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Disclosure of Confidential Information in Antidumping and Countervailing Duty Proceedings Under United States Law: A Framework for the European Communities

The Commission of the European Communities is currently investigating the possibility of releasing confidential information submitted by parties in an antidumping or countervailing duty investigation, to other parties in that investigation.[1] In line with this investigation, the authors believe that a study of the American system of disclosure of confidential or privileged information under administrative or judicial protective order would be beneficial to the Commission for several reasons. First, both the European Communities and the United States are members of the General Agreement on Tariffs and Trade (GATT) and consequently are bound by the provisions of GATT and the 1979 GATT Antidumping and Subsidies Codes. Furthermore, the United States is one of the few nations in the world to allow release of confidential information in antidumping

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1. Address by J.H.J. Bourgeois, Head of Directorate-General I, Division I.C.I. in Charge of Instruments of Autonomous and Conventional Commercial Policy, Dumping, Countervailing Duties and Safeguard Measures, Fordham Conference, New York City (Oct. 4, 1985).

and countervailing duty cases. Thirdly, and most importantly, the United States has had seven years of experience with a system that has functioned very satisfactorily.[2] This conclusion is buttressed by the current sense among practitioners that the disclosure provisions do not go far enough and that changes should be implemented to allow for more disclosure of confidential information, especially at the level of the International Trade Commission.[3]

This article describes the functioning of the American system in law and in practice, offers suggestions for improvement, and studies the extent to which adoption of a similar framework in the European Communities is feasible and desirable.

I. Disclosure of Confidential Information in Antidumping and Countervailing Duty Cases Under American Law

A. History

In 1979 Congress adopted the Trade Agreements Act (TAA)[4] not only to implement the results of the Tokyo Round of Multilateral Trade Negotiations, but to revise extensively U.S. antidumping and countervailing duty legislation as well. Called "[o]ne of the most controversial provisions" of the TAA,[5] Section 777[6] introduced the concept of disclosure of confidential information submitted by petitioners and respondents in antidumping or countervailing duty cases. The rationale was relatively straight-forward:

> Section 777 provides the maximum availability of information to interested parties consistent with the need to provide adequate protection for information accorded confidential treatment. Petitioners under the antidumping and countervailing duty laws have long contended that their ability to obtain relief has been impaired by its [sic] lack of access to the information presented by the exporters and foreign manufacturers. By the same token, importers, exporters, and other respondents in such cases have complained of lack of access to

2. Interview with Gary N. Horlick, Former Deputy Assistant Secretary for Import Administration, International Trade Administration, U.S. Department of Commerce (Dec. 5, 1985).

3. During December 1985 and January 1986 the authors interviewed the following attorneys active in the international trade field: Messrs. Lynn Barden, Robert Cassidy, Richard Cunningham, Peter Ehrenhaft, John Greenwald, David Hartquist, Gary Horlick, Bill Leonard, John Mangan, Patrick McCrory, Mike Stein, and Terry Stewart. These attorneys represent both domestic and foreign interests. Most of the interviewees agreed that disclosure at the ITC level should be expanded. At the same time, however, the general feeling was that legislative action would be necessary to accomplish this goal.

4. Pub. L. No. 96–39, 93 Stat. 144 (codified in scattered sections of 19 U.S.C.).

5. Garfinkel, *Disclosure of Confidential Documents Under the Trade Agreements Act of 1979: A Corporate Nightmare?*, 13 L. & Pol'y Int'l Bus. 465 (1981).

6. 19 U.S.C. § 1677f (Supp. II 1984).

information supplied by the domestic parties to such cases, particularly with respect to the economic health of the domestic industry involved.[7]

A characteristic that antidumping and countervail cases share with competition cases is that they are highly technical and fact-determined.[8] Consequently it is very difficult, if not impossible, to prepare an adequate defense to an opponent's arguments without having access to the facts on which those arguments are based. Those facts, however, at the same time concern a competitor's cost of production, profits, volume of sales, customers, etc., and therefore constitute the competitor's core of business secrets.

The purpose of section 777 of the TAA was to strike a balance between these conflicting interests. It has been observed that "prior to 1980, when no confidential information was made available to the other side, proceedings consisted of both parties frequently 'shooting in the dark,' with a good dose of trial by surprise."[9]

B. Background

At the administrative level two agencies are involved in the conduct of antidumping or countervailing duty investigations. The International Trade Administration of the U.S. Department of Commerce (ITA) determines whether dumping or subsidization exist. The U.S. International Trade Commission (ITC), an independent government agency, investigates whether dumped or subsidized imports cause material injury to the subject U.S. domestic industry.

If the petition alleges injurious dumping, the ITA will send out questionnaires to foreign producers/exporters and domestic importers and at a later stage of the proceeding visit the companies to verify the information contained in the questionnaire responses. In the case of subsidization, the questionnaire is sent to the embassy of the country allegedly subsidizing exports to the United States. The latter will normally forward the questionnaire to the authorities administering the subsidy programs. Verification of questionnaire responses will then take place both at the governmental and at the individual company level.[10]

7. S. Rep. No. 249, 96th Cong., 1st Sess. 100 (1979).

8. For a comparison of the basics of U.S. and EC antidumping laws, see E. Vermulst, Antidumping Law and Practice in the United States and the European Communities (forthcoming 1987).

9. Memorandum of Horlick, Bello, O'Melveny & Myers, Comments on Draft Recommendations: ITC Protective Orders Project (1984).

10. The latter is presumably necessitated by Commerce's adoption of the "benefit to the

The ITC, on the other hand, assesses the health of the domestic industry and determines whether the dumped or subsidized imports have caused injury. While the ITC will focus on information supplied by petitioners and other segments of the industry involved, the causation requirement nevertheless forces the ITC to a certain extent to consider the effects of quantities and prices of imports, based on information submitted by respondents. Obviously, petitioners will be primarily interested in data that the ITA obtained, while both petitioners and respondents will try to obtain access to information at the ITC level. In addition, both parties have an interest in access to the internal working documents that the agencies use for the preparation of their decision. The agencies, on the other hand, have a certain interest in a "true and uninhibited exchange of opinions and recommendations requisite to proper administrative determinations."[11]

C. The Legislative Framework

Section 777[12] as amended[13] provides that confidential information submitted to the administering agencies shall not be disclosed to anyone without the consent of the person submitting it.[14] However, any person who requests confidential treatment of information must simultaneously submit a nonconfidential summary in sufficient detail to permit a reasonable understanding of the substance of the confidential information. Otherwise, the party submitting the information must provide a statement as to why the information is not susceptible to such a summary.[15] In addition, the party must submit a statement that it does or does not authorize release of the information under an administrative protective order.[16]

Under section 777, if the agency involved determines that the designation as confidential is unwarranted, it will return the data to the party submitting it and decide the case on the basis of the best information available, unless the party persuades the agency that the designation is warranted, or withdraws the designation.[17] If the agency agrees with the

producer" test as opposed to the "cost to the government" test. *See, e.g.*, Railcars from Canada, 48 Fed. Reg. 6,569 (1983). For a discussion of the compatability of this approach with the GATT Subsidies Code, *see* Simon, *Can GATT Export Subsidy Standards Be Ignored By the United States in Imposing Countervailing Duties?*, 5 Nw. J. Int'l L. & Bus. 183 (1983); Holmer, Haggerty & Hunter, *Identifying and Measuring Subsidies Under the Countervailing Duty Law: An Attempt at Synthesis*, in The Commerce Department Speaks on Import Administration and Export Administration 301, 482–562 (1984).

