1993

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Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z387P9R

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Problems with the United States Anti-Dumping Law: The Case for Reform of the Constructed Value Methodology

Tycho H.E. Stahl†

Under the Tariff Act of 1930, United States industries are protected from foreign competitors selling their products at less than a statutorily prescribed "fair market value." If a product is found to have been sold at less than its "fair market value," the International Trade Administration (ITA) is required to assess an anti-dumping duty. The statute permits the ITA to choose among several methods in calculating this anti-dumping duty. The article addresses the problems in application of these methods, and in particular in application of the constructed value methodology.

This article briefly discusses the statutory and regulatory elements of the constructed value methodology. The author critically examines the problems with the substance and application of the constructed value method. The article then suggests means of revising the anti-dumping law to address these difficulties.

I. INTRODUCTION

The trade laws of the United States aim to protect U.S. industry from pernicious foreign activities such as dumping, foreign government subsidies, excessive competition by imported goods, and unfair trade practices. Under the Tariff Act of 1930, the stated objective of the anti-dumping laws in particular is to protect U.S. industries from sales of imported goods "at less than... fair value."1 If imported merchandise is being sold at less than fair value,

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The author would like to thank Professor Roy Schotland, David L. Binder, John R. Kugelman and Christopher Sorrels of the United States Department of Commerce, and unnamed members of the private bar both for their time and many helpful comments. However, all errors remain those of the author.

the International Trade Administration (ITA)\textsuperscript{2} of the U.S. Department of Commerce is required to assess an anti-dumping duty.

The statute grants the ITA discretion to choose from several methods for calculating the anti-dumping duty to be assessed. These include the constructed value (CV) methodology which, particularly in light of its growing importance to anti-dumping cases, has proven to be fertile ground for litigation.\textsuperscript{3}

This paper will argue that the constructed value methodology is marked by serious difficulties both in its substance and in its application by the ITA. These difficulties break down into roughly three groups:

(1) \textit{Unforeseeable and Inconsistent Results: the Symptoms.} The results of constructed value anti-dumping duty investigations are all too often unforeseeable or inconsistent. While there are importers that almost certainly will be able to predict which transactions will violate the anti-dumping laws, all too many will not. Indeed, even ITA personnel can take contradictory positions and exhibit confusion, which raises more fundamental questions over the standards putatively governing the law. Inconsistent and unforeseeable results are symptomatic of the underlying substantive and procedural difficulties with the statute and its application by the ITA.

(2) \textit{Substantive Difficulties.} The standards applied and discretionary decisions reached by the ITA may appear inconsistent due to insufficient transparency of ITA methods. In addition, exporters to the U.S. may unwittingly run afoul of the law and become liable for anti-dumping duties while engaged in entirely innocuous behavior. Perhaps most significantly, the constructed value methodology involves myriad technical issues, many of which can be subject to divergent interpretations. Each must be, or must have been when it was first encountered, resolved by discretionary ITA decisions as the statute provides no guidance. Finally, the statutory data verification mandate at times demands the impossible of the ITA.

(3) \textit{Procedural Issues.} Constructed value proceedings involve from dozens to tens of thousands of individual categories of data elements and issues. Multitudes of issues lend themselves to multitudes of costly, time-consuming, and often repetitive challenges. In addition, proceedings may be protracted and yet afford the parties little opportunity to challenge discretionary decisions made by the ITA for periods of up to twelve months.


\textsuperscript{3} According to the Commerce Department, about half of its anti-dumping cases involve constructed value or its close analogue, cost of production analysis. GILBERT KAPLAN ET AL., COST OF PRODUCTION AND CONSTRUCTED VALUE, A LEGAL AND POLICY VIEW 1 (1988) (manuscript obtained at the Import Administration, U.S. Department of Commerce). Of these constructed value proceedings, perhaps half may be litigated before the Court of International Trade. Interview with John R. Kugelman, Supervisory Import Compliance Specialist, International Trade Administration, U.S. Department of Commerce, in Washington, D.C. (Mar. 26, 1992). The views he expressed were his own and were not necessarily those of the Department of Commerce.
This paper will argue that these difficulties suggest that United States anti-dumping law, and in particular the constructed value methodology, is in need of revision.4

This paper proceeds in three parts. First, it briefly sketches the statutory and regulatory elements of the constructed value approach to quantifying anti-dumping duties levied against importers. Second, symptoms of and difficulties with the substance and application of the constructed value methodology are examined in detail. Finally, this paper will argue that the difficulties suggest means of revision.

II.
ANTI-DUMPING LAW: THE STATUTE

Foreign companies that export goods to the United States are held liable to pay duties if, during the course of a protracted series of steps, the International Trade Administration and the International Trade Commission (ITC)5 find that goods have been "dumped" onto U.S. markets.

A. Test for Dumping

Section 731 of the Tariff Act of 19306 provides a two-step test for dumping. First, the ITA must find "that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value" ("LTFV" sales).7 Second, the ITC must find that "an industry in the United States (i) is materially injured, or (ii) is threatened with material injury, or . . . the establishment of an industry . . . is materially retarded" because of imports or sales of the goods.8 If both prongs of this test are met, the ITA must assess an anti-dumping duty "in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise."9

As is obvious from the statutory formula, the ITA must determine the foreign market value (FMV) of an imported good in order to assess an anti-dumping duty.10 In general, the foreign market value . . . shall be the price . . . at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which it is exported, in the usual commercial quantities and in the ordinary course of trade for home consumption . . . .11

4. Some criticisms and revisions suggested by this paper may well apply to anti-dumping proceedings generally, without necessarily being limited to the constructed value context.
5. The ITC is an independent agency with responsibility for administering portions of several export and import control statutes. Government Manual, supra note 2, at 770-74.
7. Id. § 731(1), 19 U.S.C. § 1673(1).
8. Id. § 731(2), 19 U.S.C. § 1673(2).
10. The anti-dumping duty must equal the difference between the foreign market value (FMV) and the price at which the goods are being sold in the United States.
If home market or third-country sales are deemed inadequate or inappropriate, the statute allows the ITA to resort to the constructed value method for determining FMV. About half the dumping cases processed by the ITA involve constructed value or its close analogue, cost of production analysis.

The method for calculating the constructed value of imported goods is prescribed by the formula of Section 773(e). In general, the method involves adding: (1) the cost of materials; (2) the cost of fabrication and other processing involved in producing the merchandise; (3) a pro-rated portion of general corporate overhead subject to a ten percent minimum; (4) a pro-rated portion of general corporate profits subject to an eight percent minimum; and (5) the cost of containers required to ship the goods to the United States.

Constructed value is generally last in order of preference among methods for calculating FMV. The ITA may use the constructed value method to calculate FMV in four situations. If the ITA determines that FMV "cannot be determined" using (1) home market sales or (2) third-country sales of the imported merchandise, then the ITA "may" calculate FMV by the con-

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12. This situation may arise, for instance, in the case of "large, built-to-order projects such as oil platform drilling rigs . . . [for which] there were no contemporaneous, comparable home-market or third-country sales." KAPLAN, supra note 3, at 7. The constructed value method has been applied to a diverse spectrum of imported goods including raspberries, industrial pipe, menthol, potassium permanganate, iron construction castings, flowers, nitrocellulose, oil country tubular goods, and tapered roller bearings.


14. KAPLAN, supra note 3, at 1.

15. Tariff Act of 1930 § 773(e) states:

(e) Constructed Value.

(1) Determination. For the purposes of this title, the constructed value of imported merchandise shall be the sum of—

(A) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise under consideration which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(B) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, except that—

(i) the amount for general expenses shall not be less than 10 percent of the cost as defined in subparagraph (A), and

(ii) the amount of profit shall not be less than 8 percent of the sum of such general expenses and cost; and

(C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise under consideration in condition, packed ready for shipment to the United States.


