ABA STATEMENT OF EU ADMINISTRATIVE LAW

ADJUDICATION REPORT

Trade Remedies

1. Introductory note on the difference between adversary and inquisitorial administrative process.

EU law and practice is more inquisitorial and less adversarial than American or British models of administrative law. The "hearings" that are provided for in some of the sectors are very different from those that occur in the U. S. or Britain. Even though the concepts of "due process" or "natural justice" sometimes appear in descriptions of EU law and practice, these concepts have quite a different meaning than in the U. S. or Britain. The inquisitorial approach used in Commission proceedings is an adaptation of the inquisitorial process used in the civil and criminal justice systems of continental member states. EU practice also incorporates elements from the administrative law systems of continental member states (though not, for example, the conseil d'etat in France).

Under the adversarial model of administrative adjudication, there is a separation between the investigatory and adjudicatory phases. After the investigation is concluded, an independent decisionmaker provides a trial-type hearing at the agency level (this is quite distinct from the judicial review that is provided later). This decisionmaker is often called an administrative law judge (ALJ) in the U.S.; in Britain the hearing is often provided by an independent tribunal. In connection with that hearing, agency staff members who have played investigatory, prosecutorial, or advocacy roles in the particular case cannot serve as adjudicatory decisionmakers or make ex parte communications to those decisionmakers (we call this "separation of functions"). In the U. S., the heads of an agency usually have responsibility for the final agency decision (which can differ from the proposed decision of the ALJ), but separation of functions continues to apply at the agency head level. The decisionmakers at both the ALJ and agency head level take personal responsibility for their decisions. (This description is obviously oversimplified and some U.S. administrative processes are more inquisitorial and less adversarial than as described above).

In contrast, under the inquisitorial model of administrative adjudication, there is no separation between investigation and adjudication, no separation of personnel between different functions. Instead, all administrative procedures are considered to be phases of the investigation. The "hearing" is an opportunity for the party being investigated to advocate its side of the case, not a real trial before an independent decisionmaker. Thus the hearing is viewed as a phase of the investigatory process, not as a separate adjudicative process. The final Commission decision is collective and institutional in nature, not a decision for which particular persons take personal responsibility.

The fundamental distinction between adversary and inquisitorial systems is essential to understanding the law and practice of the Commission. American and British lawyers will be baffled by that law and practice until they understand this basic distinction. We would welcome your comments on the adversary-inquisitorial distinction. You can comment specifically on it in section 1 of your report or you can intersperse comments about it throughout the report—or both.

(There are some more specific questions that touch on this distinction in the portion of the guidelines relating to hearings). Does the above brief description of the inquisitorial approach correctly describe the practice in your sector? Are there elements of the adversary system in that practice? Is the inquisitorial process in EU law different from or similar to the administrative law of member states that you're familiar with? As a policy matter, should the practice change in the direction of the adversary system? Whatever comments or observations you might offer on this fundamental distinction will be very helpful to us in preparing our synthesis.

The administrative process followed in the EU in the trade remedies area is essentially inquisitorial. There is no separation between the investigatory and adjudicatory phases. The investigation is carried out by a European Commission department (DG TRADE) and that same department drafts the decision to be taken by the European Commission on a proposal by the Member of the Commission responsible for trade policy, where the Commission has the authority to act (provisional anti-dumping and countervailing duties, provisional and definitive safeguard duties). That department also drafts the decision to be proposed by the Commission to the Council of the European Union where the Council has the authority to act (definitive anti-dumping and countervailing duties, countermeasures against foreign countries under the Trade Barriers Regulation).

There are nonetheless some adversarial features in the administrative process for certain trade remedies, in the sense that interested parties have an input in the investigation and have the possibility to defend their interests and views, as will be illustrated in the relevant parts of this report. One interesting feature is the consultation by the Commission of an advisory committee consisting of representatives of EU Member States, at the initiation of the investigation and subsequently on the results of the investigation and on the measures contemplated by the Commission staff. Interested parties often contact members of such advisory committee directly on informal basis to defend their interests and views. Yet, the process remains essentially inquisitorial. There is no equivalent of an administrative law judge as in the United States of America, but it should be noted that in the US, the administrative process in the trade remedies area generally does not provide for an administrative law judge either.

From a policy perspective, in view of the checks and balances that exist – within the Commission and in the advisory committee consisting of Member State representatives - there does not appear to be a need to switch from the inquisitorial process to an adversarial one. There is no indication that an inquisitorial system like the EU results in more trade remedies being imposed than an adversarial system like the US. From a legal perspective these checks and balances ought, however, to be complemented by an additional counterweight designed to allow private parties to better defend their interests, where they do not coincide with the various public policy interests that come into play. Creating a hearing officer function would go some way towards remedying this. Such a function already exists in the framework of the enforcement of competition rules by the Commission. The task of such hearing officer should, however, not be limited to ensuring that procedural rules have been complied with, as has been the experience in the area of EU competition rules. He or she could also query the substantive aspects of the case.

2. Narrative

We would like Part 2 of each of your reports to include a narrative or story of how a typical dispute in your sector develops from beginning to end. The narrative could be based on one or more actual cases (for example, a landmark decision in the sector or a case from your own experience) or a hypothetical. If the story is entertaining, so much the better. The narrative should include:

- Description of the underlying dispute—for example, a typical alleged violation of the competition rules or a denied application to register a trademark or market a drug or an enforcement action. Give plenty of details so readers unfamiliar with EU law and practice can get a feeling for what's going on.
- If there is an investigatory phase, who are the investigators? What happens during the investigation? Are there several investigatory phases? Third party involvement? When does the lawyer for the private party ask for information and what information do they get?
- If there is an application process, tell us how the client applies for the benefit and how the Commission processes the application and what happens if the application is granted (but opposed by other private parties) or if it is denied.
- What is the nature of the hearing—oral or written? Who are the hearing officers and what responsibilities do those individuals have? What do the lawyers on each side of the dispute actually do during the hearing. Tell us a story of how the hearing will proceed. Then describe the process by which a decision is reached. Is there an opportunity to seek reconsideration of that decision?

A typical case of trade remedy, say an anti-dumping case, involves a finding of dumping and "material" injury caused by dumping. "Dumping" occurs where the exporters/producers in the foreign country sell for export at a price lower than the price they charge in the market of the exporting country or where their domestic sales are at a loss (i.a. at a price which does not provide for the recovery of all costs within a reasonable period of time).

The various steps (complaint, investigation, provisional and definitive anti-dumping measures) will be commented upon in the following sections.

This narrative is intended to offer a more general view of the way in which the process works in practice. It is based on the personal experience of one of the authors in one particular case, in which he assisted exporters/producers of a foreign country targeted by an anti-dumping investigation. According to the authors' experience, this case is not atypical as far as the process is concerned.

The exporters/producers sought the help of a lawyer at a rather late stage, i.e. after the notice of initiation of the anti-dumping investigation had been published. It was then too late to try to avert initiation, by attempting to convince the Commission that there was no or insufficient *prima facie* evidence of dumping and/or injury or by contacting delegates in the Advisory Committee from those EU Member States whose industries use the products allegedly dumped. Exporters/producers in foreign countries sometimes know earlier that an anti-dumping complaint will be or has been filed, but often they do not -- the authorities of the exporting country are informed when a complaint has been filed, and they can inform their producers/exporters of the existence of a complaint. Some do so, some do not. The Commission itself is not permitted by the Basic Regulation to disclose to exporters and importers that a complaint even exists before the initiation of an investigation, ditto for Members of the Advisory Committee. Lawyers for complainants have no ethical obligation to give a copy of the complaint to lawyers for exporters/producers targeted in the complaint and generally consider that they owe their clients a duty not to do so.

After initiation, lawyers for exporters/producers were given a copy of the non-confidential version of the complaint. Based on non-confidential information contained in it (which, as is typical in the authors' experience, did not include important relevant data), the lawyers argued that this complaint could not justify initiating an investigation. In this case the lawyers for the exporters /producers made their comments more to reserve their clients' rights in a possible subsequent court proceeding against the anti-dumping measures. There is normally no possibility to obtain a court injunction against the initiation. As a practical observation, more

recently the Commission applies higher standards in assessing the admissibility of complaints than it did in the case that is the basis for this narrative.

Much work was dedicated to assisting the exporters/producers that had been sampled by the Commission in filing the response to the questionnaire within the short time available.

The lawyers of the exporters/producers inspected the non-confidential file of the Commission containing the responses of the EU producers to the Commission questionnaire and their submissions. Particularly on injury, they concluded and argued to the Commission that the required non-confidential summary of the confidential data contained in these responses and submissions was less than meaningful. These arguments fell on deaf ears at the Commission. However, more recently the Commission has reportedly become more insistent in requiring meaningful non-confidential summaries.

On their own initiative, the lawyers for the exporters/producers sought and obtained the reports to the annual shareholders' meetings of the complainants that were public companies. Interestingly, not only did most of these reports show that these companies turned a profit during the period under investigation, but also and more importantly, none of them referred to the impact of dumped imports on the like product of these complainants.

Subsequently, the lawyers of the exporters/producers filed a submission with the Commission contesting the dumping and injury calculations in the complaint. In addition, their submission argued (a) that the product exported by the exporters/producers in the foreign country was not "like" the product manufactured by the EU industry, showing that the former was not substitutable for the latter, which was sold to a very different downstream industry and (b) that the imported product could not have caused injury to the EU producers as it was sold in a completely different market.