11. Chevron Standard, Ltd. v. United States, 4 I.T.R.D. (BNA) 1572, 1573 (1983).
12. 19 U.S.C. § 1677f (Supp. II 1984).
13. Trade and Tariff Act of 1984, Pub. L. No. 98–573, § 619, 98 Stat. 3024, 3038 (1984).
14. 19 U.S.C. § 1677f(b)(1) (Supp. II 1984).
15. *Id.* § 1677f(b)(1)(A).
16. *Id.* § 1677f(b)(1)(B).
17. *Id.* § 1677f(b)(2).

party submitting the confidential information concerning the need for confidentiality, it may nevertheless decide to make the information available under an administrative protective order upon receipt of an application (before or after actually receiving the confidential information) which (1) describes with particularity the information requested and (2) sets forth the reasons for the request.[18] Under this statutory provision, counsel for "interested parties" to the proceeding may have access to confidential information subject to the protective order. The statute and the regulations promulgated thereunder specify that the following entities or persons can be "interested parties:"

a. a foreign manufacturer, producer, or exporter, or the United States importer of merchandise which is the subject of an investigation under the unfair trade laws 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 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,
e. a trade or business association, a majority of whose members manufacture, produce or wholesale a like product in the United States, and
f. an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) with respect to a like product.[19]

With regard to the substance of the protective order, the law merely provides that the agencies shall promulgate regulations containing requirements and sanctions.[20] These regulations are discussed in the text that follows.

If the ITA denies a request for disclosure of confidential information or the ITC refuses to make available information concerning domestic price or cost of production of the product (and such information has been submitted by the petitioner or an interested party in support of the petitioner), the person adversely affected by the decision may apply in the Court of International Trade (CIT) for a court order directing the agency

18. *Id.* § 1677f(c)(1)(A).
19. *Id.* § 1677f(g), *as amended by* Trade and Tariff Act of 1984, Pub. L. No. 98–573, § 619, 98 Stat. 3024, 3028 (1984).
20. 19 U.S.C. § 1677f(c)(1)(B) (Supp. II 1984).

involved to make the information available.[21] A request for such an interlocutory order does not stop or suspend the agency's investigation.

The CIT may issue an order under such conditions and including such sanctions for breach as it deems appropriate if it finds that, "under the standards applicable in proceedings of the court," a protective order is warranted. According to the legislative history, the phrase quoted above was intended to: "refer to the [CIT's] practice of determining de novo, after, if necessary, an in camera examination of the documents, whether the need of the party requesting the information outweighs the need of the party submitting the information for continued confidential treatment."[22]

While the text of the statute merely contemplates the possibility of appeal concerning an agency order that refuses to release confidential material, the CIT has interpreted its jurisdiction broadly. In *Sacilor, Acieries et Laminoirs de Lorraine v. United States*[23] the CIT enjoined the U.S. Department of Commerce from disclosing confidential documents that had been submitted by foreign steel producers in response to antidumping questionnaires.

The CIT can also order disclosure during judicial review of the agency's determination.[24] The Trade Agreements Act established an elaborate system of judicial review of antidumping and countervailing duty determinations. During such a review, which is conducted on the basis of the administrative record, the parties will generally try to obtain access to the confidential information submitted to the administrative agencies in the course of the proceeding. If such a request is made, the CIT will examine the documents in camera and decide whether access by counsel is necessary. This issue is discussed more extensively in section F below.

D. Commerce Regulations[25]

Pursuant to its statutory mandate, the U.S. Department of Commerce (Commerce) has issued detailed regulations on confidential documents and their disclosure. Ordinarily, Commerce will only consider information to be government confidential, business proprietary, or privileged if its disclosure would be likely to: (1) cause substantial harm to the competitive position of the supplier; or (2) have a substantial adverse effect upon the

21. *Id.* § 1677f(c)(2). The jurisdiction of the CIT to entertain such actions is based on 28 U.S.C. § 1581(f) (1982).

22. S. Rep. No. 249, *supra* note 7, at 100.

23. 542 F. Supp. 1020, 3 I.T.R.D. (BNA) 2225 (Ct. Int'l Trade 1982). The foreign producers based their cause of action on 28 U.S.C. § 1581(i) (1982).

24. *See* 19 U.S.C. § 1516(a) (Supp. II 1984); 28 U.S.C. § 1581(c) (1982).

25. *E.g.*, 19 C.F.R. §§ 353.28–.31 (1985).

supplier; or (3) impair the ability of the U.S. Government to obtain in the future information from the same or similar suppliers.[26]

On the basis of these standards, Commerce will ordinarily regard as business proprietary that information concerning business or trade secrets, production costs, distribution costs, prices, customers and names of persons from whom confidential information was obtained. On the other hand, all information that is published or otherwise available to the public (price lists, published sales conditions, laws, regulations, etc.) is considered appropriate for disclosure. The same applies to information submitted by petitioners or by other domestic interested parties concerning the operations of a foreign interested party, unless such disclosure might reveal the identity of confidential sources. It is incumbent upon the party submitting the information to request that Commerce treat the information as either government confidential or business proprietary.

These standards are not used to determine whether documents are to be disclosed under an administrative protective order. That is the second step. At this point, Commerce merely decides whether designation as confidential is in conformity with the applicable standards. If so, it will accept the designation. If not, the information will be returned to the submitting party and not considered in the proceeding unless the party involved agrees to change the designation or provide a nonconfidential summary.

Even after Commerce has determined that certain documents should be considered confidential, however, they may still be disclosed to an attorney or other representative of a party to the proceeding under an administrative protective order.[27] The application must be filed by the attorney or other representative and must: (1) describe with particularity the information requested and set forth the reasons for the request; (2) indicate the procedures to be followed to avoid unauthorized disclosure; and (3) demonstrate good cause of disclosure. Following legislative directives,[28] Commerce generally will allow disclosure only to attorneys who are subject to disbarment from practice in the event of violation.[29] However, under certain conditions Commerce will also allow disclosure

26. *E.g.*, *id.* § 353.29.
27. *E.g.*, *id.* § 353.30.
28. S. REP. No. 249, *supra* note 7, at 101.
29. In the United States, in order to legally practice law, a person must pass the bar examination of the jurisdiction in which he will practice. Obviously, only those having passed the bar are subject to disbarment. Both in-house counsel and retained counsel will normally have passed at least one bar examination. For the relevance of the distinction, see *infra* text accompanying notes 67–81. If Commerce determines to allow disclosure to, for example, an industry expert, it will hold the attorneys liable for unauthorized disclosure. Interview with Richard Cunningham (Feb. 11, 1986).

to experts, such as economists or accountants, employed by the attorney or by the party to the investigation whom the attorney represents. In determining whether to grant or refuse disclosure, Commerce applies a balancing test in which it weighs not only the need of the person requesting the data and the need of the person submitting it for continued confidential treatment, but also takes account of the probable effectiveness of sanctions.

In addition, Commerce will normally consider the need of the government to obtain information in future trade cases. Thus, in *Monsanto Industrial Chemicals Co. v. United States*,[30] the CIT agreed with Commerce's refusal to disclose customer name lists to petitioner, because inter alia, "release of such requested sensitive documents at the primary stage of an investigation leading to judicial review without compelling reasons surely dampens the propensity of foreign producers to divulge confidential information in future trade cases."[31] Commerce almost always refuses to disclose customers' names because, in its opinion, this type of information is irrelevant to the determination of dumping.

