1985).

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imports are being dumped or subsidized.[33] The ITC may continue informal activities, however, while awaiting the ITA's action.

Methods used in the ITC's final injury investigation are much the same as those used in the preliminary phase. More time (120 days in the usual case) is available under statutory limits,[34] allowing for a more thorough investigation. Supplementary, revised, or more detailed questionnaires will be sent out. The investigative staff will gather new information and verify information already submitted. Parties submit additional data throughout the course of the investigation. Ultimately the Director of Operations will prepare the staff's report, presenting the facts that have been gathered and detailed summaries of statistical information in aggregated form.[35] The parties, having access to the public version of the staff report, submit prehearing briefs.[36] Then a hearing is held before the full Commission at which the parties present nonconfidential summaries of their prehearing briefs and rebut their opponents.[37] Short post-hearing briefs and statements in answer to questions raised at the hearing may be submitted within a few days after the hearing.[38] The Director of Operations submits a final staff report to the Commissioners, who make the final injury determination.[39] Coupled with an affirmative final determination of dumping or subsidy by the ITA, an affirmative final determination by the ITC fulfills the conditions for assessing an antidumping or countervailing duty.[40]

The ITC's Treatment of Confidential Information

Throughout these proceedings, the Commission devotes care to maintaining the security of confidential business information which is submitted to it or is gathered in its investigations.[41] The record of each antidumping and countervailing duty injury proceeding is

33. 19 U.S.C. §§ 1671d(b)(2), (3), 1673d(b)(2), (3) (1982).

34. *Id.* §§ 1671d(b)(2), 1673d(b)(2). Where the ITA has made a negative preliminary determination as to sales at less than fair value or as to subsidized imports but goes on to make an affirmative final determination, the ITC has 75 days after the date of the final ITA determination to make its own final determination. *Id.* §§ 1671d(b)(3), 1673d(b)(3).

35. 19 C.F.R. § 207.21 (1985).

36. *Id.* § 207.22.

37. *Id.* § 207.23.

38. *Id.* § 207.24.

39. *Id.* §§ 207.25, 207.26, 207.27.

40. 19 U.S.C. §§ 1671e, 1673e (1982).

41. Interview with William Fry, Director of Office of Investigations, U.S. International Trade Commission, in Washington, D.C. (June 15, 1983) [hereinafter cited as Fry Inter-

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divided into public and nonpublic sections.[52] The regulations provide procedures for requesting confidential treatment of proffered information.[43] In practice, the staff accords confidential treatment without specific request to information acquired in response to questionnaires and other investigative inquiries.[44] Parties customarily submit petitions, briefs and similar documents in confidential form, accompanied by a non-confidential version for inclusion in the public record.[45] Witnesses and counsel at the Director's conferences and at the full Commission's hearings are expected to refrain from mention of confidential information.[46] The prehearing staff report and other documents prepared for the Commissioner's use at hearings are marked in the margin to show what material is confidential and therefore should not be discussed in open session.[47] Confidential information contained in the Commission's opinions, and in the final staff reports appended to them, is published in aggregated form or deleted, to make identification by company impossible.[48]

The Trade Agreements Act of 1979 expressly provides for the maintenance of confidentiality in antidumping and countervailing duty cases.[49] Most of the data gathered in the ITC's injury pro-

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view]; interview with Lynn Featherstone, Supervisory Investigator, U.S. International Trade Commission, in Washington, D.C. (June 16, 1983) [hereinafter cited as Featherstone Interview]; *see* 19 C.F.R. §§ 201.6, 201.21(b), 201.30, 207.4, 207.23(b) (1985). The federal courts have traditionally protected confidential business information. "The federal courts have long recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information (citations omitted). The Federal Rules of Civil Procedure [FED. R. CIV. P. 27(c)(7)] provide similar qualified protection for trade secrets and confidential commercial information in the civil discovery context." Federal Open Market Committee v. Merrill, 443 U.S. 340, 356 (1979). The policy to protect confidentiality has been strengthened by the recent decision in Seattle Times Co. v. Rhinehart, --- U.S. ---, 104 S.Ct. 2199, 52 U.S.L.W. 4612 (1984) (protective order restricting public disclosure of information received through discovery is not a prior restraint on constitutionally protected speech).

42. 19 C.F.R. § 207.4 (1985).

43. *Id.* § 201.6.

44. Interview with Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (Oct. 23, 1984) [hereinafter cited as Berg Interview I].

45. 19 C.F.R. § 201.6(b) (1985).

46. *See id.* § 207.23.

47. Interview with Kenneth R. Mason, Secretary, U.S. International Trade Commission, in Washington, D.C. (Mar. 29, 1983) [hereinafter cited as Mason Interview].

48. *Id.*

49. 19 U.S.C. § 1677f(b) (1982).

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ceedings call for confidential treatment.[50] The investigations assess the extent of injury to members of the domestic industry, and the extent to which injury is caused by the imports in question. The Commission thus must seek information by which to gauge the effect of the import competition upon the prices and sales of domestic products and upon the economic health of domestic producers. Key elements of the inquiry are: whether the volume of imports is substantial and rising, whether the imports undersell or otherwise depress the price of the domestic products and take sales away from domestic producers, and the economic effects of the import competition upon members of the domestic industry. Most of this information comes from domestic producers, and typically relates to their own sales, prices, costs, capacity utilization, production, employment, and profitability. Confidential information can also come from the importers and foreign producers of the allegedly offending imports, concerning their own business affairs. Information from others, such as purchasers of the foreign and domestic products, usually concerns the affairs of those with whom they do business.

ITC Disclosure of Confidential Information Under Protective Order

Before the January 1980 effective date of the Trade Agreements Act of 1979, the ITC did not disclose the confidential information it acquired in these injury investigations to anyone, even to a party to the proceeding.[51] Section 777(c) of the Trade Agreements Act now authorizes, and in some circumstances has the effect of requiring, the Commission to release such confidential information under protective order.[52]

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50. Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (Mar. 24, 1983) [hereinafter cited as Stein Interview II]; interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (Mar. 31, 1983) [hereinafter cited as Stein Interview III]; interview with Edward Easton, Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (Apr. 4, 1983) [hereinafter cited as Easton Interview I]; and interview with Edward Easton, Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (Apr. 6, 1983) [hereinafter cited as Easton Interview II].

51. Stein Interview II, *supra* note 50; *see* 44 Fed. Reg. 76,458 (1979).

52. 19 U.S.C. § 1677f(c) (1982). This provision, giving rise to the questions examined in this article, provides:

(c) Limited disclosure of certain confidential information under protective

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The Commission has adopted regulations which limit its disclosures under section 777(c) to two categories of confidential information: domestic price information and domestic cost of production information.[53] Disclosure is made to counsel for the foreign and domestic competitors of the American companies that submitted such information. These two categories of information are precisely the same as those which the Court of International Trade (CIT) has jurisdiction to compel the Commission to release under protective order: "confidential information submitted by the petitioner or an interested party in support of the petitioner concerning

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order.— (1) Disclosure by administering authority or commission.— (A) In General.— Upon receipt of an application, which describes with particularity the information requested and sets forth the reasons for the request, the administering authority and the Commission may make confidential information submitted by any other party to the investigation available under a protective order described in subparagraph (B). **(B)Protective order.—** The protective order under which information is made available shall contain such requirements as the administering authority or the Commission may determine by regulation to be appropriate. The administering authority and the Commission shall provide by regulation for such sanctions as the administering authority and the Commission determine to be appropriate, including disbarment from practice before the agency. **(2)Disclosure under court order.—** If the administering authority denies a request for information under paragraph (1), or the Commission denies a request for confidential information submitted by the petitioner or an interested party in support of the petitioner concerning the domestic price or cost of production of the like product, then application may be made to the United States Customs Court [now the Court of International Trade] for an order directing the administering authority or the Commission to make the information available. After notification of all parties to the investigation and after an opportunity for a hearing on the record, the court may issue an order, under such conditions as the court deems appropriate, which shall not have the effect of stopping or suspending the investigation, directing the administering authority or the Commission to make all or a portion of the requested information described in the preceding sentence available under a protective order and setting forth sanctions for violation of such order if the court finds that, under the standards applicable in proceedings of the court, such an order is warranted, and that—

(A) the administering authority or the Commission has denied access to the information under subsection (b)(1) of this section, (B) the person on whose behalf the information is requested is an interested party who is a party to the investigation in connection with which the information was obtained or developed, and (C) the party which submitted the information to which the request relates has been notified, in advance of the hearing, of the request made under this section and of its right to appear and be heard.

53. 19 C.F.R. § 207.7(a) (1985).

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the domestic price or cost of the production of the like product."[54] Interestingly, the specification of these two categories resulted directly from a compromise, arrived at within the U.S. government during the closing stages of the multilateral trade negotiations, aimed at making the United States' implementing legislation more palatable to foreign trading partners.[55]

Protective Orders Procedure

Counsel for a party must apply for access to this confidential information upon a form which, when approved by the Secretary of the Commission, becomes the protective order itself.[56] The regulations call for a showing of counsel's need for the information, and judicial decisions reviewing similar procedures at the ITA say that such need must be weighed against the particular confidentiality needs of the submitters.[57] In practice, however, the ITC's requirements are satisfied by counsel's general statement that the data are needed to participate meaningfully in analysis of the impact of the imports on the domestic industry. In the absence of unusual circumstances, the order will be routinely issued.[58]

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54. Trade Agreements Act of 1979, § 777(c)(2), 19 U.S.C. § 1677f(c)(2) (1982).

55. The story is an interesting one as told by ITC General Counsel Michael H. Stein, Remarks to the Eighth Annual Judicial Conference of the U.S. Court of Customs and Patent Appeals, 92 F.R.D. 181, 348-50 (1981). Foreign trading partners were concerned about a provision in the multilateral trade negotiations, insisted upon by the United States, whereunder foreign producers' confidential information (concerning prices and cost of production) submitted to the U.S. administering authority (now the ITA) could be disclosed under protective order to domestic parties seeking relief. In consideration of this concern, key U.S. negotiating factions compromised and Congress concurred to provide procedures requiring the ITC to release to foreign producers the same kinds of information provided by domestic producers as the foreign producers must submit to the ITA. Mr. Stein called the compromise provision "a hazing requirement rather than a bona fide effort to open the proceedings." *Id.* at 350.

56. Mason Interview, *supra* note 47.

57. *See* Sacilor, Acieries et Laminoirs de Lorraine v. United States, 542 F. Supp. 1020, 1025 (Ct. Int'l Trade 1982). Pertinent regulations required the ITA to "weigh whether the need of the person requesting the information outweighs the need of the person submitting it for continued confidential treatment." 19 C.F.R. § 353.30(a)(3) (1985). *But see* ARBED, S.A. v. United States, 4 Ct. Int'l Trade 132, 3 Int'l Trade Rep. Dec. (BNA) 2369 (1982) (application by foreign steel producers for preliminary injunction to prevent disclosure of confidential information submitted in antidumping investigation denied).

58. Mason Interview, *supra* note 47. Recently the Secretary of the ITC has returned some requests and asked for substantiation of the need, where need was not self-evident from the general statements. Interview with Gracia Berg, Acting Assistant General

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Applicants must serve copies of their applications upon the submitters, who thereupon have a de facto opportunity to object informally or perhaps to seek judicial restraint against release.[59] Unlike ITA practice, there is no formal procedure for submitters to object to disclosure of their confidential information (because there may be insufficient time for hearings) or to withdraw the information rather than allow its release (because information from all industry members is needed by the Commission).[60]

The information is most commonly released in the form of copies of particular pages of the submitters' questionnaire responses, which had been identified on the questionnaire form with a warning that they were subject to release under protective order (provision is made for coding the names of the customers so that their identities are not disclosed). Sometimes disclosable data also appear in the confidential versions of the original petitions, and of interim submissions and briefs filed by petitioners and their supporters. In these cases, the relevant information is abstracted from the documents for disclosure under the protective order.[61]

The Commission's protective orders are standard in form, and are not tailored to particular circumstances. In view of the strict time limitations, the Commission has sought to keep the application process and the operation of the protective order itself as close to self-executing as possible.[62] Counsel seeking the confidential data must swear that he or she will use the information only in connection with the instant proceeding, will not divulge it except to authorized personnel, and will observe specified security measures and limitations on copying and distribution.[63] The attorney also specifically acknowledges that breach of the order may subject him and his

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Counsel, U.S. International Trade Commission, in Washington, D.C. (September 28, 1984) [hereinafter cited as Berg Interview II]. The proposed ITC regulation did not contain a requirement of need. In response to comments that disclosure would be "too automatic," the Commission decided "to add a standard of need similar to that incorporated in Rule 26 of the Federal Rules of Civil Procedure." 44 Fed. Reg. 76,458 (1979).

59. 19 C.F.R. § 207.3 (1985); Mason Interview, *supra* note 47.

60. Mason Interview, *supra* note 47; *see infra* text accompanying notes 191-194 (regarding existing informal procedures). On rare occasions the Secretary of the ITC permits information to be withdrawn after the submitter has informally objected to its release under protective order. Berg Interview II, *supra* note 58.

61. Mason Interview, *supra* note 47; Featherstone Interview, *supra* note 41.

62. Mason Interview, *supra* note 47; *see* 19 C.F.R. § 207.7 (1985) and *infra* note 143 (excerpts from the text of an application).

63. 19 C.F.R. § 207.7(b) (1985).

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partners and associates to disbarment from practice before the Commission, and that the Commission may refer information about violations to the U.S. attorney and to bar association ethics panels.[64] The regulations apparently intend, but do not expressly or specifically provide, that the attorney be personally subject to sanctions for unauthorized disclosures by his legal or clerical staff or by economists or other experts to whom release of the information has been authorized.[65] The regulations also provide for imposing unspecified sanctions for breach of the protective order upon the party represented by the offender.[66] In the first four years (1980-1983), 130 protective orders were issued in antidumping and countervailing duty proceedings at the ITC.[67] So far, no question regarding the possible imposition of sanctions has arisen.[68]

Limits on Releasable Information

The Commission has taken the position that the two categories of information just discussed (concerning (1) the domestic price of the like product and (2) the cost of production of the like product, both limited to information submitted by the petitioner or bv an interested party in support of the petitioner) are all that it is required by the statute to release,[69] and its position has been upheld

64. *Id.* § 207.7(d) (1985).

65. *Id.* § 207.7(d), (e) (1985); *see infra* note 181.

66. 19 C.F.R. § 207.7(d), (e) (1985).

67. Telephone interview with Gail Johnson, Office of the Secretary, U.S. International Trade Commission, Washington, D.C. (October 4, 1984). As of September 26, 1984, forty-six protective orders were granted in Title VII cases. *Id.*

68. Mason Interview, *supra* note 47 and Stein Interview III, *supra* note 50. The only suggestion of a violation occurred in 1984; however, no formal investigation was conducted nor were any sanctions imposed. Telephone interview with Kenneth R. Mason, Secretary, U.S. International Trade Commission, in Washington, D.C. (November 5, 1984) [hereinafter cited as Mason Telephone Interview].

69. *See* 44 Fed. Reg. 59,393 (1979) (discussion of proposed 19 C.F.R. § 207.7); 44 Fed. Reg. 76,462 (1979) (discussion of proposed 19 C.F.R. § 207.7). "Although the statute allows the Commission to disclose more information without the consent of the submitter, it does not require the Commission to do so," Memorandum of Points and Authorities in Support of the Motion of Defendants, United States, U.S. International Trade Commission, and Kenneth R. Mason for Dismissal of Count Three for Lack of Subject Matter Jurisdiction and Cross-Motion for Summary Judgment on Count Three of the Complaint at 28-30, American Spring Wire Corp. v. United States, 4 Ct. Int'l Trade 210, 4 Int'l Trade Rep. Dec. (BNA) 1308 (1982) [hereinafter cited as ITC's *American Spring Wire* Memorandum] (on file at the offices of *Law & Policy in International Business*); *see* H.R. REP. NO. 317, 96th Cong., 1st Sess. 78 (1979).

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by the Court of International Trade.[70]

Further, the Commission has held that to release more would be contrary to the public interest, in view of the possibility that the confidential information might leak to competitors of the submitters, despite provisions of the protective order.[71] This prospect would

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70. *See American Spring Wire Corp*, 4 Ct. Int'l Trade at 213, 4 Int'l Trade Rep. Dec. (BNA) at 1310.

