ARTICLES

Reform of the Administrative Procedures Used in U.S. Antidumping and Countervailing Duty Cases*

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INTRODUCTION

The principal recommendation of this article is that administrative law judges (ALJs) should be used in U.S. antidumping (AD) and countervailing duty (CVD) cases.[1] These cases usually arise when a petition is filed on behalf of a U.S. industry by one of several statutorily specified interested parties asking the U.S. Government to impose special duties to offset dumping or subsidization. The government itself can initiate cases.

Dumping occurs when foreign companies export goods to the United States for sale at less than their "fair value." Fair value is generally based on the exporter's prices for such goods in its home (or a third country) market or on its cost of producing the goods (including a profit margin). AD duties are imposed to offset the margin of dumping (i.e., the difference between the foreign market value and the U.S. price) if the U.S. industry producing like products has suffered or is threatened with material injury by reason of the dumped imports or if the establishment of a U.S. industry producing such products has been

1. The Administrative Conference of the United States (ACUS) and its Committee on Regulation did not adopt this basic recommendation. The recommendation that was adopted by ACUS is set out at the end of this article. *See* Appendix n.1 and accompanying text.

materially retarded.

Countervailing (CV) duties may be imposed on goods exported to the United States that benefit from certain types of subsidies granted by a foreign government. In most CVD cases, duties may be imposed only if U.S. industry producing like goods has suffered or is threatened with material injury by reason of the subsidized imports or if the establishment of a U.S. industry producing such goods has been materially retarded.

The decision whether dumping or subsidization has occurred is made by the International Trade Administration (ITA) of the Department of Commerce; the decision on injury is made by the United States International Trade Commission (ITC), an independent federal agency. These administrative decisions are subject to review in the first instance in the Court of International Trade and then in the Court of Appeals for the Federal Circuit.

In overview, we would note that the use of AD/CVD laws by the United States and other countries has been very controversial in recent years. Critics of these laws contend that while the laws were originally intended to combat specific unfair trade practices, they are now being applied as general instruments of protection to shield domestic industries from appropriate international competition.

While many of the complaints about these laws essentially concern their substantive provisions, a number of the complaints center around procedural matters. In particular, the procedures used in U.S. AD/CVD cases have been criticized as unnecessarily time consuming, expensive, and insufficiently insulated from the political process. In this article, we review these criticisms and suggest several reforms to the current system.[2]

Because more than ten years have elapsed since the AD/CVD laws were significantly overhauled,[3] the time seems ripe to evaluate the procedures. Moreover, since AD/CVD laws are one of the subjects under negotiation in the Uruguay Round of Multilateral Trade Negotiations now being held under the auspices of the General Agreement on Tariffs and Trade (GATT),[4] it is likely that the U.S. AD/CVD laws will be

2. While the line between substance and procedure is often hard to draw, the issues discussed in this article, in our view, are clearly procedural. There are many useful substantive reforms that could be made to these laws, but we did not examine them because the Administrative Conference is limited by its authorizing statute to considering procedural issues. 5 U.S.C. § 574 (1988).

3. *See* Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, title I (codified as amended in scattered sections of 19 U.S.C.) (amending U.S. anti-dumping and countervailing duty law).

4. The official text of the General Agreement on Tariffs and Trade (GATT) ap-

revised in 1993, assuming the negotiations are successfully completed. For this reason, it is an auspicious time to consider whether basic changes should be made in the procedural aspects of these laws.[5]

In the course of studying these procedures, we had contact with many government officials and international trade law practitioners. The two general concerns foremost in their minds were the need to reduce the time and expense associated with AD/CVD proceedings and the need to improve the hearing process so as to ensure impartial and consistent decisions by the administrators of the AD/CVD statutes. Accordingly, this article focuses on several possible reforms of the present system that might significantly promote cost and time efficiency and improve the impartiality and operation of AD/CVD hearings.[6]

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pears in volume IV of the series BASIC INSTRUMENTS AND SELECTED DOCUMENTS, which is published by the Contracting Parties to the Agreement. GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, (1969) [hereinafter GATT]. Developments in the Uruguay Round negotiations are described in two GATT periodical publications, *GATT Focus* and *News of the Uruguay Round.*

5. ACUS studied these laws on two prior occasions. *See* WARREN F. SCHWARTZ, THE ADMINISTRATION BY THE DEPARTMENT OF THE TREASURY OF THE LAWS AUTHORIZING THE IMPOSITION OF ANTIDUMPING DUTIES (1973) [hereinafter SCHWARTZ REPORT] (representing first ACUS study). *See also* Warren F. Schwartz, *The Administration by the Department of the Treasury of the Laws Authorizing the Imposition of Antidumping Duties*, 14 VA. J. INT'L L. 463 (1974) (providing revised version of SCHWARTZ REPORT). On the basis of the SCHWARTZ REPORT, ACUS made a number of recommendations on reforming the AD rules. *See* ADMINISTRATION OF THE ANTIDUMPING LAW BY THE DEPARTMENT OF THE TREASURY, ACUS RECOMMENDATION 73-74, 1 C.F.R. § 305.73-4 (1992) (providing ACUS Recommendation based on SCHWARTZ REPORT).

In 1984, ACUS studied one narrow aspect of current AD/CVD procedures—the availability of confidential information under protective order in proceedings of the International Trade Commission. *See* Robert A. Anthony & James E. Bryne, *Safeguarding Confidential Information in ITC Injury Proceedings: Proposals to Reduce the Risks of Disclosure*, 17 LAW & POL'Y INT'L BUS. 1 (1985) (representing second ACUS study); *see also* DISCLOSURE OF CONFIDENTIAL INFORMATION UNDER PROTECTIVE ORDER IN INTERNATIONAL TRADE COMMISSION PROCEEDINGS, ACUS RECOMMENDATION 84-6, 1 C.F.R § 305.84-6 (1992) (noting ACUS Recommendation based on second ACUS study).

6. In preparing our report for ACUS, we met with senior government trade officials and leading members of the international trade bar in Washington, D.C., on October 19, 1989, to discuss (i) how current administrative procedures in AD/CVD cases are working and (ii) what changes they believed could usefully be made to such procedures. We took their suggestions into account in preparing our preliminary draft report, dated February 4, 1991. The report was circulated for comment to the relevant government agencies and to a number of international trade lawyers in Washington, D.C. and New York who had manifested an interest in AD/CVD procedures. It was also the subject of a panel discussion at the International Trade Breakout Session at the May 9, 1991, Federal Circuit Judicial Conference and was distributed to those attending the Conference. We received a number of written comment letters on the draft report, and many additional oral comments were made during the four one-half day meetings that the ACUS Committee on Regulation devoted to discussing the draft report. The comments reflected a wide diversity of opinion on these procedures. Some

We first review the history of AD/CVD laws and how they relate to basic international trade policy issues. We then outline the AD/CVD procedures now used in the United States and several foreign jurisdictions. Finally, we discuss several possible reforms.

I. AD AND CVD STATUTES AND THE REGULATION OF UNFAIR PRACTICES IN INTERNATIONAL TRADE

AD and CVD laws have a long history. The United States adopted its first CVD law in 1897,[7] and its first comprehensive AD statute in 1921.[8] Other countries have had similar provisions for even longer periods.[9] The use of such laws is explicitly permitted by GATT which, in article VI, (i) condemns dumping by companies of one country that causes material injury to the domestic industry of another country,[10] (ii) authorizes the application of AD duties to offset dumping[11] and (iii) permits the use of CV duties to offset subsidies causing material injury to a nation's domestic industry.[12] Article VI does not regulate in any detail the procedures to be used in processing AD and CVD cases and addresses the substantive issues only in very general terms.

During the Kennedy Round of trade negotiations, held under GATT's auspices from 1963 to 1967, a number of participating coun-

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were supportive; others were quite critical. In addition, both prior to and subsequent to the circulation of the draft report, we each spoke, individually and in some cases jointly, with many individuals involved with the current procedures, including private practitioners and government officials. In order to obtain candid comments from these individuals, we told them that we would not attribute any remarks to specific individuals. We believe that the opportunity given both private practitioners and government officials to comment on the report means that the accuracy of statements made to us on which we have relied had been adequately tested without having to attribute statements to specific individuals. We accept full responsibility for our conclusions.

7. *See* JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 748 (2d ed. 1986) (discussing origins of CVD law).

8. *See* William J. Davey, *Antidumping Laws: A Time for Restriction*, 1988 CORP. L. INST. 8-1, 8-3 (B. Hawk ed.) (discussing history of antidumping laws). The United States adopted a law directed at predatory dumping in 1916 but it has apparently never been invoked successfully. *See* 15 U.S.C. § 72 (1988); JACKSON & DAVEY, *supra* note 7, at 800-01 (discussing Antidumping Act of 1916).

9. *See* Davey, *supra* note 8, at 8-3 (discussing historical development of antidumping law).

10. GATT, *supra* note 4, art. VI:1.

11. *Id.* art. VI:2.

12. *Id.* art. VI:3. The General Agreement authorizes the use of CVD duties in a backhanded way. It provides only that such duties shall not exceed the amount of the subsidy. The General Agreement does not restrict the use of domestic subsidies, although it does forbid the use of certain export subsidies. *Id.* art. XVI. *See generally* William J. Davey, An Overview of the General Agreement on Tariffs and Trade § II.C.2, *in* PIERRE PESCATORE ET AL., HANDBOOK OF GATT DISPUTE SETTLEMENT 54-57 (1991) (discussing GATT remedies to offset subsidies).

tries reached agreement on more detailed substantive and procedural rules to be applicable to AD cases. This agreement, known as the 1967 Antidumping Code,[13] had limited impact, however, because the U.S. Congress essentially forbade U.S. compliance with it, even though the United States was a party to the negotiations.[14] In 1979, the Tokyo Round of Multilateral Trade Negotiations led to the adoption, by the industrialized GATT members and some developing countries as well, of two side agreements to the General Agreement—the Antidumping Code,[15] which regulates the imposition of AD duties, and the Subsidies Code,[16] part of which governs the use of CV duties. Both of these codes are currently under discussion in the Uruguay Round of GATT trade negotiations and both may be changed in part if those negotiations are successfully completed.

Despite their long history, both AD and CVD laws remain quite controversial. This is probably due in part to the fact that although they have existed for many years, they were utilized infrequently prior to the Tokyo Round. For example, it appears that there were approximately eighty-four CV duties applied by the United States from 1897 through mid-1973.[17] While AD cases were more common, there were only thirty-four outstanding AD orders at the end of 1972.[18] In contrast, in the United States, as of December 31, 1990, there were 197 outstanding U.S. AD orders and seventy-two outstanding CVD orders.[19] The dramatic increase during the 1980's in the use of AD and CVD laws has intensified concerns about their appropriateness and their effect on international trade.[20]

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13. GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 24 (15th Supp. 1968).

14. *See* JACKSON & DAVEY, *supra* note 7, at 670-73 (discussing 1967 AD Code).

15. GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 171 (26th Supp. 1980) [hereinafter ANTIDUMPING CODE].

16. *Id.* at 56 [hereinafter SUBSIDIES CODE].

17. JACKSON & DAVEY, *supra* note 7, at 751.

18. 19 C.F.R. § 153.43 (1973). Five years earlier, there were only 17 outstanding AD orders. 19 C.F.R. § 53.43 (1968).

19. INTERNATIONAL TRADE COMM'N, PUB. NO. 2403, OPERATION OF THE TRADE AGREEMENTS PROGRAM, tables A-20 & A-22 (1991) [hereinafter ITC 1990 REPORT]. As of December 31, 1989, there were 192 AD orders and 76 CVD orders in effect. INTERNATIONAL TRADE COMM'N, PUB. NO. 2317, OPERATION OF THE TRADE AGREEMENTS PROGRAM, tables A-27 & A-29 (1990) [hereinafter ITC 1989 REPORT]. As of December 31, 1988, there were 163 AD orders and 77 CVD orders in effect. INTERNATIONAL TRADE COMM'N, PUB. NO. 2208, OPERATION OF THE TRADE AGREEMENTS PROGRAM, tables B-20 & B-22 (1988) [hereinafter ITC 1988 REPORT].

20. The initiation of new AD/CVD cases in the United States has fallen off in the last several years, although the number of outstanding AD/CVD orders continues to grow. 1989 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 76 (1990) (listing statistics for years 1981-88); ITC 1989 REPORT, *supra* note 19, tables A-26 & A-28 (for 1989); ITC 1990 REPORT,

In the case of AD laws, some commentators question their economic rationale, asking whether dumping is really an unfair or harmful practice at all and arguing that the substantive provisions in most AD laws are unfairly biased against exporters.[21] In the eyes of these critics, AD laws are used mainly for protectionist purposes. Some critics argue that the laws should be restricted in scope or even repealed and that the antitrust laws should be relied upon to combat unfair trade practices.[22] On the other side of the argument are those who point to the long history of AD laws, the condemnation of dumping expressed in GATT and the unfairness and injury that results from dumping.[23] Others take a more pragmatic perspective, essentially viewing AD laws as a useful interface mechanism that operates to relieve strains between national economies.[24] Despite this controversy, it seems likely that AD laws will continue to exist, certainly for the next decade, even if their scope of application is reduced as more free trade areas are created.[25]

CVD laws are also controversial, although much of this controversy stems not from disagreement as to whether there should be some sort of control over subsidies, but rather over how much control is appropriate. There is a fear that without some controls on the use of subsidies, particularly subsidies tied to exports, there will be undesirable competition between countries in the use of subsidies. Thus, although the European Community (EC) does not recognize the possibility of intra-Community dumping, it has an elaborate mechanism to control the granting

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supra note 19, tables A-19 & A-21 (for 1991). The use of these procedures is expected to increase significantly if the current quantitative restrictions on textiles and apparel are phased out, as has been proposed in the Uruguay Round, and as a result of the expiration of U.S. steel import quotas. After the quotas expired, the U.S. steel industry filed numerous AD/CVD petitions. 9 Int'l Trade Rep. (BNA) 1162 (1992).

21. These and other similar arguments are reviewed favorably in Davey, *supra* note 8 (arguing for restrictions of AD laws).

22. This view was held by Professor Schwartz and is also held by one of the co-authors of this report. SCHWARTZ REPORT, *supra* note 5, at 7-8; Davey, *supra* note 8, at 8-12.

23. *See* J. F. BESELER & A. N. WILLIAMS, ANTI-DUMPING AND ANTI-SUBSIDY LAW: THE EUROPEAN COMMUNITIES 41-52 (1986) (defending anti-dumping rules).

24. *See* JOHN H. JACKSON, THE WORLD TRADING SYSTEM 244 (1989) (viewing AD laws as having interface function).

25. It has been typical in more comprehensive free trade areas, such as the European Community, the proposed European Economic Area and the Australian-New Zealand Agreement on Closer Economic Relations, to abolish AD laws for internal trade on the theory that such laws are not needed if goods in fact flow freely back and forth across member country boundaries and effective antitrust laws exist. *See* BESELER & WILLIAMS, *supra* note 23, at 33 (discussing intra-community dumping). The Canada-United States Free Trade Agreement in article 1906 envisions replacement of AD laws by some other mechanisms yet to be agreed upon. Canada-United States Free Trade Agreement, art. 1906.

of trade-distorting subsidies by its member states and their regional and local authorities.[26]

Although many countries have CVD laws, in recent years only the United States has made extensive use of a CVD statute.[27] Much of the controversy surrounding the U.S. use of its CVD rules has centered on the definition of a countervailable subsidy. There seems to be general agreement among the leading members of GATT that some types of subsidies should be banned, particularly direct export subsidies on industrial products.[28] There is controversy, however, over the extent to which domestic subsidies (which obviously will allow all prices, including export prices, to be lower) should be prohibited or countervailable. Because the United States does not directly subsidize industries as much as many other governments do, the United States takes a harder line against the use of domestic subsidies, while the more frequent users of such subsidies argue that they are legitimate government policy instruments and should not be subject to counteraction by other nations. Negotiations in both the Tokyo and Uruguay Rounds have tried to reach an agreement on this question of which subsidies should be countervailable.[29]

The most controversial issues raised in respect to AD and CVD laws are substantive and essentially concern the question of how broad the

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26. The control of subsidies, or "state aids" as they are called in EC parlance, is in the hands of the Commission and its competition directorate. The EC does not ban all subsidies but does restrict the level of subsidization, depending on the economic health of the region where the subsidies are proposed to be granted. In a number of cases, the Commission has ordered that subsidies be repaid. *See generally* Manfred Caspari, *State Aids in the EEC*, 1983 CORP. L. INST. 1 (B. Hawk ed.) (describing EC system of regulating "state aids").