The balancing test is an issue with which both Commerce and the CIT have repeatedly grappled. In *Sacilor, Acieries et Laminoirs de Lorraine v. United States*,[32] for example, the CIT enjoined Commerce from disclosing to petitioners confidential information submitted by foreign producers in response to questionnaires, because Commerce had violated the statute which "displays an extreme sensitivity to the handling of confidential information."[33] The CIT noted that:

> [T]he 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. This decision should not confuse the role and need of a party to an administrative investigation with that of a litigant in a court of law and it should not reflect an abdication of the investigative duties of the agency.[34]

While the court ostensibly grappled with this "balancing test," the parties never really disputed what was to be disclosed. In reality, respondents went to the CIT in order to delay disclosure of confidential data to U.S. Steel for as long as possible. This delaying aspect was never noticed, or at least never acknowledged, by the CIT.

In *Arbed S.A. v. United States*[35] the court refused to grant an injunction to prevent disclosure by Commerce of certain data to petitioners because Commerce's decision did not involve an abuse of discretion nor an avoid-

30. 5 I.T.R.D. (BNA) 1462 (Ct. Int'l Trade 1983).
31. *Id.* at 1464.
32. 3 I.T.R.D. (BNA) 2225 (Ct. Int'l Trade 1985).
33. *Id.* at 2227.
34. *Id.*
35. 3 I.T.R.D. (BNA) 2369 (Ct. Int'l Trade 1982).

ance of the law. More importantly, the court recognized "a range of discretion in the investigating agency to determine the degree of exposure to confidential information consistent with the objectives of the investigation and the dictates of the law."[36] Commerce itself had taken the position that counsel for petitioners should have access to more than nonconfidential summaries because the use of indices or bracketed amounts therein (instead of actual data on prices, expenses and costs) precluded meaningful analysis: "We believe that petitioners should be allowed to comment on a broader range of pertinent issues rather than be limited to comments regarding only the methodology used by the Department of Commerce in calculating margins."[37]

This lenient administrative attitude towards disclosure, together with the CIT's grant of administrative discretion in this field, suggests that in most cases counsel for petitioners will get access to confidential data submitted by foreign producers.[38] If the submitting party objects to a release of confidential information under a protective order, the materials will be returned to that party and not considered in the investigation. This action, however, will lead Commerce to use the "best information available," which can be the margins or subsidy amounts alleged (and often inflated) by petitioner.

The protective order under which the information is made available to the attorney or other representative of a party to the proceeding must include a personal sworn statement by that person that he will:

1. not divulge the information to any person other than the ITA and ITC case-handlers, the person from whom the information was obtained and other attorneys, acting on behalf of the same party or persons other than attorneys employed or supervised by the attorney who have furnished similar sworn statements (experts). Under no circumstances can the attorney divulge the information to officers, partners, associates, and employees of the party represented or to any other domestic competitor of the foreign firm who supplied the information;
2. use the information solely for the purposes of the proceeding then in progress;
3. take adequate precautions to ensure the security of the materials; and
4. promptly report any breach to Commerce.

36. *Id.* at 2372.

37. *Id.* at 2371.

38. The exception to this rule, release of confidential materials submitted by foreign *governments*, is discussed *infra* in the text accompanying notes 81–87. Occasionally, release of confidential materials is subject to long delays at the ITA level.

In addition, the person providing the statement must acknowledge that in the case of breach:

(1) he, the firm of which he is a partner, associate, or employee and his partners, associates, employers, and employees may be subject to disbarment from practice before any agency of the Department of Commerce for up to seven years following publication of the breach;
(2) if he is an attorney, the breach shall be referred to the ethics panel of the appropriate bar association; and
(3) he and his client may be subjected to appropriate administrative sanctions, including striking from the record any submitted information, termination of the investigation, and revocation of any order in effect.[39]

E. ITC Regulations[40]

The ITC, like Commerce, will not automatically accept any designation of information as confidential, but will check whether the information really should be kept confidential, that is, whether disclosure might impair the ITC's ability to obtain such information in future trade cases or whether disclosure would cause substantial harm to the competitive position of the entity from which the data was obtained. Secretary of the ITC approves or denies the request for confidential treatment. In either case, an appeal may be lodged against the decision at the administrative level. If the ITC decides that certain materials are not entitled to confidential treatment, the submitter is allowed to withdraw the tender.[41]

Upon request of an attorney for an interested party to the investigation, excepting corporate counsel, the secretary may 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 an administrative pro-

39. 19 C.F.R. § 353.30(e) (1985).

40. *Id.* § 207.7; *see also id.* § 201.6(a), which defines confidential business information as:

> 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.

41. 19 C.F.R. § 201.6(g) (1985).

tective order. The request must: (1) describe with particularity the information requested; (2) set forth the reasons for the request; (3) demonstrate a substantial need for the information in the preparation of the case; and (4) demonstrate that the attorney is unable without undue hardship to obtain the substantial equivalent of the information by other means.

These restrictive ITC regulations do not strictly follow from the test of the Trade Agreements Act. The relevant TAA provision states quite broadly that the ITA and the ITC may disclose confidential information submitted by parties to the proceeding.[42] The ITC interpretation, however, seems to be a result of the provision that appeal of the CIT is only possible from an ITC decision not to disclose data submitted by the petitioner or by an interested party in support of the petitioner relating to the domestic price and the cost of production of the like product. In addition the TAA does not limit disclosure to retained counsel, as the ITC regulations do.

In practice, the ITC only discloses price and cost of production data on an industry-wide basis. Furthermore, it will not disclose data submitted by foreign respondents or by domestic entities who are either not interested parties within the meaning of the law or who do not support the petition. A sharp dichotomy exists, therefore, between Commerce and ITC practice in disclosing confidential information, a dichotomy that might be expressed as an "everything but" versus a "nothing but" approach. As disclosure at the Commerce level mainly benefits U.S. producers (petitioners) while disclosure of ITC information would benefit both petitioners and the foreign producers/exporters, the differing attitudes of the two agencies taken together give U.S. petitioners a clear advantage in terms of adequately responding to their opponents' data.

42. It has been argued by at least one commentator that inclusion of the ITC disclosure authorization in the Trade Agreements Act was a direct result of foreign government pressure at the close of the Tokyo Round and was "a hazing requirement rather than a bona fide effort to open the proceedings." Stein, *Instant Replay: Appeals of ITC Commerce and Labor Decisions, The Eighth Annual Judicial Conference of the United Court of Customs and Patent Appeals*, 92 F.R.D. 340, 349–50 (1981). The same argument was raised during the authors' interview with Mike Stein, former General Counsel ITC (Dec. 30, 1985). The history of the provision, however, goes further back. According to Peter Ehrenhaft, the Deputy Assistant Secretary and Special Counsel (Tariff Affairs) at the Department of Treasury, who was (until the transfer of his function to Commerce in 1980) responsible for the administration of the unfair trade laws, the first drafts of the legislation that became the Trade Agreements Act of 1979 were prepared in his office and contemplated the type of full disclosure of confidential information under protective order now in place at Commerce. However, in the course of congressional consideration of the draft, the ITC objected to this possible interference with its investigatory functions and departure from past practice, and the provision was dropped. Objections to this action from a number of foreign interests, primarily in the European Communities, persuaded the congressional staff to reincorporate in the proposed bill the more limited provisions law. Letter from Peter Ehrenhaft to the authors (Jan. 22, 1986).