16. See VAKERICS, supra note 1, at 91.
structured value method.\textsuperscript{17} If (3) goods have "over an extended period of time" been sold at a price which does not permit recovery of production costs, the ITA must disregard those sales in calculating FMV. If the resulting sample of foreign sales prices left to calculate FMV is "inadequate," the ITA will also resort to constructed value.\textsuperscript{18} Finally, (4) the FMV of exports from "nonmarket economy countries" (NMEs) "shall" be calculated by the constructed value method.\textsuperscript{19}

The statute grants the ITA about 345 days to reach a "final determination" of FMV and LTFV sales.\textsuperscript{20} A regular anti-dumping proceeding may last up to 370 days.\textsuperscript{21}

\textbf{B. The Anti-Dumping Proceeding}

There are, broadly speaking, five phases to an anti-dumping duty proceeding: (1) initiation; (2) the preliminary determination; (3) termination prior to the final determination; (4) the final determination; and (5) assessment of the anti-dumping duty.

1. \textit{Initiation}

An anti-dumping investigation may be initiated by the ITA.\textsuperscript{22} By far the more usual route is for a private complainant to file simultaneous petitions "on behalf of an industry"\textsuperscript{23} with both the ITA and the ITC.\textsuperscript{24} The investigation proceeds if the ITA determines that the petition "alleges the elements" of the two-part test of Section 731 and "contains information reasonably available to the petitioner supporting the allegations."\textsuperscript{25}

The domestic complainant may mount a judicial challenge to a negative determination by the ITA under Section 732(c) only if the ITA decision was "arbitrary, an abuse of discretion, or otherwise not in accordance with law."\textsuperscript{26} An importer cannot challenge the decision to launch an anti-dumping investigation because the statute requires the ITA to investigate when it suspects illegal dumping.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{17} Tariff Act of 1930 § 773(a)(2), 19 U.S.C. § 1677b(a)(2).
\item \textsuperscript{18} \textit{Id.} § 773(b), 19 U.S.C. § 1677b(b); \textit{see also} 19 C.F.R. § 353.51(b) (1992).
\item \textsuperscript{19} Tariff Act of 1930 § 773(c), 19 U.S.C. § 1677b(c); \textit{see also} 19 C.F.R. § 353.52 (1992).
\item \textsuperscript{20} Tariff Act of 1930 §§ 733(a)-(b), 735(a)(1), (2), 19 U.S.C. §§ 1673b(a)-(b), 1673d(a)(1), (2) (1990).
\item \textsuperscript{21} \textit{Vakerics, supra} note 1, at 32.
\item \textsuperscript{22} Tariff Act of 1930 § 732(a), 19 U.S.C. § 1673a(a) (1990); \textit{see also} \textit{Vakerics, supra} note 1, at 33.
\item \textsuperscript{23} Tariff Act of 1930 § 732(b), 19 U.S.C. § 1673a(b).
\item \textsuperscript{24} Interview with David L. Binder, Division Director, Antidumping Investigations, Dep't Comm., Import Administration, in Washington, D.C. (Mar. 31, 1992). The views he expressed were his own and were not necessarily those of the Department of Commerce.
\item \textsuperscript{25} Tariff Act of 1930 § 732(c), 19 U.S.C. § 1673a(c).
\item \textsuperscript{27} \textit{Id.} § 732(a), 19 U.S.C. § 1673a(a).
\end{itemize}
2. The Preliminary Determination

The ITC is given forty-five days from when the complaint is filed to make a preliminary "determination, based upon the best information available . . . at the time . . . of whether there is a reasonable indication" that the injury prong of the Section 731(2) test has been met. The ITA has 160 days to determine whether "there is a reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold, at less than fair value." If both the ITA and the ITC reach affirmative preliminary determinations, the importer will be required to post "a cash deposit, bond, or other security" to be credited against any anti-dumping duties to be assessed. Any duty assessed will apply to all imports entering the U.S. after an affirmative preliminary determination. From this moment forward, then, the importer bears real costs, including increased uncertainty and the opportunity cost of the posted bond. In the four situations calling for application of the method, constructed value will have been used to calculate the bond required to be posted by the importer.

Preliminary determinations may only be challenged in the Court of International Trade (CIT) if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

3. Termination Prior to the Final Determination

Both the ITA and the ITC have the power to terminate an investigation prior to reaching a final determination. Both the statute and the Commerce Department Regulation permit this if warranted by considerations such as the public interest or an agreement by the importer to adjust its prices. The termination or suspension of an investigation is not, however, a realistic pros-

28. See supra part II.A.
32. Id. § 733(d)(1), (2), 19 U.S.C. § 1673b(d)(1), (2).
33. The importer may bear real costs even from an earlier point: "The very decision to make a formal charge, moreover, may impose a kind of injury—a psychological anxiety or a weakening of credit position . . . ." Colin S. Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 COLUM. L. REV. 1435, 1490-91 (1979).
34. Statistics on the frequency or success of challenges to Preliminary Determinations apparently are unavailable. Interview with Kugelman, supra note 3. Interview with Binder, supra note 24. Interview with Christopher Sorrels, Program Manager, Accounting Office, Antidumping Investigations, Dep't Comm., Import Administration, in Washington, D.C. (Mar. 31, 1992). The views he expressed were his own and were not necessarily those of the Department of Commerce.
pect: of the roughly 600 cases processed by the ITA in the 1980s, at most seven were terminated via a Suspension Agreement. 38

4. The Final Determination

Within seventy-five days of its preliminary determination, the ITA must reach a final determination as to whether the less than fair value sales prong of the dumping test 39 was met. 40 The ITC must reach its final determination within at most 120 days of the preliminary determination by the ITA. 41 An anti-dumping duty will be assessed if both the ITA and the ITC reach affirmative final determinations.

The final determination may be challenged in the Court of International Trade only if the ITA or ITC decisions are "unsupported by substantial evidence on the record, or [are] otherwise not in accordance with law." 42 Perhaps half of the final determinations are challenged in the Court of International Trade. 43

5. Assessment of the Anti-Dumping Duty

The ITA is required to calculate and publish an anti-dumping duty within seven days of an affirmative final determination by the ITC. 44 The anti-dumping duty must equal "the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise . . . ." 45

In sum, an anti-dumping proceeding generally winds its way through the ITA and ITC via a protracted sequence of five steps that take about one year. As noted previously, the constructed value methodology plays a prominent role in many anti-dumping cases, a role marked by serious difficulties in its substance and in its application.

III. DIFFICULTIES WITH THE CONSTRUCTED VALUE METHODOLOGY

The constructed value methodology all too often yields (A) unforeseeable and inconsistent results which are symptomatic of the underlying (B) substantive and (C) procedural difficulties with the statute itself and with its application by the ITA. Each will be discussed in turn.

38. Interviews with Binder, supra note 24, and Kugelman, supra note 3.
39. See supra part II.A.
41. Id. § 735(b), 19 U.S.C. § 1673d(b).
42. Id. § 516A(b)(1)(B), 19 U.S.C. § 1516a(b)(1)(B).
43. Interviews with Binder, supra note 24, Kugelman, supra note 3, and with Sorrels, supra note 34.
45. Id. § 736(a)(1), 19 U.S.C. § 1673e(a)(1).
A. Unforeseeable and Inconsistent Results

Opinions on the foreseeability and accuracy of results obtained when the ITA applies the constructed value method to anti-dumping cases vary wildly. Some condemn ITA practice. Officials of the Commerce Department note that constructed value anti-dumping proceedings may ensnare foreign competitors who had neither the intention nor an awareness of violating U.S. trade law. Others, however, believe the results of constructed value proceedings to be foreseeable and accurate in most instances. While there are firms that generally can foresee which transactions will violate the anti-dumping laws, there are also all too many firms that will not be able to do so. Indeed, at times even the ITA exhibits confusion.