27. According to reports filed with the GATT Committee on Subsidies and Countervailing Measures, the numbers of CVD cases initiated between July 1, 1986 and June 30, 1990 by signatories to the Subsidies Code were as follows:

Australia	14 (11 in 1989-90)
Canada	8
New Zealand	5
United States	38 (In 1985-86: 43)

GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 191-92 (34th Supp. 1988); GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 384 (35th Supp. 1989); GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 455 (36th Supp. 1990); GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 316 (37th Supp. 1991).

28. The GATT Subsidies Code prohibits the use of export subsidies on nonprimary products and limits their use on primary (i.e., agricultural) products. SUBSIDIES CODE, *supra* note 16, arts. 9, 10. The limitations applicable to primary products are viewed as largely ineffective. *See* JACKSON & DAVEY, *supra* note 7, at 735-39 (excerpting materials showing ineffectiveness of SUBSIDIES CODE rules).

29. GATT, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS: REPORT BY THE DIRECTOR-GENERAL OF GATT, 53-60 (1979); GATT, NEWS OF THE URUGUAY ROUND 5-6 (No. 38, July 16, 1990).

scope of these laws should be (i.e., how easy should it be for domestic industry to invoke them to restrict imports). The procedures pursuant to which these laws are applied may have important effects on the outcome of cases and the ability of interested parties to bring or defend AD/CVD cases. Hence, they are the subject of contention as well. This article focuses on those procedures.

II. A DESCRIPTION OF THE PRESENT SYSTEM

This section outlines the U.S. procedures for handling AD/CVD cases and then briefly compares those procedures with the administrative practices followed by the other countries that are the primary users of AD laws—the European Community, Canada and Australia.[30]

A. Description of U.S. AD/CVD Procedures

The present U.S. system for handling AD and CVD cases is complex.[31] This complexity stems in part from the need to deal with difficult substantive issues, but it is increased significantly because of the manner in which the U.S. system processes these cases. Two federal agencies administer the U.S. law; the ITA, of the Department of Commerce, and the ITC, an independent federal agency. Their decisions are

30. As noted above, only the United States is a significant user of CVD laws. *See supra* note 28. As to use of AD laws, according to reports filed with the GATT Committee on Antidumping Practices, the numbers of AD actions initiated between July 1, 1986 and June 30, 1990, by Antidumping Code signatories were as follows:

Australia	102	
Brazil	3	
Canada	73	
EC	91	(against Code parties only)
Finland	12	
Korea	4	
Mexico	25	(1988-1990 only)
New Zealand	13	(1988-1990 only)
Sweden	6	
United States	121	

GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 359-61 (35th Supp. 1989); GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 439 (36th Supp. 1990); GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 301 (37th Supp. 1991).

31. The statutory provisions governing AD proceedings are found in Title VII, subtitles B, C and D of the Tariff Act of 1930. 19 U.S.C. §§ 1673-1677j (1988). Both the ITA and the ITC have issued regulations concerning AD proceedings. *See* 19 C.F.R. pts. 207, 353, 354. The statutory provisions applicable to CVD cases are found in Title VII, subtitles A, C and D. 19 U.S.C. §§ 1671-1671h, 1675-1677j (1988). The ITA and ITC regulations governing CVD cases are at 19 C.F.R. pts. 207, 355, 354. For an excellent description of the U.S. system, see Gary Horlick, *The United States Antidumping System, in* JOHN H. JACKSON & EDWIN VERMULST, ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY 99-166 (1989).

reviewable first in a trial level federal court, the Court of International Trade (CIT), and then by the Court of Appeals for the Federal Circuit.[32] Congress has regulated many procedural aspects of the system in great detail, particularly by establishing strict time limits for the initial investigation period leading up to the decision to issue an AD or CVD order.[33] Thereafter, the procedural complexity of the system is increased by an "annual" review procedure and the extensive judicial review of agency actions, all of which has frequently resulted in long delays in finally determining the liability to be assessed under an AD or CVD order.

In order to give the reader an appreciation of this complex system, we outline in this section how a typical AD or CVD case is processed under current rules. There are three distinct stages in U.S. AD and CVD cases: first, the initial investigation, which determines whether or not an AD/CVD order will be issued; second, the annual review procedure, in which the actual amount of AD/CV duties to be collected is established; and third, the revocation procedures, by which cases are finally terminated. In addition, there is judicial review of all final determinations in these three stages.[34]

1. Initial Investigations

An AD or CVD proceeding is typically commenced by the filing of a petition in respect of a specific product on behalf of the U.S. domestic industry producing that product.[35] Thereafter, the statute establishes strict deadlines for completion by the ITA and the ITC of the various phases of the initial investigation. Once an investigation is opened, the ITA is responsible for determining the extent of dumping or subsidization, while the ITC determines whether U.S. industry has suffered or is threatened with material injury. First, the ITC makes a preliminary injury determination; then the ITA makes both its preliminary and fi-

32. Tariff Act of 1930, 19 U.S.C. § 1516a (1988).

33. In 1979, when the current AD and CVD laws were adopted, Congress expressed considerable dissatisfaction with the way in which the laws had been administered in the past by the Treasury Department. JACKSON & DAVEY, *supra* note 7, at 674-75. Although the Treasury's administrative responsibilities were shifted to the ITA in 1980, Congress has remained intimately involved in the operational details of the law.

34. Tariff Act of 1930, 19 U.S.C. § 1516a(j) (1988).

35. *Id.* §§ 1671a(b), 1673a(b). The term "industry" is defined as the domestic producers of the product as a whole or those producers whose output constitutes a major proportion of total domestic production. *Id.* § 1677(4)(A). Absent evidence that a majority of U.S. producers (weighted by output) oppose a petition, the ITA generally assumes that the petitioner represents U.S. industry. Horlick, *supra* note 31, at 154.

nal dumping/subsidy determination; and finally the ITC makes its final injury determination. The time limits established by Congress for these determinations are as follows:

Action	Days After Petition Filed	
	AD	*CVD*
ITA decision to initiate investigation	20[36]	20[37]
ITC preliminary injury determination	45[38]	45[39]
ITA preliminary dumping/subsidy determination	160[40]	85[41]
ITA final dumping/subsidy determination	235[42]	160[43]
ITC final injury determination	280[44]	205[45]

Shorter periods are established for CVD cases because the investigations are thought to be simpler in that fewer issues and less data are involved.

The decision by the ITA on whether to initiate an investigation is largely pro forma. At this stage, the ITA determines whether the petition properly alleges the basis for an action, contains information reasonably available to the petitioner in support thereof, and is filed by an appropriate party.[46] The ITA does not permit respondents to argue

36. Tariff Act of 1930, 19 U.S.C. § 1673a(c) (1988).
37. *Id.* § 1671a9(b).
38. *Id.* § 1673b(a).
39. *Id.* § 1671b(a).
40. *Id.* § 1673b(b)(1)(A). This period may be extended to 210 days if the case is determined by the ITA to be extraordinarily complicated. *Id.* § 1673b(c). It may be shortened to 90 days after commencement of the investigation (which would normally be about 110 days after the filing of a petition) if (i) the ITA has sufficient information and (ii) the petitioner and certain other interested parties waive verification of that information. *Id.* § 1673b(b)(2). The period may also be shortened to 100 or 120 days if so-called short life cycle merchandise is involved. *Id.* § 1673b(b)(1)(B) (1988).
41. 19 U.S.C. § 1671b(b) (1988). This period may be extended to 150 days in certain extraordinarily complicated cases and to 250 (or 310) days in cases involving upstream subsidies. *Id.* §§ 1671b(c), (g). If adequate information is in the hands of the ITA and verification is waived, the period may be shortened. *Id.* § 1671b(b)(3).
42. *Id.* § 1673d(a)(1). This period may be extended by 60 days in certain circumstances. *Id.* § 1673d(a)(2).
43. *Id.* § 1671d(a).
44. *Id.* § 1673d(b)(2).
45. *Id.* § 1671d(b).
46. 19 C.F.R. §§ 353.13, 355.13 (1992). Petitions may be filed by a manufacturer, producer, or wholesaler in the United States of a like product; a certified union or recognized union or group of workers representative of an industry in the United States engaged in the manufacture, production or wholesale of a like product; a trade or business association, a majority of whose members manufacture, produce or wholesale a like product in the United States; and an association, a majority of whose members is

against initiation of an investigation.[47]

If the ITA initiates an investigation, the ITC determines whether there is a reasonable indication that U.S. industry has been materially injured by the allegedly dumped or subsidized imports.[48] To make that determination, the ITC collects information from the U.S. industry and others through questionnaires and other sources available to it about the industry. According to ITC officials, in staffing an investigation, the ITC typically assigns an investigator, an economic/financial analyst, a commodity/industry analyst from the ITC's Office of Industries, and a staff attorney who writes or reviews any report issued by the ITC. When legal issues arise, they are referred to the General Counsel's office. When there are questions raised about the proper scope of investigation, such as whether certain products should be included in the investigation, the ITC office responsible for classification issues under the Harmonized Tariff System may be consulted.

The ITC's regulations provide for the possibility of a conference with the ITC's staff prior to the ITC's preliminary determination.[49] Conferences are typically held about three weeks after the petition is filed, and both witnesses and counsel for the interested parties attend.[50] Any post-conference briefs from the parties are due shortly after the conference is held.

Thereafter, the ITC's staff prepares a report that summarizes the information collected in the investigation and, in particular, contains detailed statistical information on the state of the U.S. industry at issue. The parties do not receive a copy of the report prior to the Com-

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composed of the foregoing. There is a special rule for processed agricultural products. 19 U.S.C. §§ 1677(9)(C)-(G) (1988).

7. 19 C.F.R. §§ 353.12(i), 355.12(j) (1992).

48. 19 C.F.R. § 207.12 (1992). One major difference between AD and CVD cases is that not all CVD cases involve an injury investigation. Such investigations are held in cases involving those developed countries that are parties to the GATT Subsidies Code (without reservations) and those developing countries that (i) are parties to the Subsidies Code and (ii) have made certain commitments to the United States concerning their use of subsidies. These commitments are provided for in the U.S. CVD statute and are viewed by the United States as necessary because the Subsidies Code (despite U.S. opposition) allows more leeway in the use of subsidies by developing countries than it does in the case of developed countries. Under the statute there are a few other countries that are also entitled to an injury test. 19 U.S.C. § 1671(b) (1988). In addition, an injury investigation is conducted if a case involves a duty-free product from a GATT member. *Id.* § 1303(a)(2).

49. 19 C.F.R. § 207.15 (1992).

50. On the respondents' side, the statute defines interested parties as foreign manufacturers, producers and exporters of the product under investigation; the U.S. importers of that product (and any association of such importers); and the government of the country where the product is produced or manufactured. 19 U.S.C. §§ 1677(9)(A)-(B) (1988). The interested parties on the petitioner's side are listed in note 46 *supra*.

mission's preliminary determination. That determination is made by a vote of the six Commissioners, with tie votes counted as affirmative determinations.[51] The Commission, not infrequently, splits several ways on a particular issue and separate opinions are not uncommon.[52]

If the ITC preliminary determination is affirmative, the ITA continues its preliminary investigation. The ITA sends questionnaires to the exporters, importers and other parties known to be involved in the case, including the relevant foreign government in a CVD case. The questionnaires seek information needed to determine whether dumping or subsidization has occurred (i.e., information on domestic and export prices, information concerning adjustments needed to make those prices "comparable"), information about costs if there are allegations of below-cost sales, information about government programs, and information about receipt of government benefits by individual companies. On the basis of the questionnaire responses, or, in the absence of adequate information from a respondent, the best information available to it (which may be information supplied by the petitioner), the ITA determines on a preliminary basis whether the foreign goods are being sold in the United States at less than fair value or have been subsidized by a foreign government.

In the case of an affirmative determination, the Customs Service is directed to "suspend liquidation" of all subsequent imports of the product in question and to collect a deposit or bond thereon equal to the net subsidy or the amount by which the foreign market value exceeds the U.S. price (the dumping margin), in each case as determined by the ITA in its preliminary determination.[53] Suspension of liquidation means that the final amount of duty owed on the imported goods is held open for later determination. A preliminary negative decision does not end the case, however, as the ITA is required to proceed to a final determination.[54]

Between its preliminary and final determinations, the ITA verifies the questionnaire responses, typically by sending ITA personnel to con-

51. 19 U.S.C. § 1677(11) (1988).

52. *See* Gray Portland Cement and Cement Clinker from Japan, ITC Investigation 731-TA-461 (Preliminary), USITC Pub. 2297, July 1990 (providing example of separate opinions by Commissioners Brunsdale, Lodwick, Rohr and Newquist, with Commissioner Eckes dissenting).

53. 19 U.S.C. §§ 1671b(d), 1673b(d) (1988).

54. The ITA occasionally reaches an affirmative final determination in cases where the preliminary determination was negative. *See* Iron Metal Castings from India, 46 Fed. Reg. 28,463 (1981) (negative); 46 Fed. Reg. 39,869 (1981) (affirmative); Nitrocellulose from France, 47 Fed. Reg. 57,308 (1982) (negative); 48 Fed. Reg. 21,615 (1983) (affirmative).

duct an on-site examination of the books and records of the respondent. In addition, both the respondent and the petitioner usually file comments in respect of the preliminary determination. In its final determination, the ITA responds to these comments and revises its preliminary determination in light of those comments that it accepts and whatever additional relevant information has come to its attention.

The contested issues and interpretative questions that arise in the course of the ITA's investigation are resolved at various levels within the ITA, depending on the importance of the issue and the "access" that the party (or party's counsel) has to senior ITA officials.[55] While simple matters may be handled by the analyst assigned to a case, more difficult issues may rise to the level of program manager, division director, director of one of the Offices of Investigations, the Deputy Assistant Secretary for Investigations, or even to the Assistant Secretary for Import Administration (or his or her deputy) before a final decision is reached. In addition to the foregoing individuals, who are in the direct chain of command in an investigation, personnel from the Office of the Chief Counsel for Import Administration, the Office of Policy and the Office of Accounting may be involved, depending on the nature of the issue presented for decision. The number of ITA personnel involved in an investigation depends on the complexity of the case. For example, a 1990 case involving sweaters from several East Asian countries involved fourteen analysts, three program managers and one division director, as well as personnel from the policy, accounting and legal offices.[56]

As noted above, the ITA gathers information from the foreign producers, exporters and importers through questionnaires and on-site verification visits. Representatives of U.S. industry are not present at the verification visits. Most of the information received by the ITA comes through the questionnaires, verification visits, and briefs and arguments submitted to it by the parties in the case. The statute provides for formal hearings in ITA proceedings, to be held prior to the ITA's final determination, upon the request of any party.[57] As discussed below,[58] however, such hearings are typically pro forma, held late in the proceeding, and do not play a major role in the information gathering pro-

55. The ITA is required to maintain a record of ex parte contacts concerning factual information. 19 C.F.R. § 353.35 (1992). In practice, records of all ex parte contacts are kept.

56. Author Interview with ITA officials.

57. 19 U.S.C. § 1677c (1988). Such hearings are not conducted pursuant to the APA.

58. *See infra* note 175 and accompanying text (discussing ITA hearings).

cess or in developing the legal arguments made in a case.

If the ITA makes an affirmative preliminary dumping or subsidy determination, the ITC commences a further investigation into the injury issue. Generally, according to ITC officials, in order to avoid unnecessary work in the event of a preliminary negative determination by the ITA,[59] the ITC does not work on a matter between its preliminary injury determination and the ITA's preliminary determination (115 days in an AD case; forty days in a CVD case). In the final ITC investigation, a preliminary ITC staff report on the injury issue is made available to the parties shortly after the ITA's final determination. Thereafter, a hearing is typically scheduled at which the parties can present witnesses and legal arguments.[60] Counsel may file pre- and post-hearing briefs.[61] As a consequence of recent statutory changes allowing protective orders, there has been a significant expansion in the parties' access to the confidential information on which the ITC bases its decision.[62] The ITC's hearing is typically held about two or three weeks after the ITA's final determination, which gives the ITC three or four weeks to reach its decision and issue its final report.