71. As ITC General Counsel Michael H. Stein noted:

> It has been the experience of those at the Commission charged with sending out these questionnaires and getting the response that respondents to Commission questionnaires have often been quite nervous about giving information to the agency, lest the agency disclose it, or lest it fall into the hands of competitors.

Remarks by Michael H. Stein, General Counsel, U.S. International Trade Commission, at the Eighth Annual Judicial Conference of the U.S. Court of Customs and Patent Appeals, 92 F.R.D. 181, 349 (1981). *See also* Garfinkel, *Disclosure of Confidential Documents Under the Trade Agreements Act of 1979: A Corporate Nightmare?*, 13 LAW AND POL'Y INT'L BUS. 465, 469 n.19 and accompanying text, 474 n.42 and accompanying text (1981). E. William Fry, Director of Investigations at the ITC has expressed misgivings over the release of confidential material under protective order:

> 13. The ability of the investigative staff to obtain voluntary compliance with Commission questionnaires will suffer if it becomes known that confidential material is being released. It would be extremely difficult, if not impossible, to complete an investigation within the statutory time limits without voluntary compliance. 14. The lack of confidential business data would seriously handicap Commission Title VII investigations, since by statute, the Commission must consider such factors as price undercutting, output, sales, market share, profits, productivity, return on sales, investments, utilization of capacity, cash flow, inventories, employment, wages, ability to raise capital and investment. 15. I believe that the knowledge that the courts will permit counsel to review a firm's confidential business information will have an immediate and adverse effect on the willingness of questionnaire recipients to provide the Commission with data on their operations. 16. I believe that disclosure of confidential information will have an immediate and adverse effect on the Commission's ability to compile a proper record for decision.

Affidavit by E. William Fry, Director of Investigations, U.S. International Trade Commission, Exhibit A of Defendant's Memorandum in Partial Opposition to Plaintiff's and Intervenor's Motions for Access to Confidential Documents and in Support of Defendant's Cross-Motion for Protective Order at 2-3, Roquette Freres v. United States, 554 F. Supp. 1246 (Ct. Int'l Trade 1982) [hereinafter cited as ITC's *Roquette Freres* Memorandum] (on file at the offices of *Law & Policy in International Business*). *See also* the ITC's argument opposing release of confidential material under CIT protective order:

> The information submitted in response to ITC questionnaires [by two nonparties] constitutes highly sensitive information such that disclosure, *even under a*

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tend to chill the voluntary submission by domestic producers of information which the Commission believes it must have to make informed decisions about the domestic industry as a whole. For this reason, it has proceeded on the basis that more extensive disclosure could impair the quality of Commission injury determinations.[72] Thus, beyond the two categories just described, no other confidential information supplied by U.S. producers is released (except by agreement of all parties to the proceedings, which has occurred only once).[73] Of the confidential information submitted by importers and foreign producers, none whatsoever is released to the domestic industry parties (except by agreement, which has never occurred).[74]

> *protective order,* would not adequately assure its interest in strict confidentiality. . . . The businessmen who possess such data are extremely reluctant to disclose it, since they are well aware that in the hands of a competitor the information could translate into an advantage in the marketplace. (emphasis added).

ITC's *Roquette Freres* Memorandum, *supra* at 7, 8.

72. Stein Interview II, *supra* note 50; *see* ITC's *American Spring Wire* Memorandum, *supra* note 69, at 14 ("if these non-interested parties could not be provided with strong assurances of non-disclosure in the absence of their consent to the release of the information, voluntary compliance would be virtually impossible"); ITC's *Roquette Freres* Memorandum, *supra* note 71, at 7 ("[t]he willingness of firms to submit such [sensitive] data rests to a large degree upon their confidence in the Commission's ability to maintain the confidentiality of their information.") E. William Fry of the Office of Investigations at the ITC stated further:

> 11. In my opinion, disclosure of confidential business information, even under protective order, would seriously hamper the Commission's ability to gather information through questionnaires. 12. Because of the sensitivity of the business information requested in questionnaires and the potential for harm to a firm's competitive position if it becomes public or falls into the hands of a competitor, businessmen will not supply such information unless they are confident that the information will remain secret. . . . 15. I believe that the knowledge that courts will permit counsel to review a firm's confidential business information will have an immediate and adverse effect on the willingness of questionnaire recipients to provide the Commission with data on their operations.

Affadavit of E. William Fry, Exhibit A of ITC's *Roquette Freres* Memorandum, *supra* note 71 at 2-3; *see also* Garfinkel, *supra* note 71, at 474 n.42.

73. Softwood Lumber from Canada, Inv. No. 701-TA-197, USITC Pub. No. 1320 (Preliminary, 1982); Telephone interview with Jack M. Simmons III, Attorney, U.S. International Trade Commission, in Washington, D.C. (November 5, 1984) [hereinafter cited as Simmons Telephone Interview].

74. Mason Telephone Interview, *supra* note 68; Simmons Telephone Interview, *supra* note 73. Neither Mason nor Simmons could recall any instance of such an agreement.

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Related Disclosure Procedures at the ITA and the CIT

As part of the larger environment in which ITC release of confidential information takes place, the disclosure practices at the International Trade Administration and the Court of International Trade are important to the present inquiry, and will now be briefly discussed.

The ITA

The International Trade Administration of the Department of Commerce plays a role parallel to that of the ITC in antidumping and countervailing duty cases. Like the ITC, the ITA gathers extensive confidential information. The data primarily concern the foreign producers' home market prices and cost of production, any subsidies to their exports, and adjustments that should be made for the purpose of comparing those figures to the prices at which the foreign products are sold in the United States.[75] Almost all confidential information comes to the ITA from foreign producers of the imported merchandise in question, or from U.S. importers whose interests are aligned with those foreign producers.[76] Even though they are often beyond the reach of process, those parties have a strong incentive to submit the confidential information requested: if they do not, the ITA under the 1979 Act may base its determination on the "best information available . . ., which may include information submitted in support of the petition."[77]

Section 777(c) of the 1979 Act provides for the release of confidential information, under protective order, by the ITA as well as by the ITC. The provisions regarding the two agencies differ in one critical respect: appeals to the Court of International Trade may be taken from ITA denials of requests for disclosure of confidential information regardless of the subject matter involved, whereas the

75. *See* 19 C.F.R. §§ 353.1, 353.9, 353.13-353.23, 353.36 (antidumping) (1985); 19 C.F.R. § 355.26 (countervailing duty) (1985).

76. Interview with Lynn J. Barden, Senior Counsel, International Trade Administration, U.S. Department of Commerce, in Washington, D.C. (April 11, 1983) [hereinafter cited as Barden Interview I]; interview with Lynn J. Barden, Senior Counsel, International Trade Administration, U.S. Department of Commerce, in Washington, D.C. (May 5, 1983) [hereinafter cited as Barden Interview II].

77. Trade Agreements Act of 1979, § 776(b), 19 U.S.C. § 1677e(b) (1982); 19 C.F.R. §§ 353.51, 355.39 (1985).

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ITC denials can be appealed to the CIT only if they involve domestic price or cost of production information.[78]

The ITA has imposed no express limits on the categories of information it will release under protective order. It routinely releases to domestic industry parties confidential information it has obtained from importers and foreign producers, most of which relates to price and foreign cost of production.[79] In the less common case where domestic industry parties submit confidential information to the ITA, that information will be released in a similar manner to the importer and foreign producer parties who request such access to it.[80] The ITA practice generally results in the great bulk of the confidential information submitted by parties, except for customer names and confidential verification documents, being available under protective order to counsel for all parties.

The CIT

The Court of International Trade (formerly the Customs Court) has exclusive jurisdiction to review ITC and ITA actions in Title VII antidumping and countervailing duty cases.[81] The 1979 Act provides for judicial review of several preliminary and interlocutory steps (including preliminary negative injury determinations) as well as of the final determinations in Title VII cases.[82] Section 777(c)(2) of the 1979 Act[83] expressly empowers the CIT to review denials by the ITC and the ITA of requests for disclosure of confidential information under protective order.[84] Moreover, the CIT has held that it has jurisdiction under a general provision[85] to review or enjoin the grant of such a request by the ITA (and presumably, therefore, by the ITC as well).[86]

Review in Title VII cases is based on the record made before the

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78. Trade Agreements Act of 1979, § 777(c)(2), 19 U.S.C. § 1677f(c)(2) (1982).

79. Barden Interview I, *supra* note 76; Barden Interview II, *supra* note 76.

80. Barden Interview I, *supra* note 76; Barden Interview II, *supra* note 76.

81. 28 U.S.C. 1581(c) (1982).

82. Trade Agreements Act of 1979, § 1001(a), amending Tariff Act of 1930, § 516A(a), 19 U.S.C. 1516a(a) (1982).

83. 19 U.S.C. § 1677f(c)(2) (1982).

84. 28 U.S.C. § 1581(f) (1982) (providing that such jurisdiction shall be exclusive).

85. 28 U.S.C. § 1581(i) (1982).

86. *Sacilor, Acieries et Laminoirs de Lorraine,* 542 F. Supp. at 1022.

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agency.[87] The ITC submits its record to the court in two packages—the public record and the confidential record; the latter is kept confidential until a judge of the court rules that parts of it should be released under protective order.[88]

The court has nine judges, who sit singly. The CIT judges have long heard many kinds of cases involving confidential business information. Pursuant to the CIT's Rule 26(c)[89], which is substantially identical to Rule 26(c) of the Federal Rules of Civil Procedure, the judges are well accustomed to disclosing confidential record material to parties under protective order.[90] For Title VII review cases, a specific provision of the 1979 Act empowers the court to disclose confidential material contained in the record for review "under such terms and conditions as it may order."[91] The decisions have evolved a broadly-worded test directing the judge to balance the needs of the litigants to use the information, the needs of the submitters to protect its confidentiality, and the needs of the

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87. Trade Agreements Act of 1979, § 1001(a), amending Tariff Act of 1930, § 516A, 19 U.S.C. § 1516a(b)(2)(A) (1982); 28 U.S.C. § 2640(b) (1982).

88. Interview with Joseph E. Lombardi, Clerk of the U.S. Court of International Trade, in New York, New York (May 9, 1983) [hereinafter cited as Lombardi Interview].

89. Court of International Trade Rule 26(c) provides:

> (c) **Protective Orders.** Upon its own initiative, or upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden, delay or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(3) apply to the award of expenses incurred in relation to the motion.

90. Lombardi Interview, *supra* note 88.

91. Trade Agreements Act of 1979, § 1001(a), amending Tariff Act of 1930, § 516A, 19 U.S.C. § 1516a(b)(2)(B) (1982).

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agencies to preserve their ability to obtain confidential information in future investigations.[92]

Judges of the CIT have fairly routinely granted access to parties' counsel, under protective order, to substantial parts of the confidential record in Title VII review proceedings.[93] Counsel often successfully assert that they cannot tell whether the agency's determination is supported by substantial evidence unless they can see the entire confidential record.[94] In several instances, over the objection of the ITC, the categories of information released have gone well beyond what the ITC has disclosed or would disclose under its much more restrictive protective order practice. Thus, domestic industry parties' information other than price and cost of production has been released under CIT protective order.[95] Importer/foreign producer parties' information has also been released.[96] It seems highly probable that information submitted by customers has been disclosed without their knowledge. It is uncertain whether information, submitted to the ITC by members of the domestic industry who chose not to support the petition, has been disclosed without their knowledge. In a recent case a domestic producer, who had taken no part in the agency proceeding and submitted information only when threatened with court action by the ITC, successfully opposed the release by the CIT of the information it had ultimately supplied to the ITC.[97]

Citing the possible chilling effect upon the submission of confidential information deemed essential for its injury determinations, the Commission has vigorously opposed CIT disclosure of confidential data submitted by non-parties, disclosure to corporate (in-house) counsel, and wholesale release of confidential record

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92. American Spring Wire Rope Corp. v. United States, 566 F. Supp. 1538, 1539-40 (Ct. Int'l Trade 1983).

93. Interview with James L. Watson and Herbert N. Maletz, Judges, U.S. Court of International Trade, in New York, New York (May 9, 1983) [hereinafter cited as Watson-Maletz Interview]; *see, e.g.*, Japan Exlan Co. v. United States, 1 Ct. Int'l Trade 286, 3 Int'l Trade Rep. Dec. (BNA) 1008 (1981).

94. *See* Nakajima All Co., Ltd. v. United States, 1 Ct. Int'l Trade 267, 3 Int'l Trade Rep. Dec. (BNA) 1453 (1981).

95. *See, e.g.*, Melamine Chemicals, Inc. v. United States, 1 Ct. Int'l Trade 65, 2 Int'l Trade Rep. Dec. (BNA) 1398 (1980); Connors Steel Co. v. United States, 85 Cust. Ct. 112, 2 Int'l Trade Rep. Dec. (BNA) 1129 (1980).

96. *See, e.g.*, *Nakajima All Co., Ltd.*, note 94.

97. *See Roquette Freres*, 554 F. Supp. at 1248.

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material beyond counsel's needs.[98] Generally, the Commission has been successful in maintaining these positions in the cases in which it has urged them.[99] But it has been unable to persuade CIT judges to limit the scope of their disclosures of material from the confidential record in the same restrictive way the Commission limits its own disclosures.

Some Considerations Affecting the Evaluation of ITC Disclosure Practices

The ITA and the CIT, both of which disclose broadly under protective orders, possess a luxury envied by the ITC: the assured availability of the information they need for decision. The ITA holds the powerful inducement of turning to the "best information available" (usually provided by the reluctant submitter's adversary) if the submitter does not submit, while the CIT has a record already made for it below.[100]

By contrast, the ITC wields a very limited practical ability to back its information requests with compulsory process. It must rely largely on "voluntary" compliance.[101] Many submitters are suspicious that their confidential information might be improperly or inadvertently leaked, either by Commission officers or by those to whom it was released under protective order.[102] Those who do not volunteer the information are persuaded and cajoled, more than

98. *See supra* notes 69 and 71.

99. Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (March 29, 1983) [hereinafter cited as Stein Interview IV]; Stein Interview I, *supra* note 26; *see, e.g.*, Roquette Freres, 554 F. Supp. at 1248 (request for disclosure of vital non-party information was denied). In the run-of-the-mill case, though, the ITC does not enter an objection to the release of non-party information. *See infra* text accompanying note 156.

100. 19 U.S.C. §§ 1673b(b)(1), 1677e, 1516a(b)(2) (1982).

101. Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (May 24, 1983) [hereinafter cited as Stein Interview V]; *see also* Affidavit by E. William Fry, Exhibit A of ITC's *Roquette Freres* Memorandum, *supra* note 71.

102. Berg Interview II, *supra* note 58. In its brief in United States Steel Corp. v. United States, the government stated: "[O]ur experience has been that businessmen are skeptical of protective orders in general, and refuse absolutely to submit information if they think that it will be disclosed to employees of their competitors, even if they are members of the bar [i.e., in-house counsel]." Brief for Appellees at 15, United States Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984).

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threatened, to yield up the needed data. The staff energies devoted to persuasion and cajolery are considerable, and supply a lubricant which is often essential to a successful investigation. So as not to aggravate the difficulties of obtaining needed information through voluntary submission, the Commission has maintained that it must confine its disclosures within narrow limits.[103]

After five years of experience under this narrow mode of disclosure, there are calls to re-examine the procedure. Elements among the trade bar, believing they can better represent their clients, are pressing for wider disclosure. So are elements within the ITC, for the different reason that they feel increasingly overburdened and are looking for help in analysis.[104] The ITC, of course, must weigh these putative benefits against the probability that broadened disclosure may deepen submitter reluctance, resulting not only in the devotion of greater staff energies to persuasion, but also a likelihood that more information would be held back.

There can be little doubt that section 777(c)[105] would supply authority for the Commission to release additional information under protective order if it decided to do so.[106] More debatable is whether disclosing more categories of confidential information—potentially up to the full confidential record of data submitted by all parties—would help the parties and the Commission,

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103. Following the enactment of the Trade Agreements Act of 1979, the ITC promulgated regulations which only permitted minimum disclosure as required by law. The ITC recognized that it might modify its rules to permit greater access to confidential information once it accummulated experience. 44 Fed. Reg. 76,458 and 76,458-59 (1979) (preamble). Referring to its prior practice of not releasing any information under protective orders in antidumping and countervailing duty cases, the Commission stated it "has found that practice to be very helpful in obtaining sensitive data quickly in order to fulfill its statutory mandate of determining within a short time whether there is injury to U.S. industries." *Id.* at 76,458.