A hearing was sought, granted and held prior to imposition of the provisional duty, in which the lawyers for the exporters/producers further developed these arguments. The Head of the Mission of the exporting country to the EU participated in the hearing and argued essentially first, that the imposition of anti-dumping duties would distort competition between the exporters/producers of his country and exporters/producers of other countries, some of which were not targeted by the investigation, and, second, that the anti-dumping duties would very significantly lower the volume of his country's exports to the EU of a product that represented a high proportion of his country's export earnings. The Commission Head of Unit and his team listened carefully and politely, but gave rather technical and, in the author's opinion, not very convincing, reasons why provisional anti-dumping duties should/would be imposed.

A short time thereafter the Commission submitted to the Advisory Committee a report on the investigation. The lawyers of the exporters/producers of the foreign country tried to obtain a copy of this report but failed, as the Commission staff and the members of the Advisory Committee cannot disclose such information, let alone the report.[1] The lawyers were hamstrung in their efforts to persuade members of the Advisory Committee to oppose the imposition of provisional duties.

After the imposition of provisional duties, a "disclosure document" was sent to the exporters/producers explaining in some more detail than the recitals of the Commission Regulation imposing the provisional duties the way dumping had been calculated and the injury findings. The lawyers for the exporters/producers duly commented on the "disclosure document", contesting, as may be expected, the various findings.

---

[1] On the basis of Anti-dumping Regulation, arts. 6(7) and 19(5), and Anti-subsidy Regulation, arts. 11(7) and 29(5).

The Commission staff then collected some additional information and reviewed the findings on dumping and injury, with a view to drafting a regulation to impose definitive anti-dumping duties. Such a draft regulation is adopted by the Commission as a proposal that is then submitted to the Council of Ministers for adoption of a definitive regulation imposing anti-dumping duties.

In the meantime, in light of the Commission's expected failure to change the assessment in light of the exporters'/producers' legal arguments, the lawyers of the exporters/producers recommended to the authorities of the exporting country to put some political counter-pressure on the EU authorities, including the Member States. They were advised to collect information on pending negotiations with EU industries on major contracts for the supply of equipment to the exporting country. The recommendation was that they let it be known to these EU industries that the negotiations would have to be put on hold in view of the impending adoption by the EU of definitive anti-dumping duties. In other words, such duties would have severe consequences on the exports of the exporting country and on its ability to generate sufficient foreign currency to pay for the equipment to be supplied by EU industries.

Whether or not these recommendations were followed can be left aside, the fact is that in the Council of Ministers there was no (at that time required) simple majority in favor of the Commission proposal to impose definitive anti-dumping duties and the whole case was dropped. This was not a typical outcome, as most of the definitive anti-dumping measures proposed by the Commission to the Council of Ministers are adopted by the Council.

This case, among others, was one of the motivations for an amendment of the EU's basic Anti-Dumping Regulation providing as from 2004 that definitive anti-dumping measures are considered to be adopted by the Council of Ministers unless a simple majority of Member States in the Council actively rejects the Commission proposal within one month after its submission.[2] Indeed, it is not certain that under the new voting rules the proposal could have been defeated.

3. Substantive background

Part 3 of your report should provide a brief overview of the substantive law and policy in your sector and the range of matters that arise for adjudication. Some of the sectors involve several different types of disputes so you should describe each of them. Identify any major trends or developments on the substantive side that have consequences for the decisional process. Also identify the various participants and institutions that are involved in the decisionmaking process and what role each unit plays in the process. We are seeking only an overview of substantive law, not an extensive treatment, in light of the fact that our project is primarily procedural rather than substantive in nature.

When the EU is confronted with competition from imports, it has three main trade remedies at its disposal: anti-dumping, anti-subsidy and safeguards.

---

[2] Council Regulation 461/2004 of 8 March 2004 O.J. (L 77) 12, amending Council Regulation 384/96 of 22 December 1995 O.J. (L 56) 1 (on protection against dumped imports from countries not members of the European Community) and Council Regulation 2026/97 of 6 October 1997 O.J. (L 288) 1 (on protection against subsidised imports from countries not members of the European Community).

The basic EU anti-dumping regulation[3] is the mechanism whereby the EU can combat prices which are, according to the Basic Regulation, unfairly low, usually by imposing a duty at the EU border on products from particular companies in particular countries. Indications that prices are unfairly low are when they are lower than the price charged on the home market or where they are loss-making. The EU can impose anti-dumping measures where dumped imports cause material injury to the EU industry.[4]

The basic EU anti-subsidy regulation[5] is the mechanism whereby the EU can counteract the effects of government subsidies, which can give foreign competitors an unfair advantage over their EU counterparts. Through the EU's anti-subsidy rules, the EU can impose an extra duty at the EU border on products from particular companies in particular countries. (A duty imposed to counteract a subsidy is known as a countervailing duty or CVD, and the EU's anti-subsidy rules are sometimes referred to as its "CVD" rules.) Like in anti-dumping, the EU can impose countervailing duties where subsidized imports cause material injury to the EU industry.[6]

The EU can also take safeguard measures.[7] With safeguards, the EU can provide its industry with temporary relief from competition from abroad, regardless of whether that competition is unfair. The safeguard regulation also provides for the Commission to impose "surveillance" of imports, to monitor their development and perhaps ultimately impose safeguard measures. Different from the anti-dumping and anti-subsidy mechanisms, there are additional requirements for the EU to impose safeguard measures, and the standard of injury is higher: the EU has to prove that the imports cause "serious" rather than "material" injury to the Community industry.[8] Rather than duties, safeguards usually take the form of quantitative restrictions on imports of a particular product; more recently they have been in the form of higher customs duties. Unlike anti-dumping and anti-subsidy rules, which are directed at particular countries, as a general rule safeguards must restrict imports of the product concerned from all origins. The exception to this rule is China. In the context of China's accession to the WTO, special safeguard provisions allowing the EU to take safeguards against imports from China alone were adopted.[9] They will remain in force until 2013.

---

3 Council Regulation 384/96 of 22 December 1995 O.J. (L 56) 1, amended by: Council Regulation 2331/96 of 2 December 1996 O.J. (L 317) 1, Council Regulation 905/98 of 27 April 1998 O.J. (L 128) 18, Council Regulation 2238/2000 of 9 October 2000 O.J. (L 257) 2, Council Regulation 1972/2002 of 5 November 2002 O.J. (L 305) 1 and Council Regulation 461/2004 of 8 March 2004 O.J. (L 77) 12 (Anti-dumping Regulation).

4 Anti-dumping Regulation, art.1(1).

5 Council Regulation 2026/97 of 6 October 1997 O.J. (L288) 1, amended by: Council Regulation 1973/2002 of 5 November 2002 O.J. (L 305) 4 and Council Regulation 461/2004 of 8 March 2004 O.J. (L 77) 12 (Anti-subsidy Regulation).

6 Anti-subsidy Regulation, art.1(1).

7 Council Regulation 3285/94 of 22 December 1994 O.J. (L 349) 53, amended by: Council Regulation 139/96 of 22 January 1996 O.J. (L 21) 7, Council Regulation 2315/96 of 25 November 1996 O.J. (L 314) 1 and Council Regulation 2474/2000 of 9 November 2000 O.J. (L 286) 1 (Safeguards Regulation). In addition there are more specific provisions on quotas on imports that are built into Council Regulation 519/94 of 7 March 1994 O.J. (L 67) 89, which applies to imports from certain third countries (essentially those classified as non-market economy countries) listed in the Annex to the Regulation. However, upon China's WTO accession the progressive removal of these quantitative restrictions by year 2005 was agreed. Council Regulation 427/2003 O.J. (L 65) 1 and Commission Regulation 428/2003 O.J. (L 65) 12 implement this phase-out plan.

8 Safeguards Regulation, art. 16(1).

9 Council Regulation 427/2003 O.J. (L 65) 1.

Of the three trade remedies, anti-dumping is by far the most used remedy (in 2005 there were 24 new anti-dumping investigations initiated). Anti-subsidy action is comparatively rare (two were initiated in 2005), and safeguard action is the rarest of them all (two investigations initiated in 2005).[10] This is in contrast to the United States, which uses all three trade remedy mechanisms regularly.[11]

The European Commission plays the primary role in investigating, evaluating, quantifying and proposing trade remedies, upon a complaint from the Community industry or representatives thereof, or exceptionally, on its own initiative. The European Commission is also authorized to impose safeguard measures. However, only the Council of the European Union is authorized to actually impose definitive anti-dumping and countervailing measures. The Member State governments of individual countries have a greater role in safeguard actions, because the European Commission will generally only initiate its investigation upon a request from a Member State.

4. Application or investigation phase

4.1 Application phase: If the administrative process you are describing begins with an application for a particular benefit, license, or permission, please describe the application process. What information must be disclosed? What forms are filed? To whom is the application directed? Is it filed in a member state—and if so, which member state—or with the Commission? Are competitors or the general public notified of the application and, if so, how and when? Is there a pre-filing meeting where counsel can find out if the staff sees any problems with the application? Is there a time limit on the Commission's consideration of the application? If the application is denied, what form does the denial take?

4.2 Applications—investigatory phase. What happens to an application after it is filed? Please describe the process by which an application is processed and considered including referral to scientific committees.