1. Importers that can foresee liability

The consensus view among practitioners appears to be that most large, sophisticated foreign corporations with access to counsel know how low they may set the prices they charge in U.S. markets before their U.S. competitors will petition the ITA to initiate an anti-dumping investigation. This holds true even in situations that will require calculation of an anti-dumping duty via the constructed value method. It is interesting that this cautious formulation by ITA and private practitioners does not imply that these foreign companies understand whether they will be found to have violated the anti-dumping laws.

Some foreign corporations will rarely unwittingly run afoul of the constructed value provisions of the anti-dumping laws. Owing to their sheer size and global presence in many markets protected by anti-dumping laws, such as the United States and the European Economic Community, such firms know what to expect and internally maintain compliance offices.

46. According to one view, "[t]he laws . . . tend to result in highly arbitrary . . . determinations . . . . [The ITA] often lacks necessary information regarding a foreign company's costs, and in such situations . . . frequently relies on the self-serving data furnished by the complainant." Note, Protecting Steel: Time For a New Approach, 96 HARV. L. REV. 866, 869 (1983). For another, at times scathing, critique of the application of constructed value in the nonmarket economy context, see William P. Alford, When is China Paraguay? An Examination of the Application of the Antidumping and Countervailing Duty Laws of the United States to China and Other "Nonmarket Economy" Nations, 61 S. CAL. L. REV. 79 (1987). In addition, the author draws on off-the-record conversations with practitioners.

47. Interview with Kugelman, supra note 3.

48. Off-the-record interview with private sector members of the trade bar in Washington, D.C. (Mar. 5, 1992). All private sector practitioners interviewed for this paper have requested anonymity.

49. Interviews with Binder, supra note 24, and Sorrels, supra note 34. Off-the-record conversations with private sector practitioners.

50. For instance, ITA officials noted that a corporation of the magnitude of a Toyota could be representative of this category. Such perceptions are a touchy subject: while ITA officials cited additional examples, private sector trade practitioners emphatically requested that they not be listed here. Interviews with Binder, supra note 24, and Sorrels, supra note 34.

51. Interviews with Binder, supra note 24, Kugelman, supra note 3, Sorrels, supra note 34, and off-the-record conversations with private sector practitioners.
However, other importers cannot foresee liability under the anti-dumping provisions.

2. *Importers that cannot foresee liability*

Smaller firms and one-time or first-time exporters will not necessarily have the facility with trade regimes possessed by their larger brethren and thus are more likely to run afoul of the law.\(^{52}\) Furthermore, the cost of legal and accounting advice is no longer just a cost of doing business for exporters to the United States. Legal, accounting, and economic consulting fees for one anti-dumping proceeding may add up to a prohibitive seven million dollars.\(^{53}\) Some firms attract anti-dumping liability because they cannot afford sufficient legal counsel before exporting to the United States. Other firms have quit the U.S. market rather than incur the costs of litigation.\(^ {54}\)

However, even firms that have experience and legal representation can encounter difficulties. It would take a considerable leap of faith to accept that China National Machinery and Equipment Import and Export Corporation (CMEC) of the People's Republic of China could have divined its liability under U.S. anti-dumping law. ITA practice almost ensured that CMEC could not foresee its eventual liability and avoid violating the anti-dumping laws.\(^ {55}\)

The ITA constructed the production costs of CMEC in part using prices in effect months after the challenged transaction was consummated. One crucial price element was only certain to within twenty percent. Further, CMEC could not have foreseen at the time of the transaction that its liability would one day turn in part upon prices charged by a firm in Bombay, India which the ITA would happen to choose as being comparable. With no way to predict elements essential to the procedure used by the ITA to find a violation, it is unclear how CMEC could have avoided committing a "violation."\(^ {56}\)

53. This estimate includes the costs of the constructed value portion of an anti-dumping case. Interview with Kugelman, *supra* note 3. Telephone interview with Christopher Sorrels, Program Manager, Accounting Office, Antidumping Investigations, Dep't Comm., Import Administration, in Washington, D.C. (July 3, 1992). The views he expressed were his own and were not necessarily those of the Department of Commerce.
54. Interview with Kugelman, *supra* note 3.
55. The ITA determined that India was comparable to China, probably by comparing GNP statistics for the two countries. The ITA then sent questionnaires to a sampling of Indian manufacturers, but did not receive much by way of a reply. Undaunted, the ITA sent a telex to the U.S. Consulate in Bombay, requesting that it attempt to obtain cost data. The first reply by the Bombay consulate was inadequate. The second telex from Bombay, however, opined that "[t]he Antifriction Bearing Corporation is [currently] selling its steel scrap between rupees 8 to 10." The ITA inserted this 8 to 10 rupee figure into its calculation of the production costs of the Chinese manufacturer and concluded that the Chinese had indeed violated U.S. anti-dumping law. Timken Co. v. United States, 894 F.2d 385, 386 (Fed. Cir. 1990).
56. In 1974, the U.S. Senate had issued a rather mild summary of criticisms that had been leveled at applications of the law: "This produces occasional inequities by subjecting companies
One should, in fairness, note that constructed value anti-dumping proceedings involving “Non-Market Economies” (NMEs) are more problematic than is the general rule.\(^{57}\)

3. **Confusion at the ITA**

Inconsistencies and confusion may be found even within the ITA.\(^{58}\) The nonmarket economy provisions of the statute, which trigger application of the constructed value methodology, were applied only to communist economies, but not to equally nonmarket capitalist economies.\(^{59}\) Practitioners question whether different sections within the ITA use the same methodology or varying creations of differing vintages.\(^{60}\) For instance, the Deputy Assistant Secretary for Import Administration, the Senior Investigations Counsel of the Office of Deputy Chief Counsel for Import Administration, and the Chief Accountant for Import Administration have written that the ITA “cannot resort to another producer, aggregate data or models” in “calculating constructed value and cost of production . . . .”\(^{61}\) The CMEC-\textit{Timken} case, however, demonstrates that other members of the ITA simply do not follow this mandate and even take the opposite position in litigation on behalf of the ITA.\(^{62}\)

The preceding discussion of the unpredictable results of constructed value anti-dumping proceedings reflects the underlying substantive and procedural difficulties with the constructed value method and its application by the ITA.\(^{63}\) This paper will next discuss the substantive difficulties with the constructed value methodology.

**B. Substantive Difficulties**

The substantive difficulties with the constructed value method of the anti-dumping statute break down into four categories: (1) insufficient transparency of the discretionary decision-making processes of the ITA; (2) inevitability that foreign firms will unwittingly attract sanctions through innocuous behavior; (3) myriad technical issues that give rise to myriad dis...

\(^{57}\) Telephone interview with Christopher Sorrels, Program Manager, Accounting Office, Antidumping Investigations, Dep’t Comm., Import Administration, in Washington, D.C. (July 8, 1992). The views he expressed were his own and were not necessarily those of the Department of Commerce. \textit{See generally} Alford, \textit{supra} note 46.

\(^{58}\) \textit{See, e.g., IPSCO, INC. and IPSCO Steel, Inc. v. United States, }687 F. Supp. 633, 638 (Ct. Int’l Trade 1988). The Court of International Trade here remanded a proceeding to the ITA as the constructed value methodology had apparently not been applied consistently across similarly situated foreign respondents.

\(^{59}\) Alford, \textit{supra} note 46, at 99-112. An example of a nonmarket capitalist economy would be a market economy with some state-owned enterprises. \textit{Id.} at 111 n.187.

\(^{60}\) Off-the-record conversations with private sector practitioners.