Over the last years, two diametrically opposed schools of thought have developed that advocate changes in ITC practice, based on their respective perceptions of the role of that agency. Those who view the ITC as an investigator[43] would like to limit further the release of confidential information, thereby effectively increasing the ITC's power. On the other hand, a number of people, especially practitioners active in the international trade field,[44] advocate expanded disclosure because they see the ITC primarily as an adjudicator. They argue that if counsel for the parties involved had access to more information, counsel could make more complete presentations, which, in turn, might help the ITC to make "better informed determinations."[45] Most of the practitioners interviewed, however, agreed that the ITC itself was unlikely to modify its regulations and that, therefore, legislative change would be necessary to accomplish expanded disclosure.

In the authors' opinion, no compelling reasons exist why disclosure at the ITC level should not be broadened. The risks of leaks and chilling effect on future cases, while theoretically relevant, have turned out to be relatively unimportant in DOC practice. Only one concrete suspicion of leakage has occurred in the last five years.[46] The chilling effect (i.e., refusal of parties to submit confidential information) has seldom been realized because of Commerce's power to make its determinations in such a case on the basis of the best information available. There is no reason why the ITC experience should be different.[47]

In addition, as a large number of recent ITC determinations have been appealed, counsel eventually gains access to the confidential data anyway during subsequent judicial proceedings.[48] Furthermore, basic principles of procedural fairness would appear to require that all parties in an antidumping or countervailing duty investigation be subject to the same

43. *See* Anthony & Byrne, *Safeguarding Confidential Information in ITC Injury Proceedings: Proposals to Reduce the Risks of Disclosure*, 17 L. & POL'Y INT'L BUS. 1 (1985).

44. Ehrenhaft, *A Practitioner's Response to the Anthony-Byrne Report: "It Ain't Necessarily So,"* 17 L. & POL'Y INT'L BUS. 71, 72 (1985).

45. *Id.*

46. *Id.* at 75. Information, submitted in confidence by a surrogate country in a case involving carbon steel plate from a nonmarket economy country, found its way into a nonconfidential brief. After this information entered the public record, U.S. Steel utilized it to file a subsequent antidumping petition against Finnish carbon steel plate. According to John Mangan, attorney for U.S. Steel on trade litigation, it was the shortest petition U.S. Steel ever filed. Interview with John Mangan (Jan. 2, 1986).

47. Although, at the ITC level, there might be a difference between information supplied by petitioners or parties in support of the petition and information supplied by entities not parties to the investigation. Limited disclosure of the information supplied by the latter category might be justified. Interviews with Lynn Barden and Patrick McCrory (Dec. 23, 1985).

48. *See infra* text accompanying notes 53–66.

disclosure regime and the inherent risks thereof. The authors believe that the real reason for the ITC's reluctance to disclose confidential data[49] is a fear of losing its position as sole finder *and* interpreter of the facts throughout the proceeding. While understandable, this fear impinges on the essentially mixed administrative-adversarial character of antidumping and countervailing duty investigations and leads to a suboptimal use of the resources that can be developed in an adversarial proceeding.

F. The Court of International Trade

The CIT has two opportunities to determine whether confidential documents should be disclosed under an administrative protective order. First, a party whose request for disclosure during the investigation has been denied by the administrative agencies, can immediately petition the CIT for disclosure pursuant to section 777(c)(2) of the TAA:[50]

> [B]ecause the investigation in connection with which the information is sought is not stayed or stopped by a court proceeding, it is assumed that the Chief Judge of the Customs Court (now CIT) will act expeditiously to assign a judge to cases arising under this section who will be available to conduct a hearing whenever required and that a decision as to whether or not to issue an order will be reached as soon as possible.[51]

This section has been discussed more extensively above.[52] Secondly, if, after the investigation has been completed, certain parties decide to contest the administrative determinations before the CIT, the latter may examine, in camera, the confidential material and disclose such material under such terms and conditions as it may order.[53]

Like the agencies, the CIT has adopted a balancing test in making its decision on disclosure. A typical formulation of the test can be found in *Roquette Freres v. United States*:[54]

> This statute [§ 516A(b)(2)(B) of the Tariff Act of 1930, as amended] gives the court wide latitude in determining whether or not to release confidential doc-

49. *See generally* Anthony & Byrne, *supra* note 43, in which the authors relied very heavily on interviews with ITC officials.

50. 19 U.S.C. § 1677(c)(2) (Supp. II 1984).

51. S. Rep. No. 249, *supra* note 7, at 100.

52. *See supra* text accompanying notes 12–24.

53. Section 516A(b)(2)(B) of the Tariff Act of 1930 provides:
Confidential or privileged material. The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged materials, and may disclose such material under such terms and conditions as it may order.

54. 554 F. Supp. 1246, 1248, 4 I.T.R.D. (BNA) 1388 (Ct. Int'l Trade 1982), *discussed in* Stred, *International Trade: Court of International Trade Disclosure of Confidential Information*, 24 Harv. Int'l L.J. 219, 220–25 (1983).

> uments to parties involved in an antidumping proceeding. In making its determination, the court must consider (1) the needs of the litigants for data used by the Government in order to adequately respond to the antidumping finding, (2) the need of the Government in obtaining confidential information from businesses in future proceedings, and (3) the needs of the producers of sorbitol to protect from disclosure information which, in the hands of a competitor, might injure their respective positions in the industry.

While this case involved a request of French producers to obtain information, submitted by U.S. producers who were not petitioners in the original antidumping action, a similar formula was used in *American Spring Wire Corp. v. United States*,[55] an action brought by U.S. producers to obtain information submitted by foreign producers.[56] The balancing test as quoted above represents the current state of the law.

It is on the basis of this test that the CIT will then balance "a party's need for the information sought against the public interest in protecting confidential business information recognized by § 516A(b)(2)(B) [of the TAA] and inherent in the administrative authority's ability to effectively perform its investigative duties under the countervailing duty laws."[57] The result of the balancing test obviously depends on the type and sensitivity of the information sought. Past jurisprudence makes it clear that the following considerations play a role in the CIT's decision whether or not to grant disclosure:

1. ***The "age" of the information.*** Recent information will ordinarily be considered more sensitive than older information. In *Japan Exlan Co. v. United States*[58] the CIT, after examination of the documents in camera, permitted disclosure because "based on the fact that none of the information contained therein is more recent than September 1979 with most of the information adduced dating back to 1978 or earlier, . . . any sensitivity previously possessed by this data has become de minimis."[59]

55. 566 F. Supp. 1538, 4 I.T.R.D. (BNA) 2210 (Ct. Int'l Trade 1983).

56. The court used the following balancing test:

> By its terms this provision vests in the court discretion in determining whether to release confidential documents to parties involved in countervailing duty cases. In exercising its discretion, however, the court is guided by the following three considerations: (1) the need of the litigants for data used by the government in order to respond adequately to subsidy findings, (2) the need of the government in obtaining confidential information from businesses in future proceedings, and (3) the need of the foreign manufacturer to protect from disclosure information which, in the hands of a competitor, might injure its relative position in the industry.

566 F. Supp. at 1539.

57. *Id.* (citing Nakajima All Co. v. United States, 2 Ct. Int'l Trade 170, 174, 3 I.T.R.D. (BNA) 1453 (1981)).

58. 1 Ct. Int'l Trade 286, 15–23 Cust. B. & Dec. 102, 3 I.T.R.D. (BNA) 1008 (1981).

59. 15–23 Cust. B. & Dec. at 104, 3 I.T.R.D. (BNA) at 1010.

2. ***The "origin" of the information.*** Information submitted by entities who do not have a direct interest in the proceeding would probably be considered more sensitive.[60] The related problems of information supplied by foreign governments and information contained in internal working documents are discussed separately below.