104. Berg Interview II, *supra* note 58.

105. 19 U.S.C. § 1677f(c) (1982).

106. The ITC's discretion to reveal confidential information under protective order is expressly circumscribed only with regard to the source of the information to be disclosed. The court in dictum in *American Spring Wire Corp.*, 4 Ct. Int'l Trade 210, 4 Int'l Trade Rep. Dec. (BNA) 1308 (1982) stated, "Congress intended only information pertaining to the prices or the costs of production of the petitioner or interested parties supporting the petitioner be disclosed under protective order"; this correctly refers only to the power of the CIT to order the ITC to make information available under protective order, 19 U.S.C. § 1677f(c)(2) (1982), and not to the ITC's own authority to release information, 19 U.S.C. § 1677f(c)(1) (1982).

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through better-informed argument, more than it would hurt the parties and the Commission's processes through leaks to competitors, a chilling effect on the submission of confidential information, and bogging the investigation down in a sea of detailed rebuttals. It can also be debated, on the other hand, whether less information should be released than is now allowed, and whether more safeguards are desirable. One suggestion is that the provision requiring ITC disclosure of confidential information be repealed. A less drastic proposal is that one domestic producer's price and cost information should no longer be released to another domestic producer. Another thought is that the relatively modest utility of disclosure during the hurried preliminary investigation does not justify the risk, however small, that these sensitive sorts of information will fall into competitors' hands.

Evaluation of disclosure practices is complicated by several almost imponderable elements, the first of which is the unusual hybrid character of the ITC proceedings. Its essentially investigatory nature was modified by the 1979 Trade Agreements Act which, in addition to giving private counsel access to confidential information, replaced de novo judicial review with limited substantial evidence (or arbitrary-and-capricious) review by the CIT on the ITC-made record.[107] These developments have generated a sharp disagreement between those who still view the

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107. 19 U.S.C. 1516a(b) (1982), as *amended by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1001(a), 93 Stat. 144 (1979). Prior to the 1979 Trade Agreements Act, the ITC proceeding was investigative in the sense that the fact-gathering responsibility rested with the Commission itself, without sharply defining adversarial roles for the parties. To some extent the 1979 Act altered this arrangement. Parties to the investigation are permitted access to confidential information submitted by other parties, thereby enhancing the opportunity for attorneys to utilize this information in an adversarial mode. A further effect of the 1979 Act was to impel the ITC to make a record that would be the basis of judicial review. *See* Ehrenhaft, *What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act [Can] [Will] [Should] Mean for U.S. Trade Policy,* 11 LAW AND POL'Y INT'L BUS. 1361, 1396 (1979). The present procedure is perhaps a hybrid. It is, in one view, an "investigation with a record." Interview with Edward Easton, Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (Apr. 5, 1983) [hereinafter cited as Easton Interview III]. However, the proceedings are, as comments made to the Commission state, "in some senses adversarial." 47 Fed. Reg. 6,182 and 6,187 (1982) (preamble). A significant consequence of limited review is that parties are generally unable to adduce new evidence at the CIT, even though it is not until the CIT proceedings that attorneys will first see their opponent's submissions. 19 U.S.C. § 1516a(b) (1982).

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ITC proceeding as essentially an investigative, managerial process and those who conceive it to be an adversarial adjudicatory proceeding.

This disagreement in turn yields fundamentally different perceptions about the function and value of the disclosure of confidential information. Those viewing the proceeding as adjudicatory hold a broad view of the role of the parties' counsel, who need access to top confidential information in order to represent their clients adequately. Those holding the other view conceive that it is the Commission's job to gather the facts, primarily through its own investigations (often involving unrepresented nonparties), that the parties' lawyers' ability to assist such investigations is limited, and that the lawyers' contributions will not be enhanced appreciably by having access to confidential data when preparing their briefs.

Second, the central problems resulting from disclosure are hard to assess because of the obscurity of substantiating facts. It is impossible to assess scientifically the risk that confidential information will be leaked by those to whom it was released under protective order. Candid estimates of the prevalence or likelihood of leaks cannot be expected. Likewise the chilling of data submission, which the possibility of leakage creates, cannot be closely calculated. But possessors of information quite often acknowledge their unwillingness to submit it in an ITC proceeding, for fear that it will flow to competitors.[108]

Third, the statutory time limits—45 days to decision in the

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108. Stein Interview II, *supra* note 50; Stein Interview III, *supra* note 50; Berg Interview II, *supra* note 58; *see* ITC's *Roquette Freres* Memorandum, *supra* note 71 at 7-9, Exhibit B (Affidavit of Daniel W. Byles, Senior Staff Counsel, Merck & Co.) (disclosure of sensitive information to competitors even under protective order was resisted); Memorandum of ICI Opposing Disclosure of ICI's Confidential Data at 6-7, *Roquette Freres,* 554 F. Supp. 1246 [hereinafter cited as ICI Memorandum] (on file at the offices of *Law & Policy in International Business*); ITC's *American Spring Wire* Memorandum, *supra* note 69, at 14 ("If these non-interested parties could not be provided with strong assurances of non-disclosure in the absence of their consent to the release of the information, voluntary compliance would be virtually impossible."); Affidavit of Richard L. Enochs (Marketing Manager of ICI Americas Inc.) in Support of ICI Americas Inc.'s Motion for Leave to Intervene and in Opposition to Motion for Access to ICI's Confidential Documents of Record at 4-5, *Roquette Freres,* 554 F. Supp. 1246 ("[T]he principal reason ICI did not participate in any manner in either the ITC or ITA antidumping proceedings regarding sorbitol was that it was informed by the ITC that by not appearing, ICI's information would not be released under protective order by the ITC. . . . ICI repeatedly made it clear to the ITC staff that it did not wish to complete the questionnaire.").

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preliminary investigation and 120 days in the final[109]—exacerbate many of the difficulties discussed here. People at the Commission are inclined to believe that time constraints make it impractical to consider fully the requesters' need for confidential data, to fashion protective orders to the circumstances of each case, to utilize subpoenas to enforce questionnaires, and to compile aggregated data in time for counsel's use at preliminary conferences.[110] Time pressures permeate all the procedures for disclosure under protective order. The statutory time limits frustrate obvious remedies, and must condition any proposal for change.[111]

Finally, there is the need to balance multiple policy considerations in any practical recommendation. Some of these are: to facilitate accurate determinations, thereby shielding U.S. industry from unfair practices when relief is warranted, and maintaining the free flow of international trade when it is not; to facilitate fast and efficient determinations, within the brief time frames established by the 1979 Act for preliminary and final investigations; to assure a thorough gathering of data needed for such determinations, through the submissions of parties as well as through the Commission's investigative processes; to assure fair treatment by government of parties and nonparties whose confidential information is gathered, including fair notice of potentially injurious dispositions of such information; to accord opportunity to parties and nonparties to be represented effectively by counsel; to heed international understandings, developed after the GATT multilateral trade negotiations, concerning a right of access under protective order to confidential domestic price and cost of production information; and to cast recommendations in terms that will avoid the need to amend statutes. Some of these considerations cut against each other. For instance, although fairness may dictate that those asked to submit confidential data be warned that their data may be released to their competitors' counsel, such a warning may provoke submitters to refuse to comply or to submit incomplete information.

The ITC's Power to Limit Disclosure by Regulation

Before considering specific problems and proposals, it is useful to

109. *See supra* notes 24 and 34 and accompanying text.

110. Easton Interview III, *supra* note 107.

111. *See infra* notes 182-206 and accompanying text.

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observe that the ITC can probably impose limits and conditions upon disclosure by regulation. Section 777(c) calls for release in some situations and authorizes it in others.[112] Even regarding those categories as to which it may be understood to require disclosure—domestic price and cost of production information—the statute in no way suggests that such a requirement is absolute, requiring the CIT to compel the release of all price and cost of production in information, at all times and under all circumstances. To the contrary, the statute is properly construed to clothe the Commission with authority to establish reasonable and practical limitations upon the way it discharges its disclosure responsibilities. Section 777(c)(1)(B)[113] is express in its authorization to determine appropriate protective order requirements and sanctions. But beyond that, the statute should be understood to impart implicit authority to adopt reasonable rules and policies, regulating the circumstances of disclosure and conditions upon use of the confidential data, that will serve the overall objectives of the trade laws. Thus, where the risk of injury to parties and to the ITC's own information-gathering processes is especially acute, the Commission should be able to limit disclosure of price and cost of production information.

Such a construction is supported by common sense, by general administrative law,[114] by the statute generally empowering the ITC to promulgate regulations,[115] and by the permissive formulation of the general provision through which section 777(c) authorizes but does not require the Commission to make confidential information available under protective order.[116] This result is also borne out by the portion of the statute which, because it authorizes the CIT to order the ITC to disclose price and cost of production information, is thought to require the ITC to release such data upon proper request. The court may issue such an order "if [it] finds that, under

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112. 19 U.S.C. § 1677f (1982).

113. 19 U.S.C. § 1677f(c)(1)(B) (1982).

114. Such a regulation would probably be valid as a binding procedural rule or as a legislative rule with the force of law. *See* National Petroleum Refiners Ass'n v. F.T.C., 482 F.2d 672 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974), *discussed in* W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW—CASES AND COMMENTS 211-12 (7th ed. 1979); 2 K. C. DAVIS, ADMINISTRATIVE LAW TREATISE 36-57 (2d ed. 1979); *see also* Melamine Chemicals, Inc. v. United States, 732 F.2d 924, 928-30 (Fed. Cir. 1984).

115. 19 U.S.C. § 1335 (1982).

116. 19 U.S.C. § 1677f(c)(1) (1982).

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the standards applicable in proceedings of the court, such an order is warranted . . . ."[117] The CIT's standards, expressed in its well-established tripartite balancing test, require that account be taken of the Commission's needs to preserve its ability to obtain confidential information, and of the confidentiality needs of submitters, as well as of the needs of those requesting the information for use in litigation.[118]

Thus the ITC (assuming, at least, that it can accurately foretell the way the judges of the CIT will apply this test) seems to be entitled to frame its protective order and disclosure policies in terms that appropriately accommodate these considerations, even if that reduces the disclosure of price and cost of production information below the theoretical maximum.

THE VIRTUES OF DISCLOSING CONFIDENTIAL INFORMATION, AND PROPOSALS FOR EXPANSION

Disclosure enables counsel to offer better informed and more particularized rebuttals, analysis and argument. Counsel can often rebut or explain particular disclosed items of information. They can offer pointed economic analysis based upon information received under protective order as well as upon aggregates and other non-confidential data. Such information and analysis, and the argument that accompanies them, can be discernibly helpful to the ITC staff.[119] Especially when its manpower is stretched thin, the ITC staff can get some help from attorneys whose submissions are incrementally more useful where they have access to detailed confidential data under protective order than where they do not. The attorneys thus afford their clients more effective representation, and this in turn can enhance the parties' acceptance of the fairness of ITC proceedings, and their sense of meaningful participation in those proceedings.

The availability of composite figures—presented as aggregates, averages and ranges—can be helpful to counsel and, through counsel's submissions, to the Commission.[120] Such figures are

117. 19 U.S.C. § 1677f(c)(2) (1982).

118. American Spring Wire Corp. v. United States, 566 F. Supp. 1538, 1538-40; *Roquette Freres*, 554 F. Supp. at 1248 (court review pursuant to 19 U.S.C. § 1516a (1982)).

119. Berg Interview II, *supra* note 58.

120. Fry Interview, *supra* note 41.

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assembled in a staff report, which is made available to parties before the hearing in final investigations (though not in preliminaries).[121] These staff reports are usually nonconfidential.[122] They set forth not only price and cost of production data, but also aggregated data for all other categories gathered in the investigation. But, on critical issues like those of underselling or price suppression, such aggregates cannot do for counsel what access to individual company price data can[123] — for example, enabling them to explain the discount or credit terms accompanying particular price quotations, or to challenge the accuracy of particular quotations which staff can then check with the customer involved. Such submissions by counsel can add benefits for both clients and the Commission.

A considerable body of practitioner opinion holds that protective orders work well under the present system and that access to confidential data benefits the quality of client representation and agency decision, with little risk of leakage.[124] Some of these lawyers believe counsel ought to be given access to broader categories of data in the record collected by the ITC. Specifically, some urge disclosure of information submitted by importer and foreign producer parties;[125] others favor release of detailed kinds of information relating to price and cost production, submitted by domestic parties, which are not now released;[126] still others advocate the release of additional categories of domestic party information, beyond price and cost of production, to representatives of the importers and foreign producers.[127]

Some practitioners would go so far as to require that the entire confidential record — or at least as much as had been submitted by parties — be disclosable to all parties (perhaps with a few exceptions,

121. *See* 19 C.F.R. § 207.21 (1985).

122. *Id.*

123. Interview with Richard O. Cunningham, in Washington, D.C. (Oct. 24, 1984) [hereinafter cited as Cunningham Interview I]; interview with Herbert C. Shelley, in Washington, D.C. (Oct. 24, 1984) [hereinafter cited as Shelley Interview].

124. Easton Interview I, *supra* note 50.

125. Interview with Eugene L. Stewart, in Washington, D.C. (Apr. 29, 1983) [hereinafter cited as Stewart Interview]; Shelley Interview, *supra* note 123.

126. Interview with Edward M. Lebow, in Washington, D.C. (May 16, 1983) [hereinafter cited as Lebow Interview].

127. Interview with Richard O. Cunningham, in Washington, D.C. (May 27, 1983) [hereinafter cited as Cunningham Interview II]; Lebow Interview, *supra* note 126; Shelley Interview, *supra* note 123.

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such as customer names).[128] They assert that full disclosure is indispensible to the formulation of an adequate response to information in the record, and note that all the information may be released by the CIT if an appeal is taken. Because the proceeding at the CIT will be based upon the record established at the ITC, rebuttals and other apt submissions for that original record cannot be made on an informed basis without knowledge of the other information the Commission has before it; the opportunity to rebut may already have been lost when counsel sees the information for the first time at the CIT.

The ITC staff, on the other hand, has traditionally doubted that broadening the scope of disclosure would appreciably enhance the quality of analysis available to it. The Commission's basic investigative style does not rely very heavily upon the parties or their attorneys for necessary information or analysis.[129] The staff's established position has been that any benefit obtained from additional disclosure would be outweighed by its considerable chilling effect.[130] Recent internal deliberations at the ITC, however, indicate a willingness to consider proposals for broadening disclosure where counsel's input could thereby be made more useful.[131] All of these suggestions are discussed below.

RISKS RELATING TO DISCLOSURE UNDER PROTECTIVE ORDER: LEAKS AND CHILL

Risks of Leaks of Confidential Information

The confidential information regarding price and cost of production submitted to the ITC can be very sensitive. Revelation to a competitor could be highly damaging to the domestic producer who submitted such information. The damage would be compounded

128. Stewart Interview, *supra* note 125; interview with Paul Plaia, Jr., in Washington, D.C. (Apr. 21, 1983).

129. Fry Interview, *supra* note 41; Stein Interview III, *supra* note 50; Easton Interview I, *supra* note 50.

130. Fry Interview, *supra* note 41; Featherstone Interview, *supra* note 41; Stein Interview II, *supra* note 50; *see* Garfinkel, *supra* note 71, at 69 n.19.

131. Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (Sept. 28, 1984) [hereinafter cited as Stein Interview VI]; Berg Interview II, *supra* note 58.

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where the producer is already hard-pressed by competition. There can thus be considerable incentive to obtain confidential information, and pressure to pass it to persons not entitled to it for business use against the submitters.