\(^{61}\) \textit{KAPLAN, supra} note 3, at 19.

\(^{62}\) \textit{Timken}, 894 F.2d at 387. \textit{See supra} part III.A.2.

\(^{63}\) \textit{See Note, supra} note 46, and Alford, \textit{supra} note 46, for concurring views.
cretionary decisions; and, (4) data verification and other impossible demands made of the ITA by the statute.

These four groups of substantive issues are significant for two reasons. First, they are root causes of the uncertainty and other symptoms of difficulty discussed above. Second, they point to the need for an effective system for resolving methodological disputes between the ITA and individual parties. This is all the more true as these substantive difficulties do not exist in a vacuum, but are aggravated by procedural difficulties.64

1. Insufficient Methodological Transparency

As noted in the preceding section, the results of constructed value calculations can be unpredictable even for experienced firms with competent legal advisors. Different groups65 within the ITA may actually apply inconsistent versions of the constructed value method.66 However, results that to an outsider appear inconsistent may also stem from legitimate economic considerations that the ITA did not disclose publicly. In these instances, an appearance of inconsistency stems from insufficient transparency of ITA methodologies.67

In an effort to lend some transparency and foreseeability to anti-dumping proceedings, parties receive access to the computer software and data

64. See infra part III.C.
65. There are five groups within the ITA. The (1) Office of Investigations bears responsibility for conducting anti-dumping investigations, from initiating an investigation, to verifying and evaluating data, through dismissal or imposition of an anti-dumping duty. The Office of Investigations receives support from (2) the Office of Policy, which provides general economic data such as GNP statistics and lists of comparable economies, and (3) the Accounting Group, which actually calculates the constructed FMV of a good and performs on-site verification of data submissions. The (4) General Counsel represents the ITA in litigation. Finally, (5) the Office of Compliance reviews anti-dumping duties annually to determine whether they should be revised for the following year. The Office of Compliance in theory follows the same methodologies as the Office of Investigations. Interviews with Binder, supra note 24, and Sorrels, supra note 34.
66. Members of the ITA explain actual inconsistencies by noting rare but natural human fallibility. They also point out that the ITA has recently undertaken a program to improve methodological consistency. Interviews with Binder, supra note 24, Kugelman, supra note 3, and Sorrels, supra note 34.
67. Apparent inconsistencies arise when, for instance, one compares ICC Indus., Inc. v. United States, 812 F.2d 694, 698 (Fed. Cir. 1987) with Timken Co. v. United States, 12 C.I.T. 955, 956, remand results aff'd, Timken Co. v. United States, 13 C.I.T. 238 (Ct. Int'l Trade 1988). In ICC Indus., the ITA held Spain to be an economy comparable to that of the People's Republic of China (the PRC) as a surrogate country for determining the dumping margin of an NME exporter. In Timken, however, the ITA argued that Spain had an "advanced econom[y]... which preclude[d] corresponding comparison with the PRC." In the latter case, the ITA refused to calculate the constructed value of Chinese exports using Spanish costs and referred instead to those of a firm in India. See supra notes 55-56 and accompanying text.

These outwardly contradictory comparisons may have a basis in economic reality. The ITA Office of Policy internally circulates monthly lists of comparable economies. Countries are deemed comparable if they have comparable per capita GNP levels, so long as both are significant producers of a product. Comparability also varies frequently on a product-by-product basis. Thus, determinations that two economies are comparable may vary with the passage of time or by industry. The Economic Analysis Group circulates many other such statistics for internal use. Interviews with Binder, supra note 24, and Sorrels, supra note 34.
used by the ITA in constructing the value of imported merchandise. While such disclosure does benefit parties to a proceeding, it provides no assistance at all to importers who seek to avoid breaking the anti-dumping laws and becoming enmeshed in protracted investigations in the first place.

Without advance access to the economic factors and standards by which the ITA evaluates them, importers will have difficulty setting prices competitively while avoiding duties and protracted investigations. The Antidumping Compliance Manual, a training tool for entry level ITA analysts that compiles ITA analytical methodologies, is confidential. The ITA is considering public release of the Manual to assist importers in prospectively fashioning transactions to avoid anti-dumping violations. At the ITA, some opponents of publishing the Manual feel that the Manual could not assist litigants because its contents are subject to change; others wish to avoid giving importers any advantage in litigation.

Insufficient transparency of the law and its application may, together with the statute itself, be partly responsible for a further substantive weakness in the law. Importers may become liable for duties, even while engaged in entirely innocuous behavior.

2. Inevitability of Sanctions for Innocuous Activity

The anti-dumping statute, and in particular the constructed value provisions, can mechanically impose liability for otherwise innocuous business behavior. For instance, elimination of obsolete or inferior inventory at fire sale prices in the U.S. market has resulted in the imposition of anti-dumping duty liability on foreign exporters when these prices fell below earlier, normal prices in the home market. New entry via low initial prices and price competition in the U.S. market when U.S. prices lie below those in the foreign home market are also difficult. Unlike U.S. antitrust predatory pricing rules, the dumping law does not allow for a “meeting competition” defense. Further, the constructed value methodology can even prevent a firm from attempting to sell what little remains of its inventory after a natural disaster destroyed the balance.

68. Interviews with Binder, supra note 24, Sorrels, supra note 34, and off-the-record conversations with private sector practitioners.
69. Interviews with Binder, supra note 24, and Sorrels, supra note 34.
70. As a normative matter, one might suggest to those opposed to publishing the Manual that if importers can better understand ITA methodologies used to evaluate trade transactions, they will be better able to avoid violating the anti-dumping laws in the first place.
71. The anti-dumping statute will not permit comparison of below-cost sales in the U.S. market with similar below-cost sales in the home market, unless the below-cost sales represent a temporary phenomenon. Tariff Act of 1930 § 773(b), 19 U.S.C. § 1677b(b). This, one would expect, would exempt fire sales of obsolete/inferior merchandise. In practice, however, fire sale prices in the U.S. market have been compared to a constructed value calculation of the normal, full cost price in the home market. See Kaplan, supra note 3, at 24-25 and 82-83.
73. The ITA has refused to take into account natural disasters, such as a viral attack and the collapse of an irrigation well, that destroyed large portions of the flower crops of an exporter.
The constructed value regime can also penalize foreign competitors simply for being more efficient than their U.S. counterparts. The statutory formula for calculating constructed FMV requires the ITA to add to materials and fabrication costs at least a ten percent allowance for general administrative expenses.\textsuperscript{74} Thus a foreign firm, identical to its U.S. competitor but for its lower overhead costs and lower executive compensation, can be found to have dumped under the constructed value regime when its U.S. prices reflect its actual costs including overhead of less than ten percent. The statute also mandates that the ITA calculate constructed FMV to include at least an eight percent profit margin.\textsuperscript{75} An efficient foreign manufacturer may be liable for an anti-dumping duty under the constructed value regime if it merely exploits its efficiency advantage through high volume mass production of a commoditized product at a low per unit cost and per unit profit below eight percent.

One may conclude from these observations that the constructed value regime, though presented as a way to avoid the inaccuracies of other methods of calculating anti-dumping duties, in significant ways may bear little relation to the reality which it claims to reconstruct. This is all the more true as the constructed value regime relies on myriad, discretionary technical decisions that are often easily subject to divergent interpretations.

3. Technical Issues Breed Discretionary Decisions

Constructed value anti-dumping proceedings abound with disputed technical issues on which the statute gives little or no guidance. How should the expenses of central management and research and development of a corporate group be allocated among the divisions of the group?\textsuperscript{76} Are "equipment maintenance expenses" general expenses, which count towards the ten per

Floral Trade Council of Davis Cal. v. United States, 775 F. Supp. 1492, 1505 (Ct. Int'l Trade 1991). In this case, the ITA spread production costs for both the destroyed and the surviving crop over the small number of surviving flowers. This increased the unit cost and hence also the constructed FMV of the surviving flowers.