4.3 Complaints—pre-complaint phase. If the administrative process you are describing begins with a complain, is there a pre-complaint phase in which the representatives of private parties have an opportunity to discuss the matter with Commission staff before an investigation begins or a complaint is issued? What occurs at such meetings?

4.4 Opening of investigation. The Commission may initiate an investigation of a possible violation of its laws or rules or a failure to comply with a previous order.

4.4.1 How is an investigation triggered? Through a notification or application? By a third party complaint or information from another government agency or a court case? Or by information identified by the Commission staff itself?

Starting the process: the complaint

Anti-dumping and anti-subsidy proceedings very generally begin with the submission of a written complaint by a natural or legal person or an association on behalf of the Community

[10] In the year 2003 there were 8 new investigations initiated in total out of which 7 on anti-dumping, 1 – on anti-subsidy and none on safeguards.

[11] [US statistics?]

industry.[12] The Commission also has the power to start investigations on its own initiative.[13] Complaints are submitted to the Commission (specifically, to the Complaints Office of DG Trade) or to a Member State who will forward it to the Commission.[14] A complaint must contain evidence of dumping or subsidization, injury and a causal link between the allegedly dumped or subsidized imports and the alleged injury. There is no specific form for anti-dumping or anti-subsidy complaints, but the regulations contain indications of what must be included in a complaint

In addition, the EU has prepared two non-binding guides on preparing complaints, both of which are available on its web site.[15]

Safeguards cannot be directly requested by the Community industry; a request can only be lodged with the Commission by an EU Member State, or the Commission can open a safeguard investigation on its own initiative, persuaded by the Community industry.[16] In practical terms, companies usually submit their requests for safeguard action on the national level, with a request that the government bring the matter to the European Commission. The choice of which Member State to approach is primarily driven by which Member State or States is/are the primary seat of the threatened industry. There is no form for asking for safeguard relief, but the regulation says that the Member State (usually aided by the requesting industry) is to provide the Commission with "evidence available" about volume of imports (in particular, whether there has been a significant increase, either in absolute terms or relative to production or consumption in the Community), the price of imports (in particular where there has been a significant price undercutting as compared with the price of a like product in the Community) and the consequent impact on Community producers (as indicated by trends in certain economic factors such as production, capacity utilization, stocks, sales, market share, prices (i.e., depression of prices or prevention of price increases which would normally have occurred), profits, return on capital employed, cash flow, employment).[17]

Pre-complaint meetings

Before formally lodging an anti-dumping or anti-subsidy complaint, companies usually consult the European Commission (in practice, the Complaints Office of DG Trade) informally, sometimes several times, normally on the basis of draft complaints that the Commission comments upon. Companies then have the opportunity to try to fill in any gaps and address problems that the Commission has identified before submitting a formal complaint. The

---

12 Anti-dumping Regulation, art.5(1) and Anti-subsidy Regulation, art. 10(1).

13 Anti-dumping Regulation, art. 5(6) and Anti-subsidy Regulation, art. 10(10). It is possible for a Member State in possession of sufficient evidence of dumping/subsidization and of resultant injury to the Community industry to communicate such evidence to the Commission in the absence of a complaint. See Anti-dumping Regulation, art.5(1) subpara. 3, Anti-subsidy Regulation, art.10(1) subpara.3.

14 Anti-dumping Regulation, art.5(1) subpara. 2 and Anti-subsidy Regulation, art.10(1) subpara. 2.

15 For anti-dumping, at http://europa.eu.int/comm/trade/issues/respectrules/anti_dumping/complaint/index_en.htm. For anti-subsidy, at http://europa.eu.int/comm/trade/issues/respectrules/anti_subsidy/complaint/index_en.htm, last visited 10 January 2005.

16 Safeguards Regulation, arts. 3 and 6.

17 Safeguards Regulation, arts. 2 and 10.

Commission policy is presently to be much more demanding as to the quality of the complaint. It may take months of work to draft and re-draft a complaint that will satisfy the Complaints Office. Companies also glean from these pre-meetings whether they have a viable complaint – they might decide not to lodge a complaint at all if it is unlikely to be accepted.

With safeguards, unless the EU is prepared to act on its own initiative, companies first have to convince a Member State government to take the matter to the EU. Therefore, there are generally (possibly numerous) meetings with the Member State government prior to the Member State taking the issue to the EU. The Member State might also have informal contacts with the Commission regarding the case before officially putting the EU on notice and starting the clock running. On the other hand, if the Member State wishes to accelerate the process, it might launch the process immediately, without pre-meetings.

Time limits for considering complaints and initiation

For anti-dumping and anti-subsidy matters, from the moment that a complaint is officially lodged, the Commission has 45 days to examine it and to determine whether the companies that submitted it had the standing to do so and whether it makes out a *prima facie* case of dumping/subsidization, material injury and causation.[18] During this time, the Commission cannot publish any notice that it has received or is considering a complaint, nor can it respond to any enquires about complaints in the process of consideration.[19] It does however have the obligation to notify the government of the exporting country concerned after receipt of a properly documented complaint and before proceeding to initiate an investigation.[20]

The Complaints Office is required to investigate the "representativeness" of the complaint – that is, whether it has been filed on behalf of a major proportion of the Community industry. The Commission is required to assess the degree of support for, or opposition to, the complaint expressed by Community producers of the like product. It cannot proceed if more than half of those expressing an opinion oppose the opening of an investigation. It also cannot proceed if the Community producers expressly supporting the complaint account for less than 25% of total production of the like product produced by the Community industry.[21] If the Commission is satisfied that the complaint was submitted on behalf of the Community industry and that it provides a *prima facie* case of dumping or subsidization, injury and causation, it will, after written consultation of the Advisory Committee,[22] proceed to open an investigation.[23] This is by means of a Commission Notice, not by means of a decision by particular Commission officials. Initiation is made public by means of a "Notice of Initiation" published in the Official Journal of the European Communities.[24] The Notice announces the initiation of the investigation, indicates the product and countries concerned, gives a summary of the information

---

18 Anti-dumping Regulation, art. 5(9) and Anti-subsidy Regulation, art. 10(13).

19 Anti-dumping Regulation, art. 5(5) states that "[t]he authorities shall avoid, unless a decision has been made to initiate an investigation, any publicising of the complaint seeking the initiation of an investigation." Similarly provides Anti-subsidy Regulation, art. 10(9).

20 Anti-dumping Regulation, art. 5(5) and Anti-subsidy Regulation, art. 10(9).

21 Anti-dumping Regulation, art. 5(4) and Anti-subsidy Regulation, art. 10(8).

22 Advisory Committee is a consulting body in the proceedings, which shall consist of representatives of each Member State, with a representative of the Commission as chairman. Anti-dumping Regulation, art. 15(1) and Anti-subsidy Regulation, art. 25(1).

23 Anti-dumping Regulation, art. 5(9) and Anti-subsidy Regulation, art. 10(13).

24 Anti-dumping Regulation, art. 5(9) and Anti-subsidy Regulation, art. 10(13).

received, and asks all interested parties come forward to make themselves known, ask for a hearing and submit information.[25] The Commission sets strict time limits within which interested parties must do so, generally 10 days from initiation to make oneself known and 40 days from initiation to ask for a hearing and make submissions, including responses to questionnaires. This is very brief in view of the amount of data to be supplied in the questionnaire response. The Commission will advise the exporters, importers and representative associations of importers or exporters known to it to be concerned, as well as the country of origin and/or export and the complainants, of the initiation of the proceedings.[26]

Procedures in safeguards are different from those in anti-dumping and anti-subsidy cases. For safeguards, the process begins when a Member State informs the Commission that trends in imports appear to call for surveillance or safeguard measures, providing "all evidence available".[27] The Commission immediately passes this information on to all the Member States. Within eight working days of the Commission's receipt of the information, and in any event before the introduction of any Community surveillance or safeguard measure,[28] consultations are held in an Advisory Committee made up of representatives of each Member State with a representative of the Commission as chairman. After consultations, the Commission must decide whether or not to initiate an investigation within one month, counting from the date of receipt of the abovementioned information from the Member State.[29]

If the Commission decides to initiate an investigation, it publishes a notice to that effect in the Official Journal of the European Communities. The notice contains a summary of the information received, and stipulates that all relevant information and requests to be heard have to be communicated to the Commission within certain time limits.[30]

4.4.2 Are there checks on the investigation process? Any requirements that probable cause be established before investigations take place or any other protective requirements? How about requirements of approval (such as the requirement that lower level staff get higher-level approval in order to proceed)?

In anti-dumping and anti-subsidy cases the Commission is required before opening an investigation to, as far as possible, examine the accuracy and adequacy of the evidence provided.[31] It cannot initiate an investigation if the complaint is not "representative",[32] as described above, and the regulation provides that a complaint must be rejected where there is insufficient evidence of either dumping/subsidization or of injury to justify proceeding with the case.[33] The decision to initiate is made by the Commission normally by written procedure.