Assuming that the ITC makes an affirmative injury finding, an AD or CVD order is issued. The dumping margin or net subsidy established in the ITA's final determination is used as the basis for establishing the precise amount of AD/CV duties owed on imports of the merchandise made between the preliminary AD/CVD determination and the final ITC injury determination. If the amount fixed in the final ITA determination exceeds that of the preliminary ITA determination, the shortfall is disregarded; if the final amount is less than that established in the preliminary determination, the excess is refunded, without interest.[63] With respect to imports of the merchandise made after the issuance of an AD or CVD order, the U.S. Customs Service collects a duty equal to the final dumping margin or net subsidy as an estimated AD or CV duty. This provisional amount must normally be deposited with

59. With respect to cases disposed of in 1989, there was one ITA negative AD preliminary determination (out of 40 total cases) and two ITA negative CVD preliminary determinations (out of 10). ITC 1989 REPORT, *supra* note 19, tables A-26 & A-28. The comparable numbers for 1990 were zero of 28 (AD) and one of six (CVD). ITC 1990 REPORT, *supra* note 19, tables A-19 & A-21.

60. This hearing is not required to be, and is not, conducted pursuant to the APA. 19 U.S.C. § 1677c(b) (1988); 19 C.F.R. § 207.23(b) (1991).

61. 19 C.F.R. §§ 207.22, 207.24 (1991).

62. *See* 19 U.S.C. § 1677f(c) (1988). Access to such information was the subject of ACUS Recommendation 84-6. Disclosure of Confidential Information Under Protective Order in International Trade Commission Proceedings, ACUS Recommendation 84-6, 1 C.F.R. § 305.84-6 (1992).

63. 19 U.S.C. §§ 1671f(a), 1673f(a) (1988).

the U.S. Government in cash. The final amount of duty owing on these imports is determined in the annual review procedure discussed below.

It is possible under the AD or CVD statute for the foreign exporters or government to "settle" a case by agreeing to cease dumping, to cease subsidization, or to revise their prices so as to eliminate the injury to U.S. industry.[64] Such settlements, known as price undertakings in the GATT Codes and suspension agreements in U.S. law, are common in the EC and to a lesser extent in Australia and Canada, but not in the United States.[65] As of December 31, 1990, there were five AD suspension agreements and twelve CVD suspension agreements in effect in the United States.[66]

The principal reason that suspension agreements are not often used in the United States is that Congress has attached many conditions to their use. Under U.S. law, in order for an AD suspension agreement to be entered into, (i) exporters of substantially all investigated products must agree to stop exporting to the United States or agree to eliminate completely the dumping margin by raising their prices[67] or (ii) they must agree to revise their prices so as to eliminate completely the injurious effect of exports to the United States.[68] Use of the latter type of agreement is subject to a number of additional conditions and may be entered into only in extraordinary circumstances. Moreover, the legislative history of the U.S. law indicates considerable congressional opposition to use of suspension agreements.[69]

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64. *Id.* §§ 1671c, 1673c. The GATT Antidumping and Subsidies Codes provide for the settlement of AD and CVD cases through the use of price undertakings. ANTIDUMPING CODE, *supra* note 15, art. 7; SUBSIDIES CODE, *supra* note 16, art. 4(5)-(7).

65. Reports submitted to the GATT Committee on Antidumping Practices for the period July 1, 1986, to June 30, 1990, show the following:

Country	*Undertakings Accepted*
Australia	10
Canada	8
EC	32
US	2

GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 354, 359-61 (35th Supp. 1989); GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 439 (36th Supp. 1990); GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 301 (37th Supp. 1991). Steele states that undertakings are in fact used "quite often" in Australia. Steele, *infra* note 144, at 271.

66. 1990 ITC REPORT, *supra* note 19, tables A-20 & A-22.

67. 19 U.S.C. § 1673c(b) (1988).

68. *Id.* § 1673c(c).

69. According to the legislative history, "[t]he suspension provision is intended to permit rapid and pragmatic resolutions of countervailing duty cases. However, suspension is an unusual action which should not become the normal means of disposing of cases. . . . For this reason, the authority to suspend investigations is narrowly circumscribed." S. REP. NO. 249, 90th Cong., 1st Sess. 54 (1979). For similar language con-

Finally, one important procedural aspect of U.S. AD/CVD proceedings must be highlighted. Much of the information collected by the ITA and ITC is viewed by the suppliers as highly sensitive commercial information, such as detailed data on costs, prices and customers. While such information is treated as confidential by the agencies and is not available to the public or parties generally, it is available to attorneys for the parties under protective orders.[70]

This practice allows attorneys for the parties to participate much more effectively in the proceedings than would be the case if there was no access to such confidential information.

2. *Administrative Reviews*

As explained above, the dumping margin or net subsidy determined by the ITA in its final determination in an investigation is used to set the amount that must be deposited on importation of products subject to an AD or CVD order.[71] The ITA, at the request of an interested party, will conduct a review each year to establish the exact extent of dumping or subsidization, and the importer either receives a refund if the amount deposited was too high (plus interest) or pays an additional sum (plus interest) if it was too low.[72] Commerce Department officials stated that such a request is received in approximately fifty to sixty percent of the cases. In those cases where no review is requested, the amount deposited as the estimated duty is collected as the definitive amount due. In the other cases, reviews are held.

Reviews are performed by the ITA's compliance office, which is administratively distinct from the office that handles investigations. Essentially the same sort of information is collected in a review as in the

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cerning AD suspension agreements, see *id.* at 71. *See generally* Alan F. Holmer & Judith Hippler Bello, *U.S. Import Law and Policy Series: Suspension and Settlement Agreements in Unfair Trade Cases*, 18 INT'L LAW 683 (1984) (describing U.S. practice and policy on suspension agreements).

70. 19 C.F.R. § 207.7 (1992) (ITC); 19 C.F.R. §§ 353.34, 355.34, 354.3 (1992) (discussing ITA dumping, countervail, and sanctions for violating protective orders, respectively). The ITC protective order procedure was the subject of an earlier recommendation by the Administrative Conference. *See supra* note 5 (describing recommendation on ITC protective order procedure).

71. The AD statute provides a procedure by which a quick review may be conducted within 90 days after the issuance of an AD order to establish the amount of estimated duties to be deposited on the basis of import transactions made between the date of the preliminary ITA determination and the final ITC determination. 19 U.S.C. § 1673e(c) (1988). In theory, this would allow a company found to have engaged in dumping to stop immediately after the preliminary determination and have its deposit rate reflect its cessation of dumping. According to ITA officials, this procedure, which is discretionary on the part of the ITA, is virtually never used.

72. 19 U.S.C. §§ 1671f(b), 1673f(b) (1988).

initial investigation. There are, however, some differences in the practices of the two offices on the same issues. There are no strict statutory time limits for completion of reviews. The ITA has historically had a considerable backlog of reviews waiting to be processed, although it has made progress in reducing that backlog in the recent past.

3. *Revocation*

AD and CVD orders remain in effect until they are revoked. Even if an annual review finds no dumping or subsidization, which means that no amount is required to be deposited on future importations, the AD/CVD order remains in effect, and it is possible that a subsequent review could result in the assessment of AD or CV duties. Revocation of an AD or CVD order may occur on a number of grounds: (i) an absence of dumping or subsidization, (ii) an absence of continuing injury, (iii) a lack of continuing interest in a case by domestic industry, and (iv) application of the automatic revocation provision, the so-called "sunset" rule.[73]

First, a person subject to an AD order may request that the order be revoked on its third or any subsequent anniversary on the grounds that the person has not engaged in dumping for at least the last three years and will not do so in the future.[74] The request for revocation is treated as a request for an annual review. The review is conducted in accordance with normal review procedures, with the additional requirement that the ITA must verify the results of the review.[75] This provision has been the most common ground for revocation since 1980, although it should be noted that in most cases revocation was not opposed by U.S. industry.[76] If U.S. industry is opposed to revocation, the foreign export-

73. *See generally* Leonard M. Shambon, *Revocation Under the Antidumping and Countervailing Duty Laws?: You Should Live So Long!*, *in* THE COMMERCE DEPARTMENT SPEAKS 1987, at 241 (PLI Corporate Law and Practice Course Handbook Series No. 571, 1987) (discussing application of "sunset" rule); Bernard Carreau, *Revocation of Antidumping and Countervailing Duty Orders: New Procedures and Recent Trends in Commerce Practice*, *in* THE COMMERCE DEPARTMENT SPEAKS 1990, at 43. Prior to 1989, revocation was also possible where there had been no shipments, the second most frequent ground for revocation in AD cases. Carreau, *supra*, at 86-88; Shambon, *supra*, at 281.

74. 19 C.F.R. § 353.25(b) (1992). If the AD order is to remain outstanding because not all persons covered by it are eligible for revocation, the party seeking revocation must agree to the immediate reinstatement of the order if it is later found to have engaged in dumping.

75. The verification procedure typically involves an on-site inspection of a respondent's records to verify that the data submitted to the ITA is accurate. 19 C.F.R. § 353.36(c) (1991). The ITA does not always conduct such inspections in connection with annual reviews.

76. Shambon, *supra* note 73, at 278-80.

ers are likely to find it much harder to establish that they will not resume dumping, which is by its very nature a speculative argument.[77] In the case of a CVD order, revocation under similar grounds is possible if the country in question has eliminated the subsidy program found to be countervailable for three years[78] or an individual company has not applied for or received any net subsidy for five years.[79]

Second, there is a statutory provision for review of the injury determination by the ITC.[80] If the ITC concludes that revocation would not result in material injury to U.S. industry, the ITA will revoke an AD or CVD order. Such reviews by the ITC are only rarely conducted and only a handful have succeeded.[81]

Third, an AD or CVD order may be revoked on the basis of changed circumstances.[82] The specific circumstance mentioned in the regulations is a lack of interest in the matter by U.S. industry, and most revocations under this provision have been based on such lack of interest.[83] For example, orders in forty steel cases (seventeen dumping and twenty-three countervail) were revoked on this ground in 1985 and 1986.[84] The extent to which a segment of the U.S. industry can prevent revocation on this ground is somewhat unsettled.[85]

Finally, revocation is possible if there has been no request for an annual review for four consecutive anniversaries of an order, and, if after notice to all interested parties, no one objects to revocation on the fifth anniversary.[86] This provision was added to the AD regulations in 1989 and to the CVD regulations in late 1988. There has been little experience under it to date. Its effect may be limited since revocation is unlikely to occur if there is any objection at all from U.S. industry.[87]

From the foregoing description, it seems reasonable to conclude that revocation is relatively rare unless there is no opposition from U.S. in-

77. Carreau, *supra* note 73, at 67-80.
78. 19 C.F.R. § 355.25(a)(1) (1992).
79. *Id.* § 355.25(a)(2)-(3).
80. 19 U.S.C. § 1675(b) (1988).
81. *See* Carreau, *supra* note 73, at 107-13. Carreau notes that there have been 14 cases since 1980, two of which resulted in revocation of an AD order in 1980 and 1981 and two of which led to certain products being excluded from the relevant AD order in 1981 and 1987. *Id.*
82. 19 C.F.R. §§ 353.25(d), 355.25(d) (1992).
83. Carreau, *supra* note 73, at 89-90.
84. *Id.* at 90.
85. *Id.* at 90-97 (citing Oregon Steel Mills v. United States, 862 F.2d 1541 (Fed. Cir. 1988)).
86. 19 C.F.R. §§ 353.25(d)(4), 355.25(d)(4) (1992).
87. According to Shambon, there were 15 revocations out of 34 notices of intent to revoke issued as of mid-1991. Leonard M. Shambon, Speech to Federal Circuit Judicial Conference (May 9, 1991), 140 F.R.D. 180, 182 (1992).

dustry. From 1988 to 1990, there were a total of fifteen AD order revocations (197 AD orders remained outstanding at the end of 1990, compared to 163 at the end of 1988) and thirteen CVD order revocations (seventy-two CVD orders remained outstanding at the end of 1990, compared to seventy-seven at the end of 1988).[88] This means that the unsettling effect on international trade inherent in a U.S. AD or CVD order typically continues for a considerable period of time.[89]

4. Judicial Review

U.S. law provides for appeals from final determinations of the ITA or ITC to the Court of International Trade (CIT), a specialized Article III court that hears only cases involving international trade issues.[90] The standard of review is specified in the statute. Decisions by the ITA not to initiate an investigation and negative preliminary decisions by the ITC are reviewed to see if they are "arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law."[91] Final determinations by the ITA and the ITC are reviewed to see if they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law."[92] From the CIT, cases are appealable to the

88. ITC REPORT 1990, *supra* note 19, tables A-20 & A-22; ITC REPORT 1989, *supra* note 19, tables A-27 & A-29; ITC REPORT 1988, *supra* note 19, tables B-20 & B-22.

89. As of December 31, 1990, the outstanding AD and CVD orders had originally come into effect as follows:

Number of Orders

Year	*Outstanding*	
	AD	*CVD*
1990	14	2
1989	32	6
1988	12	3
1987	38	16
1986	23	10
1985	7	11
1980-84	30	17
1975-79	18	7
1970-74	20	
pre-1970	3	

ITC 1990 REPORT, *supra* note 19, at tables A-20 & A-22.

90. 19 U.S.C. § 1516a (1988). Approximately one-half (46.3%) of the CIT's cases in the January 1986 to September 1989 period involved AD or CVD appeals. Leonard M. Shambon, *Accomplishing the Legislative Goals for the Court of International Trade: More Speed! More Speed!*, 14 FORDHAM INT'L L.J. 31, 31 (1990). The AD and CVD cases are probably, in the main, much more complicated than the typical customs law cases in the CIT.

91. 19 U.S.C. § 1516a(b)(1)(A) (1988). This standard also applies to refusals by the ITC to conduct a changed circumstances review under § 751.

92. *Id.* § 1516a(b)(1)(B). Appeals to which this standard is applicable include ap-

Court of Appeals for the Federal Circuit, and to the Supreme Court on writ of certiorari.[93] Decisions involving Canadian products may instead be "appealed" to binational panels under the United States-Canada Free Trade Agreement.[94]

Prior to 1979, the law relating to judicial review in AD/CVD cases was different, and there was relatively little judicial review of such cases.[95] Now, judicial review is much more common, and it appears that most AD and CVD final determinations are appealed to the CIT.[96] Decisions of the CIT are generally not appealable to the Federal Circuit if the CIT decision involves a remand to the ITA or ITC.[97] The result is that cases usually reach the Federal Circuit only after considerable time has elapsed because the CIT, on average, takes many months to review a case and it frequently remands a case to the ITA or ITC. Indeed, in some cases there is more than one remand.

A recent study found that cases in the CIT took about two years for consideration of the first appeal in AD and CVD cases.[98] Moreover, that statistic does not tell the whole story because approximately one-half of the cases result in a remand to the agency.[99] The median time for disposition of a remand in the 1986-1988 period was six months, while the average was 8.4 months.[100]

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peals of final dumping and subsidization determinations by the ITA, final injury determinations by the ITC, final determinations by the ITC in changed circumstances review under § 751 and final determinations by the ITA or ITC in connection with the suspension of an AD or CVD investigation.

93. 28 U.S.C. §§ 1254, 1295(a)(5) (1988).

94. 19 U.S.C. § 1516a(g) (1988).

95. Horlick, *supra* note 31, at 130.

96. In respect of the ITC, roughly two-thirds of appealable decisions are appealed, and the 1988 trade legislation may increase that percentage. James A. Toupin, *The U.S. Court of International Trade and the U.S. International Trade Commission After Ten Years: A Personal View*, 14 FORDHAM INT'L L.J. 10, 30 (1990). We suspect that similar statistics apply for ITA determinations.

97. Cabot Corp. v. United States, 788 F.2d 1539 (Fed. Cir. 1986).

98.