The practical effect of such an inflexible application of the constructed value approach is that exporters effectively cannot sell the surviving portion of their crops in the United States. Even if they were to sell the balance of their crops at contract prices set before a disaster struck, the ITA would assess an anti-dumping duty; were the exporters to charge a price based on the total production cost spread over the few surviving flowers, they would price themselves out of the market vis-à-vis producers who had better luck. It is unreasonable to punish exporters for engaging in behavior as normal as attempting to sell their surviving crops and attempting to maintain their business relationships in the U.S. market.

It is probably possible to calculate the likelihood of such a disaster using insurance or government statistics. If such disasters occur once in 40 years, for instance, the most reasonable approach would have been to pro-rate the costs on that basis. Needless to say, the ITA did not take this approach.

\textsuperscript{74} Tariff Act of 1930 \textsection 773(e)(1)(B)(i), 19 U.S.C. \textsection 1677b(e)(1)(B)(i).
\textsuperscript{75} Id. \textsection 773(e)(1)(B)(ii), 19 U.S.C. \textsection 1677b(e)(1)(B)(ii).
\textsuperscript{76} See, e.g., Alhambra Foundry Co., Ltd. v. United States, 12 C.I.T. 343 (Ct. Int'l Trade 1988); Hercules, Inc. v. United States, 11 C.I.T. 710 (Ct. Int'l Trade 1987). One dispute arose when the ITA allocated general research and development expenses of a legally separate parent company to its 65%-owned subsidiary. Kaplan, supra note 3, at 63.
cent minimum of Section 773(e)(1)(B)(i), or are they a "materials and fabrication expense" that does not count? What is the constructed value of an unintended byproduct of production that turns out to be saleable? Should the fact that an unintended byproduct turns out to be saleable decrease the constructed FMV of the primary product? How should cost data from inflationary and hyperinflationary economies be treated?

The statutory constructed value formula is silent with respect to these issues, so ITA personnel must resolve them using discretionary administrative judgment. This is obviously true for novel issues for which no precedent exists. However, even established rules that no longer call for any exercise of discretion may be traced back to an original discretionary decision by ITA personnel. Discretionary administrative decisions grow to become technical, methodological rules as situations recur. In other words, given the minimal level of statutory guidance, much of the analytical framework used to identify anti-dumping violations by the constructed value method is the product of administrative discretion.

ITA officials suggest that the ITA must employ discretionary judgment only when a foreign exporter is uncooperative or otherwise unable to corroborate its claims. Nonetheless, there are literally tens of thousands of situations not provided for in the statute which require discretionary decisions, or reliance on the guidance of past discretionary decisions, that may arise during the course of a constructed value proceeding.

The discussion of substantive difficulties so far has focused on methodological disputes. However, each constructed value anti-dumping proceeding also raises disputes over the accuracy of data. This involves the process known as verification.

4. Verification and Impossibility

The Tariff Act of 1930 requires the ITA to "verify all information relied upon in making . . . a final determination in an [anti-dumping] investigation . . . ." Historically it has been DOC [Department of Commerce] practice to verify . . . responses before the preliminary decision," but verification may also occur later. Verification is an elaborate process in which members of the ITA travel throughout the world to exporting firms in order to conduct on-site interviews and inspections of corporate records. All interested par-

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78. See KAPLAN, supra note 3, at 96-98.
80. See KAPLAN, supra note 3, at 93.
81. Interviews with Binder, supra note 24, and Sorrels, supra note 34.
83. VAKERICS, supra note 1, at 60 n. 144.
84. Interviews with Binder, supra note 24, Kugelman, supra note 3, and Sorrels, supra note 34.
ties are given an opportunity prior to the inspection to review a "verification outline" with the ITA.\textsuperscript{85}

If the foreign respondent is unable to demonstrate the accuracy of data submitted to the ITA by tying the data to its books, cost accounting system, or other financial records, the ITA will term the data "unverifiable."\textsuperscript{86} Demonstrably inaccurate data is also termed "unverifiable." The ITA will not use unverifiable data in its constructed value calculations, but will instead turn to the "best information available."\textsuperscript{87} The best information available "is generally . . . adverse to the company"\textsuperscript{88} as it may include "information submitted in support of the petition or subsequently submitted by interested parties."\textsuperscript{89}

Consequently, a foreign respondent maintains a keen interest in helping the ITA to understand its accounting system and verify its data submissions.\textsuperscript{90} Verification will not burden large corporations as they almost invariably maintain internal cost-accounting programs to calculate production costs with precision.\textsuperscript{91} While the ITA often demands data in a format other than that in which it is gathered by the foreign respondent, ITA personnel generally work with and assist respondents in meeting ITA requirements.\textsuperscript{92}

The verification process is, as are the technical and methodological issues discussed in Section III,\textsuperscript{93} a bountiful source of dispute. Whether the research and development expenditures of a foreign corporate group have been properly allocated to the exporting division is not only a methodological issue, but is also an issue of verification.\textsuperscript{94} Whether depreciation expenses should be calculated by a straight-line method or by an accelerated method is also a verification issue,\textsuperscript{95} as is the amortization of start-up costs.\textsuperscript{96} Needless

\begin{itemize}
  \item \textsuperscript{85} Interviews with Binder, supra note 24, and Sorrels, supra note 34.
  \item \textsuperscript{86} Interviews with Binder, supra note 24, Kugelman, supra note 3, and Sorrels, supra note 34.
  \item \textsuperscript{87} If the ITA "is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its action . . . ." Tariff Act of 1930 § 776(b), 19 U.S.C. § 1677e(b). \textit{See also} KAPLAN, supra note 3, at 110-12.
  \item \textsuperscript{88} VAKERICS, supra note 1, at 43.
  \item \textsuperscript{89} 19 C.F.R. § 353.37(b) (1992). "Interested parties" will in practice be interested \textit{adverse} parties.
  \item \textsuperscript{90} Indeed, when supporting records are unavailable, the ITA may make the presumption that the data submitted by the foreign exporter is in error. Interview with Kugelman, supra note 3.
  \item \textsuperscript{91} Off-the-record conversations with private sector practitioners.
  \item \textsuperscript{92} Interview with Sorrels, supra note 34, and off-the-record conversations with private sector practitioners.
  \item \textsuperscript{93} \textit{See} supra part III.B.3.
  \item \textsuperscript{94} \textit{See}, e.g., Hercules, Inc. \textit{v.} United States, 11 C.I.T. 710, 755 (Ct. Int'l Trade 1987).
  \item \textsuperscript{95} \textit{Id.} at 755-56.
  \item \textsuperscript{96} A production line may be run more slowly and may require additional workers for its initial adjustment than it will after the breaking-in period. The line may thus present higher per unit production costs when it is first installed. A verification issue arises because only the high, initial costs can be proven and "verified." Long-term costs are likely to be unproven projections and are hence deemed "unverifiable." See, e.g., IPSCO, INC. and IPSCO Steel, Inc. \textit{v.} United
to say, potential issues that require discretionary resolution by the ITA, or reliance upon the guidance of past discretionary decisions, are legion.

While the anti-dumping statute unambiguously requires the ITA to verify "all" information processed by the constructed value calculations that are relied upon in making a final determination, this does not actually happen. Owing to the number of relevant issues and data points, the ITA does not, and cannot, perform the equivalent of a full-scale accounting audit of foreign respondents subject to verification. Instead, samples of suspicious data are verified until ITA accountants get a "feel" for whether data supplied by the U.S. complainant or the foreign respondent is more accurate. This "feel" is then used to guide the resolution of disputes with regard to other unverified data used in constructed value calculations.