It is impossible to determine the extent to which leaks may occur. It is very unlikely that they can be detected; obviously, the persons involved will not come forward, and there is no other ready method of discovery. Knowledgeable sources believe that some wrongful disclosure does occur, and this view must be given weight in view of the sensitive nature of the information, its importance to clients, and the virtual impossibility of detection.[132]

Leaks can occur through the carelessness or the unscrupulous conduct of an attorney.[133] Such risks are entailed in any protective order. Of equal concern is unintentional disclosure, occuring when the attorney inadvertently reveals the confidential information or relies upon it while giving advice on related aspects of the client's business. For example, if the attorney to whom price information was released in a Title VII case counseled the client regarding competitive pricing tactics, it would require a conscious and perhaps unnatural effort to avoid reference to the competitor's confidential price information.[134]

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132. Of the sixteen responses to the survey of practitioners undertaken in connection with this article, eight expressed little or no concern with leaks of confidential information. The other eight responses varied from the certainty that leaks occurred (three), to concern among clients, to gradations between these positions. Pasco Terminals, Inc. v. United States, 477 F. Supp. 201 (Cust. Ct. 1979), *aff'd,* 634 F.2d 610 (C.C.P.A. 1980), is cited as an instance where sanctions were employed by the Customs Court (now the CIT) for a breach of its protective order. *See* Garfinkel, *supra* note 71, at 491-92 (based upon an interview with a U.S. Department of Justice staff attorney, since no published order was available). No complaints or charges of leaks under Title VII were known to Edward Easton, or to Michael H. Stein, who point out that a leak may not be detectable even where there is extrinsic evidence of knowledge by the attorney's client. Easton Interview I, *supra* note 50; Stein Interview V, *supra* note 101.

133. One of the two incidents of leakage known to Edward Easton in connection with an ITC unfair competition proceeding under 19 U.S.C. § 337 occurred through the accidental use of the wrong envelope. Easton Interview I, *supra* note 50. Carelessness in segregating files and screening materials forwarded or made available to a client could lead to similar accidental disclosure.

134. In response to proposed revisions of the rules excluding in-house counsel from obtaining release of confidential information under protective order, the Commission received a number of comments emphasizing the danger of inadvertent leaks. Stating that "it is impossible to segregate information in the human mind," the Commission concluded that

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Such a concern underlies the way in which the Federal Circuit in *U.S. Steel Corp. v. United States* couched its opinion vacating the CIT decision which denied access to confidential information to in-house counsel.[135] Like the ITC, the CIT had decided to release no information to in-house counsel, on the reasonable assumption that they are more likely than retained counsel to be placed in situations where inadvertent disclosure can occur. While recognizing the danger, the Federal Circuit observed that similar dangers can exist with retained counsel who advise on a broad range of matters.[136] It therefore required the CIT to make a factual determination on a "counsel-by-counsel basis" of whether retained as well as in-house lawyers should be denied access to confidential information because, for example, they are involved in "competitive decision-making."[137] The issue of denying access to in-house counsel is receiving considerable attention elsewhere, and is not central to this report.[138] It is cited here as a vexing illustration of the possibility of inadvertent leakage.

"there is an opportunity for the inadvertent misuse of information—even if no misuse is intended. . . ." 47 Fed. Reg. 6,182 and 6,187 (1982) (preamble).

135. United States Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984).

136. *Id.* at 1468.

137. *Id.* The Court of Appeals for the Federal Circuit stated that the CIT's assumption of a greater likelihood of inadvertent disclosure by in-house attorneys could not be applied generally, but that each case must be considered separately, as to retained as well as to corporate attorneys. Application of this test could result in the denial of information to retained counsel who are closely involved in the affairs of the client; such counsel may under current practice receive confidential information.

Although the court carefully limited its decision to the specific proceeding before the CIT, expressly refraining from consideration of the ITC's practice under 19 C.F.R. § 207.7 (1985), the ITC probably will have to reconsider its practice of excluding all in-house counsel in light of this decision. *Id.* The court's rationale seems fully applicable to the ITC, except on the possible basis that the ITC has particular discretion in the exercise of its investigative powers.

138. *See* Arthurs, *House Counsel Clamor for Access to Foreign Data,* Legal Times, Jan. 9, 1984, at 2, col. 1; Arthurs, *House Counsel's Battle Over Data Not Finished,* Legal Times, Apr. 16, 1984, at 2, col. 1; Junker, *Protective Orders and Exclusion of Corporate Counsel from Access to Confidential Information,* 8 MD. J. INT'L LAW & TRADE 191 (1984); *see also,* Arthurs, *Court Curbs Document Access of Chrysler In-House Counsel,* Legal Times, July 9, 1984, at 4, col. 3 (discussing an order in Chrysler Corp. v. General Motors Corp., No. 84-115 (Del. D.C. June 28, 1984), by which in-house counsel with management duties were barred from access to confidential documents). Intense interest has been generated by this issue. Organizations of in-house counsel, including the American Corporate Counsel Association and Corporate Counsel, which retained former U.S. Attorney General Griffin Bell, submitted *amicus* briefs to the CIT in the *United States*

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An additional hazard may arise from the attorney's secondary disclosure to employees or consultants.[139] The statute does not identify those to whom confidential information may be released. The ITC's regulations permit direct release only to an attorney.[140] The

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Steel case (on file at the offices of *Law & Policy in International Business*). The position of Corporate Counsel was that a blanket rule prohibiting disclosure under protective order to corporate counsel impairs a corporation's right to choose its legal representation, and that corporate counsel are bound by the same obligations as all attorneys and should not be discriminated against.

139. The concern of petitioners regarding secondary disclosure of confidential information submitted in connection with the investigation is aptly summarized in the argument of Fairchild Aircraft Corp., resisting a provision of a proposed protective order that would have permitted disclosure to experts under the supervision of a competitor's attorney. Fairchild stated that it was:

> wary of allowing experts who at a later date may be hired by Embraer [the foreign competitor] as marketing, commercial, or financial consultants to examine the confidential data submitted by Fairchild to the Commission. Even though the experts may be prohibited from disclosing specific confidential information directly to Embraer, such information could be used to Fairchild's competitive disadvantage if these experts are subsequently retained by Embraer to provide advice on marketing strategies or other competitive aspects of the commuter airline business. In such a situation, release of confidential information to these experts would be virtually equivalent to release of the information to Embraer's management. (footnotes omitted).

Plaintiff's Opposition to Defendant-Intervenor's Motion for Release of Documents in the Administrative Record Previously Treated as Confidential and Cross-Motion for a Protective Order at 11-12, Fairchild Aircraft Corp. v. United States, 5 Ct. Int'l Trade 163, 4 Int'l Trade Rep. Dec. (BNA) 2075 (1983).

140. The request and protective order sections of the regulation at 19 C.F.R. § 207.7 provide:

> (a) Upon request of an attorney for an interested party to the investigation, excepting corporate counsel which (1) describes with particularity the information requested, (2) sets forth the reasons for the request, (3) demonstrates a substantial need for the information in the preparation of his case, and (4) demonstrates that he is unable without undue hardship to obtain the substantial equivalent of the information by other means, the Secretary will make available confidential information concerning the domestic price and cost of production of the like product submitted by the petitioner or by an interested party in support of the petitioner to such attorney under a protective order described in paragraph (b) of this section. Upon filing with the Secretary of an agreement among all interested parties to the proceeding requesting the release under protective order of confidential information submitted by such interested parties, other than domestic price and cost of production data, the Secretary may make such confidential information available to an attorney of such an interested party, excepting corporate counsel, under a protective order described in paragraph (b) of this section. The Secretary

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attorney, in turn, may disclose the confidential information to employees, other attorneys or consultants who supply a sworn statement that they will comply with the governing protective order.[141] The attorney charged with monitoring the recipients of secondary disclosures has the duty to assure that they do not pass the information further.[142]

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may adopt, from time to time, forms for submitting requests for disclosure pursuant to a protective order incorporating the terms of this rule. The Secretary shall determine whether the requirements for release of information under this rule have been satisfied. The Secretary's determination shall be final for purposes of review by the Customs Court under section 777(c)(2) of the Act.

(b) *Protective order.* The protective order under which information is made available to the attorney of an interested party shall require him to submit to the Secretary in a form prescribed by the Secretary a personal sworn statement that, in addition to such other conditions as the Secretary may require, he will: (1) Not divulge any of the information so obtained and not otherwise available to him, to any person other than (i) Personnel of the Commission concerned with the proceeding, (ii) The person or agency from whom the information was obtained, (iii) An attorney, excepting in-house counsel, employed on behalf of the party requesting the disclosure, and who has furnished a similar statement, or (iv) Those persons independently contracted with, or employed or supervised by, the attorney having a need thereof in connection with the proceeding and who have furnished a similar statement; (2) Use such information solely for the purposes of the Commission proceeding then in progress or for judicial or Commission review thereof; (3) Not consult with any person not described in paragraph (b)(1)(iii) or (iv) concerning such confidential information without first having received the written consent of the Secretary and the attorney of the party from whom such confidential information was obtained; (4) Not copy or otherwise reproduce any confidential material obtained under protective order except in accordance with procedures to be established by the Secretary; and (5) Report promptly to the Secretary any breach of the protective order.

19 C.F.R. § 207.7(a),(b) (1985).

The regulations also make provision for the final disposition of the material released under protective order. *Id.* § 207.7(c).

141. *Id.* § 207.7(b)(1)(iv). For the text of the regulation, *see supra* note 140. The regulation does not specify to whom the sworn statement is to be given. In practice, it is sent to the Secretary with a copy to submitters. For additional attorneys in the same firm, no approval is required. For outside attorneys and consultants, the Secretary's approval is required before they may come under the protective order; the submitter may object informally. No approval or sworn statement is required for clerical personnel employed by the attorney. Telephone interview with Pamela Cassidy, Office of General Counsel, U.S. International Trade Commission, in Washington, D.C. (Oct. 26, 1984); *see* U.S. International Trade Commission, Application for Protective Order for Release of Information under Title VII Cases, at 6 (on file at the offices of *Law & Policy in International Business*).

142. 19 C.F.R. § 207.7(d) (1985). The provision reads:

(d) *Sanctions for breach of protective order.* The sworn statement referred to

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The form of the protective order, though not individually formulated for each case, appears to be adequate.[143] The sanctions,

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> in paragraph (b) shall include an acknowledgement by the person providing it that breach thereof may, for up to seven years following publication of a determination that the order has been breached, subject to being barred from practice in any capacity before the Commission: (1) The person submitting the statement, and (2) Such person's partners, associates, employer, and employees. Any breach of a protective order may be referred to the United States Attorney. In the case of an attorney, accountant, or other professional, such breach may also be referred to the ethics panel of the appropriate professional association, and the offender and the party he represents shall be subject to such other administrative sanctions as the Commission determines to be appropriate, including striking from the record any information or briefs submitted by, or on behalf of, the party represented by the offender.

Id. See supra note 140 for text of paragraph (b) regarding the sworn statement. It is, however, uncertain whether sanctions can be imposed against an attorney for disclosures by members of the attorney's team. *See infra* notes 179-181 and accompanying text.

143. In order to facilitate the process, the application for a protective order is designed to become the actual order. Its operative language states:

> C. *Precautions*
>
> In order to avoid unauthorized disclosure of the confidential information requested, should it be released to me under protective order, I certify that the following procedures shall be followed: (1) no copies of any information shall be made without my prior express written approval; (2) each page of all copies shall be marked "business confidential"; (3) distribution of such copies shall accord with section D of this protective order; (4) any person to whom a copy is given pursuant to section D(1)(iv) of the protective order, excepting clerical personnel, shall sign and date a copy of this protective order reflecting his or her acceptance of the terms hereof, the signed original of which copy will be returned immediately to the Secretary; and (5) whenever any document subject to the protective order is not being used, it shall be stored in a locked file cabinet, vault, safe or other suitable container.
>
> D. *Use of Information*
>
> I hereby swear that I will— (1) Not disclose any of the information obtained hereunder to any person other than to: (i) personnel of the Commission who are involved in this proceeding; (ii) the person or responsible official of the agency from whom the information was obtained; (iii) an attorney, excepting in-house counsel, employed on behalf of the party requesting the disclosure who has furnished an appropriate protective order, identical to this; (iv) those attorneys in my firm who have need thereof in connection with the proceeding and who have each signed and returned to the Secretary a copy of this or an identical protective order, which has been accepted by the Secretary; (v) those persons independently contracted with me or my firm who have a need thereof in connection with the proceeding and who have each signed an identical protective order, which has

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though untested, also seem adequate.[144]

The Chill Factor: Effect of the Risk of Leaks Upon the ITC's Ability to Gather Information

While leaks harm the domestic producer, the chill which they may induce impairs the ITC's ability to do its job. In determining whether injury has occurred, the ITC must look to the entire U.S. industry involved and not just the petitioning party.[145] The industry is defined as "the domestic producers as a whole of a like product, or

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> been accepted by the Secretary; (2) Use such information solely for the purpose of this Commission proceeding or for judicial or Commission review thereof; (3) Not discuss with any person, other than a person described in paragraph (1), such information without having first received the written consent of the Secretary and the attorney for the party from whom the information was obtained; (4) Take adequate precautions as described above to ensure the security of the business confidential materials and the information contained therein subject to the protective order; (5) Promptly report any breach of the conditions of this protective order to the Secretary; and (6) Upon completion of this proceeding, or at such earlier time as the Secretary may designate, return or destroy all copies of materials released pursuant to this protective order and all other notes based on any such information received under this protective order, accompanied by my certification that all such copies and materials have been returned or destroyed.
>
> E. *Sanctions*
>
> I acknowledge that violation of this protective order— (1) May subject me, my firm of which I am a partner, associate, or employee, and my partners, associates, employer and employees, to disbarment from practice before the Commission following publication of a determination that the order has been breached; (2) May be referred to the United States Attorney; (3) May, if I am an attorney, accountant, or other professional, lead to referral of such breach to the ethics panel of appropriate professional associations; and (4) Shall subject me and the party I represent to such other administrative sanctions determined to be appropriate, including striking from the record any information or briefs submitted by, or on behalf of, the party I represent.

U.S. International Trade Commission, Application for Protective Order *supra* note 141, at 3-5.

144. *See* Garfinkel, *supra* note 71, at 490-92; *see also infra* notes 179-181 and accompanying text.

145. Trade Agreements Act of 1979, § 701, 19 U.S.C. §§ 1671, 1673, 1677 (4)(A) (1982). "[A]ll information that is 'accessible or may be obtained,' from whatever its source may be, must be reasonably sought by the Commission." Budd Co., Ry. Division v. United States, 507 F. Supp. 997, 1003-04 (Ct. Int'l Trade 1980).

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those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."[146] To determine whether there is cognizable injury, the ITC needs figures from all or most of the industry. If members of the industry are concerned about unauthorized disclosure of confidential information, they may be unwilling to file a petition initially, to join in a petition already filed, or to submit confidential data to the ITC. The Commission would thus find it difficult to get sound data for the industry as a whole.[147]

There is no precise way to gauge the impact of the perceived risks of leakage upon ITC data gathering. Submitters are unlikely to

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146. 19 U.S.C. § 1677(4)(C) (1982). An exception exists for regional industries, where an affirmative finding may be made "if the producers of all, or almost all, of the production within that [regional] market are being materially injured or threatened by material injury . . ." *Id.*

147. "The Commission must provide some reasonable assurance that this information will not be disclosed to competitors, if it is to have any hope of achieving adequate voluntary responses to the questionnaires. . . . Our concern that we will have insufficient information to allow us to make informed decisions has been the overriding determinant of the Commission's protective order policy." Brief of the U.S. International Trade Commission at 15, United States Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984) [hereinafter cited as ITC Brief] (on file at the offices of *Law & Policy in International Business*).

The chilling effect of judicial protective orders was considered in Martindell v. Int'l Tel. & Tel. Corp., 594 F.2d 291 (2nd Cir. 1979). A Department of Justice criminal investigation had been denied access by the trial court to transcripts of depositions taken in a private civil action. The transcripts had been made available to parties under a protective order. In affirming, Judge Mansfield stated that a FED. R. CIV. P. 26(c) protective order is intended to encourage full disclosure of all evidence conceivably relevant:

> Unless a valid Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining [the] procedural system. . . . In short, witnesses might be expected frequently to refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders.

Id. at 295-96. The test formulated by the court was that,

> absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need, none of which appear here, a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government, and that such an order should not be vacated or modified merely to accomodate the Government's desire to inspect protected testimony for possible use in a criminal investigation.

Id. at 296.

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declare with candor that they have failed to be candid. But those who were dissuaded from submitting information or supporting a petition will quite frequently be vocal about their fear of leaks, though there is no way to tabulate their criticisms.[148] In the informed opinion of some members of the bar, the ITC staff, and the single published commentator, however, it is widely believed that concern about unauthorized disclosure lessens the amount and reliability of information submitted to the ITC.[149]

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148. Berg Interview II, *supra* note 58.