3. ***The relevance of the documents to the administrative determinations.*** In *American Spring Wire Corp.*[61] the CIT refused to release documents concerning customer-related information because such information was "not directly relevant to the administrative determinations."[62]

4. ***The motivation of the requestor.*** In *Roses, Inc. v. United States*[63] the CIT refused disclosure because plaintiff had not shown a "specific need."

5. ***The "specificity" of the information requested.*** This argument is obviously based on the theory that the more specific the information is, the easier identification becomes. In *Roquette Freres*[64] ITC reports were disclosed as far as they contained "industry-wide aggregate data" and not individual producer statistics.

6. ***Equitable arguments.*** In *Nakajima All Co. v. United States*[65] the court ordered disclosure of confidential documents to outside counsel for Nakajima on the basis of equity and fundamental fairness because defendant and SCM's outside counsel also had access to the documents in question.[66]

60. These conclusions rest on *interpretation ad analogiam* of the decision in *Roquette Freres* in which the CIT held that information submitted by U.S. producers who were not petitioners in the administrative proceeding was "totally protected" from disclosure. 554 F. Supp. at 1250.

61. 566 F. Supp. 1538, 4 I.T.R.D. (BNA) 2210 (Ct. Int'l Trade 1983).

62. 566 F. Supp. at 1540; *see Roquette Freres:* "[W]here the information . . . requested 'directly related to an assessment of whether there is material injury or a threat of material injury, and, consequently, germane to the major issues' of the case, disclosure was required." 554 F. Supp. at 1248 (citing Rhone Poulenc, Inc. v. United States, No. 81–87, slip op. (Ct. Int'l Trade Sept. 29, 1981); *see also* Atlantic Sugar, Ltd. v. United States (Atlantic Sugar I), 85 Cust. Ct. 128, 129, 2 I.T.R.D. (BNA) 1546 (1980), where the CIT stated that plaintiffs must demonstrate more than "mere curiosity or a vague groping for clues;" Rhone Poulenc, Inc. v. United States, 1 Ct. Int'l Trade 116, 4 I.T.R.D. (BNA) 1386 (1981). Lately, however, this consideration seems to have become less important to the CIT. In Jernberg Forgings Co. v. United States, 598 F. Supp. 390, 392, 6 I.T.R.D. (BNA) 1602 (Ct. Int'l Trade 1984), the CIT argued that, as far as verification exhibits are concerned, "a party is not required to express a particularized need for the data." *Cf.* Star Kist Foods, Inc. v. United States, 6 I.T.R.D. (BNA) 1349 (Ct. Int'l Trade 1984).

63. 2 I.T.R.D. (BNA) 1548 (Ct. Int'l Trade 1981); *cf.* Jernberg Forgings Co. v. United States, 1 Ct. Int'l Trade 116, 4 I.T.R.D. (BNA) 1386 (1981).

64. 544 F. Supp. at 1248; *see also* Roquette Freres v. United States, 5 I.T.R.D. (BNA) 1658 (Ct. Int'l Trade 1983).

65. 3 Ct. Int'l Trade 69, 3 I.T.R.D. (BNA) 1974 (1982).

66. *Cf.* Ceramica Regiomontana v. United States (Ceramica II), 557 F. Supp. 593, 594–95, 4 I.T.R.D. (BNA) 1481 (1982).

7. ***The status of counsel of the requesting party.*** Until the decision in the litigation brought by U.S. Steel, the CIT was extremely reluctant to disclose confidential information to "in-house" or "corporate" counsel of parties. This issue is discussed directly below.

G. Corporate Versus Retained Counsel

Most large companies today have an in-house legal staff that advises them on a multitude of legal subjects, including international trade issues. In addition, in-house attorneys, at least in some instances, can also be assumed to play a role in the formulation of corporate policy.[67] It is this combination of functions that could create problems in disclosing competitors' confidential business information to such attorneys. The problem is particularly acute because antidumping and countervailing duty cases very often involve companies with in-house counsel.[68] Consequently, the CIT has had to face this problem from the inception of the TAA.[69]

While the ITA, since 1981, provides access to corporate counsel,[70] the ITC regulations still explicitly prohibit such release. Until 1983 the CIT routinely refused to release confidential information to in-house counsel: "The Court is of the opinion that in actions such as these the confidential business information of business competitors should not be disclosed to in-house counsel unless a party has no other reasonable way of adequately preparing and presenting its arguments."[71] The CIT added that it did not have doubts about the integrity of in-house counsel, but merely wanted

67. It should be noted, however, that this problem is not unique to in-house counsel. Retained lawyers, for example, could be members of the board of directors of a company they represent.

68. In litigation brought by U.S. Steel, 61 corporations in steel, chemical, automotive and other industries filed an amicus curiae brief requesting disclosure to in-house counsel.

69. The problem has come up in the following cases: Atlantic Sugar, Ltd. v. United States (Atlantic Sugar I), 85 Cust. Ct. 128, 2 I.T.R.D. (BNA) 1546 (1980); Atlantic Sugar Ltd. v. United States (Atlantic Sugar II), 511 F. Supp. 819, 2 I.T.R.D. (BNA) 1586 (1980); Connors Steel Co. v. United States, 85 Cust. Ct. 112, 2 I.T.R.D. (BNA) 1129 (1980); Timken Co. v. United States, 5 I.T.R.D. (BNA) 1080 (Ct. Int'l Trade 1983); U.S. Steel Corp. v. United States (U.S. Steel I), 569 F. Supp. 870, 4 I.T.R.D. (BNA) 2449 (Ct. Int'l Trade 1983), *vacated on other grounds*, No. 84–12, (Ct. Int'l Trade Feb. 24, 1984); U.S. Steel Corp. v. United States (U.S. Steel II), 5 I.T.R.D. (BNA) 1249 (Ct. Int'l Trade 1983); Republic Steel Corp. v. United States, 572 F. Supp. 275, 5 I.T.R.D. (BNA) 1269 (Ct. Int'l Trade 1983), *vacated*, 730 F.2d 1465 (Fed. Cir. 1984); Bethlehem Steel Corp. v. United States, 5 I.T.R.D. (BNA) 1333 (Ct. Int'l Trade 1983); U.S. Steel Corp. v. United States (U.S. Steel III), 730 F.2d 1465, 5 I.T.R.D. (BNA) 1955 (Fed. Cir. 1984).

70. Cunningham, *The Current State of U.S. Import Relief Laws—Increased Importance and Increased Complexity*, in International Trade Policy: The Lawyer's Perspective 1–1, 1–25 (Jackson, Cunningham, Fontheim eds. 1985).