---

25 Anti-dumping Regulation, art. 5(10) and Anti-subsidy Regulation, art. 10(14).

26 Anti-dumping Regulation, art. 5(11) and Anti-subsidy Regulation, art. 10(15).

27 Safeguards Regulation, art. 2.

28 Safeguards Regulation, art. 3.

29 Safeguards Regulation, art. 6(1)(a).

30 Safeguards Regulation, art. 6(1)(a).

31 Anti-dumping Regulation, art. 5(3) and Anti-subsidy Regulation, art. 10(3).

32 Anti-dumping Regulation, art. 5(4) and Anti-subsidy Regulation, art. 10(8).

33 Anti-dumping Regulation, art. 5(7) and Anti-subsidy Regulation, art. 10(11).

Individual case handlers do not make decisions on their own. The investigation is typically carried out by a team of four case handlers, supervised on a day-to-day basis by the Head of Unit and the Heads of Section. Subsequently, proposals for formal action are vetted by the Director and ultimately by the Director-General of DG Trade, before they are submitted to the entire Commission (for provisional anti-dumping or countervailing measures, which can only be imposed by means of a Commission Regulation[34]) or by the Commission to the Council (in the case of a proposal for definitive anti-dumping or countervailing measures, which can only be imposed by means of a Council Regulation[35]).

While safeguard proceedings are much less frequent than anti-dumping and anti-subsidy procedures, the requirements for initiating and conducting an investigation are, on paper, less stringent – except that the Member States, not private parties, must complain. Member States can inform the Commission of trends in imports that "appear" to call for surveillance or safeguard action.[36] Subsequently consultations take place and the Commission can initiate an investigation when "[…] it is apparent […] that there is sufficient evidence to justify the initiation of an investigation […]."[37] As for the investigation itself, the regulation only provides that the Commission is to "[…] seek all information it deems to be necessary […]" and, where it considers it "appropriate" to endeavor to check this information with importers, traders, agents, producers, trade associations and organizations.[38]

In safeguards too, individual case handlers do not make decisions on their own. Like anti-dumping and anti-subsidy investigations, safeguard investigations are assigned to a team of case handlers in DG Trade of the European Commission, supervised on a day-to-day basis by the Head of Unit and Heads of Section and, with proposals for formal action being vetted by the Director and ultimately by the Director-General of DG Trade.

Formal action under the safeguard regulation, such as a decision to impose quantitative restrictions on imports, is taken by Commission decision,[39] i.e., by vote of all the Commissioners. If a Member State disagrees with the Commission decision, it can refer the matter to the Council, which acting by a qualified majority may confirm, amend or revoke that decision.[40] Alternatively, the Council can itself take safeguard action, voting by qualified majority on the basis of a Commission proposal.[41]

4.4.3 Are there ways by which a private party can push forward or expedite Commission action on an application or with respect to a complaint against a competitor? How about ways to slow down an investigation?

In anti-dumping and anti-subsidy proceedings, the time limits for the consideration of a complaint are fairly brief; thus it would be difficult for a private party to obtain action earlier than

---

34 Anti-dumping Regulation, arts. 7(1) and 14(1), Anti-subsidy Regulation, arts. 12(1) and 24(1).

35 Anti-dumping Regulation, arts. 9(4) and 14(1), Anti-subsidy Regulation, arts. 15(1) and 24(1).

36 Safeguards Regulation, art. 2.

37 Safeguards Regulation, art. 6(1).

38 Safeguards Regulation, art. 6(2).

39 Safeguards Regulation, art. 16(1) and (6).

40 Safeguards Regulation, art. 16(7) and (8).

41 Safeguards Regulation, art. 17.

within the 45 days that the Commission has for the consideration of the complaint and required consultation of the Advisory Committee.

The overall timing of anti-dumping and anti-subsidy investigations is explicitly specified in the regulations at maximum 15 months[42] and 13 months respectively,[43] so it is not possible to slow the process beyond those maximum limits. As for accelerating, the conduct of investigations is very "routinized", and Commission officials will regularly comment that the time frame is fairly tight for them to accomplish everything they need to, such as studying questionnaire replies, conducting verification visits in Europe and abroad, holding hearings, providing access to the file, making provisional and definitive conclusions and taking into account the submissions of interested parties. It would be difficult to convince the Commission to deviate from its regular practices in order to expedite the process. However, complainants can, by choosing the date to file their complaint, determine the "period of investigation", i.e. the reference period for establishing dumping, and thus the period where dumping is highest.

Safeguard action, being much rarer, is less "routinized" and consequently, there is more room for flexibility in the timing. However, the regulation does set a time limit for a safeguard investigation of nine months, extended by a maximum of two months,[44] limiting the possibility of delay. As for accelerating the process, urgent action by imposing immediate surveillance or provisional safeguard measures is possible under the safeguard rules.[45] However, it is not a private party who can ask for it but rather a Member State. According to the safeguard regulation, urgent measures, in the form of an immediate increase in the existing level of customs duty, can be taken in "critical circumstances", where delay would cause damage which would be difficult to repair, and where a preliminary determination provides "clear evidence" that increased imports have caused or are threatening to cause serious injury. The duration of such measures cannot exceed 200 days.[46]

4.5 Personnel and committees:

4.5.1 Describe the organization of the staff on the Commission side during the application and the investigation phase. What is the division of responsibilities between staff members and supervisors?

In the case of anti-dumping or anti-subsidy procedures, once the Complaints Office has finished its work and has advised that the complaint meets the requirements for initiation of an investigation, and the case is initiated, it passes to the other units of the directorate responsible for anti-dumping and anti-subsidy investigations within DG Trade of the European Commission.

DG Trade assigns separate teams to investigate the existence of dumping/subsidization and to investigate the existence of injury and causation. Generally, the team is made up of one Head of Section, aided by two case handlers to assess dumping/subsidization, and one Head of Section aided by two case handlers to investigate injury. In practice, the four case handlers conduct the investigation, for example carrying out verifications. The case handlers report orally and in writing to their Heads of Section on "missions". The Heads of Section bear the overall

42 Anti-dumping Regulation, art. 6(9).

43 Anti-subsidy Regulation, art. 11(9).

44 Safeguards Regulation, art. 7(3).

45 Safeguards Regulation, art. 8.

46 Safeguards Regulation, art. 8(2).

responsibility for the case, usually attending the hearings and overseeing the drafting of all documents in the case. Higher up in the hierarchy is the Head of Unit, the Director and the Director General of DG Trade. A proposal for provisional or definitive measures will be scrutinized by these higher levels of the hierarchy, and the proposal for a Commission Regulation (in the case of provisional measures) and the proposal for a Council regulation (in the case of definitive measures) will be finally vetted by the Commissioner's cabinet and the Commissioner him or herself. It will also usually be scrutinized by other DGs of the EC, such as DG-Enterprise or DG-COMP.

As mentioned above, safeguard investigations are much rarer, and thus less "routinized" than anti-dumping or anti-subsidy investigations. Nevertheless, the investigations are the responsibility of people of the same directorate and as the case may be of the same people that handle anti-dumping or anti-subsidy investigations, and hence are staffed and proceed in roughly the same way. However, safeguard investigations are characterized by more political involvement than anti-dumping or anti-subsidy investigations because complaints can only be filed by the EU Member States and are more politically sensitive, as the trade at issue is not unfair trade.

4.5.2 Any requirement of consultation with advisory committees or other parts of the Commission? Does the comitology process come into play here? How about consultation with member states or agencies of member states?

There is an Anti-dumping and Anti-subsidy Advisory Committee, composed of representatives of Member States with a representative of the Commission as chairman.[47] This Advisory Committee is consulted by the Commission at various stages in the investigation, notably at the stage of initiation of the investigation[48] and of any reviews,[49] before termination,[50] before the Commission imposes provisional measures,[51] and before the Commission proposes that the Council adopt definitive measures.[52] The Advisory Committee only has an advisory role; its positions do not compel the Commission in any way. That being said, considering that the Advisory Committee contains Member State representatives and definitive measures can only be imposed by the Council composed of Member State representatives, the opinion of the Advisory Committee is generally taken seriously. After all, at the end, the decision of whether or not to adopt a definitive regulation will be based on the recommendation of these representatives to their respective Ministers sitting in the Council.

DG Trade, whose services conduct the investigations, consults other DGs of the Commission, notably DG Enterprise and the Legal Service, before a proposal for provisional measures or a draft of a Commission proposal for definitive measures is submitted to the Commission. On a formal basis, provisional anti-dumping or anti-subsidy duties can only be imposed by means of a Commission regulation, which has to be adopted by the college of Commissioners, voting by simple majority.

---

47 Anti-dumping Regulation, art. 15(1) and Anti-subsidy Regulation, art. 25(1).

48 Anti-dumping Regulation, art. 5(9) and Anti-subsidy Regulation, art. 10(13).

49 Anti-dumping Regulation, arts. 11, 12 and 13, Anti-subsidy Regulation, arts. 18-23.

50 Anti-dumping Regulation, art. 9(2) and Anti-subsidy Regulation, art. 14(2).

51 Anti-dumping Regulation, art. 7(4) and Anti-subsidy Regulation, art. 12(3).

52 Anti-dumping Regulation, art. 9(4) and Anti-subsidy Regulation, art. 15(1).

In safeguards, consultations take place in an Advisory Committee (whose members may or may not be the members of the AD or AS Advisory Committees) made up of representatives of each Member State with a representative of the Commission as chairman.[53] These consultations are held at the start of the proceedings, eight working days after the Commission has received information from a Member State about suspect import trends.[54] Consultation of the Advisory Committee is also called for during the application of surveillance or safeguard measures, to determine their efficacy and continued necessity.[55]

4.6 Notice

4.6.1 Is a complaint issued before an investigation begins or does investigation precede the complaint?

4.6.2 What are the requirements of notifying the target of a pending investigation or of the decision to issue a complaint? What information is conveyed in the notice? How specific must the notice be?