149. Fry Interview, *supra* note 41; Stein Interview I, *supra* note 26; and Stein Interview II, *supra* note 50.

In its conclusions about the release of information to in-house counsel, the Commission acknowledged that a "chilling effect" may result. 47 Fed. Reg. 6,187-88 (1982).

In an affidavit submitted in connection with the ITC's *Roquette Freres* Memorandum, *supra* note 71 at Exhibit A, E. William Fry, Director of the ITC's Office of Investigations, stated that release under protective order "would seriously hamper the Commission's ability to gather information." *See* ICI Memorandum, *supra* note 108 at 6-8 (questioning the reliability of legal support staffs, temporary secretaries, and the use of hypothetical questions by lawyers to clients on explanations without mention of precise figures; "[a] lawyer advising his client at a later date is likely to base his advise on the confidential information, thus giving the client the benefit of it without literally disclosing it." *Id.* at 7); ITC's *Roquette Freres* Memorandum, *supra* note 71 at 6-7 ("Disclosure of confidential information in the record unquestionably has an adverse and chilling effect upon the ITC's ability to gather information necessary for an informed determination of the health of the domestic industry."); remarks of Michael H. Stein, General Counsel, U.S. International Trade Commission, 92 F.R.D. 183, 350 (1981) (as to the impact of disclosure of confidential information upon questionnaire respondents, "[a]ll I can say is I spend a lot of time on the telephone explaining the protections that we give to this information to nervous questionnaire recipients.").

See also Garfinkel, *supra* note 71 at 492. Notwithstanding the Commission's bland explanation that it was limiting disclosure until it accumulated experience, the author quotes General Counsel Michael H. Stein as stating "that the ITC's real concern is maintaining its ability to conduct investigations." *Id.* at 474.

Actions of the ITC underscore its assumption that there is a chill—sometimes it refrains from asking questions which elicit sensitive information to avoid non-cooperation arising from fear of unauthorized disclosure. Stein Interview I, *supra* note 26; Stein Interview II, *supra* note 50. The ITC will on occasion urge domestic producers not to become parties to an investigation even though a negative inference might be drawn from their non-participation. *See, e.g.,* Affidavit of Richard L. Enochs In Support of ICI Memorandum, *supra* note 101 at 4-5, Roquette Freres v. United States, 554 F. Supp. 1246; the ITC refused to release information to in-house counsel because it recognized that a chill would result from such disclosure, 47 Fed. Reg. 6,187 (1982), 44 Fed. Reg. 76,458 (1979), even though it recognized that the same problem of inadvertent disclosure may exist with regard to retained counsel who provide business advice, 46 Fed. Reg. 28,674 (1981).

In an analogous situation, the commodity futures trading industry was concerned over

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Several factors bolster this assessment's accuracy. Obviously, the high potential for damage from the release of sensitive information is likely to dispose domestic producers against seeking relief or cooperating with an investigation. The chill touches nonparties as well as parties. Even though the ITC assiduously protects nonparty information, nonparties often act upon the belief that their best interests lie in noncooperation. Nonparty withholding of information can stymie the ITC's efforts to round out a picture of the entire industry. Yet, because it has little practical ability within the statutory time limits to compel disclosure by subpoena, the Commission is highly dependent on the submitters' voluntary cooperation.[150] The chilling effect may be magnified by the fact that nonparty data, though carefully kept confidential by the ITC, are frequently released during appeals under CIT protective orders.[151]

Chill can induce a more subtle form of noncooperation, difficult to detect. Apart from a reluctance to file a petition, to join as a party, or to answer a questionnaire, there can be disingenuous responses.[152] It would be relatively easy for a suspicious producer, concerned that his business information might be leaked, to craft his submission in a manner that makes the data meaningless, inaccurate, or useless.

One further, almost ironic, effect of submitters' concerns about leaks may be a chilling inhibition upon the Commission itself.

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potential improper use of confidential information submitted to the Commodity Futures Trading Commission and lobbied Congress to exempt such information from disclosure. Congress responded with an amendment, 7 U.S.C. § 12(f) (1983), providing increased notice and opportunity for submitters to protect their interests. Letter from Kenneth M. Raisler, General Counsel, Commodities Futures Trading Commission, to Jeffrey S. Lubbers (July 18, 1983).

Of the ten attorneys who responded to the question in the survey undertaken in connection with this article, only three practitioners stated categorically that they perceived no chill. One of the three admitted to very limited experience in dealing with clients. Four respondents believed that there was chill. Two responses indicated that chill was a factor which on occasion inhibited a client's willingness to submit complete information. In one instance, the attorney stated that he convinces clients that they need have no concern.

150. Stein Interview II, *supra* note 50. "[T]he fact is that the Commission has no hope of enforcing responses to more than the tiniest fraction of its questionnaires." ITC Brief, *supra* note 147, at 16.

151. *See supra* notes 93-97 and accompanying text and *infra* notes 154-158 and accompanying text.

152. Stein Interview III, *supra* note 50; Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (May 29, 1983) [hereinafter cited as Stein Interview VII].

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There is reason to believe that its investigators refrain from asking for especially sensitive information, lest submitters feel especially threatened by its release, and withhold cooperation in the future.[153]

As these observations indicate, the success of the ITC's investigations depends upon industry cooperation and, in turn, upon the reputation of its own protective orders for safeguarding confidentiality. As serious as direct damage from leaks may be in individual cases, their chilling effect probably poses an even greater threat to the public interest. It weakens the Commission's reputation for safeguarding confidentiality, and thus undermines the ITC's ability to get information that it must have to carry out its responsibilities.

CIT Disclosure of Confidential Information Originally Submitted by Parties and Nonparties to the ITC

Despite the care the ITC gives to confidential information submitted by nonparties, all such information may be disclosed by the CIT if the ITC decision is appealed. The ITC, of course, limits its disclosure to price and cost of production data submitted by domestic parties who support the petition. However, in its protective order practice the CIT is prepared to release virtually all of the confidential information in the record before it, which had originally been submitted to the ITC.[154] The court typically orders this broad disclosure in response to counsel's contention that he or she must see the full record in order to frame arguments as to whether it contains substantial evidence sufficient to support the ITC's findings.[155]

Broad disclosure by the CIT magnifies the risk of unauthorized disclosure, amplifies the chill factor, and compounds the problem of inadequate warning to submitters of possible disclosures.

Because the record made at the ITC usually contains confidential information submitted by nonparties, appellants will quite naturally urge the CIT to disclose such information along with that originating from parties. The statute does not appear to authorize

153. Stein Interview I, *supra* note 26; interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (March 23, 1983) [hereinafter cited as Stein Interview VIII].

154. Only the most sensitive data available to the ITC, such as customer names, have consistently escaped disclosure by the CIT. Berg Interview II, *supra* note 58.

155. Judge Maletz, Watson-Maletz Interview, *supra* note 93; Lombardi Interview, *supra* note 88.

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release of nonparty information by the ITC, and the Commission has never released any nonparty information under it.[156] So far, the ITC has succeeded in its selective case-by-case efforts to persuade the CIT to deny disclosure of nonparty data in particular circumstances.[157] Whether this pattern will prevail, though, is problematic.

Nonparty disclosure would be unfair to those who chose not to take part in the proceeding, and surely would heighten the resistance of nonparties to the Commission's inquiries and questionnaires. Neither the ITC's questionnaires nor its regulations warn nonparties of the possibility that the CIT will disclose the information they submit.

Nonparties experience an additional fairness problem. The CIT has no mechanism or requirement to afford the nonparty notice of a request for disclosure of its information.[158] There is no apparent reason for the court's failure to assure that nonparties get such notice and be given an opportunity to protest the requested disclosure of their data.

PROPOSALS TO REDUCE THE RISKS OF DISCLOSURE

Without information from substantially all domestic producers, the ITC cannot determine whether the domestic industry is injured by dumped or subsidized imports. To assure the flow of needed information, potential submitters' apprehensions should be alleviated by reducing opportunities for unauthorized disclosure of their data, as will now be discussed. Cooperation should also be induced, to the extent feasible, through the use and enforcement of subpoenas, as discussed in a later section of this article.

Much can be said for a return to the ITC's pre-1980 practice, under which no disclosure of confidential information occurred.[159] Resuming this practice would remove the danger of leaks and their

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156. Stein Interview V, *supra* note 101.

157. Berg Interview II, *supra* note 58. This success may be largely attributed to the careful choice of cases by the ITC staff. In many cases, the ITC does not object to the disclosure of non-party information, often resulting in the release of non-party confidential data. In some instances, however, the ITC tries to warn parties by telephone that the disclosure of data has been requested in a CIT proceeding. *Id.; see, e.g.*, Roquette Freres, 554 F. Supp. 1246.

158. Judge Watson, Watson-Maletz Interview, *supra* note 93.

159. *See supra* note 51 and accompanying text.

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chilling effect, safeguard the rights of submitters and ease the burdens on the ITC. In the opinion of some observers, little would be lost: Since access to confidential data has not materially improved counsel's capacities to represent clients or contribute to the ITC decisional process, the protective order process serves no end other than to mollify our international trading partners.[160] But any attempt to repeal the disclosure provisions of the 1979 Act would encounter strong opposition. Foreign governments and producers, importers, segments of the trade bar, and perhaps elements of the United States government could be expected to voice powerful support for the existing statute.

And apart from these political concerns, limited disclosure has its benefits.[161] Participation by counsel provides the ITC a wholesome balance and different perspective, and access to disclosed data enhances their participation. It also gives parties—at least those whose counsel are eligible to receive released information—a perception that they are able to argue their cases on a substantial factual basis. In view of these considerations, it is neither desirable nor worthwhile to attempt a repeal of the statutory requirements under which price and cost of production information are released.

Because of the potential effects of unauthorized disclosure and fear of leakage, however, every reasonable step should be taken to reinforce the security of the system of disclosure. Protection of the data should be a predominant consideration in revising the policies that determine what information should be released under protective order, and the circumstances and conditions of such release.

The chances of unauthorized disclosure, and the attendant chilling effect, can be reduced by a) decreasing the categories of information released, b) limiting the persons to whom release is made, c) diminishing the duration of release, d) tightening the mechanics of disclosure, and e) amending the practice of the CIT. Each of these will be considered in turn.

Restricting the Categories of Information Released

The language of Section 777(c) does not expressly require the Commission to disclose any information.[162] However, a refusal by

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160. Stein Interview III, *supra* note 50; Easton Interview II, *supra* note 50.

161. *See supra* notes 119-131 and accompanying text.

162. *See supra* note 52.

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the Commission to disclose information "concerning the domestic price or cost of production," submitted by an interested party supporting the petition, would be subject to review by the Court of International Trade, which may direct disclosure.[163]

The ITC's decision to release no information, beyond those categories where disclosure can be compelled, certainly limits the risks of leakage and chill, and simplifies the work of the Commission. It may be asked whether the categories should be further restricted.

Price information is frequently the critical element in the determination of injury. If no price information were released, it is difficult to conceive how there could be effective participation of counsel as contemplated by the 1979 Act. There is, however, some room for disagreement as to what constitutes disclosable price information.[164] The ITC takes a narrow view, which is effective for purposes of risk reduction. It would be strengthened by adoption of a regulation defining the price information that can be released, to forestall judicial imposition of a broader or unexpected definition.

What constitutes cost of production is somewhat unclear.[165] Accountants are uncomfortable with the category.[166] It allocates joint costs and overhead in ways that distinguish it only marginally from the cost of goods sold.[167] Pure cost of production information is gathered in few instances. Occasionally, domestic producers' cost

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163. 19 U.S.C. § 1677f(c)(2) (1982).

164. Often the investigation will reveal that price lists have been published. Mason Interview, *supra* note 47. In such a situation, the list, though not confidential, may not reflect the actual prices at which goods are sold. Prices can be distinguished as wholesale prices or discounted prices and can either include or exclude shipping, handling and other expenses. According to Michael H. Stein, there have been several substantial disagreements between the ITC and attorneys representing parties to the investigation over the meaning of "price." Stein Interview II, *supra* note 50.

165. Section 1336 of 19 U.S.C. empowers the Commission to investigate differences in cost of production of domestic and foreign articles and to recommend compensating duties. But section 1352 of 19 U.S.C. provides that section 1336 does not apply to any article with respect to which the United States has entered into an agreement under the Reciprocal Trade Agreements Act of 1934 and its successors. Since almost all imports are covered by such trade agreements, section 1336 has virtually no application.

166. Mason Interview, *supra* note 47.

167. Easton Interview II, *supra* note 50. A pair of cases are now pending in the CIT in which this distinction is at issue. Societe Nationale des Poudres et Explosifs v. United States, No. 83-7-01075 (Ct. Int'l Trade, filed July 21, 1983) and No. 83-9-01325 (Ct. Int'l Trade, filed Sept. 9, 1983).

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of production information appears in the petition to demonstrate that the foreign producers must be selling below cost. In other situations, as where products are assembled from components imported from other countries, cost of production figures may assist in determining which producers are domestic producers.[168]

Since experience is negligible, the usefulness of counsel's access to cost of production information is hard to assess. Where the information is submitted, however, absolute nondisclosure would emasculate the statute and be unacceptable. Since the information is seldom sought by the Commission and the category is narrowly construed,[169] it again would be useful to establish an explicit definition of disclosable cost of production information, with careful attention to its role in the inquiry.

Limiting the Persons to Whom Disclosure is Made

An obvious approach to reducing the risks of disclosure is to narrow the classes eligible to receive confidential information under protective order. Two classes must be considered: the parties or entities for whose benefit the information is released, and the individual representatives of those entities to whom the information is actually given.

Disclosure to competing domestic producers

The United States accepted some risk of wrongful disclosure during the GATT negotiations when it explained to foreign trading partners that the implementing statute would temper broad disclosure at ITA with disclosure at the ITC of at least domestic price and cost information.[170] To that extent, the risk is a necessary evil. Where disclosure exceeds that required by the statute, however, the added risk may be thought unnecessary and therefore

168. Easton Interview II, *supra* note 50. In Fresh Cut Roses from Columbia, Inv. No. 731-TA-148, USITC Pub. No. 1575 (Sept.1984), the actual cost of production figures were used where there was no inventory and, consequently, no difference from the cost of goods sold.

169. *See* 44 Fed. Reg. 76,461-62 (1979); Easton Interview II, *supra* note 50; Mason Interview, *supra* note 47.

170. *See* Remarks by Michael H. Stein, General Counsel, U.S. International Trade Commission to the Eighth Judicial Conference of the U.S. Court of Customs and Patent Appeals, 92 F.R.D. 181, 348 (1981).

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undesirable. The statute's policies mandate the disclosure of domestic producers' data to foreign producers (and importers). But ITC release of confidential data of individual domestic producer submitters to other parties who are also domestic producers may present an example of unnecessarily enlarging the risk.

The disclosure of company-identifiable information submitted by those domestic producers who support the petition, to counsel for other domestic parties (who need not support the petition), is rarely requested.[171] To the extent it occurs, it appears to generate more-than-usual risks of leakage, without any particular benefits. Domestic producers are often more intensely competitive for the domestic market with each other than they are with foreign producers. Accordingly their counsel's incentive to pass along information would seem to be at least as strong as that to which counsel for foreign producers are subject. Their need to have their domestic competitors' information for litigation may be quite different, however. Without domestic producer information, a foreign producer's counsel might well be unable to make a meaningful contribution to the injury determination. But, although individual cases vary, there seems to be little that counsel for one domestic producer can add to the ITC's fund of analysis, based upon his possession of domestic competitors' figures, beyond what he could have argued based only on his own client's information and available aggregates. Any such incremental benefit does not justify the added risk that American producer submitters will be damaged through unauthorized disclosure.[172]

To discontinue the domestic competitors' eligibility would harm neither the intent of the statute nor the operations of the ITC. It would also end an egregious unfairness: a domestic producer who becomes a party to the investigation, but who does not support the petition, can see (through counsel) the data submitted by its domestic competitors (petitioners and supporters of the petition), while enjoying immunity from disclosure of its own confidential data (because it is not "a party in support of the petitioner"). The

171. Stein Interview VI, *supra* note 131; Berg Interview II, *supra* note 58.

172. Cunningham Interview II, *supra* note 127; Shelley Interview, *supra* note 123. Counsel for domestic producers often agree to submit their clients' individual information to a trade association or other central dataholder which will aggregate the information for use by all domestic producer parties in a way that does not reveal individual company figures.