71. *Atlantic Sugar I*, 85 Cust. Ct. at 133; *Atlantic Sugar II*, 2 I.T.R.D. (BNA) at 1586.

to avoid placing it "under the unnatural and unremitting strain of having to exercise constant self-censorship in their normal working relations."[72]

The CIT's attitude changed slightly during appeals from the 1982 steel determinations. In-house counsel for the seven American steel companies involved had prepared the petitions and continued to represent the companies in the administrative and judicial proceedings. While six of the steel companies had also retained outside counsel, U.S. Steel relied exclusively on its in-house counsel. Because of this involvement, the CIT clearly had more difficulty in refusing disclosure to in-house counsel. Nevertheless it held its ground:

> It is only because the Court sees this information as having ineradicable importance that it takes this step. In the combination of its detail, and its scope, the information is extremely potent. Its nature and volume place it beyond the capacity of anyone to retain in a consciously separate category. When the Court said in *Atlantic Sugar* that it was acting out of a desire to avoid placing lawyers under an unnatural and unremitting strain, it was really expressing its rationale indirectly and incompletely as a form of solicitude for the lawyers. The direct and complete reason is that, in the Court's judgment, it is humanly impossible to control the inadvertent disclosure of some of this information in any prolonged working relationship.[73]

The CIT repeated that the retention of outside counsel was a reasonable way for the steel company to obtain the information and paid considerable attention to the differences between corporate and retained counsel. Although it accepted the argument that in case corporate counsel was not involved in pricing or other competitive decision-making, this did not alter the fact that counsel, albeit somewhat isolated, still operated "within a rather worldly cloister."[74] Furthermore, in the CIT's opinion, it could reasonably assume that counsel would move into other roles and positions within the company in the future.[75] On the basis of these considerations, the CIT concluded that there was simply "a greater likelihood of inadvertent disclosure by lawyers who are employees committed to remain in the environment of a single company."[76]

The decision was reversed by the Court of Appeals for the Federal Circuit in an interlocutory appeal on a certified question arising from the CIT decision.[77] An interesting aspect of the case was that the U.S. Gov-

72. *Atlantic Sugar I*, 85 Cust. Ct. at 133.
73. *U.S. Steel I*, 569 F. Supp. at 871–72.
74. *Id.* at 872.
75. The *U.S. Steel I* reasoning was incorporated by reference in *Republic Steel* and in *Bethlehem Steel*.
76. *U.S. Steel I*, 569 F. Supp. at 872.
77. *U.S. Steel III*, 740 F.2d at 1465. The case is discussed by McIntyre, *Can In-House Counsel Be Trusted With Access To A Competitor's Confidential Information?: U.S. Steel Corp. v. United States*, 58 ST. JOHN'S L. REV. 890 (1984).

has generally taken a lenient attitude towards government requests for confidentiality.

Different rules are applied by the CIT. The law[88] permits the CIT to order disclosure of information provided to the United States by foreign governments to parties, their counsel or any other person under such terms and conditions as the CIT deems appropriate. This issue has arisen in several cases[89] and over the years the CIT has come to look more favorably upon disclosure under protective order. In early cases, the CIT flatly refused disclosure on the basis of danger to national security without even considering the contents of the materials: "[T]he status of foreign government information is determined by the identity of the party that submits the information, and not the nature of the information itself."[90]

Considerable thought was given to the problem in the *Ceramica Regiomontana* cases.[91] The CIT noted that while the state secrets privilege was well-established, it could not be considered "absolute" in view of section 2641(b).[92] The CIT held in that case that the privilege was properly asserted because of the following factors:

1. the party submitting the information was a foreign government;
2. the Mexican government requested, understood and expected the materials to be treated confidentially;
3. the materials had been classified as confidential by Commerce pursuant to the Executive Order;
4. based on Commerce's classification, disclosure was presumed to cause at least identifiable damage to the national security; and
5. the declaration by the Under Secretary of Commerce that disclosure in contravention of assurances of confidentiality would be "prejudicial to our relations with Mexico."[93]

The decision did, however, leave the door open for the party requesting disclosure to establish that its opponents, the Mexican tile industry, had had access to or input into the governmental documents. If so, a subterfuge would have taken place and "equity and fundamental fairness [would] require making the information equally available to intervenor [the American Tile Council]."[94]

88. 28 U.S.C. § 2641(b) (1982).
89. *See e.g., Carlisle II,* 663 F.2d at 219 n.63; Ceramica Regiomontana, S.A. v. United States (Ceramica I), 4 Ct. Int'l Trade 267, 4 I.T.R.D. (BNA) 1103 (1983); *U.S. Steel II,* 5 I.T.R.D (BNA) at 1249; *Ceramica II,* 557 F. Supp. at 593; Carlisle Tire & Rubber Co. v. U.S. Customs Serv. (Carlisle I), 1 I.T.R.D. (BNA) 1891 (D.D.C. 1979).
90. *Carlisle I,* 1 I.T.R.D. (BNA) at 1897; *see also Carlisle II,* 663 F.2d at 210.
91. *Ceramica I,* 4 I.T.R.D. (BNA) at 1103; *Ceramica II,* 557 F. Supp. at 593.
92. *Ceramica I,* 4 I.T.R.D. (BNA) at 1104.
93. *Id.* at 1104, 1105.
94. *See Ceramica I,* 4 I.T.R.D. (BNA) at 1105; *Ceramica II,* 557 F. Supp. at 595.

The *Carlisle* and probably the *Ceramica* cases were overruled by *U.S. Steel v. United States*, wherein Judge Watson of the CIT denied a motion of the government for a protective order. The case involved a consolidated action by domestic steel producers for review of the final Commerce determination in a countervail case involving carbon steel plate from South Africa and Brazil. The CIT found that the request for confidentiality by a foreign government, the U.S. Government's classification under the Executive Order, and the opinion of the Secretary of the Commerce Department that disclosure would damage international relations nevertheless did not make the information a state secret: "The potency of the state secrets privilege is such that it ought not to be granted except in cases of a *palpable threat to national security* just as the more exceptional powers of the Executive ought not to be used except in cases of grave peril."[95]

The CIT explicitly rejected the approach that considered the *source* of information (*e.g.*, the *Carlisle* case) rather than its *contents* determinative for the decision whether or not to disclose. The rule of *U.S. Steel* has severely restricted the U.S. government's ability to invoke the state secrets privilege to prevent disclosure in proceedings before the CIT. The CIT will examine the documents in camera and then make its own determination as to whether disclosure under a protective order would damage international relations. This decision will be based on the contents of the government materials.

I. Commerce and ITC Internal Working Documents

In the course of antidumping or countervailing duty investigations, staff of the administrative agencies circulate internal intraagency communications containing predecisional comments, opinions, pros-and-cons statements, and the like. Numerous lawyers have tried to obtain these documents in order to defend their clients properly. The government's defense is usually to claim executive privilege. To invoke the claim, the following requirements must be fulfilled:

1. executive privilege must be formally claimed by the agency;
2. it must be asserted by the head of the agency who personally considered the matter;
3. the materials must be reviewed; and
4. a proper affidavit must be submitted in support of the claim.[96]

95. *U.S. Steel II*, 5 I.T.R.D. (BNA) at 1253 (emphasis added).