4.6.3 Are third parties notified of such action? What public notice is provided? Are complaints confidential?

The first public announcement of trade remedies case comes with the publication of a notice of initiation in the Official Journal of the European Communities. [56] This is a notice of initiation of an investigation; if the Commission services rejected the complaint, no public announcement is made. The notice of initiation is brief, generally two to three pages. It announces the initiation of the investigation, indicates the product and the countries concerned, gives a summary of the information received and provides that all relevant information must be communicated to the Commission within particular time limits.

In anti-dumping and anti-subsidy proceedings, the Commission must advise the exporters, importers and representative associations of importers of exporters it knows to be concerned, as well as representatives of the exporting country[57] and the complainants of the initiation of the investigation.[58] Although the Commission makes an effort to notify interested parties directly, publication of the notice is considered notice of the initiation of the investigation and interested parties are expected to take the initiative to make themselves known. Very often, interested parties find out about the investigation too late, i.a. because their own authorities failed to inform them and they failed to notice publication; in such a case, the Commission is generally unsympathetic, because the overall procedure is subject to strict deadlines that cannot be extended to accommodate companies who have come forward too late.

---

53 Safeguards Regulation, art. 4(1).

54 Safeguards Regulation, art. 3.

55 Safeguards Regulation, art. 21.

56 Anti-dumping Regulation, art. 5(9), Anti-subsidy Regulation, art. 10(13) and Safeguards Regulation, art. 6(1)(a).

57 The Commission sends a copy of the notice of initiation to the delegation of the target country or countries, which are better placed to make sure that the concerned companies are notified.

58 Anti-dumping Regulation, art. 5(11) and Anti-subsidy Regulation, art. 10(15).

In safeguard proceedings, the Commission has no obligation to endeavor to inform interested parties of its investigation, beyond the publication of the notice of initiation in the Official Journal of the European Communities.[59]

4.7 Conduct of the investigation

4.7.1 Are there time limits on completing investigation? Where no time limits are specified, are there general requirements? What happens if time limits are exceeded?

The time limits for completing anti-dumping and anti-subsidy investigations are strict: provisional measures in maximum nine months,[60] a regulation for imposition of definitive measures must be adopted fifteen months from initiation for anti-dumping,[61] thirteen months for anti-subsidy proceedings,[62] which means that the investigation has to be finished and the proposal submitted one month prior to the expiration of this deadline. The regulation does not allow the authorities any flexibility; if the deadlines are not respected, duties cannot be imposed.

According to the safeguard regulation, if the Commission considers that Community surveillance or safeguard measures are necessary, it shall take the necessary decisions no later than nine months from the initiation of the investigation. In exceptional circumstances, this time limit may be extended by a further maximum period of two months.[63] However, if those time limits are not respected, nothing in the regulation seems to prevent a Member State from later asking the Commission to take action, in which case it must take a decision within five working days of receipt of the request.[64] The regulation does not impose time limits for action to be taken by the Council, acting by qualified majority on a proposal from the Commission[65], if that route is taken, which never happens.

4.7.2 What are the techniques whereby the Commission can investigate private parties and learn the facts of disputed transactions? Required periodic reports? Subpoenas (or equivalent process such as Art. 11) to compel persons to show up and give testimony? Subpoenas to require the submission of documents? Physical inspections of business premises or private homes? Inspection of required records? What are the consequences of failing to comply with compulsory process?

---

59 Safeguards Regulation, art. 6(1)(a).

60 Anti-dumping Regulation, art. 7(1), Anti-subsidy Regulation, art. 12(1). It is not compulsory to take provisional measures; the Commission can skip this step and still propose definitive measures. However, skipping the provisional stage is frowned upon, both by outside practioners and within the Commission itself. It gives interested parties less of an opportunity to comment meaningfully on the proposed measures and it gives the Commission less opportunity to perfect its proposal.

61 Anti-dumping Regulation, art. 6(9).

62 Anti-subsidy Regulation, art. 11(9).

63 Safeguards Regulation, art. 7(3).

64 Safeguards Regulation, art. 16(6).

65 Safeguards Regulation, art. 17.

Providing information to the Commission in the course of trade remedies investigations is entirely voluntary; the Commission has no power whatsoever to compel answers. However, interested parties often participate in the investigation, because if they do not, or if the Commission deems their cooperation insufficient, the Commission can proceed on the basis of "non-cooperation" (see below), or, in the absence of cooperation of the Community industry, decide that there is no or insufficient evidence of injury.

4.8 Rights and duties of target

4.8.1 What privileges are available to the target of investigation? Attorney client? Self-incrimination? Work product?

4.8.2 Is there a duty on the part of private parties to cooperate in the investigation? What is the nature and source of this duty and does it vary as between sanction cases and application cases?

Since cooperation with the investigation is voluntary, parties can refuse access to any information for whatever reason, subject always to the threat by the Commission of being deemed "uncooperative" and having the Commission make decisions on the basis of the "facts available". However, providing a justification for refusal, for example, legal privilege, can help to avoid that the Commission sees the refusal as evidence of lack of cooperation.

4.8.3 Must the target be notified when third parties are questioned regarding the target?

Parties need not be notified when the Commission interviews third parties about them, but if the Commission intends to rely explicitly on information provided orally, interested parties have a right to comment on it. In such a case, a non-confidential summary of the remarks would have to be prepared for the file, probably by the private party upon the request of the Commission. All written submissions must be accompanied by a non-confidential version, which is made available to interested parties as part of the non-confidential file.

However, oral submissions to the Commission are often not "relied upon" as such, but can have a significant influence on the case handlers. For example, during the on-site verification visits, the Commission officials invariably ask questions of persons in the companies they visit. Responses are recorded in the mission report of the case handlers, never provided to other interested parties. Where these statements do not contain business secrets, it is a lacuna in the legal protection of interested parties that oral submissions do not have to be recorded or reported in the file that is available for inspection.

4.8.4. What are the mechanisms whereby the target can raise issues about pending investigations?

The target of an investigation is allowed to make written submissions, provided that they arrive within the time limits set in the notice of initiation of the investigation. Generally, the target will make written comments on the complaint in the first instance, exporters will also often take the opportunity of the reply to the Commission's questionnaire to make further written comments. The target will also have an opportunity for one or two oral hearings, in which it can make its case orally. Most substantively, the target receives disclosure of the details underlying

the essential facts and considerations on the basis of which provisional measures are imposed,[66] likewise for the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures,[67] and it has the opportunity to submit comments on disclosure.

These opportunities are not expressly provided for in the case of a safeguard proceeding. However, in a recent case the targets, i.e. the authorities of the exporting countries and even the exporters that had made themselves known, did receive a disclosure documents following the imposition of provisional measures.

4.8.5. Are there any defenses against investigation? Harassment? Selective complaints (that is, Commission has picked on one party but not others)? Excessive burden of demand for information?

In anti-dumping and anti-subsidy proceedings, in principle, if the Commission opens an investigation on the basis of a properly filed and substantiated complaint, it is not a defense to cry harassment or to argue that others ought to be investigated too. The company might be able to convince the Commission to look into imports from another source in addition, on the basis of the general principle of non-discrimination. Furthermore, if the products of others are causing problems, they can be raised in the course of the investigation as a possible "other factor" causing injury.[68]

Safeguard proceedings must be initiated against all countries exporting the "like" or "directly competitive" products to the EU, except in the case of a special safeguard against China.[69]

With safeguards, where imports of a product have already been subject to a safeguard measure, no new measure can be applied to that product until a period equal to the duration of the previous measure has elapsed. Such period shall not be less than two years. However, a safeguard measure of 180 days or less may be re-imposed for a product if at least one year has elapsed since the date of introduction of a safeguard measure on the import of that product and such a safeguard measure has not been applied to the same product more than twice in the five-year period immediately preceding the date of introduction of the measure.[70]

4.9 Access to information in Commission files

4.9.1 What are the rights of access to information in the Commission's files by the target or a rejected applicant? Everything in the files or only selected information? If the latter, who decides what information is to be provided? Is access given to member states but not private parties?

4.9.2 How is this right exercised & when must it be exercised? When must the information be provided?

---

66 Anti-dumping Regulation, art. 20(1) and Anti-subsidy Regulation, art. 30(1).

67 Anti-dumping Regulation, art.20(2) and Anti-subsidy Regulation, art. 30(2).

68 Anti-dumping Regulation, art. 3(7) and Anti-subsidy Regulation, art. 8(7).

69 Council Regulation 427/2003 O.J. (L 65) 1.

70 Safeguards Regulation, art. 22.

4.9.3 Can affected third parties such as competitors have access to Commission's files? How about people representing the public interest?

4.9.4 What information in the files is unavailable, for example because of trade secrets [Art. 287]? Unavailable because of confidentiality, informant protection, or state secrets? Unavailable because they are staff advisory memos or preliminary decisional documents? (These question may overlap the project on transparency and data protection).

4.9.5 Consequences if Commission fails to provide access to information? Does it make the subsequent decision illegal? Only if the failure to provide information was prejudicial?