Year of CIT Opinion	*Cases*	*Median Time to Issuance*
1986	17	20 months
1987	29	24 months
1988	39	21 months
1989(3Q)	27	24 months

Shambon, *supra* note 90, at 46. Shambon recently reported that the 17 CIT decisions in 1990 he had examined had a median disposition time of 29 months. Shambon, *supra* note 87, at 181.

99. Shambon, *supra* note 90, at 48. These figures are for all 112 decisions considered. The percentage remanded varied as follows: 1986 - 41.2%; 1987 - 51.7%; 1988 - 59.0%; 1989(3Q) - 29.6%. *Id.* It was approximately 50% for 1990 as well. Shambon, *supra* note 87, at 180-81.

100. Shambon, *supra* note 90, at 48.

Thus, in a significant number of cases, there is no final disposition, on average, for two and one-half to three years after the administrative determination. This is a rather striking contrast to the tight investigative timetables. Moreover, some cases continue beyond a first remand. During the 1986-1988 period, there were twelve cases remanded for a second time, and the median time for disposition on the second remand was five months.[101]

In short, the process of judicial review in the CIT often takes years. This is true despite a perception, at least on the part of the agencies, that CIT review does not cause them to change their results significantly. For example, in the case of appeals from ITC decisions, the ITC rarely reverses its decision on remand.[102] In the case of the ITA, remands are more common and often result in some change in duty rate. The authors conclude from talking to present and former ITA officials, however, that in most cases CIT review has not resulted in significant changes in ITA determinations. Thus, the long wait for CIT decisions may not lead to significant changes in results even if a remand is obtained.

B. The European Community, Canadian and Australian Experiences: Lessons for the United States?

This section does not describe in any detail the AD/CVD systems in the European Community (EC), Canada or Australia.[103] In many respects, these systems operate in much the same way, which is not surprising, given that they apply more or less the same substantive rules. There are some procedural differences, however, and in this section we will attempt to point out the more salient ones.

1. The European Community (EC) System

Under the EC antidumping rules,[104] investigations are conducted by one agency, a division of the External Affairs Directorate of the EC

101. *Id.* at 19. The average time for a remand was 7.2 months. *Id.*

102. Toupin, *supra* note 96, at 25.

103. *See generally* JACKSON & VERMULST, *supra* note 31; GENERAL ACCOUNTING OFFICE, PUB. NO. 91-59, INTERNATIONAL TRADE: COMPARISON OF U.S. AND FOREIGN ANTIDUMPING PRACTICES (1990) [hereinafter GAO REPORT]. The GAO Report analyzes EC, Canadian and Australian practices regarding procedures for initiating cases, general transparency, and rights of appeal. The report contains more limited information on these issues under the new Mexican AD law. In addition, it describes briefly the as yet seldom used AD laws of Brazil, India, Japan and South Korea. *Id.*

104. The EC AD/CVD are found in Council Regulation (EEC) 2423/88 of July 11, 1988, which was published in O.J. EUR. COMM. (No. L 209) 1 (1988) [hereinafter EEC REGULATION].

Commission, that examines both the dumping and injury aspect of each case.[105] In the EC, a case is commenced when the EC initiates an investigation after receiving complaints filed by EC industry.[106] However, the EC is not required to initiate a case unless it is satisfied that the complaint contains "sufficient evidence."[107] Consequently, it has considerable discretion over the initiation of cases. In deciding whether to initiate a case, compared to the United States, the EC focuses more on the injury issue than on the dumping issue because it believes that the complaining industry has more reliable relevant data.[108] The EC is not subject to time limits for completing various aspects of the case, although the regulation provides that cases should normally be concluded within one year of initiation.[109]

In processing cases, the EC utilizes the same basic procedures as the United States: it sends out questionnaires and later verifies the responses. In dealing with the parties, however, it uses more informal procedures. Most contact with the EC authorities is through *ex parte* contacts with the casehandlers, and formal hearings are generally not held.[110] Moreover, because of the EC confidentiality rules, much of the most important information filed in a case is not subject to review by the parties or their attorneys.[111] Even more critically, the Court of Justice of the EC has not examined AD cases in any depth; it tends only to verify that the Commission and the Council of Ministers followed the general terms of the EC rules.[112] While this has meant that the EC

105. For a concise general description of the EC system, see Jean-Francois Bellis, *The EEC Antidumping System*, *in* JACKSON & VERMULST, *supra* note 31, at 41-97.

106. EEC REGULATION, *supra* note 104, art. 7.

107. *Id.* art. 5(5).

108. GAO REPORT, *supra* note 103, at 21.

109. EEC REGULATION, *supra* note 104, art. 7(9)(a).

110. There is provision for a so-called confrontation hearing at which EC officials listen to arguments made by both parties. Confrontation hearings are not held often, however, and are not generally useful because most factual information is treated as confidential and cannot be discussed. Bellis, *supra* note 105, at 49-50 (describing EC hearings). The GAO found that they were seldom held. GAO REPORT, *supra* note 103, at 28-29.

111. There is no provision for access to such information under a protective order, as there is in the United States. This situation may change, since the Court of Justice recently overturned a Community antidumping order on the grounds that the Commission had failed to disclose information to a respondent that the Court thought was necessary to enable the respondent to defend itself. Al-Jubail Fertilizer Co. v. Council, Case C-49/88, [1991] E.C.R. ____ (June 27, 1991). It is not yet clear how the Commission will change its procedures on disclosing information to meet the Court's concerns in this case.

112. In a recent case, the EC Court of Justice engaged in somewhat more intrusive review, although its decision was couched in procedural terms. *See* Rölle v. Hauptzollamt Bremen-Freihafen, Case C-16/90, [1991] E.C.R.____(Oct. 22, 1991).

authorities are now careful to follow the letter of their own procedures, challenges to the detailed calculations of dumping margins have not been closely reviewed by the Court. Furthermore, review in the Court has been very time-consuming.[113]

The results of dumping cases in the EC are much different from those in the United States. The amount of the duty imposed is not necessarily commensurate with the dumping margin. The EC authorities have the discretion to impose a lesser duty if such would be sufficient to eliminate the injury to EC industry.[114] This practice is referred to as using "injury margins" or a "lesser duty rule," and a significant proportion (roughly fifty percent) of EC/AD duties are based on such analysis.[115] Moreover, the EC is required to take into account the "Community interest" in imposing duties,[116] although this provision is not typically applied to reduce duties since the EC authorities seem to equate Community interest with complainant (and not consumer) interests in most cases.[117]

If duties are ultimately imposed in the EC, they are imposed on a prospective basis.[118] There is no annual review to determine the precise amount of the dumping margin for each transaction. There is the possibility of obtaining a refund if no dumping in fact occurred in a given transaction,[119] but because of procedural and substantive impediments, refunds are rare.[120] After one year, those subject to duties may ask that the duty rate be reviewed.[121] In practice, reviews seldom lead to significant changes in an EC and AD duty.[122] After five years, an EC/AD duty expires unless "an interested party shows that the 'expiry' of the measure would lead again to injury."[123] In that case, the EC conducts a review of the measure and decides whether it should be extended. A considerable number of old measures have consequently been abrogated as a result of this rather new procedure. At least some experts are uncertain whether it will have any long term beneficial effect since the procedure occasionally leads to renewed interest in cases that have oth-

113. *See* Bellis, *supra* note 105, at 67-68 (describing EC judicial review generally); GAO REPORT, *supra* note 103, at 41-42.
114. EEC REGULATION, *supra* note 104, art. 13(3).
115. Bellis, *supra* note 105, at 57.
116. EEC REGULATION, *supra* note 104, arts. 11(1), 12(1).
117. Bellis, *supra* note 105, at 62-63.
118. EEC REGULATION, *supra* note 104, art. 13.
119. *Id.* art. 16.
120. Bellis, *supra* note 105, at 60-61.
121. EEC REGULATION, *supra* note 104, art. 14.
122. Bellis, *supra* note 105, at 63-64. Because of various disincentives, administrative reviews in the EC are not often sought. GAO REPORT, *supra* note 103, at 37.
123. EEC REGULATION, *supra* note 104, art. 15(3).

erwise been forgotten. This is especially true when EC industry decides to oppose the expiration as a matter of course.[124] Our impression from speaking to attorneys practicing before the EC is that an EC industry can usually successfully oppose revocation if it merely alleges that removal of the duties would result in increased imports and ultimately worsen its situation.

For a business, the prospect of a fixed prospective duty is disturbing. Even if it stops dumping, the duty may continue to be payable. To avoid this kind of duty, companies subject to EC investigations typically have made so-called price undertakings,[125] pursuant to which they "settle" the case by agreeing to respect certain price levels in their exports to the EC and to report their prices to the EC regularly.[126] From 1980 to 1989, of those cases in which dumping and injury were found, 183 cases (sixty-six percent) were concluded by undertakings, while in ninety-six cases (thirty-four percent), duties were imposed.[127] Although no undertakings were accepted in 1988,[128] undertakings remain a major feature of EC practice, and eight were accepted in 1990.[129]

A comparison of the EC system to the U.S. system suggests a number of conclusions in respect to fairness and efficiency. First, as to fairness, there are fewer institutional safeguards against bias in the EC system. There is only one level of judicial review, and as long as the EC follows the proper procedures, experience suggests that judicial review in the EC Court of Justice will be pro forma. In addition, because the lawyers involved in EC cases have access to much less information than lawyers in the United States, they are less able to argue their clients' cases effectively.

Second, as to efficiency, the EC procedures seem to be much less costly than those in the United States. To begin with, many cases are

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124. Bellis, *supra* note 105, at 64-65.

125. The term "price undertaking" appears in Article 7 of the GATT Antidumping Code, *supra* note 15. Similar settlements are possible, although rare, under U.S. law where they are called suspension agreements. The U.S. practice with respect to suspension agreements is described, *supra* pages 414-15.

126. *See* EEC REGULATION, *supra* note 104, art. 10 (establishing procedures for undertakings).

127. FINANCIAL TIMES, Apr. 17, 1991, at 6.

128. COMMISSION OF THE EUROPEAN COMMUNITIES, SEVENTH ANNUAL REPORT OF THE COMMISSION ON THE COMMUNITY'S ANTI-DUMPING AND ANTI-SUBSIDY ACTIVITIES, at Annex O (COM(90)229, June 13, 1990). No undertakings were accepted in 1988 due in part to EC political concerns with Japan—a major target of EC AD actions—as well as worries about the enforceability of the undertakings, particularly in respect to product areas characterized by rapid model changes.

129. COMMISSION OF THE EUROPEAN COMMUNITIES, NINTH ANNUAL REPORT OF THE COMMISSION ON THE COMMUNITY'S ANTI-DUMPING AND ANTI-SUBSIDY ACTIVITIES (1990), at 47, Annex D (SEC(91)974 final, May 31, 1991).

settled, which eliminates several stages of a typical proceeding. In addition, the prospective nature of the duty eliminates from an EC proceeding the entire cost associated with annual reviews in the United States (except to the limited extent that refunds are requested or reviews conducted with respect to the prospective rate). Finally, the nature of EC judicial review means that there will be one appeal at most, and it will probably fail. In the United States, by contrast, the appellate process is often longer and more costly, but at the same time, more likely to lead to at least some changes in the administrators' decisions.

2. *The Canadian System*

The Canadian system[130] seems to operate more like the U.S. system than the EC system. Among the Canadian system's similarities with the United States are strict time limits,[131] a bifurcated dumping and injury investigation,[132] and extensive access under protective order to the confidential information of all parties in proceedings before the Canadian International Trade Tribunal (Tribunal) (the body charged with determining the injury issue).[133] Compared to the EC, there is a relatively limited use of undertakings, although Canada appears to use undertakings more frequently than the United States.

Some significant differences exist, however, between the Canadian and the U.S. systems. First, as in the case of the EC, judicial review appears to be relatively limited, particularly concerning the findings of the Tribunal, which determines the injury issue.[134] As to dumping issues, appeals of Revenue Canada decisions can be made to the Federal Court on questions of law.[135] One Canadian official estimated that perhaps five to ten percent of dumping assessments were appealed.[136] Second, hearings before the Tribunal are more formal than those held in the United States, as the opposing parties present evidence and wit-

130. *See generally* Peter A. Magnus, *The Canadian Antidumping System, in* JACKSON & VERMULST, *supra* note 31, at 167-223 (describing Canadian AD rules). The relevant statute is the Special Import Measures Act, R.S., 1985, c. S-15, as amended by R.S. 1985, c. 23 (1st Supp.), R.S. 1985, c. 1 (2d Supp.), R.S. 1985, c. 47 (4th Supp.) and 1988, c. 65 [hereinafter SIMA].

131. SIMA, *supra* note 130, §§ 31, 38, 41, 43.

132. The dumping investigation is conducted by Revenue Canada (Department of National Revenue, Customs and Excise) and the injury determination is made by the Canadian International Trade Tribunal. Magnus, *supra* note 130, at 178.

133. *Id.* at 179.

134. *Id.* at 175-76. The Tribunal's decisions on injury questions are deemed to be "final and conclusive." SIMA, *supra* note 130, § 76.

135. *Id.* § 62.

136. Magnus reports, however, that only a very few such appeals have occurred in the past. Magnus, *supra* note 130, at 180 n.51 & 221 n.206.

nesses, who are subject to cross-examination.[137] Third, the Tribunal may consider whether an AD/CV duty would be in the public interest and may recommend to the relevant minister that duties should not be imposed or should be imposed only in part.[138] To date, it appears that such recommendations have been made only rarely.[139] Fourth, if dumping and injury are found, Revenue Canada usually sets the normal value for the product in question by establishing a so-called benchmark price. Future imports at less than the benchmark price are subject to a duty in the amount of the shortfall.[140] Thus, as in the EC system, there is a prospective duty; but like the U.S. system, if the exporter stops dumping, there is usually no duty due. According to Canadian officials to whom we spoke, the principal exception to the use of benchmark prices is that, in respect to certain products for which it is difficult to establish benchmark prices, prospective ad valorem duties are used, as in the EC.[141] Reviews of the benchmark prices are conducted more or less annually.[142] There is a five year sunset provision under which duties expire unless the Tribunal finds that dumping and injury would result if they are not continued.[143]

On the question of fairness, the Canadian system appears to lack the intrusive judicial review that is the hallmark of the U.S. system. The Canadian system, however, with its more extensive formal injury hearings by an independent tribunal, seems to be a fairer system than that provided by the EC. As to efficiency, the use of benchmark prices seems to be less trade disruptive and costly than the practice in the United States of conducting annual reviews. However, the periodic reviews of the benchmark values in Canada, occurring apparently on an annual basis, include a complex process to set the values.

3. *The Australian System*

Under the Australian system,[144] the Australian Customs Service (Customs Service) is charged with investigating allegations of dumping

137. Magnus, *supra* note 130, at 179.
138. SIMA, *supra* note 130, § 45(1).
139. Magnus, *supra* note 130, at 190-91.
140. *Id.* at 191.
141. Apparel or footwear products, which are in fashion for only a few months, are products that are sold in a multitude of models or by an uncooperative exporter.
142. *Id.* at 192. The GAO Report confirms that reviews are conducted frequently. GAO REPORT, *supra* note 103, at 36.
143. SIMA, *supra* note 130, § 76(5).
144. *See generally* H. Keith C. Steele, *The Australian Antidumping System, in* JACKSON & VERMULST, *supra* note 31, at 223-86 (describing Australian AD rules).

pursuant to a statutory timetable.[145] Affirmative determinations by the Service are referred to the Anti-Dumping Authority (ADA), an independent agency, which makes a further inquiry into the matter and recommends to the relevant Minister whether AD duties should be imposed.[146] According to ADA officials, the ADA inquiry reviews the Customs Service file in the matter and often gathers additional data.[147] It asks for comments from the interested parties and encourages parties to meet with it, although confidential information of other parties is not revealed. In making its inquiry, the ADA is directed to solicit comments from the public and is able to consider the national interest in its recommendations to the Minister.[148] Judicial review of the imposition of AD duties is possible under Australian law and sufficient reversals of agency decisions appear to have had an effect on administrative practices.[149] It is our impression, however, that judicial review is less frequent and much less intrusive than in the United States.[150]

Antidumping cases in Australia are often settled by undertakings.[151] When AD duties are imposed, they are normally set prospectively through the use of NIFOBs—Noninjurious FOB Values.[152] Under this system, the Australian authorities determine what price would have prevailed in the Australian market in the absence of dumped imports. This is done by examining Australian industry's costs and mark-ups and establishing a price at which Australian industry would not suffer any injury.[153] Using that price, an equivalent FOB price for imports is calculated. Imports at lower FOB prices are subject to duties in an amount equal to the difference between the import price and the applicable NIFOB, provided that a NIFOB cannot be set at a level in excess of the product's normal value. In essence, this means that Australia does have a version of the so-called lesser duty rule.[154] NIFOBs may be

145. Customs Legislation Act, §§ 269 TC, TD.

146. Anti-Dumping Authority Act 1988, § 7(1). The ADA also considers appeals of negative dumping and injury determinations by the Australian Customs Service. *Id.* § 8.