96. Asahi Chem. Indus., Ltd. v. United States, 1 Ct. Int'l Trade 21, 23, 2 I.T.R.D. (BNA) 1340, 1342 (1980).

Thus far, all claims of executive privilege in the trade field appear to the authors to have been upheld by the CIT.[97] The rationale for this deferential approach is well explained in *Henkel Corp. v. United States*:[98]

> The privilege exists to encourage uninhibited and frank internal discussion in the formulation of governmental policy and decisionmaking. In the words of Mr. Chief Justice Burger the privilege is necessary because "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process."[99]

Nevertheless, the privilege is not "absolute, but qualified"; the CIT has held repeatedly that it must weigh the need for the materials sought against the potential harm that would result from their disclosure.[100] "The question at the core of any claim of executive privilege is whether the damage resulting from disclosure outweighs the need for a just resolution of a legal dispute."[101]

To answer this question, the CIT will examine the documents in camera and decide whether the documents are useful to the party[102] and whether this usefulness outweighs the dangers inherent in disclosure. Until now, however, the CIT has attached paramount importance to "the free and uninhibited exchange of opinions and recommendations requisite to proper administrative determinations."[103]

II. Framework for the European Communities

A. Background

In the European Communities (the EC), the Commission of the European Communities (the Commission) essentially conducts antidumping

97. *See, e.g., Asahi Chem. Indus.*, 1 Ct. Int'l Trade at 21; Melamine Chem., Inc. v. United States, 1 Ct. Int'l Trade 65, 2 I.T.R.D. (BNA) 1398 (1980); Henkel Corp. v. United States, 2 I.T.R.D. (BNA) 1465 (Ct. Int'l Trade 1980); Silver Reed Am. v. United States, 2 I.T.R.D. (BNA) 1552 (Ct. Int'l Trade 1981); Nakajima v. United States, 2 I.T.R.D (BNA) 1553 (Ct. Int'l Trade 1981); National Latex Prods. v. United States (Latex I), 3 I.T.R.D. (BNA) 1459 (Ct. Int'l Trade 1981); National Latex Prods. v. United States (Latex II), 3 I.T.R.D (BNA) 1794 (Ct. Int'l Trade 1982); West Coast Indus. Inc. v. United States, 3 I.T.R.D (BNA) 1925 (Ct. Int'l Trade 1982); Chevron Standard, Ltd. v. United States, 4 I.T.R.D (BNA) 1572 (Ct. Int'l Trade 1983).

98. *Henkel Corp.*, 2 I.T.R.D. (BNA) at 1466.

99. *Id.* (citing SCM Corp. v. United States, 473 F. Supp. 791, 82 Cust. Ct. 351 (1979)).

100. *Silver Reed Am.*, 2 I.T.R.D. (BNA) at 1553; *cf. Nakajima*, 2 I.T.R.D. (BNA) at 1555; *Latex I*, 3 I.T.R.D. (BNA) at 1461.

101. *Latex I*, 3 I.T.R.D. (BNA) at 1461 (citing Black v. Sheraton Corp. of Am., 371 F. Supp. 97, 100 (Ct. Int'l Trade 1979)).

102. *Latex I*, 3 I.T.R.D. (BNA) at 1461; *West Coast Indus.*, 3 I.T.R.D. (BNA) at 1925.

103. *Chevron Standard*, 4 I.T.R.D. (BNA) at 1573. The CIT appears more prone to accept a claim of executive privilege than a claim of state secrets. One could raise the question to what extent this differential treatment discriminates against the *foreign government's* "free and uninhibited exchange of opinions and recommendations requisite to proper administrative determinations."

and countervailing duty investigations.[104] Over the past five years the Commission and the European Court of Justice (the ECJ) have substantially improved the procedural safeguards for parties involved in such proceedings. The Commission, for example, "[t]oday . . . publishes considerably more information in the *Official Journal,* compared to the sketchy, boiler plate type of reasoning typically used in the early days of [EC] antidumping enforcement."[105] Furthermore, the EC antidumping and countervailing duty regulation, Council Regulation no. 2176/84,[106] contains several procedural safeguards, including: (1) the right of access to the nonconfidential files; (2) the right to comment in writing and orally; (3) the right to exchange thoughts with the opponent in so-called "confrontation hearings" (subject to agreement with the opponent); and (4) the right to be informed of the essential facts and considerations on which the Commission bases its decision. The ECJ, for its part, has recently established the right of judicial review under article 173.2 of the EC treaty for exporters, dependent importers and complainants involved in antidumping or countervailing duty proceedings.[107]

B. The Legislative Framework

In the EC the Commission, the Council, and the Member States are not allowed to reveal any information for which the submitting party has requested confidential treatment without specific permission of the latter.[108] The party submitting the information must indicate why the information is confidential and enclose a nonconfidential summary of the information or a statement of the reasons why such a summary is not possible.[109] The Commission will determine whether the designation of the documents as confidential is warranted on the basis of the standard contained in Council Regulation no. 2176/84 that disclosure will be "likely to have a significantly adverse effect upon the supplier or the source of

104. For an extensive and most up-to-date overview of trade laws and their administration in the EC, see Van Bael & Bellis, International Trade Law and Practice of the European Community (1985).

105. Van Bael, *A Practitioner's Guide to Due Process in EEC Antitrust and Antidumping Proceedings,* 18 Int'l Law. 841 (1984).

106. Reg. No. 2176/84, 27 O.J. Eur. Comm. (No. L. 201) 1 (1984). This regulation is the basic antidumping and countervailing duty regulation in the EEC as published in the Official Journal, the EEC's official gazette comparable to the Federal Register.

107. For extensive discussions, see Bellis, *Judicial Review of EEC Anti-dumping and Anti-subsidy Determinations After Fediol: The Emergence of a New Admissibility Test,* 21 Common Mkt. L. Rev. 539 (1984); Kuyper, *Some Reflections on the Legal Position of the Private Complainant in Various Procedures Relating to Commercial Policy,* [1983] 1 Legal Issues Eur. Integration 115 (1983).

108. Reg. No. 2176/84, *supra* note 106, art. 8, § 2(a).

109. *Id.* § 2(b).

such information."[110] If such is not the case and the supplier is either unwilling to make the information publicly available or to authorize disclosure in summary form, the Commission may disregard the information and decide the case on the basis of the best information available.

The parties in an investigation may inspect all information made available to the Commission by any party to the investigation,[111] provided that the information is: (1) relevant to the defense of their interests; (2) not confidential in the above sense; and (3) used by the Commission in the investigation. Commission or Member State documents are excluded from the right of inspection.[112]

Finally, the Commission is not precluded from disclosing general information or evidence relied on by the Commission so far as necessary to explain its motivation in court proceedings.[113]

C. Current Commission Practice

Counsel for parties seeking access to Commission files are usually astounded at the vagueness of the nonconfidential files.[114] Indeed, contrary to a European Parliament resolution[115] that the confidentiality provisions of article 8 of the Council regulation[116] should be interpreted as narrowly as possible, the Commission seems to grant requests for confidential treatment liberally.

As of yet, only one case before the ECJ has attacked the designation of documents as confidential by the Commission.[117] In that case the ECJ held that all nonconfidential information submitted by EC or non-EC corporations that had been used by the Commission during the investigation, and that had had a decisive influence on the decision, must be made available to the complainant. The designation by the Commission of certain price information, submitted by third country producers for the purpose of establishing constructed value, as confidential was unacceptable in view of the fact that the complainant was "entirely dependent for the defense of its interests on the factors on which the Commission based

110. *Id.* § 3.

111. In Timex v. Council & Commission, Case 264/82, judgment of 20 Mar. 1985 (not yet reported), the EC held that this term should be interpreted as including not only the parties which are the subject of the investigation, but also the parties whose information had been used to calculate the normal value of the relevant product (in this case, Hong Kong manufacturers). *See* Consideration 25.

112. Reg. No. 2176/84, *supra* note 106, art. 7, § 4; a concept analogous to "executive privilege" in the United States.

113. *Id.* art. 8, § 5.

114. *Cf.* Van Bael, *supra* note 105, at 859.

115. 25 O.J. Eur. Comm. (No. C 11) 37 (1982).

116. Reg. No. 2176/84, *supra* note 106, art. 8.

117. Timex v. Council & Comm'n, Case 264/82, judgment of 20 Mar. 1985 (not yet reported).

its calculation."[118] Because the Commission had violated this procedural requirement, the ECJ invalidated the antidumping duty.[119]

D. Disclosure Before the Court

In *Celanese*[120] an American importer brought a case against an EC Council regulation[121] imposing an antidumping duty. The applicant submitted documents to the ECJ for which it requested confidential treatment and the ECJ had to determine to what extent this treatment could be granted. The ECJ made a distinction between documents on the confidential status of which parties in the litigation agreed (Category I documents) and documents that would be submitted to the ECJ without prior agreement (Category II documents).