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free rider may be more interested in access to information than in the case itself.

Interested Parties to the Investigation

The Trade Agreements Act of 1979 does not expressly indicate to whom confidential information may be disclosed. The confidential information which section 777(c)(1) authorizes to be released, however, is that "submitted by any *other party to the investigation*;"[173] the inference is strong that disclosure is authorized to be made only to a party. By terms of the statute the Commission may be *compelled* to make disclosure only to members of an even narrower class: "an interested party who is a party to the investigation in connection with which the information was obtained or developed," and the regulations condense this phrase to "an interested party to the investigation."[174] This formulation represents a combination of the separate status of "party" and "interested party." To appreciate its limitations, one must give patient attention to several terms.

Departing from its tendency to define narrowly, the ITC in a rulemaking defined "party" (a term not addressed in the Trade Agreements Act) in a way that permits entities which are not "interested parties" to play an active role in Title VII investigations.[175] To be accorded such status, the would-be party must show sufficient interest and state its intent to file a brief. A major supplier of a domestic producer, for example, could thus qualify as a party even though it is not an interested party.

Although the statute identifies interested parties, it does not explain their status.[176] An "interested party" is not ipso facto a "par-

173. 19 U.S.C. § 1677f(c)(1)(a) (1982).

174. 19 U.S.C. § 1677f(c)(2) (1982); 19 C.F.R. § 207.7(a) (1985).

175. 47 Fed. Reg. 6,182-83 (1982). 19 C.F.R. § 201.2(h) (1985) provides that, for purposes of Title VII investigations, a party is "any person who has filed a complaint or petition on the basis of which an investigation has been instituted, or any person whose entry of appearance has been accepted."

176. Section 1677(9) provides that an "interested party" is:

> (A) a foreign manufacturer, producer, or exporter, or the United States importer, of merchandise which is the subject of an investigation under this subtitle or a trade or business association a majority of the members of which are importers of such merchandise, (B) the government of a country in which such merchandise is produced or manufactured, (C) a manufacturer, producer, or

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ty to the investigation" under ITC terminology. What an interested party must do to become a party to the investigation, and thus become eligible to receive disclosure, is not clear from the statute. By regulation, the Commission has provided that an interested party must file an entry of appearance which includes a statement of "the person's intent to file briefs with the Commission regarding the subject matter of the investigation;" the associated preamble purported to require active participation, but the language of the regulation itself is ambiguous.[177] If a mere statement of intent to file a brief suffices, an interested party can receive disclosure of its competitors' confidential information, even though it may never actually file a brief or otherwise actively participate. Since disclosure is mainly intended to permit use of the information in brief preparation,[178] disclosures which do not come to fruition in briefs probably entail greater-than-usual risks of unauthorized use. A remedy is to condition disclosure upon a stronger commitment to active participation than is now demanded for party-to-the-investigation status, and to discipline the observance of the commitment.

Individual Representatives

In the face of statutory silence as to which individual representatives may receive disclosure of confidential information on behalf of an eligible party, the rules take a straightforward approach: disclosure may be made only to "an attorney for an interested party to the investigation."[179] Other lawyers, and other professionals, such as accountants and economists whose analysis of the disclosed

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> wholesaler in the United States of a like product, (D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a like product, and (E) a trade or business association, a majority of whose members manufacture, produce, or wholesale a like product in the United States.

19 U.S.C. § 1677(9) (1982).

177. 19 C.F.R. § 201.11 (1985). In so defining "party," the Commission expressed its hope that "only those persons who have a direct interest in the investigation will become parties." 47 Fed. Reg. 6,182-83 (1982).

178. Confidential information may not be directly referred to in oral argument, even though knowledge of it will certainly shape arguments. The principal use of confidential information is in the preparation of briefs.

179. 19 C.F.R. § 207.7(a) (1985).

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information might assist the attorney, may gain access indirectly through the attorney if they have need for the information and swear to uphold confidentiality.[180] Oddly enough, the regulations do not expressly provide that the attorney is liable for a breach by another person to whom he or she has properly revealed information, even though the Commission probably intended such a result.[181] This omission weakens the incentive for attorneys to instruct secondary recipients carefully and to monitor them closely. Indirect disclosure poses compounded dangers of unauthorized use or disclosure, especially where the experts or associated attorneys advise the same client on related matters. Since the ITC must rely upon the attorneys to whom release is directly given, those attorneys should be personally accountable for violations by clerical personnel, experts and other lawyers associated with them.

Diminishing the Duration of Disclosure

Return of Confidential Materials After the Preliminary Investigation

Before an ITC final investigation may commence, there must exist not only an ITC preliminary finding of injury, but also an affirmative ITA determination (preliminary or final) that subsidization or dumping has occurred.[182] Thus there can be substantial gaps of time between conclusion of the preliminary and commencement of the final ITC investigations, and it is quite possible that there will be no final investigation at all.[183]

180. 19 C.F.R. § 207.7(b)(1)(iv) (1985).

181. In adopting the present provisions, the Commission justified disclosure to nonlegal professionals not only on the grounds that the professional will be bound, but also that "the attorney will also be responsible for any breach by the professionals working for him." 44 Fed. Reg. 78,458 (1979).

182. *See supra* notes 30-33 and accompanying text.

183. 19 U.S.C. §§ 1671b and 1673b (1982) provide that the preliminary determination by the ITC precedes that of the ITA. Forty-five days are allotted to the ITC preliminary investigation. A substantial period then follows for completion of a preliminary investigation by the ITA: forty days in a countervailing duty investigation, 19 U.S.C. § 1671b(b) (1982), and 115 days in an antidumping investigation, 19 U.S.C. § 1673b(b)(1) (1982). If the preliminary investigation by the ITA is negative, the ITC must wait for a final ITA determination before beginning its own final investigation, for which seventy-five days are then available. 19 U.S.C. §§ 1673d(b)(3), 1671d(b)(3) (1982). If both ITA investigations are negative, there is no final investigation by the ITC. 19 U.S.C. §§ 1671b(a), 1673b(a) (1982).

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During such dormant periods, the disclosed confidential materials ordinarily remain in the possession of the counsel to whom they were released during the preliminary proceedings. Since there are no formal ITC proceedings and no role for parties' counsel during such interims, little purpose is served beyond the convenience of counsel and avoidance of minor administrative burden. But the opportunities for unauthorized disclosure continue and even arguably increase during this period. This increment of risk could be eliminated by requiring counsel to return all confidential materials at the conclusion of the preliminary stage, to be reclaimed if and when a final investigation is undertaken.[184]

Limiting Disclosure to the Final Investigation

In partial response to concerns of importers and foreign producers that the mechanisms of the law might be invoked solely to impede imports during the lengthy predecisional proceedings, the 1979 Trade Agreements Act provides for a quick preliminary determination by the ITC of whether there is a "reasonable indication" of the existence or threat of material injury.[185] The forty-five day time limit, of course, constrains the conduct of the investigation and influences the methods used. The statute, however, does not address the extent or scope of this preliminary proceeding. The CIT has recently held that Congress intended a rather summary proceeding, based upon the petition and readily available information, by which an affirmative determination would be rendered upon a reasonable prima facie showing.[186] There would not be a full scale investigation at this stage; there would be no substantial role for the parties and their counsel to play. If the ITC had followed this approach, little confidential information would be gathered and even less released.

As the Commission has taken up its task, however, the preliminary investigation has become a far more intensive and

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184. The regulations appear to permit the Secretary to require the return of released information. 19 C.F.R. § 207.7(c) (1985).

185. *See* 19 U.S.C. §§ 1671b(a), 1673b(a) (1982) (requiring the Commission to determine the existence of a reasonable indication of injury within forty-five days after the date of filing the petition).

186. Republic Steel Corp. v. United States, 591 F. Supp. 640 (Ct. Int'l Trade 1984). Judge Watson, in reviewing the statutory language and the legislative history, concluded that the preliminary determination involves "an extremely low threshold for finding a reasonable indication of injury." *Id.* at 646.

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adversarial proceeding than was apparently intended.[187] As a result, a large volume of confidential information is generated during the preliminary stage. Counsel have of course sought and received access to such information, so far as it is submitted by parties supporting the petition and concerns price or cost of production. Because of time pressures, however, it is questionable how far counsel's access to such information can make a real difference in the preliminary proceedings. Often the ITC receives the information and releases it to counsel so late that counsel cannot use it in the conference[188] (which is held between the twenty-first and twenty-fifth days) or in briefs.

The value of such disclosures should be reconsidered. The statute does not expressly require disclosure during the preliminary stage. Indeed, the statute probably gives the ITC adequate implied authority, in implementing the disclosure provisions, to impose reasonable restrictions upon release of information during the preliminary stage, just as it reasonably limits disclosure by establishing strict terms for protective orders and requiring a showing of need.[189] Without altering the active mode of the preliminary investigation, it would seem desirable to eliminate entirely the release of confidential information at the preliminary stage. In view of the risks avoided and advantages gained, such a restriction ought to be deemed reasonable. In addition to lessening the prospects of leak and chill, such a step would lessen time pressures on the ITC staff, yielding fuller opportunity to pursue information, and perhaps enabling earlier preparation of the staff report summarizing the data gathered. If the staff report could be completed just a few days earlier than is usual, counsel could use it at least in post-conference briefs. Even if the figures were aggregated and sanitized to preserve confidentiality, the staff report, summarizing all factual aspects of the investigation, is likely to offer counsel more valuable data for use in argument than the fragments of price and cost of

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187. Easton Interview II, *supra* note 50; *see also* Statement of Alfred Eckes, Chairman, U.S. International Trade Commission, Testimony to Committee on Ways and Means, U.S. House of Representatives (Mar. 16, 1983) (justifying a thorough investigation, which has in practice significantly reduced the number of examinations which reach the final investigation stage) (on file at the offices of *Law & Policy in International Business*).

188. *See supra* notes 26-29 and accompanying text.

189. *See supra* text accompanying notes 112-118.

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production data now available under protective order during the preliminary stage.[190]

Tightening the Mechanics of Disclosure

Inadequate Opportunity to Protest Disclosure

The submitter receives notice that disclosure of his information has been requested, because the request for release must be served on all parties.[191] The Secretary ordinarily acts upon the request within ten business days, but is not restricted from acting more quickly.[192] As in the case where service upon the Secretary is by hand delivery and upon the parties is by mail, the Secretary might occasionally act before the affected party has time to object to the request.[193] The ITC does nothing to inform the submitter—directly or even by the regulations—of what he can do to object.[194]

In practice a submitter may informally protest to the Secretary.[195] But there is no published procedure for presenting objections, or for withholding grant of the disclosure order until objections are received and considered.

The Commission should establish by regulation an informal pro-

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190. One leading practitioner, who favors elimination of release of confidential data under protective order during the preliminary stage, would retain the discipline afforded by allowing importer's counsel access to the petitioner's own price information. Cunningham Interview I, *supra* note 112; interview with Richard O. Cunningham, in Washington, D.C. (June 2, 1983).

191. 19 C.F.R. § 201.16(b) (1985).

192. *See* 19 C.F.R. § 201.6 (1985) (permitting an appeal if a request for confidential treatment of a submission is not approved or denied within ten working days). The Secretary has created an analogous internal rule calling for action upon a protective order application within ten days. Mason Interview, *supra* note 42. Usually the Secretary will wait until approximately the seventh day to afford the submitter an opportunity to make an informal objection. *Id.* This approach, of course, assumes that the submitter has prompt notice of the application and is aware of the unpublished procedure for making informal objections.

193. The Commission rejected an alternative to 19 C.F.R. § 207 which included a "reasonably short" waiting period (from the date of service of a request for release) for the purpose of receiving objections. 47 Fed. Reg. 6,188 (1982) (preamble to final rules) (quoting from a comment submitted by the U.S. Department of Justice).

194. Whether the opportunity to object can be of much value to the submitter is problematic. Apparently, few if any protective orders have been denied on grounds advanced solely by objecting parties. *See* Berg Interview II, *supra* note 58.

195. Mason Interview, *supra* note 47.

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cedure under which the submitter may object to disclosure of its confidential information under protective order, except in cases of extraordinary urgency. The regulations should also provide that, when the submitter is given notice of an application for disclosure of its information, it be advised of the objection procedures.

The Requester's Need for the Information

The regulations require an attorney requesting disclosure of confidential information to demonstrate "a substantial need for the information in the preparation of his case," and "that he is unable without undue hardship to obtain the substantial equivalent of the information by other means."[196] The federal courts including the CIT traditionally impose similar requirements for the release of confidential information under protective order.[197]

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196. 19 C.F.R. § 207.7(a) (1985).

197. In their application of FED. R. CIV. P. 26 in cases involving trade secrets or confidential business information, the federal district courts generally require the requester to show need and relevancy before ordering release under protective order. *E.g.*, Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 999 (10th Cir.), *cert. denied,* 380 U.S. 964 (1965) ("No absolute privilege protects the [confidential business] information sought here from disclosure in discovery proceedings. The claim of irreparable competitive injury must be balanced against the need for the information in the preparation of the defense. Judicial inquiry should not be unduly hampered. Inconvenience to third parties may be outweighed by the public interest in seeking the truth in every litigated case." (footnote omitted)). The courts balance the requestor's need and relevancy against the submitter's need for secrecy. *E.g.*, Centurion Indus. v. Warren Steurer, 665 F.2d 323, 326 (10th Cir. 1981) ("It is within the sound discretion of the trial court to decide whether trade secrets are relevant and whether the need outweighs the harm of disclosure. Likewise, if the trade secrets are deemed relevant and necessary, the appropriate safeguards that should attend their disclosure by means of a protective order are also a matter within the trial court's discretion.").

While the CIT requires a showing of need (as well as of relevancy), the degree of need that the requester must show is uncertain. The court, in *American Spring Wire Corp.*, 566 F. Supp. 1538, presents a useful review of cases decided by the CIT and its predecessor, the Customs Court. *See also* ARBED, S.A., 4 Ct. Int'l Trade 132, 3 Int'l Trade Rep. Dec. (BNA) 2369 (1982). In Japan Exlan Co. v. United States, 1 Ct. Int'l Trade 286, 3 Int'l Trade Rep. Dec. (BNA) 1008 (1981), the court rejected the argument that the need must be "compelling."

Holding that the ITA may not order the release of confidential information until the information has actually been submitted, the CIT stated that "the release of confidential information must be the result of a reasoned decision which carefully evaluates the need of the applicant as opposed to the demands of confidentiality." *Sacilor, Acieries et Laminors de Lorraine,* 542 F. Supp. 1025. The court referred to the statutory requirement for an ap-

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Recitation of this standard suggests that the release of confidential information will occur only after a considered exercise of discretionary judgment. In practice, however, it is sufficient to state in general terms that, without the requested information, counsel cannot meaningfully prepare analysis of the facts relating to injury.[198] The ITC usually makes no further assessment of need; its regulation is to this extent virtually a dead letter.[199] For the submitter or nonspecialist attorney who relies on the regulation as a safeguard, the regulation is misleading and imparts an impression that the ITC says one thing and does another.

In the ordinary case the present practice is nevertheless satisfactory, given time and personnel constraints, so long as submitters receive notice of the request and have an informal opportunity to object whenever feasible. Where extraordinary sensitivity or other unusual considerations are demonstrated by the submitter,

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plication for release under protective order which "describes with particularity the information requested and sets forth the reasons for the request. . . ." 19 U.S.C. § 1677f(c)(1) (1982).

198. The preamble to the statement of need in the application for a protective order reads:

> I certify that I have a substantial need for the information for which release is sought under this protective order in the preparation of the case of my client and that I am unable without undue hardship to obtain the substantial equivalent of such information by other means. My specific reasons for concluding that I have a substantial need for the information within the meaning of 19 C.F.R. 207.7 include . . .

U.S. International Trade Commission, Application for Protective Order For Release of Information Under Title VII Cases, *supra* note 129.

Ironically, in promulgating 19 C.F.R. § 207.7 on December 26, 1979, the Commission rejected automatic disclosure and, instead,

> decided to add a standard of need similar to that incorporated in rule 26 of the Federal Rules of Civil Procedure. Before the Secretary releases domestic price and cost of production information to an interested party, an interested party must demonstrate a substantial need for the information in the prosecution of his case and that he is unable without undue hardship to obtain the substantial equivalent of the information by other means.