147. Telephone interview with ADA official.

148. Anti-Dumping Authority Act 1988, § 7(5); Steele, *supra* note 144, at 284.

149. Steele, *supra* note 144, at 237-40.

150. The GAO Report cites Australian experts to the effect that appeals will likely become more common in Australia in the coming years. GAO REPORT, *supra* note 103, at 42.

151. Steele, *supra* note 144, at 271-72.

152. *Id.* at 272-73.

153. If the Australian industry is not making a profit for reasons unrelated to dumped or subsidized imports, the NIFOB level may be based on the industry's actual selling prices. Australian Anti-Dumping Authority, Bulk Brandy from France 28-35 (Report No. 17, Feb. 1990).

154. Steele, *supra* note 144, at 272.

adjusted every twelve to eighteen months if requested.[155] Finally, under Australian law, AD duties expire, automatically and without review proceedings, after they have been in effect for three years.[156]

The Australian procedures resemble those used in the EC and Canada in that price undertakings are common, duties are prospective, and judicial review is not particularly intrusive. The ADA procedures, with respect to treatment of confidential information and gathering information from parties, seem more like the EC procedures than those of the United States and Canada. One noteworthy and unique feature of the Australian law is the automatic revocation procedure which limits the effective period of an AD duty to three years.

4. *Summary*

The procedures used by these three jurisdictions seem simpler, less time-consuming and less expensive than U.S. procedures. To the extent that these advantages are obtained by cutting corners on fairness by providing less judicial review, or through the lack of effective party involvement in reviewing data submitted by other parties, the systems may be deficient compared to the U.S. system. On the other hand, it would seem worth exploring whether an increased use of undertakings and prospective duties, with limited opportunity for refund or review, might offer considerable time and cost savings without reducing the overall fairness of the U.S. system.[157]

III. Reform of Procedures Used in AD/CVD Proceedings

Based on our review of the current procedures used in AD/CVD cases and comments received from administrators and practitioners while preparing our report for the ACUS, we believe that there are four areas where reforms in current procedures could be useful. First, we consider improvements in the hearing process before the ITA and the ITC, examining whether it would be desirable to insert ALJs into the process and, if not, whether other changes could be implemented to improve the hearings now conducted by those agencies.[158] Second, we

155. Telephone interview with Australian Customs Service official.

156. Customs Tariff (Anti-Dumping Act) 1975, § 12B; Steele, *supra* note 144, at 285.

157. We explored these issues in our preliminary report to ACUS, John H. Jackson & William J. Davey, Reform of the Administrative Procedures Used in U.S. Antidumping and Countervailing Duty Cases 97-110 (preliminary draft, Feb. 4, 1991), but did not do so in our final report to ACUS and have not done so here.

158. Neither ACUS nor its Committee on Regulation accepted our recommendation on the use of ALJs, apparently because they felt the problems we outline were not

analyze a number of cost-saving measures that would reduce parties' expenses in bringing and defending proceedings before the ITA.[159] Third, we turn our attention to the structure of the ITC and consider whether certain changes in its decisionmaking processes would be desirable. Finally, we examine whether there is a need for two levels of judicial review in AD/CVD cases.

As will become evident in our discussion, our goal is to improve the administrative decisionmaking process and the overall efficiency of AD/CVD proceedings—the two areas that we felt were of primary concern to those involved in AD/CVD cases.[160] The goal of improving the administrative decisionmaking process by making it more accurate and fairer must be balanced against the goal of efficiency—in other words, whatever administrative procedures are used must not take too long and cost too much.[161] The AD/CVD system should obviously not be so costly that some petitioners and respondents cannot afford to participate in the proceedings. At the same time, however, it must allow for sufficient investigation and comment so that the results are reasonably accurate. The tradeoff between cost and time, on the one hand, and accuracy and fairness, on the other, places a premium on a system that attains reasonable accuracy with minimal costs in a short period.

A. Improvements in ITA/ITC Hearings

First, we examine whether it would be useful to change the nature of hearings that are now conducted in AD/CVD cases. In examining this issue, we first consider what sort of procedural protections parties ought to have in an administrative process. We then consider the nature of AD/CVD proceedings and how that affects what kind of procedural

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serious or that the use of the ALJs would either not solve them or create other, more serious problems.

159. In our preliminary report to ACUS, Jackson & Davey, *supra* note 157, we made a number of proposals that we believe offer the prospect of significant time and cost savings. These proposals were generally opposed by the ITA and ITC and significant elements of the international trade law bar. We did not discuss them in our final report to ACUS and have not done so here.

160. These goals are similar to those advanced by administrative law scholars for administrative procedures generally. *See* Roger C. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 591-593 (1972) (noting goals are accuracy, efficiency and acceptability); Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 740 (1976) (noting goals are fairness, efficiency and satisfaction to participants).

161. In considering the costs of the procedures, it is necessary to weigh their trade disruptive effect as well as the direct out-of-pocket costs and other costs, such as diversion of management and staff time associated with gathering data and participating in the procedures.

protections are appropriate. In light of our conclusions, we consider whether the hearings presently conducted by the ITA and the ITC are adequate. In particular, we examine whether the present system could be improved (i) by the insertion of ALJs into the administrative process and (ii) if not, by more limited changes in the conduct of hearings at the ITA and the ITC.

1. The Concept of Procedural Fairness

At the outset, it is helpful to focus conceptually on the question of what are the components of procedural fairness. This question has arisen numerous times in U.S. courts, particularly in the context of determining what sort of procedures must be followed by government agencies in dealing with individuals in a wide variety of contexts. One of the more influential federal jurists of recent years, the late Judge Henry J. Friendly, once listed the basic considerations useful in determining whether parties dealing with the government have received a fair hearing as follows:

1 - An unbiased tribunal;
2 - Notice of the proposed [government] action and the grounds asserted for it;
3 - An opportunity to present reasons why the proposed action should not be taken;
4 - The right to call witnesses;
5 - The right to know evidence against one, perhaps including the right to cross-examine adverse witnesses;
6 - The right to have the decision based only on the evidence presented;
7 - The right to have counsel present;
8 - The making of a record of the evidence presented;
9 - A statement of reasons [for the decision];
10 - Public attendance;
11 - Judicial review.[162]

These factors were not presented as immutable requirements but only guidelines for evaluating a specific process. Indeed, Judge Friendly stressed that some may be unnecessary in certain proceedings, particularly if there is an unbiased decision-maker. For our purposes, these factors can be divided usefully into three categories:[163] (i) the opportu-

162. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-95 (1975).

163. For a similar categorization, see Cramton, *supra* note 160, at 588 (listing similar goals for trial-type procedures).

nity to have a meaningful hearing which includes the right to receive notice, to present one's own position to the decision-maker, and to be aware of and able to challenge the opposing evidence and argument; (ii) the right to have a decision made on the record by an impartial decision-maker; and (iii) the right to judicial review.[164] If meaningful hearings in AD/CVD cases are held before unbiased decision-makers whose actions are subject to effective judicial review, the result should be the sort of predictable, consistent decisions that are essential in international trade matters.

2. *The Nature of AD/CVD Proceedings: Investigative or Adjudicative?*

In order to evaluate the hearings held in AD/CVD proceedings, one must consider whether those proceedings should be investigative or adjudicative in nature. The question then is whether the government's role should be principally that of an investigator who collects and weighs evidence and then acts to enforce a statute, or mainly that of a judge, essentially ruling on a dispute between two private parties? The answer to this question will have an important impact on how the hearing process is appraised and what changes might be suggested to improve it. The courts have found that the process is primarily an investigative one, although there are clearly aspects of the process that resemble an adjudication.[165] This does not answer the question, however, of whether the process *should* be more or less investigative or adjudicatory. For that answer, it is necessary to examine more closely the nature of these proceedings.

Governments have traditionally played an investigative role in AD/CVD proceedings. This has been due in part to the fact that the remedy that these laws provide—an increase in customs duties—can only be implemented and enforced by the government. The extensive government involvement also has a historical basis. AD/CVD investigations have traditionally been administrative proceedings. Moreover, the role played by the government benefits all the parties. AD/CVD investigations may be too costly and complex to be undertaken by smaller businesses. To prevent those businesses from being effectively excluded

164. We have omitted "public attendance." Because of the volume of confidential information involved, full public participation in proceedings would probably not be desirable. There are, however, timely public notices of actions taken in AD/CVD cases, and much information is available in the public record.

165. Edwin J. Madaj, *Agency Investigation: Adjudication or Rulemaking? — The ITC's Material Injury Determinations Under the Antidumping and Countervailing Duty Laws*, 15 N.C. J. INT'L L. & COMM. REG. 441 (1990).

from the protections offered by the AD/CVD laws, the government must take the laboring oar in the investigations. Because of the sensitivity of the commercial information that must be analyzed to determine the existence of dumping or subsidization, the exporters may well be more comfortable having the government carry the principal investigative burden in AD/CVD cases. Thus, it has been longstanding practice for government investigators to collect the relevant information, verify it, and then use it to determine whether to impose duties.

The government's investigative role may also be explained by the unusual nature of AD/CVD proceedings. AD/CVD actions are neither criminal proceedings, nor do they give rise to civil damage actions.[166] Indeed, often the conduct that leads to imposition of AD/CV duties is not subject to sanction at all in the purely domestic context.[167] In other words, AD/CVD cases involve more than one company using an unfair trade practice statute against another. If AD/CVD cases were so limited, then perhaps a private damage action could be justified. Instead the policies are more complex.[168] The harmed domestic industry receives compensation for its injury only in the sense that the duty should offset in the future the challenged trade practices. The remedy is a limited one: the prevailing domestic industry is not guaranteed a remedy that completely offsets its overall injury, only a remedy that offsets the dumping/subsidization.

Neither the parties nor their attorneys conduct the investigation of the opposing side. Moreover, while the attorneys see the results of the investigation, subject to a protective order, they do not otherwise participate in it. The role of the parties, however, cannot be dismissed as merely tangential. By their intervention with the agencies (made more effective because of their access to information), the parties may considerably influence the direction and scope of the investigation. The parties are, in addition, the source of most of the information collected in the investigation,[169] and they comment extensively on how the AD/

166. The 1916 Antidumping Act makes certain intentional dumping unlawful and provides for a civil treble damage remedy. 15 U.S.C. § 72 (1988). As of yet, there are apparently no reported cases of a conviction or civil recovery. JACKSON & DAVEY, *supra* note 7, at 800-01.

167. In some cases dumping would be actionable domestically under price discrimination statutes and thus subject to treble damages. In other cases, an antitrust action might be successfully brought on the grounds of predatory pricing. Such actions appear to be rarely successful. Davey, *supra* note 8, at 8-1, 8-2.

168. It should be noted that a private remedy would almost certainly violate natural treatment GATT rules, unless there were a comparable remedy in the domestic setting. Jackson, *supra* note 24, at 244.

169. This statement is somewhat less true of the ITC than of the ITA because the ITC contacts nonparties (e.g., customers) for information about domestic industry.

CVD rules should be applied to the information in the agencies' hands. Furthermore, they are the principal parties in interest. Agencies' decisions will directly affect their businesses, sometimes on a massive scale. Thus, at the center of the investigation is a commercial dispute between private parties, but the government bears the principal responsibility for investigation.

Moreover, even as presently structured, the government's role is not only investigative; it also has an adjudicative aspect. The government considers the evidence and the arguments of the parties and decides whether injurious dumping or subsidization has occurred. Because of the importance of these proceedings to the economic interests of the parties, they typically spend large sums on attorneys and other experts who in turn immerse themselves in every detail of these cases.[170] The deep involvement of the parties can be seen in the fact that most of the government's decisions are appealed to the Court of International Trade.[171] As a result, in many respects these proceedings resemble adjudications.

Comments made to us by agency personnel in the course of our study make it clear that they believe that AD/CVD proceedings are and should be solely investigative.[172] Indeed, it would seem from the comments made to us that the agencies to some extent consider the parties and their attorneys to be annoyances as opposed to full participants in the process. It seems to us that this attitude is inappropriate. Given the economic interests at stake and the way in which these procedures have evolved over time so as to include extensive involvement by the parties and especially their attorneys, the procedures cannot be considered solely as government investigations where those investigated should speak only when spoken to.

In our view, these proceedings are sufficiently adjudicative and the parties are sufficiently involved in them that meaningful hearings with appropriate procedural protections should be held by the agencies.

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170. According to a GAO study based on interviews with petitioners' counsel, the averages for attorneys fees (determined from average minimum and maximum estimates) in AD and CVD cases were as follows:

AD	$352,000	CFD	$269,000
AD Reviews	$105,000	CVD Reviews	$ 95,000
AD Appeals (CIT)	$ 66,500	CVD Appeals (CIT)	$ 87,500
AD Appeals (FC)	$ 34,000	CFD Appeals (FC)	$ 42,500

GENERAL ACCOUNTING OFFICE, NSIAD-89-69BR, INTERNATIONAL TRADE: PURSUIT OF TRADE LAW REMEDIES BY SMALL BUSINESS 13 (1988). Respondents in a case typically spend much more since each respondent is likely to have separate counsel.

171. Toupin, *supra* note 96.

172. Madaj, *supra* note 165.

3. *Evaluation of the Current System*

As noted above, there are three basic elements to procedural fairness: a meaningful opportunity to be heard, a decision on the record by an impartial decision-maker, and an opportunity to obtain court review of that decision. An analysis of the current U.S. procedures suggests that while they in part meet those three criteria, some improvements can be made.

a. A Meaningful Hearing

First, with respect to a meaningful opportunity to be heard, we suggest above that such an opportunity include the receipt of notice of government action, the right to present one's own arguments and evidence, and the right to know and contest the opponent's arguments and evidence. Under current U.S. law and practice, those parties directly interested in the proceeding have considerable opportunity to present their arguments and contest those of their opponents. Under the protective order procedure, their attorneys have relatively detailed knowledge of their opponent's evidence. The ITC conducts a non-APA hearing on the injury issue, at which the Commissioners hear some evidence and argument by the parties. In addition, the parties have the opportunity to file pre- and post-hearing briefs. With respect to the dumping/subsidization issue, hearings do not play an important role in the ITA information gathering and decision-making process, but the parties have considerable opportunity to present their evidence and arguments to the ITA, through both informal ex parte contacts and the submission of written evidence and briefs.

The ITA and the ITC are not subject to the APA.[173] In conducting AD/CVD investigations, they do not use ALJs and do not hold APA-style hearings in which the basic evidence to be considered is presented to the decision-maker and witnesses are subject to cross examination.[174] The absence of such hearings means that the contending parties cannot contest the arguments of their opponents as well as they might have if there were such hearings.

i. ITA

In the case of the ITA, a brief, perfunctory hearing is held at the end

173. 5 U.S.C. §§ 551-559 (1988).

174. The "central model" under the APA for adjudication on the record is the use of ALJs and formal evidentiary hearings. PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 144 (1989).

of the proceeding, typically presided over by either a deputy assistant secretary or office director, the two levels in the hierarchy immediately below the Assistant Secretary for Import Administration. Although there are occasional exceptions, this official typically does not participate in the hearing but rather listens without question or comment to the arguments presented by the parties. It appears from statements made by present and former ITA representatives that this practice stems in large part from a desire to avoid saying anything that might later be cited as somehow committing the ITA to a specific position on some issue. This practice renders the typical hearing rather useless, as there is no give and take between the hearing officer and the attorneys. Issues that might be clarified are not because it is not known what is unclear in the minds of the ITA decision-makers. This has the deleterious effect, according to at least one former ITA administrator, of forcing the decision-maker to rely too heavily on the views of the ITA staffers assigned to the case. Thus, the true purpose for the hearing, that it should be a vehicle for getting nonstaff input on key issues, is not fulfilled.