Two conclusions may be drawn from this discussion of verification in practice. First, members of the ITA make an intense, diligent effort to assemble the most accurate, realistic, and complete picture possible in carrying out their verification mandate. Second, the verification mandate imposed by the statute is not only unrealistic, but is impossible to meet, so that the ITA cannot but make many discretionary evaluations of disputed data.

This takes us back to the recurring, normative themes that underlie the preceding inquiry. Due to four types of substantive difficulties with the statute and its application by the ITA, constructed value proceedings have led to unforeseeable and inconsistent results, even for proficient international traders. Given the nature of these substantive difficulties, procedural safeguards are essential to ensure that administrative discretion, which is absolutely essential for implementing the anti-dumping statute, does not result in unreviewable or arbitrary decisions. Unfortunately, however, the procedural safeguards applicable to constructed value anti-dumping proceedings are also marred by difficulties.

C. Procedural Difficulties

Constructed value proceedings generally fall prey to two types of procedural difficulties: (1) the proceedings themselves become burdensome; and (2) there is insufficient opportunity to review discretionary agency choices.

States, 12 C.I.T. 384, 390-91 (Ct. Int'l Trade 1988); see also interviews with Binder, supra note 24, and Sorrels, supra note 34. 97. Interviews with Binder, supra note 24, and Sorrels, supra note 34. 98. Interviews with Binder, supra note 24, and Sorrels, supra note 34. 99. Interviews with Binder, supra note 24, and Sorrels, supra note 34. 100. ITA officials stress their good faith efforts and claim that they do not feel compromised in their work administering the constructed value methodology. Interviews with Binder, supra note 24, Kugelman, supra note 3, and Sorrels, supra note 34.
1. The Burdens of Procedure

Constructed value proceedings can be used to impose costs on opponents in litigation, as multitudes of issues lend themselves to multitudes of costly, time-consuming, and repetitive challenges. The procedural burdens of constructed value proceedings do matter. Essentially all proceedings at the very least raise disputes that are resolved informally with the ITA staff.101 Perhaps half of the cases reviewed by the ITA Office of Compliance are appealed judicially and so end up in litigation.102

Domestic complainants may use anti-dumping proceedings to harass their foreign competitors.103 While such practices apparently do not represent the norm, they are possible in particularly large and politically-charged cases.104 Owing to the vast number of data points and methodological choices inherent in a constructed value proceeding, litigants could in theory seek to impose costs upon their opponents by continuously raising new issues105 or by repetitively challenging old issues.106 The Commerce Department does not maintain statistics on the number of issues that are appealed to the Court of International Trade or the frequency with which new issues are raised in an ongoing proceeding.107

The procedural history of one of the anti-dumping proceedings instigated by the Timken Company against its foreign competitors is illustrative of the potentially burdensome character of such proceedings. The Timken Co., the U.S. complainant, filed an anti-dumping duty petition with the Commerce

101. Interviews with Binder, supra note 24, Kugelman, supra note 3, and Sorrels, supra note 34.

102. Interview with Kugelman, supra note 3. See supra note 65 for a description of the Office of Compliance.

103. J.H. Jackson, Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States, 82 MICH. L. REV. 1570, 1579 (1984). It is worth noting that this charge is not specific to constructed value proceedings, but that it is leveled generally at all anti-dumping and countervailing duty proceedings. Telephone interview with Sorrels, supra note 57.

104. Interviews with Binder, supra note 24, Kugelman, supra note 3, Sorrels, supra note 34, and off-the-record conversations with private sector practitioners. That constructed value proceedings could be used to achieve political purposes or to obstruct opponents was suggested by practitioners in off-the-record conversations involving specific cases. In response, one member of the ITA notes that in his recent experience, he "would be hard pressed to state that . . . [constructed value and cost of production] allegations were harassments." Letter from David L. Binder 2 (July 13, 1992). The views he expressed were his own and were not necessarily those of the Department of Commerce.

105. See, e.g., IPSCO, INC. and IPSCO Steel, Inc. v. United States and Lone Star Steel Co., 749 F.Supp. 1147, 1149 (Ct. Int'l Trade 1990), in which the Court denied hearings on several issues that could have been raised up to two years earlier in any of several prior proceedings.

106. "Any argument specific to this . . . [issue] should have been made in connection with the court's original consideration of this issue [two years earlier] . . . [T]he court is not aware that there are any particular facts . . . that were not raised and considered." Id. In this opinion, even the judge sounded unenthusiastic at having the same litigants and issues before him once more.

107. Interviews with Binder, supra note 24, Kugelman, supra note 3, and Sorrels, supra note 34.
Department on August 25, 1986.\textsuperscript{108} The ITA issued an affirmative preliminary determination on October 2, 1986.\textsuperscript{109} After the usual battery of proceedings involving the ITA and ITC,\textsuperscript{110} the ITA issued its final determination on May 27, 1987, in which the ITA excluded CMEC from its antidumping findings.\textsuperscript{111} The ITC issued its final material injury determination on June 11, 1987.\textsuperscript{112} Timken challenged these final determinations in the Court of International Trade. Before the CIT could hear this appeal, Timken also sought preliminary injunctive relief, which was denied.\textsuperscript{113} On October 18, 1988, however, Timken prevailed in the CIT, which remanded to the ITA for reconsideration of its final determination.\textsuperscript{114} Upon reconsideration, the ITA issued a new final determination recalculating the dumping margin of CMEC, which Timken appealed; Timken lost this appeal in the CIT on March 22, 1989,\textsuperscript{115} and then in the Federal Circuit on January 19, 1990.\textsuperscript{116}

For three and a half years, the foreign exporter found itself on a legal odyssey, uncertain of the final anti-dumping duty, if any, to be imposed by the ITA. These three and a half years of uncertainty and litigation were undoubtedly costly. Such expense and uncertainty may discourage further attempts to export to the U.S., particularly as a complainant remains free to lodge dumping complaints against future transactions.\textsuperscript{117} In other words, a U.S. complainant may succeed in using a constructed value anti-dumping complaint to exclude a foreign competitor from the U.S. market for several years by imposing costs and uncertainty, even if the complaint is eventually denied on the merits. While it is not clear whether Timken was motivated by such considerations, this scenario suggests what is possible.

Anti-dumping proceedings impose significant costs on the participants. Legal fees in one large constructed value anti-dumping proceeding were about $7 million.\textsuperscript{118} By one rough estimate, total costs in 1983 of complying with the U.S. trade laws was about $238 million: $44 million for the annual budget of U.S. trade administration agencies, $97 million in private legal fees, and $97 million in corporate in-house compliance costs.\textsuperscript{119}

\begin{itemize}
  \item \textsuperscript{108} Timken, 894 F.2d at 386.
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} See supra part II.B.
  \item \textsuperscript{111} 52 Fed. Reg. 19,748 (1987).
  \item \textsuperscript{112} 52 Fed. Reg. 22,399 (1987).
  \item \textsuperscript{113} Timken Co. v. United States, 11 C.I.T. 504 (Ct. Int'l Trade 1987).
  \item \textsuperscript{114} Timken, 12 C.I.T. at 955.
  \item \textsuperscript{115} Timken Co. v. United States, 13 C.I.T. 238 (Ct. Int'l Trade 1989), aff'd Timken Co. v. United States, 894 F.2d 384 (Fed. Cir. 1990).
  \item \textsuperscript{116} Timken, 894 F.2d at 385.
  \item \textsuperscript{117} Interview with Kugelman, supra note 3. Indeed, even "the mere announcement of an AD [anti-dumping] or CVD [countervailing duty] investigation is claimed to have a trade disruptive effect." John H. Jackson & William J. Davey, Reform of the Administrative Procedures Used In U.S. Antidumping and Countervailing Duty Cases 4 (Nov. 1991) (mimeo of unpublished report available from the Administrative Conference of the United States, 2120 L Street, NW, Suite 500, Washington, DC 20037).
  \item \textsuperscript{118} Interview with Kugelman, supra note 3.
  \item \textsuperscript{119} Jackson, supra note 103, at 1570-78.
\end{itemize}
These figures do not include the costs imposed on domestic complainants and foreign exporters by the lengthy periods of uncertainty inherent in these proceedings. Potential transactions foregone by discouraged foreign exporters are likewise not included. These figures also exclude the higher consumer prices charged by foreign exporters who want to avoid entanglement in U.S. anti-dumping laws. Thus, the actual costs of anti-dumping proceedings are significantly higher than is suggested by the mere tabulation of attorney fees.