44 Fed. Reg. 76,458 (1979) (preamble to final rules).

199. *See* Garfinkel, *supra* note 71, at 473 n.38 (citing Michael H. Stein, General Counsel, U.S. International Trade Commission, as confirming this ITC practice). Recently, however, the Secretary has returned at least one request, where need was not self-evident from the general statements, and asked for substantiation of need. Berg Interview II, *supra* note 58.

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however, the ITC should to the extent feasible require a showing of substantial need before releasing confidential information. In any event, the regulations and the practice should be harmonized.

Conditions of Disclosure

Another way to limit the possibility of unauthorized disclosure is to impose conditions on use of the information which will improve its security. The regulations and the form of protective orders anticipate dangers and prescribe steps to minimize them. The sanctions are well formulated and appear fully adequate, despite the absence of experience by which to assess them.[200] Follow-up, however, is absent. To require a periodic certification of compliance, executed by all individuals receiving the information through the attorney, would impose only a modest burden. It would remind the recipients of their obligations, and serve renewed notice of the Commission's serious concern with compliance.

Safeguarding the Interests of Submitters at the CIT

As explained, present Court of International Trade practice permits release under protective order of confidential information submitted by nonparties, without giving the nonparty submitters notice or opportunity to object.[201] This practice is unfair to the nonparties, who ordinarily have submitted information even though they would have preferred to have nothing to do with the case. The CIT should amend its rules to provide notice to nonparties when release of their confidential information is requested, and an opportunity to support and argue their objections.

Little can or should be done to cause the CIT to limit the information it discloses to the same two categories as the ITC discloses. The court has very broad statutory discretion to "disclose [confidential] material under such terms and conditions as it may order."[202] In the three-factor test by which the CIT implements this authority, one element is the ITC's need to preserve its ability to obtain con-

200. *See* Garfinkel, *supra* note 71, at 490-92.

201. *See supra* notes 156-158 and accompanying text.

202. 19 U.S.C. § 1516a(b)(2)(B) (1982). "[T]he court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order." *Id.*

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fidential information in future investigations.[203] One may hope that the court, when urged to limit its disclosures because of unusual sensitivities of the data or unusual opportunities for leaks, will give full weight to this factor.

STRENGTHENING THE FORCE OF QUESTIONNAIRES

A principal occupation of this study is to protect the ITC's ability to gather adequately the information needed to assess injury to domestic industries. Reducing the risks of unauthorized disclosure is one means of addressing that concern. Taking steps to compel submission of data is a complementary approach.

The regulations provide that the Commission may issue its questionnaires as subpoenas.[204] In fact, though, it does not do so.[205] It

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203. *E.g.*, American Spring Wire Corp., 566 F. Supp. 1538, 1539-40. The other two elements consist of the need of the litigants for data used by the government in order to respond adequately and the need of the manufacturer/submitter to protect sensitive information from disclosure. *Id.*

204. 19 C.F.R. § 207.8 (1985) provides:

> Any questionnaire issued by the Commission in connection with any proceeding under section 303 or title VII of the Act, may be issued as a subpoena and subscribed by a Commissioner, after which it shall have the force and effect of a subpoena authorized by the Commission. Whenever any party or any other person fails to respond adequately to such a subpoena or whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, the Commission may (a) use the best information otherwise available in making its determination; (b) seek judicial enforcement of the subpoena pursuant to 19 U.S.C. 1333; (c) take such other actions as are necessary and appropriate, including waiver of any time limitation set forth in this part, as necessary to obtain needed information; or (d) any combination of the above.

The Commission appears to have adequate authority to cast its questionnaire as a subpoena. 19 U.S.C. § 1333(a)(4) (1982) empowers the Commission to "require any person, firm, copartnership, corporation, or association, to furnish in writing, in such detail and in such form as the Commission may prescribe, information in their possession pertaining to such investigation" and authorizes any member of the Commission to sign subpoenas. *Id.* Although this arrangement has not yet undergone judicial scrutiny, it seems directly analogous to the Federal Trade Commission's investigative power to demand information and reports, which is directly enforceable in federal courts. *See* 15 U.S.C. §§ 46(b), 49, 57b-1 (1982).

205. *See* Stein Interview II, *supra* note 50 (describing difficulty in subpoenaing information as a practical matter because lawyers can stall for 30 days, by which time it is too late to go to court to obtain a subpoena).

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does not even make much use of its statutory subpoena power to remedy noncompliance with its questionnaires. The apparent explanation is that there would usually be insufficient time (within statutory limits) to get the requested information by these means; even if there were, enforcement would divert ITC lawyers and other resources from priority needs elsewhere.[206]

Use of the subpoena format from the outset seems a promising way to alleviate the squeeze of statutory deadlines. If the Commission regularly sought judicial remedies for refusals to respond, there would soon be positive incentive to answer the questionnaires. Enforcement would be more difficult in the situation where only a partial response is made to the questionnaire. Court proceedings might be factually complicated, and contumacious or evasive intent might be hard to establish. Even here, though, enforcement against carefully chosen respondents could stimulate more thorough questionnaire responses. This approach should be considered for use as an alternative in cases deemed appropriate by the Commission.

ATTENTION TO THE INTERESTS OF SUBMITTERS

Rules and procedures in force at the ITC appear to undermine the interests of persons who submit confidential information. To the

206. *See id.; see also* ITC's *Roquette Freres* Memorandum, *supra* note 71, at 8-9 ("[R]esort to subpoena enforcement actions (19 U.S.C. § 1333) may be of little avail to the ITC especially when one considers the short periods within which ITC must make its determination, particularly with respect to ITC's preliminary determinations . . ."). An additional reason advanced is the perception of the ITC staff that use of a subpoena from the outset would in some fashion restrict its flexibility in the negotiation process by which information is elicited from uncooperative recipients of ITC questionnaires. *Id.* at 8 (citing affadavit of E. William Fry contained in Exhibit A). Use of the subpoena format does not, of course, require actual enforcement of the subpoena, but emphasizes the ability of the Commission to enforce its requests. Also, it should shorten the time involved.

For an example of the ITC's current subpoenas practice, see ITC's *Roquette Freres* Memorandum, *supra* note 71. In that case, ICI, the largest domestic producer, refused to cooperate with the ITC during the preliminary investigation. *Id.* at 3. During the final investigation, ICI returned the questionnaire but did not include financial information "for the specific reason that it was concerned about the release of its information to third parties." *Id.* A letter was sent on January 25, 1982, by the Secretary, outlining the treatment given confidential information. *Id.* at 4. On February 4, 1982, the ITC Director of Investigations asked the General Counsel's office to prepare Commission orders requiring submission of the information, which were approved by the Commission and mailed on February 8, 1982. *Id.* On February 17, 1982, as the Commission prepared to file an action to enforce its order, ICI submitted the information under protest. *Id.* at 4-5.

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extent this results in a perception that the Commission has incompletely implemented its commitment to the vigilant protection of such information, members of industry may cooperate less willingly. Because the ITC relies upon voluntary cooperation, and in the interest of fairness, submitters' interests should have priority in any recommendations. Where present procedures could compromise submitters' interests or diminish their good will, adjustments should be made.

Inadequate Warning of the Possibility of Disclosure

Although confidential information regarding price costs of production may be disclosed under protective order by the ITC, and virtually all confidential information submitted to the ITC may be disclosed in the course of an appeal proceeding at the CIT, the submitter is given no specific and straightfoward warning that these things may happen. The only notice is contained in the general explanation of procedures given on questionnaires sent to producers. It indicates that information which is designated confidential "will not be disclosed except as may be required by law. Such confidential information will not be published in a manner that will reveal the individual operations of your firm."[207] Subsequently it states:

> In the event that your firm is an interested party supporting the imposition of antidumping duties, the domestic price information requested in sections H, I, and J could become subject to the protective order provisions of the Tariff Act of 1930 and section 207.7 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 207.7).[208]

To one acquainted with the ITC practice, this language is not misleading. To the layperson or non-specialist, however, it implies that confidentiality will be protected in the ordinary case, with the exceptions only in vague circumstances "required by law." Even the

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207. Producer's Questionnaire: Certain Carbon Steel Products from Argentina, Australia, Finland, and Spain at 2, USITC Number: 84-1-319, U.S. International Trade Commission (return date Sept. 12, 1984) [hereinafter cited as Producer's Questionnaire] (on file at the offices of *Law & Policy in International Business*).

208. *Id.*

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last quoted passage does not convey that such information is regularly released, almost automatically, to counsel for foreign (and sometimes domestic) competitors of the submitter. Nor does reference to the statute or regulations reveal this important fact.[209] It would require familiarity with the practice of the ITC to know that release under a protective order is so likely and routine a prospect. Moreover, there is no warning about disclosure of information submitted other than that contained in the questionnaire. The present warning may only lull the submitter, and make actual disclosure more galling.

The Commission's questionnaires and other inquiries should present more specific and informative warnings, in language understandable by laypersons and by non-specialist attorneys. These same ITC documents should give a parallel warning that all confidential information (not merely price and cost of production) is subject to disclosure at the CIT, under protective order, to counsel for any party to a judicial review proceeding involving such information.[210]

Warnings may discourage full submissions in some cases. But to request or compel the submission of confidential business information without revealing that it may be made available through counsel to the submitter's competitors seems fundamentally unfair. Moreover, use of subpoenas as suggested above would diminish the effect of warnings upon submissions.

Processes for Classifying Information as Confidential

The system of gathering information by questionnaire and field investigation presumes that sensitive company level data will be given confidential treatment. If not so treated, the data become available not only to adversaries in litigation, but to all competitors and the general public.[211] At present there is no problem with the

209. The "protective order provisions of the Tariff Act of 1930" may not be easy for the layperson or nonspecialist questionnaire recipient to find. The original 1930 Act did not address disclosure or protective orders. The questionnaire recipient ought to be straightforwardly referred to 19 U.S.C. § 1677f (1982), which was added by the 1979 Act. This lack of clarity causes needless toil for nonspecialist lawyers and makes the bureaucracy appear thoughtless.

210. *See supra* text accompanying notes 154-158.

211. *Cf.* 19 U.S.C. § 1677f(a)(4) (1982) (authorizing disclosure of confidential informa-

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Commission's treatment of confidential information, which it fastidiously classifies and safeguards. But the possibility of confusion and inadvertent disclosure may arise from a conflict between the practice and the regulations.

The regulations (which apply to all ITC proceedings, and apparently were not drawn with Title VII proceedings specifically in mind) detail the steps the submitter must take to obtain confidential treatment.[212] They leave no doubt that the affirmative duty to seek confidential treatment rests with the submitter. But these rules diverge strikingly from the practice of the ITC in Title VII cases. The standard questionnaire preamble blandly states that data

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tion in the form of anonymous summaries); 5 U.S.C. § 552 (1982) (authorizing Freedom of Information Act requests). *But cf.* Chrysler Corp. v. Brown, 441 U.S. 281, 317-19 (1979) (holding that a private party may seek judicial review of an agency's decision to disclose a party's documents, where the party alleged a violation of the Trade Secrets Act).

212. 19 C.F.R. § 201.6(a)-(c) (1985), *as amended by* 49 Fed. Reg. 32,571 (1984), provides:

§ 201.6 Confidential business information.

> (a) *Definition.* Confidential business information is information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either (1) impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or (2) causing substantial harm to the competitive position of the person, firm, partnership, corporation or other organization from which the information was obtained, unless the Commission is required by law to disclose such information. (b) *Procedure for submitting business information in confidence.* (1) A request for confidential treatment of business information shall be addressed to the Secretary, United States International Trade Commission, 701 E Street, NW. [sic], Washington, D.C. 20436, and shall indicate clearly on the envelope that it is a request for confidential treatment. (2) In the absence of good cause shown, any request relating to material to be submitted during the course of a hearing shall be submitted at least three (3) working days prior to the commencement of such hearing. (3) With each submission of, or offer to submit, business information which a submitter desires to be treated as confidential under paragraph (a)(2) of this section, the submitter shall provide the following, which may be disclosed to the public: (i) A written description of the nature of the subject information; (ii) A justification for the request for its confidential treatment; (iii) A certification in writing under oath that substantially identical information is not available to the public; (iv) A copy of the document (A) clearly marked on its cover as to the pages

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revealing individual company operations "will be treated as confidential by the Commission."[213] There is no indication that the respondent has an affirmative burden to request confidential treatment, nor is there any reference to the regulations. The impression conveyed is that confidential treatment is accorded such data as a matter of course. Indeed, the ITC does treat as confidential all submissions of such information—whether in response to questionnaires or to other inquiries—apparently without regard to its own regulations.[214]

This state of affairs presents two dangers. First, as the Commission has acknowledged, it might "inadvertent[ly] overlook" portions of documents not clearly marked by the submitter as confidential.[215] The other hazard arises from a recent amendment

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on which confidential information can be found, and (B) with information for which confidential treatment is requested clearly identified by means of brackets (except when submission of such document is withheld in accord with paragraph (b)(4) of this section); and (v) A nonconfidential copy of the documents as required by § 201.8(d). (4) The submission of the documents itemized in paragraph (b)(3) of this section will provide the basis for rulings on the confidentiality of submissions, including rulings on the confidentiality of submissions offered to the Commission which have not yet been placed under the possession, control, or custody of the Commission. The submitter has the option of providing the business information for which confidential treatment is sought at the time the documents itemized in paragraph (b)(3) of this section are provided or of withholding them until a ruling on their confidentiality has been issued. (c) *Identification of business information submitted in confidence.* Business information which a submitter desires to be treated as confidential shall be clearly labeled "confidential business information" when submitted, and shall be segregated from other material being submitted.

213. Producer's Questionnaire, *supra* note 207, at 2. The general cover letter accompanying this questionnaire states somewhat ambiguously: "[t]he information supplied by you in this questionnaire or in connection therewith that qualifies as confidential business information will be so treated by the Commission . . . ." Letter from Kenneth R. Mason, Secretary, U.S. International Trade Commission (Aug. 22, 1984) (accompanying questionnaire concerning certain carbon steel products antidumping investigations), *supra,* note 207 (on file at the offices of *Law & Policy in International Business*).

The formal notice of these carbon steel investigations, by contrast, required that any business information for which confidential treatment was desired be submitted separately. 49 Fed. Reg. 33,349 (1984). It provided that the envelope and all pages of such submissions must be clearly labeled "Confidential Business Information" and that confidential submissions and requests for confidential treatment must conform with the requirements of 19 C.F.R. § 201.6. *Id.*

214. Berg Interview I, *supra* note 44. But if a domestic producer submits information on its own initiative, it must specifically request confidential treatment. *Id.*

215. 49 Fed. Reg. 32,570 (1984) (preamble to final amendment of rules).

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tightening the requirements for confidential treatment and requiring more detailed marking of documents by submitters.[216] If practice conformed to this strict regulatory system, some parties (or, especially, nonparties), who had expected but not requested confidential treatment for their information, might find that it had been released to a competitor's attorney or to the whole world.[217]

The regulations and the practice should be harmonized, so that parties can know what they must do and what they may rely upon. If the practice is changed to conform to the regulations, there should be adequate notice of the change.

One provision of the regulation appears to conflict on its face with the statute as well. Section 777(b) of the 1979 Act promises generally that information designated as confidential by the submitter will be so treated.[218] It places upon the Secretary the initial burden of

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216. *See* 49 Fed. Reg. 32,571 (1984) (codified at 19 C.F.R. § 201.6 (1985)). The preamble to this final rule explains that:

> Confidential . . . documents presently filed with the Commission often do not clearly identify which information is confidential. When the confidential information is not clearly identified, the Commission staff must spend extra time comparing confidential and nonconfidential versions in order to identify the confidential information. This causes delays in processing requests and may result in the Commission's inadvertent overlooking of portions not clearly marked as confidential.

49 Fed. Reg. 32,570 (1984) (preamble to final amendment of rules).

217. The Commission in Title VII proceedings may disclose any submitted information "not designated as confidential by the person requesting it." 19 U.S.C. § 1677f(a)(4)(B) (1982); *cf.* 5 U.S.C. § 552 (1982) (authorizing Freedom of Information Act requests).