It could be argued that there is adequate opportunity to present arguments to the ITA because parties and their attorneys can and do contact ITA officials on an ex parte basis at all levels to make arguments. While there are such opportunities, it would seem preferable for the opposing party to be present when such arguments are presented and also to have an occasion designed for interchange between the decision-making agency official and the parties. Thus, we conclude that the quality of decisions would likely be better with improved hearing procedures.

In contrast to the ITA hearings, hearings before binational panels considering appeals of U.S.-Canadian AD/CVD cases under Chapter 19 of the U.S.-Canada Free Trade Agreement,[175] typically involve a fair amount of give and take between the panelists and counsel for the parties. These binational panels were cited to us as being far more useful than the ITA's current hearings—precisely because of the greater interchange of views between the attorneys and the panelists who make the decision.

ii. ITC

Although the ITC holds a hearing at which there is interchange between counsel for the parties and the ITC Commissioners, dissatisfac-

175. United States-Canada Free Trade Agreement, Jan. 2, 1988, ch. 19.

tion was expressed to us about the utility of these hearings as well. While parties can present testimony, the ITC rules discourage cross-examination by deducting time so spent from the time allowed for affirmative presentation. Moreover, the ITC tends to hold standardized, relatively brief hearings regardless of the complexity of issues and number of parties involved in the proceeding. As a result, the ITC cannot always delve into the issues in any depth.

The extent of dissatisfaction with the ITC hearing process varied considerably. Some practitioners felt that they had adequate time to present their cases; others thought that in complex cases with multiple parties there was not enough time. Members of the ITC Chairman's staff expressed the view that there was not enough testing of evidence in the hearings:

> In a typical investigation, there is little or no opportunity for the Commissioners — who are only finders of fact — to observe, question, or interact with the parties who provide a major portion of the information on which a decision is based. At no point do the parties have a clear opportunity to question or cross-examine those who provide the information in a meaningful way.[176]

Thus, we conclude that improvements can be made to the ITC hearing process as well.

iii. Summary

It appears that the 1979 amendments to the AD/CVD laws made proceedings under those laws much more adjudicative. In particular, the 1979 amendments require that the ITA and the ITC hold non-APA hearings before decision in such proceedings. From the foregoing, it appears that the hearings now held are not as effective as they could be. We consider below two ways that they could be improved: (i) the use of ALJs and APA procedures and (ii) changes in the current hearing procedures.

b. An Impartial Decision-maker

The second component of procedural fairness is impartial decision-making. To evaluate this, it is useful to recall the structure of the decision-making process at the ITA and the ITC. According to ITA officials, ITA decisions potentially affecting the outcome of investigations are made at varying levels—from case analysts to the Assistant Secre-

176. Letter To Hon. Marshall Breger from Robert P. Parker and Randi Boorstein (Feb. 28, 1991) (on file with *The Administrative Law Journal of The American University*).

tary of Commerce for Import Administration. According to ITC officials, some ITC decisions are made by the staff, but the Commissioners decide issues such as material injury.

Since the Assistant Secretary at the ITA and the Commissioners at the ITC are presidential appointees confirmed by the Senate, some participants in AD/CVD cases are concerned that these individuals might tilt their decisions in favor of domestic industry because of their connection with the political process. Moreover, lower echelon employees might act to favor domestic interests on the belief that such favoritism would be noticed by their superiors and redound to the benefit of their careers over the long run.

In addition, there was some concern in comments made to us that the international trade bar is a very "clubby" group. Consequently, certain lawyers may have better access to higher level decision-makers, particularly in the ITA. As a result, they may be able to influence decisions or draw the attention of senior decision-makers to their client's concerns. Knowing that senior officials are interested in a matter, analysts and managers may handle such cases differently. Interestingly, while we believe that some lawyers probably have better access to higher officials than others, we heard few complaints about this practice from the bar itself.[177]

We found no specific evidence of bias on the part of ITA or ITC officials. We did find, however, that there is a perception on the part of some, mainly foreign, respondents that ITA decisions are sometimes influenced by political factors.

For example, 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 for AD and CVD cases in the U.S.-Canada Free Trade Agreement.[178] In early 1987, Canada's International Trade Minister Pat Carney said, "[W]e want impartial mechanisms. For example, if the U.S. alleges that our stumpage programs are subsidies, we want an impartial, binational tribunal to deal with the issue, not the U.S. Department of Commerce."[179] More recently, the

177. Officials at the ITC suggested that the Commissioners were relatively insulated from informal contacts.

178. United States-Canada Free Trade Agreement, Jan. 2, 1988.

179. *Protection From U.S. Countervailing Duty Laws Prime Goal of FTA Talks*, 4 Int'l Trade Reptr. (BNA) 369 (Mar. 18, 1987). *See also* Joseph A. Vicario, *The Anatomy of Antidumping Proceedings: A Case Study of the Antifriction Bearings Investigations*, 15 N.C. J. INT'L L. & COMM. REG. 249, 265 (1990) ("The [ITA's] position on standing [in the antifriction bearings case] only reinforces the opinion held by many that the administration of the antidumping law is politically sensitive with domestic industries and their congressional supporters.").

Canadian ambassador to the United States was quoted as follows with respect to a U.S. CVD decision on Canadian lumber: "[W]e believe that the Department of Commerce made the wrong decision, one which not only ignores the merits of the case, but which is a tortured attempt to manipulate the facts to substantiate a preordained result."[180] In a recent AD investigation of Japanese-origin flat panel display screens, the *Journal of Commerce* reported: "[T]he investigation has become so politically charged that some, including House Majority Leader Richard Gephardt, D-Mo., are worried the outcome is already fixed and could have nothing to do with the department's actual findings."[181] Examples such as these raise the question of whether the current system is viewed as sufficiently impartial and whether it could be improved in that regard. Accordingly, we consider below how an arguably more neutral decision-maker could be inserted into the administrative process.

c. A Right of Appeal

The decisions of the ITA and the ITC are appealable to the Court of International Trade and thereafter to the Court of Appeals for the Federal Circuit. In practice, there has been extensive judicial review of administrative action in AD and CVD cases, particularly when compared to the other major users of AD laws. Thus, the existence of appellate review is not an issue. As we discuss below, the issue is whether so much time is spent in court proceedings that the overall procedures have become too time-consuming and expensive.[182]

d. Summary

Generally, we found the U.S. system fair in the sense that the most interested parties were able to make relevant arguments to the administrative authority and that those parties were well informed as to the contentions and evidence of the opposing parties. The hearings held before the ITA and the ITC seemed, however, inadequate.

We found no hard evidence of a politically related bias against foreign interests in the ITA or ITC. Nonetheless, there is a perception, particularly among some of those who represent foreign interests, that the agencies tend to favor domestic industry. This perception may be

180. Keith Bradsher, *Canadian Lumber Penalized*, N.Y. TIMES, Mar. 7, 1992, at A39.

181. *Journal of Commerce*, July 5, 1991, at 1A.

182. *See supra* part II.A.4, at 418 (describing time now taken by judicial review); *see also infra* part III.D, at 453 (discussing possible elimination of CIT review).

unavoidable given that the laws are administered by the government and that the affected domestic interests have better access to the political process than do the foreign ones.

Given our conclusions, it is appropriate to consider if changes in the procedures used in AD and CVD cases could be made so as to reduce the possibility and perception of bias and to improve the hearing process. Two solutions seem worthy of consideration: (1) use of ALJs in AD/CVD investigations and (2) other revisions to the current hearing procedures.

4. *Use of ALJs and APA Procedures*

One possible model for AD/CVD proceedings is based on the procedural requirements of the APA.[183] In adjudicative proceedings under the APA, the parties introduce their case at an evidentiary hearing before an ALJ. At this hearing, both parties may call witnesses and subject them to cross-examination. In essence, the matter proceeds like a trial before a court. Parties may appeal the ruling of an ALJ to a higher authority within the agency, such as the Secretary or the Commission.[184]

Such a procedure is not unheard of in unfair trade cases. Under section 337 of the Tariff Act of 1930,[185] claims by a U.S. industry that it has been injured by unfair methods of competition or unfair acts in the importation of goods (including by patent or trademark infringement) are adjudicated in accordance with the APA by ALJs employed by the ITC.[186] These cases are processed in accordance with strict time limits. Usually the final determination of the ITC, which may review the ALJ's decision, occurs within one year, although complicated cases may take eighteen months. The proceedings before the ALJ resemble court proceedings—there are provisions for discovery, presentation of evidence and witnesses, and cross-examination.

A proposal to use ALJs in AD/CVD cases raises three basic questions: (1) how would ALJs be inserted into the process? (2) would using ALJs solve the problems highlighted above? (3) would introducing ALJs into the process raise other problems that would offset any bene-

183. 5 U.S.C. §§ 551-559 (1988); *See also supra* note 174 and accompanying text (describing "central model" of APA procedures).

184. *See* KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 10.3 (1979); 5 U.S.C. § 557(b) (1988).

185. 19 U.S.C. § 1337 (1988).

186. *See generally* DONALD A. DUVALL, FEDERAL UNFAIR COMPETITION ACTIONS: PRACTICE AND PROCEDURE UNDER SECTION 337 OF THE TARIFF ACT OF 1930 (Clark Boardman ed., 1990) (describing practice and procedure under § 337).

fits obtained from their use?

a. The Role of the ALJ

When and how could an agency insert ALJs and APA procedures into the process and what effect would this have on the cost and length of the proceedings? We do not think that the insertion of an ALJ in the process should change the role of the petitioner or respondent in an AD/CVD investigation. The issue is the extent to which tasks now performed by the ITA or ITC staff would be reassigned to the ALJ or his/her staff.

i. ALJs at the ITA

The ITA could insert ALJs at the very beginning of the case or following the ITA's preliminary determination. In the former case, the ALJ would be involved in all aspects of an AD/CVD investigation; in the latter, the ALJ would essentially decide on challenges to the ITA's preliminary determination and its proposed final action.

ALJs at all stages. If an ALJ were to be inserted in the process at the very beginning of a case, presumably the ALJ would decide whether the petition was sufficient to open an investigation.[187] The principal effect of this change would be that the petitioner would lose some ability to consult with the decision-maker concerning whether a prospective petition was sufficient. That change would presumably not be too great, however, since the petition could be refiled to meet whatever objections, if any, the ALJ had.

The more difficult issue concerns how the investigation would be conducted. If an ALJ has already been assigned to a case, should he or she be involved in resolving disputes between the ITA and the parties? For example, soon after opening an investigation, the ITA distributes questionnaires to and collects responses from the exporters and others. What role would the ALJ have in this process? Would the ALJ review the ITA's determinations with respect to the coverage of the questionnaires or the scope of the investigation? How thorough would that review be? Would the ALJ be involved in reviewing the questionnaire responses? If the ALJ's review was more than cursory in any of these cases, the ALJ would probably need the assistance of a considerable staff. The cost of such a change would be an issue. More significantly,

187. In § 337 cases, the decision to open an investigation is made by the ITC on recommendation of its staff. Once opened, an investigation is assigned to an ALJ. *See* 19 C.F.R. pt. 210 (1991) (regulating § 337 investigations).

however, would be the question of timing. The ITA now has difficulty meeting statutory deadlines in many cases. Adding a layer of preliminary review would necessarily increase the time necessary to process cases. Since the effect of the ITA's preliminary decision on dumping/subsidization is only temporary, such additional cost in time and money might not be justifiable.

While an affirmative preliminary determination of dumping/subsidization has a trade disruption effect beyond that caused by the filing of a petition, its effect is temporary, since the final determination is normally made within 135 days.[188] Consequently, it would not be important to have ALJ participation prior to the preliminary ITA determination. This consideration, in conjunction with the somewhat unclear role that an ALJ would play in the preliminary stages of an investigation and the additional time such a role would entail, suggests that using an ALJ from the very outset of a case would not be appropriate.

ALJs after the preliminary determination. Using an ALJ after the preliminary AD/CVD determination has been made could be more advantageous.[189] The ALJ could decide on issues raised by the parties with respect to the preliminary determination.[190] Under this scheme, the role of the parties would not change. Currently, parties comment on the ITA's preliminary determination. With an ALJ, parties would instead address those comments to the ALJ. At present, after the preliminary determination, the ITA conducts verification of the responses it has received and decides how to change its initial determination in light of verification and the comments of the parties. Using ALJs, the ITA would continue to conduct verification[191] but report on its verification findings to the ALJ and the parties. Thereafter, following receipt of the parties' comments on the preliminary determination and verification, the ITA could issue a proposed decision, respond to those comments as

188. Tariff Act of 1930 §§ 705(a), 735(a), 19 U.S.C. §§ 1671d(a), 1673d(a) (1988).

189. In the case of annual reviews, the ALJ's involvement would commence after the ITA had reached its preliminary results which usually occurs after verification, if any.

190. It would also be possible for an ALJ to make certain discrete decisions that need to be made early in an investigation, such as reviewing a preliminary negative ITA determination, determining scope issues, or deciding whether a cost of production investigation is justified.

191. Putting the responsibility for verification on the ALJ would probably not work well because it would require the existence of a substantial staff to aid the ALJ. While verification could be made the responsibility of the parties, that would (i) put a heavy additional burden on the petitioner and (ii) probably be viewed as undesirable by the respondent, since the involvement of a petitioner's representative in the verification process would entail revealing information that now is not revealed to petitioner because it is not collected by the ITA.

a representative of the public interest, and justify its proposed action. Following briefing and hearing, the ALJ would then affirm or order the modification of the ALJ's proposal. Because the prime information-gathering responsibility would remain with the ITA, it would seem unnecessary to give discovery rights to the parties.[192]

Using ALJs as described in the foregoing paragraphs is analogous to their use in other contexts. For example, the staff of the Federal Trade Commission (FTC) may initiate an investigation upon the complaint of a private party.[193] The staff then "prosecutes" the case before an ALJ. While the original private complaint may continue to supply information to the staff, the staff is primarily responsible for pushing the case forward. The respondent's position is not unlike that of the exporter in an AD/CVD proceeding. A second example would be the National Labor Relations Board (NLRB), where the staff investigates and prosecutes private complaints before an ALJ. Thus, the use of ALJs in the manner proposed in AD/CVD cases is not without precedent.

Compared to the present system, using ALJs would effect two basic changes. First, the major arguments of the parties—their comments on the preliminary determination and proposed final determination—would be directed to a more impartial decision-maker. Increased impartiality resulting from changing the identity of the decision-maker would be the principal advantage. The downside would be the likelihood that an ALJ may need additional time to hear argument and make his or her decision. Considerable time could be saved, however, if this change were combined with the elimination of CIT review, a proposal discussed below.[194]

Second, since the ALJ would hear arguments at a hearing, the parties would have a more thorough ventilation of the disputed issues during that hearing. We think that it would be appropriate to allow for the calling and cross-examination of witnesses, although we do not envision witness testimony at hearings as being a significant source of information for the ALJ since most relevant information exists in documentary form, such as invoices.

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192. Section 337 cases, where the parties have basic discovery rights, are much more similar to private litigation in courts than are AD and CVD investigations. As noted at the outset of this discussion, it would be preferable to continue to place the information-gathering role in such investigations on the government. The lack of discovery rights would not be unique—for example, the NLRB does not permit discovery. *See* 29 C.F.R. pts. 101, 102 (1991) (establishing NLRB procedural rules).

193. *See* 16 C.F.R. § 2.1 (1992) (listing sources of investigations).

194. *See infra* part c.iii, at 445 (discussing how much more time would be required).

ii. ALJs at the ITC

At the ITC, ALJs could preside over either the preliminary phase, the final phase, or both, of the ITC's injury investigation. In the case of the preliminary determination, we propose that the ALJ assume the ITC's current role, with the rest of the proceeding remaining the same. The ALJ would later make his or her decision on the basis of a staff report.