While the protracted nature of these proceedings can impose costs, insufficient process can also be detrimental.

2. The Burdens of Insufficient Procedure

Constructed value proceedings are protracted, as are most anti-dumping proceedings, and parties often have little opportunity to challenge discretionary decisions made by the ITA for periods of up to twelve months. This is true because preliminary determinations may only be challenged judicially under the strict "arbitrary and capricious" standard of Section 516A(b)(1)(A) of the Tariff Act.120

ITA final determinations, in turn, are reviewed with deference under the "substantial evidence" standard of Section 516A(b)(1)(B).121 According to the Honorable J.A. Restani of the Court of International Trade,

[the limitation on agency discretion under the antidumping ... statutes is not as great as it might appear ... There are relatively few cases where the Court of International Trade has found the factual underpinnings of a determination missing. A larger group of cases have been remanded for further explication of the basis for decision.]122

The overwhelming majority of the myriad discretionary decisions of methodology and data quality made by the ITA in the course of a constructed value anti-dumping proceeding are not reviewable other than in informal consultation with ITA personnel. In some cases, this may present a problem.

The ITA is fallible. This is not to say that the ITA is particularly prone to err, but just that the ITA may make mistakes as does any other organization.123 In one instance, after the third remand, the ITA could still not explain its own determinations "due to the passage of time and departure of employees."124 If ITA decisions truly were not discretionary, but rather in-

121. Id.
122. Id.
volved a clear, predictable application of standards, "the passage of time and departure of employees" most likely would have no bearing on its ability to explain its methodology.

D. Summary of Issues

Difficulties with the current constructed value anti-dumping regime can be reduced to a series of observations:

1. The results of constructed value anti-dumping duty investigations are all too often unforeseeable, even for proficient international traders and the ITA itself. This affects the ability of exporters to avoid violating the anti-dumping laws.

2. Internal ITA methodologies are insufficiently transparent to outsiders. This may raise the appearance of inconsistency, even when ITA decisions are based on legitimate economic considerations.

3. Innocuous, legitimate business behavior may result in anti-dumping liability under the constructed value approach.

4. Administrative discretion is fundamental to constructed value proceedings. Because the anti-dumping statute provides little guidance, even established rules that no longer call for any exercise of discretion may be traced back to an original act of administrative discretion. Since the outcomes of individual proceedings turn more on administrative rules and decisions than on legislative mandate, procedural safeguards over ITA discretion are crucial.

5. The verification requirement raises innumerable additional issues that can only be resolved discretionarily. In addition, this is an instance in which the statute demands the impossible of the ITA. These two observations further underscore the necessity of effective procedures for reviewing ITA discretion.

6. The current regime is conducive to occasional abuse by domestic complainants who wish to impose prohibitive costs upon their opponents in order to discourage foreign competitors, at least for several years.

7. The vast majority of the discretionary decisions made by the ITA are essentially unreviewable, even though the current regime is administered by an agency that is as prone to human error as is any other organization.

The current constructed value anti-dumping regime is in need of revision.

IV. CONCLUSION: PROPOSALS FOR REFORM

The constructed value portions of the anti-dumping laws yield inconsistent and unforeseeable results that may catch all too many international traders, as well as the ITA itself, unawares. The substantive and procedural difficulties that cause these symptoms require revision. Several types of reform are proposed:

A. Increase Methodological Transparency

The outcome of a constructed value anti-dumping proceeding may be unforeseeable or may appear to be inconsistent with prior ITA decisions ow-
ing to insufficient methodological transparency.\textsuperscript{125} This can be remedied by providing firms which seek to export to the U.S. access to the methodologies and data types that the ITA would rely on in conducting an anti-dumping investigation.\textsuperscript{126} Enforcement of the internal mandate that the ITA not "re-sort to another producer, aggregate data or models" in constructing production costs\textsuperscript{127} would eliminate some uncertainty. The ITA's objective should be to ensure that firms that wish in good faith to avoid breaking the law be assisted in doing so.

Arguments that internal ITA methodologies should be kept confidential to avoid assisting foreign firms under investigation are misguided. The ITA ought to define the law and enforcement standards as clearly as possible in order to avoid entrapping firms.

\textbf{B. Provide Pre-Transaction Clearances}

The unforeseeability of constructed value anti-dumping liability may also be addressed by providing optional pre-transaction clearance similar to the pre-merger clearance provided by the Federal Trade Commission and Justice Department in antitrust cases.\textsuperscript{128} A threshold transactional value could provide a safe harbor below which there would be no anti-dumping investigation. Such a safe harbor would also help to stave off a deluge of filings of minimal interest. Fees that are nominal by comparison with the value of the transaction could be used to pay for the scheme.

Pre-transactional notification should be optional, as are submissions seeking private letter rulings from the Internal Revenue Service.\textsuperscript{129} A requirement that notification be mandatory would unnecessarily impose delay and burdens upon foreign exporters confident of the legality of a contemplated transaction. On the other hand, the availability of the prior clearance option would decrease risks to parties contemplating major, long-term commitments.

\textbf{C. Procedural Checks on ITA Discretion}

Discretionary resolution of methodological disputes and of the validity of data used in calculations is fundamental to constructed value anti-dumping proceedings. Given the minimal level of statutory guidance, discretionary ad-

\textsuperscript{125} See generally discussion supra part III.B.1.

\textsuperscript{126} It is recommended that the confidential \textit{Antidumping Compliance Manual} be published. Computer software, manuals, and internal data publications such as those issued by the Office of Policy should also be published. See supra text accompanying note 67. In addition, it would make sense for the ITA to provide access to ITA personnel capable of explaining the relevance and application of these data, documents, and methodologies, as is done in the private sector. Reasonable fees to cover the costs of providing these services would not be out of place.

\textsuperscript{127} See supra note 61 and accompanying text.


ministrative decisions become technical, methodological rules as situations recur. Innocuous, legitimate business behavior may result in anti-dumping liability under the constructed value approach. However, this discretionary authority of the ITA is in practical terms unreviewable, except in informal consultation with ITA personnel. Procedural safeguards which allow effective challenge to ITA discretionary decisions are needed.

The federal Administrative Procedure Act (APA) does not apply to the anti-dumping process. Applying elements of the Act to anti-dumping proceedings, and in particular to those proceedings involving constructed value calculations, would appear to yield significant benefits. Several Department of Commerce officials thought the suggestion interesting and worth investigating, though they were unable to comment in their official capacities.

It is proposed that highly informal hearings before an impartial Administrative Law Judge (ALJ) be held permissively at least prior to the preliminary and final ITA determinations under the anti-dumping statute. It may be desirable to permit more frequent hearings to be held on very short notice, perhaps of only several days, to resolve specific, technical methodological disputes. The aim is to provide parties with an opportunity to challenge ITA determinations to an impartial decision-maker without incurring the delay, expense, and deferential standard of review inherent in judicial proceedings.