In anti-dumping and anti-subsidy cases, the complainants, importers and exporters and their representative associations, users and consumer organizations – thus, interested parties, not the general public – plus representatives of the exporting country have a right to inspect all information made available by any party to an investigation.[71]

In terms of protection of confidentiality, all written submissions made by interested parties, in order to be considered by the Commission, must be accompanied by a non-confidential version.[72] The same applies to questionnaire replies, which are required to be submitted in a "limited" and "non-limited" version. The non-confidential versions of all documents are placed in the file, for inspection by interested parties. These versions may not always contain summaries of confidential information that are meaningful enough to allow other interested parties to defend themselves properly. In contrast to the US, no disclosure of confidential information to lawyers under a protective order is possible in the EU.

Information is passively placed in the file and it is the interested parties' responsibility to come check its contents periodically. The Commission does not notify interested parties when new documents enter the file. As a result, an interested party could be unaware of the arrival of an important document in the file, missing the opportunity to comment on it. Although it is an admittedly unsatisfactory solution, lawyers generally stay in contact with the Commission officials in charge of the case, calling them frequently in order to check the status of the file to determine when a visit to the file is called for.

Interested parties are not allowed to see the Commission's internal memos and mission reports.[73] These internal working papers do not make up part of the file and are virtually never disclosed.

The Commission summarizes its conclusions for the first time in a provisional disclosure letter. This is produced at the same time as the provisional regulation, and it is provided to

---

71 Anti-dumping Regulation, art. 6(7) and Anti-subsidy Regulation, art. 11(7).

72 Anti-dumping Regulation, art. 19(2) and Anti-subsidy Regulation, art. 29(2). As noted above, provisions for non-confidential versions of *oral* submissions are lacking in the Community legislation, leaving open a gap in the legal protection of interested parties.

73 Anti-dumping Regulation, arts. 6(7) and 19(5), Anti-subsidy Regulation, arts. 11(7) and 29(5).

interested parties as a matter of course. Other parties can make a written request for a copy of this letter, which is meant to be "disclosure of the details underlying the essential facts and considerations on the basis of which provisional measures have been imposed."[74] When the provisional disclosure letter is for companies targeted by the investigation, it also contains an individualized part addressed to individual companies only, in which the Commission analyzes specific confidential information (such as prices) pertaining to that company.

Definitive duties are preceded by a final disclosure letter. This letter contains final disclosure of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures, or the termination of an investigation or proceedings without the imposition of measures.[75] Final disclosure is normally made not less than one month before the definitive regulation, and interested parties have at least 10 days to comment.[76]

Provisions for access to the file are conspicuously absent from the safeguard regulation. However, in practice, access is granted along the same lines if the exporting country's authorities so request.

4.10 Settlement or compromise. What opportunities exist to settle or compromise a dispute before formal proceedings are instituted or after they are instituted but before decision? What obligation is imposed on the Commission to conduct settlement negotiations in good faith? If there are conflicting private parties, what is the process whereby complaints by private parties are settled or compromised?

A common means of "settling" an anti-dumping or anti-subsidy investigation is by means of an undertaking. Once a provisional affirmative determination of dumping or subsidization and injury is made, the Commission can accept a voluntary undertaking offer, after specific consultation of the Advisory Committee.[77] In dumping, the undertaking is usually a price undertaking, where the company commits itself to charge at least a certain amount for the product in the future. In anti-subsidy cases, the undertaking would be from the government, promising to cease subsidization, or from particular companies, agreeing to cease exports or to charge at least a certain price for them.[78]

In return, the Commission agrees to waive the anti-dumping or anti-subsidy duty for that company.[79] If undertakings are accepted, the investigation of dumping and injury is normally still completed.[80] If a negative final determination is made, the undertakings automatically lapse, except where the negative final determination is basically due to the existence of the undertaking. (In that case, the undertaking may be required to be maintained for a reasonable period.) If an affirmative final determination of dumping/subsidization and injury is made, then the undertaking stays in place and its duration is as long as the underlying anti-dumping or anti-subsidy

---

74 Anti-dumping Regulation, art. 20(1) and Anti-subsidy Regulation, art. 30(1).

75 Anti-dumping Regulation, art. 20(2) and Anti-subsidy Regulation, art. 30(2).

76 Anti-dumping Regulation, art. 20(5) and Anti-subsidy Regulation, art. 30(5).

77 Anti-dumping Regulation, art. 8 and Anti-subsidy Regulation, art. 13.

78 Anti-subsidy Regulation, art. 13(1)(a) and (b).

79 Anti-dumping Regulation, art. 8 and Anti-subsidy Regulation, art.13.

80 Anti-dumping Regulation, art. 8(6) and Anti-subsidy Regulation, art. 13(6).

regulation. If undertakings are accepted from all the companies concerned, then the investigation is terminated (barring objection from the Advisory Committee).[81]

The offer of an undertaking has to be timely, except for in exceptional circumstances, at the latest at the time that the comments on final disclosure are due. The regulations also say that non-confidential version of the undertaking offer must be provided, to allow other interested parties to comment on it.[82]

Undertakings have the advantage that the amount of the price increase is kept by the company, rather than being paid as an anti-dumping or anti-subsidy duty into the Community budget. However, undertakings have the disadvantage of anti-competitively fixing prices at a certain level, even though the regulations do caution that price increases should not be more than necessary to offset the amount of dumping/subsidization or injury, whichever is the lowest.[83]

In addition, compliance with undertakings is difficult to monitor, and sometimes the offer of an undertaking is rejected as impracticable.[84] It can be difficult for the Commission to discover breaches of undertakings, so when undertakings are accepted, the Commission requires exporters, or in the case of subsidies, countries, to provide periodic reports of compliance. It also requires companies/governments to accept verification of pertinent data.[85]

In case of breach, the benefit of a price undertaking is quickly and easily (in procedural terms) withdrawn, and any interested party is entitled to submit *prima facie* evidence of a breach, which the Commission is required to investigate.[86] Failure to comply with reporting obligations or any suspicion of a breach of an undertaking tends to result in a wholesale withdrawal of its benefits, after consultation with the Advisory Committee and after the exporter/country has been given the opportunity to comment. Where the acceptance of the undertaking is withdrawn, the provisional or definitive duty automatically applies.[87]

As for settling a safeguard action, the taking of safeguards is an intensely political matter, and the EU might drop its action upon reaching a political compromise with the foreign government or governments in question. For example, although "voluntary" restraints imposed by a foreign government are prohibited by the WTO Safeguards Agreement, the Chinese government recently announced its intention to impose export quotas for textiles, in order to ward off safeguard and other trade remedy actions upon expiration of the WTO Agreement on Textiles and Clothing in the beginning of 2005.

5. The individualized/generalized (or adjudicative-legislation) distinction

Are there procedural distinctions between situations in which an individual party is affected on grounds particular to that party (individualized or quasi-adjudicative action) and situations in which a large number of different persons are affected in the same way (generalized or quasi-legislative action)? For example, in the case of generalized action, are the rules relating to

81 Anti-dumping Regulation, art. 8(5) and Anti-subsidy Regulation, art. 13(5).

82 Anti-dumping Regulation, art. 8(4) and Anti-subsidy Regulation, art. 13(4).

83 Anti-dumping Regulation, art. 8(1) and Anti-subsidy Regulation, art. 13(1)(b).

84 Anti-dumping Regulation, art. 8(3) and Anti-subsidy Regulation, art. 13(3).

85 Anti-dumping Regulation, art. 8(7) and Anti-subsidy Regulation, art. 13(7).

86 Anti-dumping Regulation, art.8(9) and Anti-subsidy Regulation, art. 13(9).

87 Anti-dumping Regulation, art.8(9) and Anti-subsidy Regulation, art. 13(9).

investigation, hearings, and decisions different than in the case of adjudication? If there are such distinctions, how is this line between individualized and generalized action drawn in practice?

In trade remedies cases, final decisions are in the form of regulations, which are of general application. In anti-dumping and anti-subsidy cases measures provided by them are individualized together with a measure of general application.

6. Hearing phase

6.1 Rights to an administrative hearing

6.1.1 Is there a right to one or more hearings in your sector? In which type of dispute is an opportunity for hearing provided?

Interested parties have a right to be heard in anti-dumping and anti-subsidy procedures, at least once.[88] In many cases, when parties request it, they are permitted a second or even third hearing. However, additional hearings are granted at the discretion of the Commission officials in charge of the case.

The Court of Justice of the European Communities, which was responsible for trade remedies cases prior to the creation of the European Court of First Instance in 1989, has specifically said that the right to a fair hearing in anti-dumping investigations is a fundamental principle protected by Community law:

> […] Those requirements must be observed not only in the course of proceedings which may result in the imposition of penalties, but also in investigative proceedings prior to the adoption of anti-dumping regulations which, despite their general scope, may directly and individually affect the undertakings concerned and entail adverse consequences for them.[89]

For safeguards, interested parties also have a right to be heard orally by the Commission where they have made a written application showing that they are actually likely to be affected by the outcome of the investigation and that there are special reasons for them to be heard orally.[90]

6.1.2 Who is entitled to a hearing in the case of a prospective adverse decision? In addition to parties who would be subject to sanctions, or parties whose applications are denied, is anyone else is entitled to a hearing? Competitors who would be harmed by the grant of favorable treatment by the Commission to an applicant? Persons claiming to protect the public interest?