As to the final determination, we would envision the ITC staff continuing its current role of information gathering.[195] As part of the final determination process, however, the ALJ would preside over a formal hearing at which there would be presentation of evidence and cross-examination of witnesses. This is a significantly expanded version of the hearing now held before the ITC, perhaps more in the nature of the injury hearing before the Canadian International Trade Tribunal.

An expanded hearing before an ALJ would solve the shortcomings of the ITC hearing process described above by providing for more thorough hearings with more rigorous testing of the parties' arguments and evidence. While the ITC Commissioners could in theory conduct such a hearing, we believe that given their current workload it would not be practical for them to do so. An APA-style hearing is more time-consuming than current procedures, where hearings take at most one day.[196]

b. The Advantages of Using ALJs

Using ALJs would solve the problems of inadequate hearings and perceptions of partiality discussed above. Under an ALJ system, initial agency decisions concerning the applicability of agency rules would be made by a neutral decision-maker who presides over a hearing at which the relevant facts are presented and tested by cross-examination. Such a hearing would go into more detail and allow better testing of the evidence and arguments of the parties than do the hearings under the present system.

Moreover, in contrast to current ITA procedures, using an ALJ guarantees that those persons in the agency who are charged with investigating AD/CVD matters would not be the same ones who decide the issues raised by the investigation. Accordingly, the use of ALJs in

195. Among other consequences, this would solve concerns expressed by the ITC staff as to whether the right mix of information would be obtained in an ALJ proceeding.

196. *See infra* part c.iii, at 445 (discussing how much more time would be required).

AD/CVD cases would likely reduce, and perhaps even eliminate, perceptions of partiality. Although ALJs are formally employed by the agency in which they serve, the APA contains mechanisms to ensure their independence and insulation from political pressures.[197] Moreover, since all contacts with the ALJ would be in the presence of all counsel, the "differential access" problem would be mitigated to the extent that it exists. Consequently, better and more impartial decisionmaking should result.

c. Possible Disadvantages of Using ALJs

We must examine a number of issues to decide whether the benefits of using an ALJ system would be outweighed by the disadvantages. First, are ALJ hearings suitable for the type of issues raised in AD/CVD proceedings? Second, what effect would the use of ALJs and APA procedures have on agency decision-making? Third, what effect would they have on the length and cost of AD/CVD proceedings? To the extent that ALJs would lengthen the proceedings, could other procedures be shortened? Fourth, how "final" would an ALJ's decisions be and what type of appeal procedure would be implemented? What effect would a lack of finality have on the impartiality issue?

i. Appropriateness of AD/CVD Issues for ALJs

The issues in an AD/CVD proceeding are the sort of issues that are appropriately considered in a trial-type hearing with an ALJ. Essentially an AD/CVD proceeding involves establishing historical facts and applying rules to them. Two or more parties offer competing versions of the facts or of how agreed-upon facts should be treated in light of the relevant rules. In AD/CVD proceedings there is also considerable dispute over the significance of accepted facts. For example, much of the parties' argument before the ITC may be that given facts do or do not constitute material injury. An ALJ would resolve these factual disputes and apply a defined body of rules and precedents to the facts as determined.

ii. Effect on Agency Decision-making

One could argue that the use of ALJs at the ITC would have an undesirable impact on ITC decision-making. First, it could be argued

197. *See* OFFICE OF PERSONNEL MANAGEMENT, OFFICE OF ADMINISTRATIVE LAW JUDGES, ADMINISTRATIVE LAW JUDGE PROGRAM HANDBOOK 1-2 (1989) (describing status of ALJs).

that the parties will not or cannot provide the ITC with the information, that it needs to make decisions in these cases. For example, the ITC now obtains information from customers of the domestic industry about conditions in the marketplace. That information would probably not be obtainable by either the petitioners or respondents.

This concern is misplaced, applying only if the primary responsibility for information gathering were placed on the parties. Under our proposal, however, the ITC staff would continue to gather the information that it currently collects. Its role before an ALJ would be that of an information resource. There is no reason under our proposal for the staff's role to change significantly.

Second, it could be argued that the staff would fail to collect and/or the ALJ would fail to include in the record all the information that an individual Commissioner considers important in making his or her decision. It should be noted that the approach of individual Commissioners to the injury question varies widely, with different Commissioners emphasizing different information. We do not believe that this would be a problem, however. ALJs are often used in proceedings that ultimately are reviewed by multiperson commissions, and they will certainly learn quickly what information their reviewing body wants in the ALJ decision.[198]

A more general criticism of the effect of ALJs on ITA/ITC decisionmaking would be that using ALJs might convert the staffs of both agencies from independent, impartial factfinders into advocates of one position or another. The actual magnitude of change is questionable in this regard, however. At present, the parties attack staff conclusions, trying to convince staff superiors to change them, and the staff defends its actions. Under a system using ALJs, the same process will occur, except that the decision-maker will be the ALJ instead of the Commission or a higher ITA official. Consequently, the use of ALJs would not have a serious deleterious effect on the role of the staff in AD/CVD investigations at either the ITA or the ITC.

Finally, the use of ALJs could possibly lead to a less coherent body of rules in AD/CVD matters because of individual interpretations of the AD/CVD law by different ALJs. This assumes that the ALJs would ignore each others' decisions and that agency and court review

198. In the early 1980's, the ITC experimented with having its Director of Operations make a recommended decision in preliminary determinations. Apparently the first few such recommendations were rejected and the experiment was ended. While we can see that a new procedure for an agency might be unpopular with those accustomed to a different way of doing things, we do not see any inherent reason why decisionmaking at the ITC cannot be done effectively under procedures commonly used in other agencies.

would not standardize practices, an assumption that we do not share.

Thus, we conclude that use of ALJs would not adversely affect ITA/ITC decision-making. Indeed, for the reasons discussed above, we believe that the use of ALJs would improve agency decisionmaking.

iii. How Much Additional Time?

The use of ALJs would clearly lead to a lengthening of AD/CVD proceedings. Assuming the ALJs would be involved only at the ITA after the preliminary determination, the point of time at which preliminary relief is now available would not be affected. The ITA could issue its proposed final determination no later than at present, perhaps even a bit earlier. Requiring the ITA to defend its determinations before the ALJ obviously increases the time for brief filings, arguments and decisions by the ALJ, including additional time for implementation of the decision. It seems feasible, however, for the parties to file briefs on the ITA's position, for the ITA to respond, for a hearing to be held and a decision rendered all within a two-month period.[199] The typical appeal process from the ALJ to the high-level authority within the relevant agency would add approximately an extra month for that review, with additional time required for those cases where the ITA must implement changes required as a result of that review.

Under our proposed procedures, the ITC would require more time for its material injury investigation. Now, hearings of one day or less are the norm. In contrast, the formal hearings of the Canadian International Trade Tribunal, which include presentation of evidence and witnesses by the parties, subject to cross examination, typically last three or four days and have taken as long as two weeks.[200] Somewhat longer hearings would not significantly expand the time needed in ITC proceedings, and an ALJ could probably issue his or her decision about as promptly as the Commission does now. More time would be needed, however, for Commission review of the ALJ decision. Under section 337 procedures, the ITC must decide within forty-five days whether to

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199. The schedule could be as follows:

Day 1:	ITA Proposed Decision
Day 21:	Briefs of Parties
Day 35:	ITA Brief
Day 35::	Hearing
Day 60:	ALJ Decision

To the extent that the ITA has not radically changed its preliminary determination, the ITA brief would be in the nature of a reply brief. This would be true particularly in the case of administrative reviews.

200. Telephone interview with officials of Canadian International Import Tribunal.

review an ALJ decision and whether to hear further argument.[201] If further argument is ordered, the ITC may limit the issues it will consider. Consequently, inserting an ALJ into the ITC injury determination would probably require additional time, perhaps a month or two, to be added to the time frame of the standard injury investigation.

Assuming no agency review of the ALJ decision has occurred, a final dumping/subsidy decision could not be implemented until two to three months later than the current time for the ITA final determination.[202] If the ITC's final determination were also made in this time period, then the net addition to an AD/CVD proceeding would be thirty to forty-five days. There would be two complications: (1) more time would be needed if Commerce Department authorities reviewed an ALJ decision and; (2) although the ITC could not act until the final dumping margins were established, it could do so immediately after those numbers were known, with its injury investigation proceeding on the basis of the ITA's proposed decision.

Thus, it appears that the use of ALJs at both the ITA and the ITC would add one or two months to the length of an investigation. If, however, the use of ALJs were combined with the elimination of CIT review, final decisions in AD/CVD cases might well occur sooner than at present. Indeed, the use of ALJs would decrease the need for the current two levels of federal court review.[203] Instead, agencies decisions would be appealed to the Court of Appeals for the Federal Circuit.[204] This arrangement would be typical of most federal administrative agency actions, which are usually reviewed in the federal courts of appeal rather than in trial level courts. It would also be in accord with the ACUS's general recommendation on appellate review of administrative action.[205]

If CIT review were eliminated, the one or two additional months added to the final stage of the investigation by using ALJs could probably be recouped several times over since most cases are appealed to the

201. 19 C.F.R. § 210.54 (1992) (stating that one Commissioner has power to require entire Commission to review ALJ decision).

202. In the case of administrative reviews, there are no real deadlines currently enforced. This proposal would not be inconsistent with a system of administrative reviews that was more timely than the current system.

203. *See infra* part III.D, at 453 (discussing reasons to eliminate CIT review).

204. The Federal Circuit now hears appeals from a wide variety of federal bodies, such as the CIT, the Claims Court, the Board of Contract Appeals, the Merit System Protection Board, certain ITC decisions and certain administrative proceedings involving patents, as well as appeals of patent, trademark and copyright decisions by the federal district courts.

205. THE CHOICE OF FORUM FOR JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, ACUS RECOMMENDATION 75-3, 1 C.F.R. § 305.75-3 (1992).

CIT and review in the CIT is very time-consuming.[206] Accordingly, final decisions on duties owing could be expected much sooner. Thus, if CIT review were eliminated the "final" result in a typical case would be months, if not years, sooner than at present. Since the proposed 1992 Budget listed the CIT's budget at $8.8 million, and the CIT's workload would be cut in half if AD/CVD cases were taken from its jurisdiction, this could provide a source to fund much of the increased cost to the government of using ALJs.

iv. The Additional Costs of Using ALJs

ALJs would cost more money, both for the parties and the government. For the parties, the difference would not be substantial since they would be making the same arguments as they now make. The only basic difference is that they would make their arguments to an ALJ instead of ITA officials or the ITC. Moreover, the costs of CIT review would be eliminated.

For the government, the installation of ALJs would clearly increase the cost of processing these cases and not decrease any of the current spending if the staffs play the role that we envision for them. How much ALJs would cost the government is difficult to estimate, but the use of ALJs would definitely result in higher costs. One estimate is that it would cost $7.5 million, or fifty percent of the ITA's current budget for AD/CVD cases.[207] As noted above, however, a reduced CIT budget might be used as a source of funds to cover much of this additional cost.

v. Finality of ALJ Decisions

In most federal administrative agencies, a decision of an ALJ is reviewable by a higher authority within the relevant agency.[208] From comments made in discussions of this issue, it seems clear that such an opportunity for review would probably be necessary in AD/CVD cases. The existence of such review would raise a couple of serious issues.

First, it would mean that the political input that some people perceive to exist now in AD/CVD cases, and that would otherwise be re-

206. *See supra* part II.A.4, at 418 (discussing time spent in judicial review of ITA or ITC decisions).

207. Stephen J. Powell, Chief Counsel for Import Administration, Dept. of Commerce, Speech at the Federal Circuit Judicial Conference (May 9, 1991), 140 F.R.D. 176, 177 (1992).

208. KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 10.3 (1979); 5 U.S.C. § 557(b) (1988).

duced or eliminated through the use of ALJs, would reappear. The possibility of such review could mean no improvement in perceptions as to the impartiality of the AD/CVD process. For example, in the *Canadian Softwoods Lumber* case,[209] the issue of whether certain Canadian governmental practices constituted countervailable subsidies is the kind of policy issue that would be ripe for review at the highest agency level after an ALJ decision. Such a result might inject a political aspect into these matters which the use of ALJs was supposed to avoid in the first place. We tend to think, however, that the number of issues that would justify intervention on policy grounds would not be that great, but opponents of the proposal suggest that such policy review would be intrusive.[210]

Second, the existence of such a review process could significantly increase the time and cost of inserting ALJs if it were to be used in most cases and result in no change to the ALJ decisions. We would anticipate such review to be pro forma in most cases. However, the existence of a specific procedure for review at a high level might cause the parties to focus more attention on that review and to treat it as an appeal of right.

Thus, the need for agency oversight would negate some of the benefits of using ALJs. The improvements in the hearing process would not be affected, but there might be little improvement in the perceptions of partiality that now exist.

d. Evaluation of Using ALJs

ALJs would improve the hearing process at the ITC and ITA. Using ALJs would also solve other problems that parties now encounter in dealing with the ITA, such as surprise changes in methodology, and offer the potential of solving other problems, such as inconsistencies in ITA practices.[211] It would likely reduce perceptions of bias or differential treatment at the hearing stage,[212] because ALJs, like federal

209. Certain Softwood Lumber from Canada: Preliminary Determination, 51 Fed. Reg. 37,453 (1986).

210. *See* Powell, *supra* note 207, at 170.

211. *See supra* part III.B (noting changes in ITA procedures that would reduce costs in AD/CVD cases or otherwise generally improve administrative process).

212. It is possible that over time ALJs would be "captured" by the agency, start to identify with it, and take its side in most disputes. This, of course, would increase perceptions of bias if it occurred. We doubt that it would, however, any more than it has to date in respect of the CIT and the Federal Circuit. These courts are specialized courts and the same arguments—familiarity with the agency and tendency to side with it—could be made vis-a-vis the current system. It is not our impression, however, that the CIT has been too deferential to the ITA and ITC, even if its impact on agency

judges, are insulated from informal contacts by parties or their attorneys and from political pressures, while the current decision-makers in the ITA are not. This gain would be offset to the extent that the agency frequently revised ALJ decisions on review. Finally, it is arguable that ALJs would render better initial decisions since they would be the product of a more adjudicative process, which might reduce the number of appeals in the long run.

The use of ALJs would entail costs in terms of more money and time being devoted to the administrative process. Some of the money would be saved in eliminating CIT review, and the parties would probably have the final answer to the amount of duties owed, if any, sooner than they do under the present system. The increase in time could mean that more cases would take over one year to process before an AD/CVD order is issued.[213] The insertion of ALJs would, however, be a major structural change in the system and it would take some years for that change to be digested.

We believe that the benefits to the parties of using ALJs will outweigh the costs, once the system is operational. As to the government, the increased costs of ALJs to the agencies would be largely offset by cost savings obtained from greatly narrowing the jurisdiction of the CIT.

5. *Changes in Current Hearing Process*

Instead of adopting a system using ALJs, it may be possible to eliminate some of the problems with hearings at the ITA and ITC with minor changes in the hearing procedures. As we noted above, the two agencies view AD/CVD proceedings as investigative rather than adjudicatory. Nonetheless, given the conflicting positions of the parties before the agencies—the domestic industry versus the foreign exporters—and their role in supplying much of the information on which the agency decisions are based, the important role the parties play could be more useful if hearings at which the submissions of the two sides are tested could be conducted more effectively than at present.

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interpretation of the AD/CVD laws has not been that great. *See* GAO REPORT, *supra* note 103, at 40 (discussing extent of deference shown by CIT).

213. Under the GATT Codes, AD and CVD investigations are normally supposed to be completed within one year. ANTIDUMPING CODE, *supra* note 15, art. 5(5); SUBSIDIES CODE, *supra* note 16, art. 2(14). Under U.S. laws, dumping investigations in which there are no time extensions now take about nine months while subsidies investigations take about seven months. Complicated investigations may even now extend beyond one year. *See supra* part II.A.1, at 408 (describing statutory time periods applicable in AD/CVD investigations).