The Category I documents automatically obtained confidential status. The ECJ decided to examine Category II documents and hear the defendants. If the defendants disagreed, the ECJ could fix a period within which the applicant might withdraw the documents. All confidential documents were placed in a special file to which only the parties and court officers had access. Finally, the ECJ order provided that the ECJ reserved the right to exclude from the file confidential documents if the use of such material would be incompatible with the public nature of court judgments or opinions of the Advocate General.

The issues in *Celanese* were completely different from the problems discussed above with regard to court-ordered disclosure in the United States. There, the documents in question concerned materials submitted in confidence by parties to the administering agencies and the release thereof to counsel for business competitors during the court proceeding. Submission of new materials during the court proceeding is unlikely because the CIT reviews the case on the basis of the administrative record.[122] *Celanese,* however, involved submission of new materials[123] to

118. *Id.* Consideration 30.

119. The ECJ, however, allowed the duty to remain in force provisionally until the Commission had taken appropriate action.

120. Celanese Chemical Co. v. United States, Case 236/81, Court order of March 30, 1982, E.C.R. 1183 (1982). *See also* Riesenfeld, *The Treatment of Confidential Information in Antidumping Cases: A Comment on the Celanese Case,* Common Mkt. L. Rev. 553 (1984).

121. 24 O.J. Eur. Comm. (No. L 129) 1 (1981).

122. *Cf.* Stewart, *Practice and Procedure in Antidumping and Countervailing Duty Investigations, As Experienced by Counsel for Petitioners and Other Domestic Interested Parties,* in The Commerce Department Speaks on Import Administration and Export Administration 185, 230 (1984) and cases cited there. In practice, of course, counsel frequently introduces new arguments, often based upon additional discovery that the court allows. Letter of Peter Ehrenhaft to the authors (Jan. 22, 1985).

123. Riesenfeld, *supra* note 120, at 556.

the ECJ and the administrative agencies and maintenance of their confidential character.

E. A Framework for the EC Based on the American Experience

Disclosure of confidential information can take place at both the administrative and the judicial level. In the United States, at the administrative level, a slight bias appears to exist in favor of domestic producers. Commerce, which receives the confidential information from foreign producers, generally discloses that information to counsel of petitioners under a protective order. On the other hand, the ITC, which receives the confidential information from domestic U.S. producers, has taken a very restrictive attitude toward disclosure. This approach has been sanctioned by the CIT. However, there is a strong feeling among practitioners that the law and regulations should be changed in order to permit more disclosure at the ITC level. This development is one that should receive the endorsement of all parties involved in proceedings before the Commission because it would improve the quality of the determinations.

In other respects, the experience with the disclosure provisions of the 1979 Trade Agreements Act has been satisfactory. The current tendency is to favor more, rather than less, release of information.[124]

At the judicial level, the CIT has also broadly interpreted its powers to order or forbid disclosure. Generally speaking, rather than prohibiting release of certain information per se, the CIT allows release, but shapes its protective orders on a case-by-case basis to protect inadvertent disclosure. However, as discussed above, there is one exception to this practice; release of information contained in internal agency documents is almost uniformly denied.

In the EC, on the other hand, counsel for parties involved in dumping or countervailing duty investigations are still "shooting in the dark." The Commission realizes the disadvantages of this situation and is currently considering changes in Council Regulation no. 2176/84[125] that would permit disclosure of confidential information.

The authors suggest that, at least at the administrative level, the Commission should take a close look at the American system and consider to what extent the Commission could adopt the U.S. framework. In the authors' opinion, there are no reasons why the basics of the system would

124. An interesting detail is that in Canada the Import Tribunal discloses more information on the injury side than does Revenue Canada on the dumping/subsidization aspects, thereby taking an approach opposite to that of the U.S. agencies. On Canadian trade laws, see Handbook on Trade Laws of Canada, UNCTAD/TAP/298 (1986).

125. *See supra* note 106.

not work in the EC. Certain disadvantages in that system, such as the discrepancy between Commerce and ITC disclosure rules, would even be less likely to occur in Europe where the Commission conducts both the dumping/subsidization and the injury investigations. And while the U.S. system's success obviously rests to a great extent upon the deterrent effect of the Draconian sanctions imposed for illegal disclosure, there is no reason why similar sanctions could not be applied in the EC. Even more than in the U.S., the firms practicing antidumping and countervailing duty laws before the Commission are relatively few and highly specialized in this matter. They would not be willing to run the risk of being disbarred from practice before the Commission. Furthermore, like attorneys in the U.S., attorneys in the EC are bound by Codes of Professional Responsibility, albeit those issued by the national bar associations. Devising a system of disciplinary referral to those associations in case of breach of a protective order poses no insurmountable difficulties. A system for application of administrative sanctions like those in the United States could be adopted by the Commission itself.[126]

III. Conclusions

Antidumping and countervailing duty proceedings have changed radically in character over the last seven years. Until the signing of the 1979 GATT Antidumping and Subsidies Codes and their implementation into American law by means of the 1979 Trade Agreements Act, the administrative aspect of such proceedings prevailed. Consequently, the U.S. governmental agencies authorized to administer these laws performed both investigative and adjudicatory functions.

Since 1980, however, trade law has become increasingly judicialized.[127] This judicialization has led to more adversarial proceedings in which legal counsel for the parties involved criticize not only each other's submissions but the agencies' decisions as well. It is submitted that the development of legal counsel or, in other words, the parties themselves, taking over part of the investigative duties of the administrative agencies has improved the quality of the decision-making process.[128] In most instances, the parties involved have more resources at their disposal to generate the necessary data. The adversarial system of attack-riposte-counterattack is best suited to discover and present these data. Obviously, a concomitant sine

126. In addition, disclosure likely would lead to a significant decrease in the workload of the Commission. Interview with John Greenwald (Dec. 26, 1985).

127. The term is derived from Ehrenhaft, *The "Judicialization" of Trade Law*, 56 NOTRE DAME L. REV. 595 (1981).

128. This conclusion was shared by practically all of the attorneys interviewed by the authors.

qua non for optimal functioning of the system is access to the broadest possible range of information submitted to the authorities by parties to the investigation. In the United States this access is accomplished through disclosure of confidential documents under an administrative protective order.

This article has analyzed the U.S. law and practice concerning administrative and judicial disclosure of confidential business and governmental information in antidumping and countervailing duty cases. The authors' conclusion, shared by most of the trade lawyers interviewed by them, is that overall the system has functioned satisfactorily. The sanctions against breach of the protective order have proved to be a sufficient deterrent.

In the EC access to confidential information is still nonexistent. Apart from the fact that counsel's access to confidential information would undoubtedly improve the quality of the decision-making process, basic rules of due process require that counsel for parties in an antidumping or countervailing duty investigation should have the right to see the information that is presented to the Commission by their opponents, and on the basis of which the Commission makes its decisions, in order to defend their clients' interests as efficiently as possible.

Building on these contentions, the authors conclude that no major reasons exist why the Commission should not adopt the basics of the American system. The best way for the Commission to proceed would be to publish proposed guidelines and organize a public hearing in which interested parties would be invited to comment. This approach would present a basis for necessary interaction between Commission officials, practitioners, and others active in this area of the law.