As mentioned above, in order to have a right to be heard, interested parties must make themselves known in writing within the time limits set by the notice of initiation. This written manifestation of interest has to show that the party is an interested party "likely to be affected by the result of the proceeding" and that there are "particular" or "special reasons" why they should

---

88 Anti-dumping Regulation, art. 6(5) and Anti-subsidy Regulation, art. 11(5).

89 Al-Jubail Fertilizer Company (Samad) et Saudi Arabian Fertilizer Company (Safco) v. Council of the European Communities, Case C-49/88, 1991 E.C.R. 3187, para. 15.

90 Safeguards Regulation, art. 6(4).

be heard.[91] As a matter of practice, it can be observed that the Commission interprets these provisions very liberally, usually allowing anyone who asks for hearing (as long as they can make out a reasonable interest) to be heard.

6.1.3 If several private parties are involved, will there be separate hearings or just one hearing?

6.1.4 Can other interested parties intervene in the hearing? How else can they participate (for example, is there a practice of filing amicus briefs?

Generally, interested parties each have their own individual hearing and other persons are not informed nor invited to attend. Often, after a hearing, the interested party will submit a confidential and non-confidential copy of its presentation, which is then available for perusal and comment by other interested parties.

The Commission officials may attempt, in the interest of saving time and avoiding repetition, to group interested parties with similar concerns, such as importers, so as to have one long hearing instead of several shorter ones. However, if parties object to being "grouped", the Commission will usually, as far as practicable, try to accommodate them by granting them individual hearings.

The amount of time allocated to the hearings and whether or not interested parties can have individual hearings depends to a very large extent on the discretion of the individuals in charge of the case and on the number of parties involved who request a hearing. Some officials are very strict, insisting that the hearing be no more than one hour, for example, while others are willing to allow the hearing to continue as long as necessary in order to allow the interested party to address all its concerns.

6.1.5 At what point in time is a private party entitled to a hearing? Before or after the Commission has taken legally effective action? At any point during the investigatory process? Before a benefit is terminated or after it has been terminated?

In general, in anti-dumping and anti-subsidy matters, the first hearing takes place after verification and before the provisional regulation. By having a hearing at that moment, interested parties hope to have an impact on the Commission's thinking before it is consecrated into a regulation.

However, interested parties may consider that they have more to say once they have seen the provisional regulation and provisional disclosure of the essential facts and considerations that were the basis for the provisional regulation. At that point the Commission has disclosed its preliminary point of view; up until that point, the Commission does not inform interested parties of its conclusions or inclinations. Therefore, some interested parties prefer to be heard (or heard again) at that stage.

Whether or not the Commission will accommodate requests to be heard at different moments or to have a second hearing depends very much on the discretion of the individual

[91] Anti-dumping Regulation, art. 6(5), Anti-subsidy Regulation, art. 11(5) and Safeguards Regulation, art. 6(4).

Commission officials involved in the case. Their obligation is simply to hear interested parties – when and how often is not specified.

Similarly, the safeguard regulation does not go into specifics about the right to be heard, beyond saying that interested parties have such a right, if they ask within the time limits and show that they are actually likely to be affected by the outcome of the investigation and that there are special reasons for them to be heard orally.[92]

6.1.6 How serious does the proposed action have to be to trigger a right to a hearing? (We note different adverbs being used such as "perceptibly affected" or "gravely affected") Is there a right-privilege distinction? Doctrine of legitimate expectations? Are discretionary decisions treated differently from non-discretionary decisions? Are decisions to take away an existing benefit (or to prohibit certain actions) treated differently from applications for a new benefit or for permission to take action?

6.1.7 As to what issues is person entitled to a hearing? Only if there are disputed facts? Is there a distinction between "adjudicatory facts" (that is, facts about the parties) and "legislative facts" (that is, generalized facts that don't concern the specific parties)? Where discretionary action is at stake? Where party wishes to argue for a new legal interpretation or for an exception to existing precedents? How about the situation in which a rule (delegated legislation) has already resolved the issue that the person wishes to raise—is there still entitlement to a hearing? Where Commission has discretionary powers, can it constrain that power by adopting generally applicable rules?

There are not rules regulating or indicating appropriate topics for a hearing. Interested parties are entitled to come to present whatever they feel is relevant to the Commission officials. Commission officials will often say "this is <u>your</u> show" to interested parties who come for a hearing, emphasizing that the Commission officials are there to listen to whatever the interested party considers relevant, but refusing to enter into a dialogue with the interested party at the hearing.

6.2 Hearing officer or officers

6.2.1 Who is the hearing officer or officers? How are those persons qualified and trained? Is the person a full-time hearing officer or does he/she have other tasks? How many hearing officers are present at a hearing (that is, is there just one hearing officer or is there a panel of hearing officers)?

In trade remedy cases, there is not a "hearing officer"; the Commission officials in charge of the particular case are the persons who conduct and attend the hearing. In general, the case

[92] Safeguards Regulation, art. 6(4).

handlers and their immediate superiors (Heads of Section) will attend the hearing. Sometimes, a Head of Unit, higher in the hierarchy, will attend the hearing. It would be very rare indeed to see the Head of Unit's superior, the Director, attend a hearing.

In other words, the persons who attend the hearing are not specialized in hearings; the hearing is simply one of the stages of a proceeding that takes place in every case. The case handlers and their superiors are responsible for every aspect of the particular case to which they are assigned, the hearing included.

6.2.2 What is the role of the hearing officer or officers? To serve as independent administrative judges (as would occur in an adversarial system) or as officials gathering information as part of an administrative investigation (as would occur in an inquisitorial system). [See part 1. of these guidelines for further background on this distinction] Or do they serve some other function or functions?

Hearings are part of the information gathering of the investigation. As mentioned above, the Commission officials generally listen passively and do not engage in a debate. They generally begin the hearing with a statement that the hearing is the interested party's opportunity to state its concerns; the Commission official will generally warn the participants that it will not answer questions or enter into a debate on the merits of the case. While the Commission officials usually do not answer questions themselves, they often do pose questions to the company being heard. However, the Commission's questions are generally related to the topics that the company has chosen to focus on, and crop up in the course of the hearing.

6.2.3 In adversarial systems, there are various rules intended to safeguard the independence of hearing officers in administrative proceedings. Perhaps none of these rules apply to the inquisitorial proceedings conducted by the Commission. Is there any law or practice in your sector that provides protection to private interests similar to the following:

6.2.3.1 Could decisionmakers be disqualified for any form of bias? For example, what about a financial conflict of interest? Is there a transparency system in which officials must disclose any financial interests? How about clear evidence that a decisionmaker has prejudged the issues? If any such bias issues can be raised, how do you raise them and when must you raise them?

6.2.3.2 Are there any limitations on off-the-record ("ex parte") communications between the decisionmakers and by parties outside the Commission?

6.2.3.3 Is there any separation of functions of Commission staff members? In other words, can persons who have played roles as investigators, prosecutors, or advocates serve as hearing officers or advisers to hearing officers?

6.2.3.4 Are there any rules prohibiting or relating to legislative or political pressure on decisionmakers?

Because the hearings are informal, there is no hearing officer; they are inquisitorial and very rarely adversarial. Concerns about the impartiality of the Commission officials conducting the hearing generally do not arise. There are no provisions for objecting on the basis of bias.

6.3 Conduct of hearing

6.3.1 Hearing or conference? Is the "hearing" a meaningful step in the decisionmaking process or merely a relatively useless informal conference with Commission officials? Please explain.

6.3.2 What is the order of events at the hearing? For example, does the prosecution open with a statement of its position?

6.3.3 Do witnesses present testimony at the hearing? If so, who selects the witnesses—the hearing officer or the lawyers? Who frames the issues? Who decides on the order in which witnesses testify? Who puts questions to the witnesses? Can hearing officer engage his own experts? If he does, can the parties present their own experts?

As mentioned above, hearings in trade remedy cases are informal. In fact, it is almost a misnomer to call them "hearings", so informal and unstructured they are. They generally take place in a meeting room near the offices of the case handlers in charge of the case, with the participants sitting around a table. A hearing is an opportunity for interested parties to have the attention of the officials responsible for the case, so although in many cases it is not a "meaningful" event, it does provide some opportunity to ensure that the case handlers are aware of certain issues.

In terms of "witnesses", the interested party can bring whatever persons it deems fit to its hearing, and the Commission officials may very well ask questions. It is for this reason that interested parties must be careful about who they bring to a hearing, must brief them as to the issues of the case, and must know in advance what they plan to say and would say if asked specific questions. Individuals do not have an obligation to answer questions, but refusal makes a very negative impression on the officials in charge of the case. In such situations, it is better not to bring certain persons along to the hearing at all rather than have them be faced with questions they do not want to answer.

6.3.4. Presentation of proof. Assuming that the hearing is more than an informal conference but is actually an opportunity to present proofs, how are proofs presented? Oral or written? Audio-visual? Expert testimony? Qualification of experts? Any rules of evidence? Burden of proof rules?

6.3.5 Does the Commission staff present evidence or argument or only the private party or parties?

6.3.6 Is there one continuous hearing or are the proceedings carried on discontinuously from time to time?

6.3.7 Confrontation. Can one side (private or Commission) contradict the proofs or arguments introduced by the other side? How? Cross-examination?

There is provision in the anti-dumping and anti-subsidy rules for confrontational hearings, where importers, exporters, representatives of the government of the exporting country and the complainants can meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered.[93] No party is obliged to attend such a meeting however, and the regulation specifically says that failure to do so shall not be prejudicial to that party's case. As a practical observation, such confrontational hearings are exceedingly rare.