In the case of the ITA, the hearing is now typically conducted by a deputy assistant secretary or office director,[214] and the hearing officer now typically does not participate in the hearing or engage in interchanges with counsel. The ITA hearing process would be improved if the hearing officer were more knowledgeable about the contested issues and participated more actively in interchanges with counsel. In the view of one attorney who has been active in representing petitioners, the need is to have someone the parties can talk to, even if that person is not neutral.

In the case of the ITC, standard hearing times for cases are typical even though cases vary widely in complexity and number of parties. The result is that in some cases parties have only a few minutes to present their arguments. Testing of factual information is limited by rules that discourage cross-examination of witnesses. The ITC hearing process would be improved if, in setting the times for argument, the ITC took into account factors such as the complexity of the case and the number of parties involved. The ITC should also allow reasonable time for cross-examination without taking time from the questioner's affirmative presentation.

B. Cost Savings Measures

There are a number of changes in ITA procedures that would reduce the costs of the parties in AD/CVD cases or otherwise improve the process by which the parties and the ITA interact.[215] First, faster preparation of the administrative record by the ITA would speed up the appeals of cases. We heard a number of complaints in this regard and structural reasons do not appear to prevent the ITA from implementing this.[216]

Second, the ITA should streamline and standardize its procedures for handling routine protective order disclosure requests to reduce the amount of time and money spent by the parties preparing such requests. The ITA seemed to agree that its procedures could be improved and that they were now more cumbersome than those used at the

214. These positions are two levels in the administrative hierarchy immediately below the Assistant Secretary for Import Administration.

215. We did not study these proposed improvements in our preliminary report to ACUS. They are based on comments made in respect of that report and at the meetings of the ACUS Committee on Regulation. While less extensive than the tentative recommendations for improving efficiency discussed in our preliminary report, we believe these proposed changes to be meritorious and advocated them in our final report.

216. Letter from Terrence P. Stewart to David M. Pritzker of ACUS, Nov. 4, 1991, at 4-5.

ITC.[217] The ITA should also strive to lower the parties' costs by reducing the number of copies of documents required to be filed.

Third, the ITA now sometimes decides to reject a party's factual submissions or to change its methodology for calculating dumping/subsidy margins without notice to the parties. It would be desirable for the ITA (a) to notify parties before it rejects their evidentiary submissions in favor of using "best information available" and (b) to give the parties the opportunity to comment on changes in methodology. Implementation of this recommendation would allow parties to argue their positions more effectively and avoid wasted effort. We do not intend to suggest by this proposal, however, that a party be given any more time to comply with ITA information requests or to object to methodology changes.

Originally, the agencies used preliminary determinations to avoid this sort of problem by allowing the parties to comment on the ITA's position before the final determination. But in the initial investigation, because verification usually takes place after the preliminary determination, considerable disparity may arise between the preliminary and final comment. The result of the disparity is that the use of comments on the ITA's preliminary determination is often unsatisfactory as a way to comment on the ITA's ultimate approach to a proceeding. One way to reduce the foregoing problem, would be for the ITA to issue a proposed final determination for a short comment period. Some practitioners with whom we spoke thought that this procedure would be a useful one, although others worried that it would be time consuming.

Fourth, at present there are a number of inconsistencies between the way that the ITA's investigations office[218] and the ITA's compliance office[219] handle certain issues. Since there is no justification for these inconsistencies, the ITA ought to eliminate them.

Fifth, under U.S. law the actual amount of AD/CV duties owed is usually determined after the fact. While exporters deposit an estimated duty when goods are imported into the United States, that amount may be adjusted upwards or downwards as a result of an annual review, if requested.[220] The ITA has traditionally had a large backlog of annual

217. *See* Letter from Marjorie A. Chorlius, Dep. Asst. Sec. for Import Administration to Marshall J. Breger of ACUS, Nov. 15, 1991, at 2-3.

218. This office handles the initial investigation to determine whether a AD/CVD order should be issued. Author interview with Commerce Department officials.

219. This office reviews shipments made after the issuance of an AD/CVD order to assess the amount of duties owing. Author interview with Commerce Department officials.

220. If not requested by anyone, the estimated duties are collected as the final duties. 19 C.F.R. § 353.22(e) (1991).

reviews, although it has been reducing it in recent years. The delay in finally determining duties owed is unnecessarily disruptive to trade flows and unfair to the parties to the case. Accordingly, the ITA should attempt to eliminate its backlog of annual reviews.

C. *Structural Reform of the ITC*

In the course of our study, several complaints were made about the structure of the ITC. One was the undesirability of having an even number of Commissioners. While this does lead to tie votes, the relevant statute[221] deals with that eventuality and we do not think that it poses a serious problem.

Second, some practitioners expressed concerns about the background of the Commissioners. Some felt that fewer former Congressional aides and more lawyers should be appointed. We do not think that any ironclad rules about nominees' backgrounds would be useful. Many of the issues that the ITC deals with, including the basic injury issue, are much more economic than legal in nature. Thus, requiring Commissioners to have legal training would not necessarily be helpful. Moreover, all of the Commissioners have law clerks and are supported by the lawyers in the ITC's General Counsel's office. We, accordingly, see no need for legislative action on these concerns.

Third, some practitioners complained about the tendency of the Commissioners to write separate opinions, thus making it difficult to know the exact basis of the ITC's determination.[222] While such a practice can make judicial review difficult if the reviewing court believes that some of the Commissioners are using the correct standards while others are not, the problem can be solved by remand. While it seemed to us that this problem was potentially the most serious of those discussed in this section, we did not find it to be of major concern to most participants in the system. It does seem to us, however, that the ITC ought to strive to reduce the number of separate opinions and to attempt to agree on common positions.

Finally, it was called to our attention that the Commissioners of the ITC apparently do not normally meet as a group to discuss their views of a case before their formal deliberations, apparently because of concerns stemming from the Government in the Sunshine Act.[223] In a recent case, the Acting Chairman of the ITC noted:

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221. 19 U.S.C. § 1677(11) (1988).

222. *See supra* note 52 and accompanying text (demonstrating tendency of commissioners to write separate opinions).

223. 5 U.S.C. § 552b (1988).

> Of course, in light of the Commission's practice of voting the week before opinions are due and then not sharing opinions — not even the opinion drafted by the General Counsel for the plurality — before they are released, I do not have the benefit of my colleagues' views on the central issues in this case. I therefore do not know whether their arguments might have swayed me. . . .[224]

It appears that this practice adversely affects the ITC decision-making process. In order to encourage collegial decision-making, the ITC should take steps to exchange drafts, views and other information before entering into formal deliberations. If the Sunshine Act impedes it from doing so, the Act should be amended.

D. Elimination of CIT Review

Agency action in AD/CVD cases can be appealed as a matter of right first to the CIT and then to the Court of Appeals for the Federal Circuit. In examining the role of the CIT in this process, two facts stand out. First, having two levels of court review of agency action is unusual. While models of judicial review of agency action vary, review only in the courts of appeals is much more common.[225] Second, review in the CIT of AD/CVD cases has been very time-consuming. As we noted earlier,[226] most AD/CVD cases are appealed to the CIT, and the typical appeal takes almost two years, and often results in a remand for further agency action. Appeals from remands and to the Federal Circuit after all remands add additional time to the judicial review process. In light of its cost in time and money and its unusual nature to begin with, CIT review should be eliminated.

There have in fact been proposals in the past to abolish the CIT altogether,[227] and the Senate version of the 1984 Trade and Tariff Act would have removed its jurisdiction in AD/CVD cases.[228] According to the fact sheet accompanying the Senate bill:

> The only function of the courts in [AD/CVD] cases is to conduct an appellate review of the agency proceedings. Such review is more appropriate for a court of appeals than for a trial court. By eliminating the first step in this process, the bill brings the import relief area into conformity with the usual administrative prac-

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224. Coated Groundwood Paper from Austria, USITC Pub. 2359, at 56 n.7 (Feb. 1991) (views of Acting Chairman Brunsdale).

225. *See* THE CHOICE OF FORUM FOR JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, ACUS RECOMMENDATION NO. 75-3, 1 C.F.R. § 305.75-3 (1992) (describing current models of judicial review).

226. *See supra* part II.A.4, at 418 (noting time taken by CIT review of ITA and ITC final determinations).

227. *See* Kevin C. Kennedy, *A Proposal to Abolish the U.S. Court of International Trade*, 4 DICK. J. INT'L L. 13 (1985) (proposing abolition of CIT).

228. *Id.* at 23.

> tice and reduces the costs associated with appellate review by two different courts.[229]

These reasons are essentially the same as those advanced by Professor Kennedy for eliminating the CIT's role in AD/CVD cases.[230]

While it is true that the current two tiers of appellate review are unusual, it is also true that the ITC and ITA do not follow normal federal administrative agency procedures because no ALJ is involved. We think, as noted above,[231] that if an ALJ were inserted into the administrative process, the need for court review of AD/CVD cases would decrease since an impartial, judicial-like hearing would have already been conducted. In that case, elimination of CIT review would have the salutary side effect of solving the problem of the increase in time that might result from using ALJs, saving considerable overall time and expense.[232]

In the absence of using ALJs, it is less clear that restriction of CIT review of AD/CVD cases would be appropriate. The hallmark of the U.S. AD/CVD system is its overall fairness, which to a large degree exists because there is serious judicial review of administrative actions in AD/CVD cases. Indeed, a major complaint about other AD/CVD systems is their lack of effective judicial review. We would hesitate to give up the fairness associated with the U.S. system solely for minor efficiency gains.

Accordingly, the issue would seem to be whether review of AD/CVD cases only in the Federal Circuit would result in inadequate judicial review of AD/CVD cases. It is not obvious to us why it would. Moreover, if the only effect of the elimination of CIT review, combined with implementation of an ALJ system, on the outcome of cases was somewhat less intrusive judicial intervention in the minute details of dumping margin/net subsidy calculations, the overall fairness of the U.S. system might not experience any negative impact. As we have noted before, one justifiable criticism of the U.S. system is that too many resources are devoted to establishing a precise result from an inherently imprecise calculation system. It is probably true that the overall fairness of the U.S. system would, if anything, be enhanced if AD/CVD cases were resolved more quickly, the likely result of the elimination of CIT review.

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229. 129 CONG. REC. S10,757 (1983), *quoted in* Kennedy, *supra* note 227, at 23 n.80.

230. *Id.* at 20-23.

231. *See* part III.A.4, at 438 (discussing ALJs and APA procedures).

232. *See supra* part III.a.4.c.iii (discussing use of ALJs in AD/CVD proceedings).

The only possible disadvantage would arise if the Court of Appeals for the Federal Circuit was unable to monitor these cases adequately. Although we see no reason why the Federal Circuit could not adequately handle appeals from ALJs in AD/CVD cases, its workload might well increase. Thus, while the matter requires a more thorough study than we were able to undertake, we think that serious consideration should be given to eliminating CIT review in AD/CVD cases, even if an ALJ system is not established.[233]

If CIT jurisdiction of AD/CVD appeals is retained, CIT practices still could be significantly improved. For example, the agencies and most of the lawyers active in these cases are based in Washington, D.C. It makes little sense to have the CIT in New York.[234] Second, there is a feeling that the CIT is nine courts, not one, because each judge goes off by him or herself without always paying attention to the rulings of his or her colleagues. The expanded use of more three-judge panels to hear important issues would help to eliminate this problem. Third, given that a case cannot normally be appealed until all remands are over, expanded use should also be made of certified appeals to the Federal Circuit so that the authoritative view of that court can be more quickly ascertained on significant issues.

CONCLUSION

This Article has examined the procedures used by the ITA and the ITC to conduct AD/CVD investigations and found that it would be desirable to improve the hearing process so as better to ensure impartial, consistent decisions. Although we concluded that the U.S. system seems to work reasonably well compared to the systems used by other major countries imposing AD duties, we found that the U.S. system was not perceived to be sufficiently impartial and that the hearing process was deficient. In examining possible solutions to these problems, we concluded that the use of ALJs to decide the dumping/subsidization and injury issues would make the U.S. system appear less partial and would improve the decision-making process through the use of more effective hearings. Under an ALJ system, initial agency decisions concerning the applicability of agency rules would be made by a neutral

233. It seems to us that even without the use of ALJs, there is a strong case that can be made for eliminating CIT review of ITC decisions. Given the discretionary nature of the ITC decision—an evaluation of economic data to determine whether or not material injury has occurred or is threatened—we believe that Federal Circuit review would be sufficient. It does make some sense, however, to have the same judicial review procedures for both ITA and ITC decisions.

234. The CIT's home is New York City. 28 U.S.C. § 251(c) (1988).

decisionmaker who presides over a hearing at which the relevant facts are presented and tested by cross-examination. Such a hearing would go into more detail and allow better testing of the evidence and arguments of the parties than do the hearings under the present system.

Moreover, using ALJs would mean that those persons in the agency who are charged with investigating AD/CVD matters would not be the same ones who decide the issues raised by the investigation, as is now the case at the ITA. Accordingly, the use of ALJs in AD/CVD cases would likely reduce, and perhaps even eliminate, perceptions of partiality. Moreover, it would allow the elimination of time-consuming and expensive review of AD/CVD cases in the Court of International Trade.

APPENDIX

Administrative Conference of the United States
Recommendation 91-10, adopted December 14, 1991
56 Fed. Reg. 67,144, 1 C.F.R. § 305.91-10 (1992)

RECOMMENDATION

A. Congressional Study

The Congress should authorize and fund a study, by the Administrative Conference or another appropriate agency, of the agency structures for handling AD/CVD cases. The study should address whether responsibility for these cases should continue to be divided between the ITA and the ITC. It should also consider whether the usual procedure for judicial review of agency adjudications should be followed for AD/CVD cases by providing for direct appeals from the ITA and/or ITC to the Court of Appeals for the Federal Circuit or whether the additional level of specialized court review at the Court of International Trade is required in these cases.[1]

B. Improved Agency Factfinding Procedures

The ITA and the ITC should develop factfinding procedures that improve development of the administrative record, with increased opportunities for the parties and decisionmakers to test the factual submissions made in the proceedings.

1. ITA Procedures

To accomplish this goal, the hearing conducted by the ITA at the end of its investigation should be presided over by a senior official, with adequate staff support, who is knowledgeable about the contested issues in the proceeding and who actively participates in interchanges with counsel for the parties. Where appropriate, the hearing officer should make a recommendation with regard to the issues raised in the hearing.

2. ITC Procedures

To accomplish this goal, the ITC should provide adequate time for oral presentations, taking into account factors, such as multiple parties or countries under investigation, that may justify more time than normally allowed. The ITC should allow reasonable time for cross-examination in appropriate cases without reducing the cross-examiner's time for affirmative presentation at the hearing.

C. ITA Administrative Reforms

1. ACUS has generally recommended that appeals from administrative agency decisions should go to the federal courts of appeal. THE CHOICE OF FORUM FOR JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, ACUS RECOMMENDATION 75-3, 1 C.F.R. § 305.75-3 (1992).

To improve the efficiency of case processing, the ITA should adopt the following reforms:

1. To speed judicial review, the ITA should complete the record in individual cases and make that record available to parties promptly.

2. The ITA should streamline its handling of applications for release of information under administrative protective orders and of requests for access to computerized information. It should also require that only a reasonable number of copies of documents be submitted by parties.

3. The ITA should give notice to parties before it (a) rejects portions of parties' evidentiary submissions or (b) adopts significant changes in methodology on which the parties have not had an opportunity to comment. The ITA should also consider whether there are techniques within the statutory time constraints to permit parties to comment in response to substantial changes in methodology.

4. The ITA should eliminate unjustified inconsistencies in the practices and policies of its investigations and compliance offices.

5. The ITA should continue its efforts to eliminate its backlog of annual reviews of the actual duties owed by specific companies subject to AD/CVD orders.

D. The ITC and the Government in the Sunshine Act

To encourage collegial decisionmaking, the ITC should exchange drafts, views and other information before entering into formal deliberations. The Commission should decide whether informal meetings to discuss the disposition of AD/CVD cases constitute meetings exempt from the Sunshine Act under exemption

10. If the Commission determines that such meetings are subject to the Sunshine Act, then Congress should consider amending the Tariff Act to provide that the Sunshine Act does not apply to informal meetings held to discuss the disposition of AD/CVD cases.