Recommendation 91-10

Administrative Procedures Used in Antidumping and Countervailing Duty Cases

(Adopted December 13, 1991)

This recommendation discusses several possible reforms of the administrative procedures used in U.S. antidumping (AD) and countervailing duty (CVD) cases. 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 also 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 goods 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 goods has been materially retarded. Countervailing 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 the U.S. industry producing like goods 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 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 U.S. International Trade Commission (ITC). 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 the case of Canadian exports, the decisions may be "appealed" instead to a binational panel established under the U.S.-Canada Free Trade Agreement.

In recent years, the use by the United States and other countries of AD and CVD laws has been controversial. While many of the complaints about these laws are essentially about their substantive provisions, a number of the complaints concern procedural matters. In particular,

some critics have contended that the high cost of defending these cases, which are often quite complex proceedings involving the collection and analysis of vast amounts of data and which often continue for years, amounts to a new form of protectionism–process or procedural protectionism. At the same time, U.S. domestic producers complain that the great expense of invoking these laws virtually precludes their use by some petitioners deserving of relief.

The two concerns that seem to be foremost in the minds of trade law practitioners are reducing the time and expense associated with AD and CVD proceedings and improving the decision making process under the relevant statutes. The Conference notes, at the outset, that the complex procedures for AD and CVD cases, involving a division of responsibilities between two agencies with appeals to a specialized court and then to a federal court of appeals, may contribute to the time and expense associated with these proceedings. The Conference recommends in Part A that Congress authorize and fund a study of the agency structures and judicial review for AD and CVD cases. Recommendations B, C and D are intended to address problems arising under the current structure.[1]

The ITA and ITC both 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 parties do and should play an important part in the process. That part could be made more useful if hearings at which the factual submissions of the two sides are tested could be conducted more effectively than at present.

In the case of the ITA, the hearing officer 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 than is presently the case.

In the case of the ITC, hearing times for cases are standardized and somewhat inflexible, even though cases vary widely in complexity and number of parties, with the result that in some cases parties have only a few minutes for oral presentations. Testing of factual

[1] In 1973, the Administrative Conference recommended a number of reforms in the then existing procedures for administering AD cases. See Conference Recommendation 73-4, Administration of the Antidumping Law by the Department of the Treasury, 39 FR 4846 (1974). In 1984, it recommended reform of one narrow aspect of AD and CVD procedures-the availability of confidential information under protective order in ITC proceedings. See Conference Recommendation 84-6, Disclosure of Confidential Information Under Protective Order in International Trade Commission Proceedings, 1 CFR 305.84-6 (1991).

information at the hearing is limited by practices that discourage cross-examination of witnesses. The ITC hearing process would be improved if, in setting the times for oral presentations, 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 subtracting such time from the questioner's time for affirmative presentation.

Several changes could be made to simplify ITA administrative procedures and reduce somewhat the time and expense associated with AD/CVD cases. First, preparing the administrative record more promptly would speed up the appeals of cases. Second, streamlining and standardizing the ITA's procedures for handling routine requests for access to information would reduce the amount of time spent by the parties in preparing such requests, thereby reducing costs. The ITA should also strive to reduce parties' costs by reducing where possible 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 significantly its methodology for calculating dumping/subsidy margins without notice to the parties. It would be desirable for the ITA to notify the parties when it makes such a decision, so that the parties will not continue to prepare their cases on the assumption that the agency has not taken such actions. Implementation of this recommendation would allow parties to argue their positions more effectively and avoid wasted effort. This recommendation is not intended to suggest the ITA does not have the right to reject a party's evidentiary submissions, or that a party should have any new rights to more time to comply with ITA information requests or to object to methodology changes. The ITA should also consider whether there are methods within the statutory time constraints to permit parties to comment in response to substantial changes in methodology.

Fourth, at present there are a number of inconsistencies between the way that the ITA's investigations office (which handles the initial investigation to determine whether an AD/CVD order should be issued) and the ITA's compliance office (which reviews shipments made after the issuance of an AD/CVD order to assess the amount of duties owing) handle certain issues. The ITA ought to eliminate those inconsistencies for which there is no justification.

Fifth, under U.S. law the actual amount of AD/CVD duties owed is usually determined after the fact. Exporters deposit an estimated duty when goods are imported into the United States, and that amount may be adjusted upwards or downwards as a result of an annual review, if requested. (If not requested by anyone, the estimated duties are considered to have been collected as the final duties.) The ITA has traditionally had a large backlog of annual reviews,

although the backlog has been reduced in recent years, and reduced substantially in recent months. The delay in finally determining duties owed is unnecessarily disruptive to trade flows and unfair to the parties to such cases. Accordingly, the ITA should continue its efforts to eliminate its backlog of annual reviews.

The Commissioners of the ITC apparently do not normally meet as a group to discuss their views of a case before their formal deliberations, evidently because of concerns stemming from the Government in the Sunshine Act. It appears that the Commission's reluctance to meet as a group adversely affects the ITC decision-making process. The Commission's general counsel has taken the position that its meetings to dispose of AD/ CVD cases are not within the terms of exemption 10 of the Act, which exempts meetings involving determinations "on the record after opportunity for a hearing." Some practitioners, however, believe that exemption 10 applies, and the Commission should decide whether such meetings do or should come within the ambit of exemption 10. If the Commission concludes the meetings in question are not in fact exempted from the Sunshine Act, then Congress should consider exempting such meetings for AD/CVD cases from the Act. As an interim measure for achieving the benefits of collegial decisionmaking, the ITC should take steps to exchange drafts, views and other information among the commissioners before entering into formal deliberations.

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.[2]

[2] The Administrative Conference has generally recommended that appeals from administrative agencies should be to the courts of appeals. See Conference Recommendation 75-3, The Choice of Forum for Judicial Review of Administrative Action, 1 CFR 305.75-3 (1991).

B. Improved Agency Fact-finding Procedures

The ITA and the ITC should develop factfinding procedures that improve development of the administrative record, with increased opportunities for the parties and decision makers 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, which 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

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.

Citations:

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