218. 19 U.S.C. § 1677f(b) (1982), provides:

> **(b) Confidential information**
>
> **(1) Confidentiality maintained.** — Except as provided in subsection (a)(4)(A) and subsection (c) of this section, information submitted to the administering authority or the Commission which is designated as confidential by the person submitting it shall not be disclosed to any person (other than an officer or employee of the administering authority or the Commission who is directly concerned with carrying out the investigation in connection with which the information is submitted) without the consent of the person submitting it. The administering authority and the Commission may require that information for which confidential treatment is requested be accompanied by a non-confidential summary in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence, or a statement that the information is not susceptible to summary, accompanied by a statement of the reasons in support of the contention.

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determining that the classification is unwarranted, and then states that the Secretary shall "notify the person who submitted it and ask for an explanation of the reasons for the designation."[219] The regulation, by contrast, requires that an explanation accompany the request for the designation.[220] If the explanation is pro forma, it should not be required. If it is intended to be detailed, the requirement conflicts with the statute.[221]

PROPOSALS FOR BROADER DISCLOSURE

Disclosure of Importer and Foreign Producer Information to Domestic Parties

The ITC releases confidential information, submitted by parties who are domestic producers, to counsel for interested parties who are foreign producers or importers; it does not, however, release information about foreign producers or importers to counsel for petitioners or to other domestic producers, even though they are

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> (2) **Unwarranted designation.**—If the administering authority of [sic] the Commission determines, on the basis of the nature and extent of the information or its availability from public sources, that designation of any information as confidential is unwarranted, then it shall notify the person who submitted it and ask for an explanation of the reasons for the designation. Unless that person persuades the administering authority or the Commission that the designation is warranted, or withdraws the designation, the administering authority or the Commission, as the case may be, shall return it to the party submitting it.

219. *Id.*

220. 49 Fed. Reg. 32,571 (1984) (codified at 19 C.F.R. § 201.6(b)(3) (1985)).

221. Curiously, in response to an unusual request made by an intervenor for complete and unrestricted public disclosure of confidential information at the CIT without a protective order, the ITC urged a construction of 19 U.S.C. § 1677f(b)(1) (1982) which contradicts its own regulations promulgated under the statute:

> This section *mandates* that any information designated as confidential by the party submitting the information *shall* be accorded confidential treatment by the Commission. The language is mandatory, not hortatory, leaving the Commission no discretion on this issue. . . . Section 777 does provide the Commission with the authority to challenge a submitter's confidential designation.

Opposition of Defendants United States and United States International Trade Commission to Defendant-Intervenor's Motion for Release of Documents Previously Treated as Confidential at 6-7, Fairchild Aircraft Corp. v. United States, 5 Ct. Int'l Trade 163, 4 Int'l Trade Rep. Dec. (BNA) 2075 (1983) (on file at the offices of *Law & Policy in International Business*).

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interested parties.[222] This practice engenders an impression of unfairness: the foreign producer has access to the domestic producer's information, while reciprocal access is denied. Such access is not normally critical, since the determination of injury to the domestic industry turns mainly upon the figures of domestic producers. However, specific prices and terms of sale offered by the foreign producers and their importers in the U.S. market may bear upon penetration of that market, underselling, price suppression, and other factual issues which in turn bear upon the question of injury or threat of injury. Where importers and foreign producers do submit such information to the ITC, its release under protective order could well enable domestic producers' counsel to present useful analysis and rebuttal. For example, domestic producers' counsel will want to check and rebut information about specific quotations offered in the United States, especially to major customers and when the defense of "meeting competition" is claimed. Foreign cost of production data are rarely presented to the ITC, but when they are, they may have value to counsel, for parallel reasons.

To the extent such information is useful to the domestic producers' case and is not otherwise available, it should be released to counsel under regular protective order procedures. Provision for release could be accomplished by regulation, without statutory amendment. While likely to arouse opposition from importer and foreign interests, it is not inconsistent with any multinational understanding, and might not enjoy widespread use in any event. Perhaps more important is the stronger impression of the fairness of the ITC's procedures that it would create among domestic producers.

Additional Disclosure of Domestic Producer Information to Importers and Foreign Producers

The consideration of injury might be benefitted by disclosure to importers and interested foreign producer parties of further data or

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222. *See supra* notes 70-74 and accompanying text. It is true that some of this information may often be known to the domestic parties through protective order at the ITA. Under the ITA protective order, however, this material cannot be used at the ITC. Berg Interview I, *supra* note 44; Interview with Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (Oct. 4, 1984).

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categories of data received from domestic producer parties. The best candidates are aspects of price information—such as credit terms and other terms of sale, volumes and discounts, or detailed specifications for custom-made equipment—which bear directly upon whether underselling or price suppression is causing injury. Credit terms, for example, obviously affect the way a price figure should be interpreted. Although the ITC frequently gathers such data, it does not usually disclose them, despite the absence of any impediment in the statute or regulations.[223] Since attorneys' responses to price information can be useful to the ITC, by permitting a more meaningful analysis, this information should be released.

Cost of production information, when obtained, is also disclosed. Whether the ITC should broaden the scope of disclosure to include closely allied data on cost of goods sold, for example, is more problematic. A pair of related cases currently before the CIT raises the question of whether the ITC may gather only data on cost of goods sold, rather than on cost of production, and then withhold the information from disclosure.[224]

Beyond these, it is more difficult to identify categories of information that might usefully be disclosed, especially if their sensitivity is taken into account. Other standard categories of especially sensitive information are profitability, shipments (sales), purchases (for processing or resale), capacity, production, and inventory. Less sensitive would be data on wages, employment, and transportation adjustments. Any broadening of the categories of information susceptible to disclosure should be accompanied by the safeguards recommended in this article. Broader release should be provided only where the Commission's investigative and decisional processes would clearly be improved, without impeding fulfillment of statutory deadlines, and only in cases where the requester shows a substantial need for the information.

If the ITC were to permit disclosure in any such category, it should specifically define the category and, where appropriate, the particular kinds of information within the category that may be released. If additional categories were disclosed to counsel for importers and foreign producers, reciprocal disclosure to domestic

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223. Stein Interview IV, *supra* note 171; Berg Interview II, *supra* note 58; Berg Interview I, *supra* note 44.

224. Societe' Nationale des Poudres et Explosifs v. United States, No. 83-9-01325 (Ct. Int'l Trade, filed Sept. 9, 1983) and No. 83-7-01075 (Ct. Int'l Trade, filed July 21, 1983).

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producers of information submitted by foreign producers should be considered.

The considerations supporting disclosure of all (or substantially all) confidential information are not weighty. Full release would result in somewhat better-informed presentations by attorneys. This putative improvement, however, would be outweighed by the enlarged opportunity for leaks, the probable rise in submitter resistance, and the increase in costs, delay and the complexity that such a procedure would generate. Even if confined to information submitted by parties, broader release would considerably complicate Title VII injury proceedings. All parties could file more ample rebuttals and briefs than at present. The proceeding would move further from the investigative format toward an adjudicative one. As cases became more complex and more openly adversarial, it might be thought necessary to provide for oral evidentiary procedures, for a presiding hearing officer, and perhaps for a recommended decision. Considering its resources and its traditions of determining injury primarily by reliance on its own expert investigative staff, the Commission would undoubtedly ask whether its ability to decide injury cases would be impeded by more complex proceedings. Beyond a certain point, the statutory time limits would decisively rule out the enlarged proceedings that wider disclosure would engender.

The present scheme is structured to draw information from the entire industry, instead of only from the parties, in a timely and cost-efficient manner. Nonparty submissions can best be encouraged by nonrelease; party submissions by limited release. The present system works well in its fundamental structure. The radical change of full release is not warranted.

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APPENDIX

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

RECOMMENDATION 84-6: DISCLOSURE OF CONFIDENTIAL INFORMATION UNDER PROTECTIVE ORDER IN INTERNATIONAL TRADE COMMISSION PROCEEDINGS *(ADOPTED DECEMBER 6, 1984)*

This recommendation concerns the protective orders practice of the United States International Trade Commission in antidumping and countervailing duty proceedings. Under the Trade Agreements Act of 1979, the Commission has authority to release to counsel, under protective order, certain confidential business and financial information that is submitted to it by parties in such proceedings.

The export to the United States of goods at less than their fair value (called "dumping") and the subsidization by foreign governments of exports of their countries' products to the United States are treated by American law as unfair methods of international trade. If dumped or subsidized imports are found to cause or threaten material injury to an industry in the United States, the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, provides for imposition of a duty in an amount intended to offset the margin of dumping or subsidy. There must be two determinations: (1) whether the imports in question have been dumped or subsidized, which is decided by the International Trade Administration of the Department of Commerce ("ITA"), and (2) whether the imports are causing or threatening injury to an industry in the United States, which is decided by the International Trade Commission ("ITC").

The injury proceeding at the ITC is substantially the same for both types of cases, known respectively as antidumping and countervailing duty proceedings. The ITC conducts a preliminary investigation in which it must determine within 45 days whether there is a "reasonable indication" that the injury test will be met. If its determination is negative, the entire antidumping or countervailing duty proceeding (including the portion conducted by the ITA) is terminated. If the ITC's determination is affirmative, and the ITA has made an affirmative determination that the imports are being dumped or subsidized, the ITC conducts a final investigation to reach a determination, which usually must be made within 120 days, whether the imports are threatening or causing injury to an industry in the United States.

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In both stages of the proceeding, the ITC gathers extensive information from American producers, importers, and purchasers of the products in question. The Trade Agreements Act of 1979 authorizes the ITC to make available, under protective order, confidential business information that it has received in these proceedings. Under this authority, the ITC releases the confidential data of one party to counsel for other parties. In almost all cases those other parties, to whose counsel the confidential information is disclosed, are business competitors of the party that submitted the information. The only companies whose confidential information is disclosed are those American companies that complain of injury from the alleged unfair import practices. Confidential data concerning their prices and cost of production can be released to counsel for both their domestic competitors and their foreign competitors. In addition, all confidential information submitted to the ITC, regardless of the submitter's identity, may ultimately be disclosed, under judicial protective order, in proceedings to review ITC determinations before the Court of International Trade ("CIT"). Throughout the proceedings, the ITC devotes great care to maintaining the security of confidential business information which is submitted to it or is gathered in its investigations. Agency regulations provide procedures for requesting confidential treatment of proffered information, and the staff in practice accords confidential treatment without specific request to information acquired in response to questionnaires and other investigative inquiries. The record of each antidumping and countervailing duty injury proceeding is divided into public and non-public sections. Pleadings, staff documents, and ITC opinions are prepared and submitted under procedures designed to avoid the public disclosure of confidential information.

The principal concern here is not with the agency's internal procedures, but with the potential misuse of parties' information which has been received under protective order by lawyers for other parties. A particular concern is that such information will, willfully or inadvertently, be passed along by a lawyer to his client, who then can make competitive use of it against the American company that submitted it. Though there is little hard evidence of such improper disclosure, there is much suspicion that it occurs. It is believed that the perceived risk of wrongful disclosure generates a chilling effect which, by discouraging voluntary submission of essential information, hampers the International Trade Commission's ability to do its

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job. The ITC's responsibility is to determine whether the allegedly unfair imports are threatening or causing "injury"—not simply injury to individual American companies as such, but injury to the entire "industry" affected by competition from the imports. If American companies fear that their confidential business data will leak to their competitors, and for that reason refuse to submit that information, the Commission will be unable to assemble the complete industry figures it needs for a soundly-based determination of injury. Although the agency has the power to subpoena the necessary information, the short statutory deadlines it must meet and its own limited resources to procure enforcement of subpoenas make heavy reliance on voluntary cooperation a practical necessity.

Another area of concern arises from the circumstance that existing ITC practices do not adequately inform submitters of information of the high likelihood that confidential price and cost of production information will be disclosed, nor of the possibility that other confidential information may be disclosed, without further warning, in review proceedings before the CIT.

These recommendations propose that the ITC (and, in one case, the CIT) establish a series of measures intended to reduce the risks of disclosure, protect submitters and safeguard the process of making disclosure of price and cost of production data. In some circumstances, these measures would preclude disclosures that are now permitted. No recommendation is made to reduce the categories of information it will release under protective order to facilitate more meaningful analysis of the information now disclosed. Any broader disclosure should be accompanied by the safeguards herein recommended, and should be provided only if the Commission's investigative and decisional processes will clearly be improved thereby.

RECOMMENDATION

A. Limiting the Exposure of Confidential Information

1. The International Trade Commission should provide for the disclosure of confidential information during the preliminary investigation phase of its antidumping and countervailing duty injury proceedings only in circumstances in which disclosure is important to achieving the limited purposes of the preliminary investigation itself.

2. Confidential information submitted by a domestic producer

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party should not be disclosed to counsel for any other domestic party (except a United States importer which is an interested party within 19 U.S. Code § 1677(9)(A)).

3. The Commission by regulation or policy statement, should define and specify the kinds of data which are disclosable as "information concerning the domestic price and cost of production of the like product."

B. Protection Of Submitters' Interests

1. The Commission's questionnaires should more clearly inform petitioners and supporters of the petition about the likelihood that their confidential price and cost of production information (whether submitted in response to the questionnaire or otherwise) will be disclosed by the Commission under protective order to counsel for competitors of the submitter.

2. The Commission's questionnaires and other inquiries, by which confidential information is requested from parties and nonparties, should be accompanied by a statement that all such information of whatever kind (not merely that in the price and cost of production categories) is subject to disclosure by the Court of International Trade, under protective order, to counsel for any party to a judicial review proceeding involving such information.

3. Although in practice the Commission does not require the submitters of responses to questionnaires and follow-up inquiries to make specific request that the information submitted be treated as confidential by the Commission, its regulations (19 C.F.R. § 201.6) do require such a specific request. The regulations should be modified to reflect the practice.

4. The Commission's regulations should be conformed to 19 U.S. Code § 1677f(b), which requires the Commission to treat as confidential any information so designated by the submitter, unless the Commission requests an explanation and is unpersuaded by it, in which event it must return the information to the submitter.

5. The Commission should establish by regulation an informal procedure whereunder the submitter may object to disclosure of its information under protective order, except in cases of extraordinary urgency. Commission regulations should also provide that, when the submitter is given notice of an application for disclosure of its information, it also be advised specifically of the procedures whereunder it may object.

6. With respect to a requirement that the requester show a need

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for confidential information before it can be released under protective order, for the ordinary case the Commission should continue its present practice whereunder a simple statement of need, rather than a showing of need, suffices. Where extraordinary sensitivity or other unusual considerations are demonstrated by the submitter, the Commission should require an actual showing of need before releasing the information. The Commission's regulation (19 C.F.R. § 207.7(a)), which purports to require the requester to "demonstrate . . . a substantial need for the information in the preparation of his case" in all instances, should be accompanied by a statement of the requester's intent to participate actively in the proceeding.

7. The Court of International Trade should seek to provide in proceedings for judicial review of ITC injury determinations in antidumping and countervailing duty cases, that nonparty submitters be given notice and a meaningful opportunity to object to the release under protective order of any confidential information which they had submitted to the International Trade Commission.

C. *Counsel's Responsibilities Under Protective Orders*

The Commission's regulations and protective orders should provide by specific language that the attorney who has received information under protective order may be personally liable to sanctions (1) for a breach of the protective order by other persons—such as attorneys, experts, and support staff working on the case—to whom the attorney, under the authority of the protective order, has divulged the confidential information or (2) where the attorney has been shown to have been negligent in the custody of such information and unauthorized disclosure has resulted.

D. *Possible Broader Disclosures*

1. Confidential price and cost of production information submitted to the Commission by importer and foreign parties to the investigation should be made available under protective order to counsel for domestic parties to the investigation, or at least to those who support the petition.

2. The Commission should consider disclosing under protective order further kinds of confidential information pertaining to price and cost of production, beyond what is now disclosed, to the extent such further information can facilitate more meaningful analysis of

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the kinds of information that are now disclosed.

3. The Conference takes no position on whether or not the Commission should consider disclosing confidential information in categories other than price and cost of production. If the Commission does consider such disclosure, it should make such disclosure only (a) in categories where party analysis of such information is likely to assist the Commission's investigation without impeding its fulfillment of statutory deadlines, (b) in cases in which the requester shows a substantial need for access to the information, and (c) under additional safeguards including as appropriate thos recommended herein.

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