Several elements could be borrowed from the APA. An Administrative Law Judge would preside over these hearings. The ALJ would have the power to administer oaths, issue subpoenas, take depositions, hold conferences, generally regulate the hearing, and reach a decision that would be

130. See supra part III.B.3.
131. See supra part III.C.2.
133. Jackson & Davey, supra note 117, at 32.
134. Some private practitioners advocate such a move. Off-the-record conversations with private sector practitioners.
135. Interviews with Binder, supra note 24, Kugelman, supra note 3, and Sorrels, supra note 7.
136. Permissive hearings, to be held at the request of any of the parties, are recommended. There would appear to be little benefit in requiring a hearing in the unlikely event that there are no methodological or factual disputes.
137. Such hearings would also appear to be warranted prior to the preliminary and final determinations of the ITC.
138. See generally supra part III.B.3.
139. Others have also suggested resort to a system of impartial ALJs for many of the same reasons argued in this paper. See, e.g., Jackson & Davey, supra note 117, at 36-39.
binding on the ITA as well as private parties. Parties would be permitted to testify, present evidence, cross-examine, and present rebuttal evidence. The emphasis in these hearings would be on concise resolution, on short notice, of specific issues without the delay and expense characteristic of regular litigation.

Such hearings would present advantages for constructed value anti-dumping proceedings. Under the current system, ITA personnel will voluntarily hear any evidence submitted by any party. However, parties do not have the right to challenge the legitimacy of the past and current discretionary methodological and valuative decisions governing the outcome of their case. Parties that perceive inequities in the current process must persuade the very personnel that developed the challenged methodology or evaluation that their work is wrong.

The current approach is not conducive to unbiased evaluation. An ALJ, however, provides this opportunity. Under the proposed approach, parties would have an opportunity to cross-examine ITA personnel and demand explanations for inconsistencies and unforeseeable results produced by constructed value calculations. This could decrease the frequency of inconsistent applications of ITA methodology, which, in turn, could increase the foreseeability of outcomes under the constructed value approach. The proposed approach would also put more of the methodological processes of the ITA on the public record, thereby allowing exporters to predict the law more accurately prior to engaging in export transactions. Finally, resort to an ALJ-based system could address the fact that political influence or superior access to high ITA personnel may at times redound to the benefit of the parties that have it.

The APA system would not be a perfect remedy as it only grants the ALJ the power to make interim and not final decisions. Under the APA, initial decisions become final unless the agency on appeal or sua sponte chal-

141. See 5 U.S.C. § 556(c).
142. See 5 U.S.C. § 556(d). Others have also advocated borrowing these provisions. See Jackson & Davey, supra note 117, at 38.
143. Interviews with Binder, supra note 24, Kugelman, supra note 3, and Sorrels, supra note 34. Indeed, the ITC and ITA "are each required to hold a hearing in the course of an investigation upon request of any party to the investigation, before making a final determination." Vakerics, supra note 1, at 55.
144. Of course, parties remain free to attempt to meet the highly deferential standards of review set by the Court of International Trade and the Federal Circuit.
145. The ITA has for several years been implementing an internal program to encourage methodological uniformity across the Office of Investigations, the Office of Compliance, the Office of Policy, and the General Counsel. This program is aimed at rectifying identified policy and methodological differences among different offices. Interviews with Binder, supra note 24, Kugelman, supra note 3, and Sorrels, supra note 34.
146. See Jackson & Davey, supra note 117, at 14, 34, 39.
lenges the decision of the ALJ.\textsuperscript{148} This, however, paves the way for political influences to continue to affect the outcome of some decisions. Lobbying within an agency or reliance by top agency personnel on the judgment of those who performed investigations and determined methodology could also serve to circumvent the efficacy of the ALJ. Thus, it is recommended that ALJ decisions be final,\textsuperscript{149} with appeal only to the Court of International Trade, or to binational adjudicatory panels along the lines of what has been implemented under the U.S.-Canada Free Trade Agreement.\textsuperscript{150}

Finally, both the ITA and ALJ require interpretive guidance in resolving discretionary issues. Under present law, the ITA is allowed to take any reasonable course of action in accord with either the "arbitrary and capricious" or the "substantial evidence" standards.\textsuperscript{151} This is unsatisfactory. The United States is heavily and increasingly dependent on international trade. Other jurisdictions also apply strict anti-dumping laws that can harm the U.S. economy by restricting U.S. exports.\textsuperscript{152} For this reason, the anti-dumping statute ought also to recognize an explicit right of importers to buy foreign-manufactured goods, in addition to the right of domestic complainants to receive protection. The statute ought to ensure that discretionary decisions are not slanted in favor of domestic complainants at the expense of domestic importers.

\textbf{D. Avoid Inconsistent Applications of the Law}

Inconsistent applications of constructed value methodologies\textsuperscript{153} should be addressed by enforcing uniform standards and requiring written explanations for deviations from prior practice.\textsuperscript{154} Although the ITA has, over the

\begin{footnotesize}
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\item \textsuperscript{148} \textit{Id.}
\item \textsuperscript{149} Others have made this argument as well. \textit{See, e.g.,} Jackson & Davey, \textit{supra} note 117, at 43.
\item \textsuperscript{150} Off-the-record conversations with practitioners suggest that binational adjudicatory panels can be an effective, but costly, means of frustrating the political biases that occasionally creep into U.S. executive branch decision-making. It is worth noting that "the belief that politically motivated decisions are made was a major factor in causing Canada to push for the inclusion of the binational panel review process . . . in the U.S.-Canada Free Trade Agreement." Jackson & Davey, \textit{supra} note 117, at 34.
\item Given that dozens of countries export to the United States, binational panels, convened for each of hundreds of trade disputes, may be prohibitively expensive. A multilateral framework may be a more effective long-term solution.
\item \textsuperscript{151} \textit{See supra} part III.C.2.
\item \textsuperscript{152} \textit{See, e.g.,} P. Kapteyn & P. van Themlaat, \textit{Introduction to the Law of the European Communities} 811-17 (1989). For an examination of the approaches taken by Australia, Canada, and the EEC, see also Jackson & Davey, \textit{supra} note 117, at 21-27.
\item \textsuperscript{153} \textit{See supra} part III.A.3. Without providing specific proposals for reform, others have also argued that inconsistent applications of standards ought to be eliminated. \textit{See} Jackson & Davey, \textit{supra} note 117, at 45.
\item \textsuperscript{154} \textit{See} Diver, \textit{supra} note 33, at 1494-95, for a discussion of the mechanics of enabling an agency to achieve consistent applications of its methodologies using precedents. Written statements of reasons for deviating from prior practice, a filing system guaranteeing physical accessibility of prior decisions, and a properly organized subject matter index are key elements of the system suggested by Diver. \textit{Id.}
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past several years, been implementing a system to facilitate access to prior decisions,\textsuperscript{155} it must ensure that the system is actually used. Requiring written explanations for deviations from prior practice and laying the burden of proving the necessity of a deviation upon the ITA could achieve this end. Needless to say, this system of methodological precedent must be available to the public.

\textit{E. Allocation of Litigation Costs}

Particularly domestic complainants are in a position to misuse constructed value anti-dumping procedures to impose costs on foreign competitors and thereby discourage competition.\textsuperscript{156} This situation could be addressed by holding the losing party liable for litigation costs and by personally sanctioning both private and ITA attorneys who file claims and appeals primarily to impose costs on their opponents.\textsuperscript{157}

\textsuperscript{155} Interview with Kugelman, \textit{supra} note 3.

\textsuperscript{156} See \textit{supra} notes 103-07 and accompanying text.

\textsuperscript{157} The possibility of sanctioning private sector attorneys who file frivolous complaints and appeals raised some interest in various ITA officials in off-the-record conversations.