



Recommendation 84-6

Disclosure of Confidential Information Under Protective Order in International Trade Commission Proceedings

(Adopted December 6, 1984)

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

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

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



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In both stages of the proceeding, the ITC gathers extensive information from American producers, importers, and purchasers of the products in question. The Trade Agreements Act of 1979 authorizes the ITC to make available, under protective order, confidential business information that it has received in these proceedings. Under this authority, the ITC releases the confidential data of one party to counsel for other parties. In almost all cases those other parties, to whose counsel the confidential information is disclosed, are business competitors of the party that submitted the information. The only companies whose confidential information is disclosed are those American companies that complain of injury from the alleged unfair import practices. Confidential data concerning their prices and cost of production can be released to counsel for both their domestic competitors and their foreign competitors. In addition, all confidential information submitted to the ITC, regardless of the submitter's identity, may ultimately be disclosed, under judicial protective order, in proceedings to review ITC determinations before the Court of International Trade ("CIT").

Throughout its proceedings, the ITC devotes great care to maintaining the security of confidential business information which is submitted to it or is gathered in its investigations. Agency regulations provide procedures for requesting confidential treatment of proffered information, and the staff in practice accords confidential treatment without specific request to information acquired in response to questionnaires and other investigative inquiries. The record of each antidumping and countervailing duty injury proceeding is divided into public and nonpublic sections. Pleadings, staff documents, and ITC opinions are prepared and submitted under procedures designed to avoid the public disclosure of confidential information.

The principal concern here is not with the agency's internal procedures, but with the potential misuse of parties' information which has been received under protective order by lawyers for other parties. A particular concern is that such information will, willfully or inadvertently, be passed along by a lawyer to his client, who then can make competitive use of it against the American company that submitted it. Though there is little hard evidence of such improper disclosure, there is much suspicion that it occurs. It is believed that the perceived risk of wrongful disclosure generates a chilling effect which, by discouraging voluntary submission of essential information, hampers the International Trade Commission's ability to do its job. The ITC's responsibility is to determine whether the allegedly unfair imports are threatening or causing "injury"—not simply injury to individual American companies as such, but injury to the entire "industry" affected by competition from the imports. If American companies fear that their confidential business data will leak to their competitors, and for that reason refuse to



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submit such information, the Commission will be unable to assemble the complete industry figures it needs for a soundly-based determination of injury. Although the agency has the power to subpoena the necessary information, the short statutory deadlines it must meet and its own limited resources to procure enforcement of subpoenas make heavy reliance on voluntary cooperation a practical necessity.

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

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

Recommendation

A. Limiting the Exposure of Confidential Information

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

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



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

B. Protection Of Submitters' Interests

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

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

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

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

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

6. With respect to a requirement that the requester show a need for confidential information 'before it can be released under protective order, for the ordinary case the



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

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

C. Counsel's Responsibilities Under Protective Orders

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

D. Possible Broader Disclosures

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

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



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

Citations:

49 FR 49838 (December 24, 1984)

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