6.3.8 Is there any requirement that persons responsible for making a decision have achieved personal familiarity with the issues or can the decision be purely institutional in nature?

6.3.9 To what extent are criminal law standards followed in cases of serious sanctions such as a requirement that the Commission prove fault or intent? Is there a requirement that legal standards be clearly defined? How does one distinguish whether the administrative law or criminal law standards are applied?

6.3.10 Time limits on making the decision? How long is a "reasonable time"?

6.3.11 How is the record of the hearing maintained? Is there a verbatim transcript? What goes into the record and to what degree can decisionmaker rely on material outside the record? Can decisionmaker rely on his/her own expertise? Can decisionmaker rely on material in Commission's files? Can the decisionmaker take official notice of facts that have not been proved and what is the procedure for doing so?

There is no transcript of the hearing made. The officials may take notes of what is presented, but in general interested parties that make a presentation provide the Commission after the fact with a confidential and non-confidential version of it.

7. Decisional phase.

7.1 Are we correct in assuming that the officials who conducted the hearing do not write a "proposed" decision? Our assumption is that there is only a single final decision at the conclusion of the process, not a series of tentative decisions.

No decision is made pursuant to the hearing.

In anti-dumping and anti-subsidy cases, the first decision that the Commission emits is the provisional regulation, which is adopted by it maximum nine months after initiation of the procedure.[94] (The Commission could also decide to terminate the procedure at any point, after consultation and if no objection is raised in the Advisory Committee.[95])

Where the facts as finally established show that there is dumping or countervailable subsidies and injury caused thereby, and the Community interest calls for intervention, a definitive anti-dumping or countervailing duty shall be imposed by the Council, acting on a

---

93 Anti-dumping Regulation, art. 6(6) and Anti-subsidy Regulation, art. 11(6).

94 Anti-dumping Regulation, art. 7(1) and Anti-subsidy Regulation, art. 12(1).

95 Anti-dumping Regulation, art. 9(1) and (2), Anti-subsidy Regulation, art. 14(1) and (2).

proposal submitted by the Commission after consultation of the Advisory Committee.[96] The proposal is adopted by the Council unless it decides by a simple majority to reject the proposal, within a period of one month after its submission by the Commission.[97] The regulations specify that the amount of the anti-dumping or countervailing duty shall not exceed the margin of dumping or subsidization established but it "should" be less if such lesser duty would be adequate to remove the injury to the Community industry.[98] The "should" reflects the terminology of the WTO Anti-Dumping Agreement. Under EU law as interpreted by the EU Courts, it means "must" pursuant to the proportionality principle.

In safeguard cases, the Commission can decide preliminarily to take provisional measures which can stay in place for 200 days, while it is conducting its investigation.[99] Definitively the Commission can decide, within maximum nine months of the initiation of the investigation, to terminate the investigation with no surveillance or safeguard measures, after consultation of the Advisory Committee.[100] Termination is to take place within maximum one month of the consultation. If the Commission considers that Community surveillance or safeguard measures are necessary, it makes the necessary decisions no later than nine months (exceptionally extended for two further months) from the initiation of the investigation.[101] Any decision taken by the Commission can be challenged by a Member State, which refers the decision to the Council. Then the Council, acting by a qualified majority, may confirm, amend or revoke that decision.[102] If, within three months of the referral of the matter to the Council, the Council has not taken a decision, the decision taken by the Commission shall be deemed revoked. The Council also has the power, acting by a qualified majority on a proposal from the Commission, to take safeguard measures.[103] However, this power has heretofore not been used.

7.2 What is the nature of the decision-maker's obligation to find facts (how detailed must fact findings be)? Must the decisionmaker provide and justify legal interpretations and conclusions? Must the decision-maker furnish reasons for discretionary decisions? How detailed a statement of reasons must be provided? [Art 253] Must the statement of reasons cover all of the factors that the agency is required to consider?

In anti-dumping and anti-subsidy proceedings, to take action the Commission must have proof that the constituent elements empowering the institutions to impose anti-dumping or anti-subsidy measures are present: dumping or subsidization, material injury, and causation.[104] Furthermore, they are required to determine that imposing measures would not be against the Community interest.[105] In theory, on this point, the EU rules differ much from US rules that provide for measures once dumping / subsidization and resulting injury are established. In

---

96 Anti-dumping Regulation, art. 9(4) and Anti-subsidy Regulation, art. 15(1).

97 [The method of voting was changed by the amending Council Regulation 461/2004 of 8 March 2004 O.J. (L 77) 12.]

98 Anti-dumping Regulation, art. 9(4) and Anti-subsidy Regulation, art. 15(1).

99 Safeguards Regulation, art. 8(2).

100 Safeguards Regulation, art. 7(2).

101 Safeguards Regulation, art. 7(3).

102 Safeguards Regulation, art. 16(8).

103 Safeguards Regulation, art. 17.

104 Anti-dumping Regulation, arts.7(1) and 9(4), Anti-subsidy Regulation, arts. 12(1) and 15(1).

105 Anti-dumping Regulation, art. 21 and Anti-subsidy Regulation, art. 31.

practice, although the Community interest is increasingly emphasized, cases in which no measures are adopted on the ground that they are not in the Community interest are very rare.

To prove the existence of dumping or subsidization, the Commission sends questionnaires to exporters and to the governments. The Commission officials then conduct on site verification visits in order to ensure that the information provided in the questionnaire replies was true and accurate. Questionnaires ask for a transaction-by-transaction report of all domestic sales[106] (for normal value) and export sales (for export price) that occurred during the year-long investigation period. For subsidization, they will investigate in the company's books what payments it received from government; the Commission will also ask the government about payments to companies. On the basis of such data, the Commission can evaluate the dumping or subsidization margin. For injury, the Commission also relies on questionnaire replies, this time from the Community industry and importers. The analysis of injury involves primarily a determination of the amount of price underselling or price undercutting. These questionnaire replies are also verified on site. In addition to the questionnaire replies, which are the Commission's primary source of data, the Commission also has information gathered from the complainants and through the hearings.

Non-cooperation in anti-dumping and anti-subsidy cases

Companies or governments could refuse to cooperate with the investigation. In that event, the Commission is not paralyzed by their failure to provide information. The regulations empower the Commission to proceed on the basis of "facts available" or the "best information available" in case of non-cooperation.[107]

The "best information available" often turns out to be the worst information available from the perspective of the "target", for example, figures provided by the complainants. That being said, the Commission is admonished in the regulations to make an effort to crosscheck this "best information" against other independent sources, particularly when best information is used to establish normal value. The other independent sources could be published price lists, official import statistics and customs returns, or information obtained from other interested parties. That being said, the Commission is only asked to do so "where practicable and with due regard to the time limits of the investigation."[108] In addition, since the Commission does not want to encourage non-cooperation, so in using the "facts available", it usually errs on the side of caution, meaning prefers the information that shows the greatest margin of dumping and/or injury.

Thus, non-cooperation has consequences, and the regulations explicitly say that "[i]f an interested party does not cooperate, or cooperates only partially, so that relevant information is thereby withheld, the result may be less favorable to the party than if it had cooperated."[109] The consequences of non-cooperation can be so negative in fact that the regulations place some limits on the Commission's ability to call "non-cooperation" and move to the "facts available." For example, the regulations say that failure to provide a computerized response does not necessarily constitute non-cooperation,[110] and information that is not "ideal in all respects" should not simply

---

106 In the case of a market economy country; for non-market economy countries, the investigation of normal value may involve investigation of an appropriate company in an analogue country.

107 Anti-dumping Regulation, art. 18 and Anti-subsidy Regulation, art. 28.

108 Anti-dumping Regulation, art. 18(5) and Anti-subsidy Regulation, art. 28(5).

109 Anti-dumping Regulation, art. 18(6) and Anti-subsidy Regulation, art. 28(6).

110 Anti-dumping Regulation, art. 18(2) and Anti-subsidy Regulation, art. 28(2).

be disregarded. Rather, companies should be given a reasonable chance to complete any deficiencies.[111] Finally, if evidence or information is not accepted, the entity that provided the information is to be informed and given an opportunity to provide further explanations. If the explanations are deemed unsatisfactory, the reasons must be disclosed in published findings.[112]

In general, the Community institutions are required by Article 253 EU Treaty to state the reasons on which any decision is based, to enable judicial review of their decisions.

Safeguards

With regard to safeguards, a decision to take action requires proof that there is serious injury or a threat of serious injury to Community producers resulting from imports.[113] In addition, although it is not mentioned in the EU legislation, WTO dispute settlement has also made it clear that serious injury or a threat of serious injury must be the result of "unforeseen developments".[114]

"Serious injury" is defined by the EU regulation as a significant overall impairment in the position of Community producers, and "threat of serious injury" is defined as serious injury that is "clearly imminent".[115] Proof that imports are causing or threatening to cause serious injury is provided by evidence that there has been a significant increase, either in absolute terms or relative to production or consumption in the Community, in the volume of imports and that there has been significant price undercutting by imports as compared with the price of a like product in the Community.[116] Proof of serious injury is provided by evidence of the impact on Community producers as indicated by trends in certain economic factors like production, capacity utilization, stocks, sales, market share, prices (i. e. depression of prices or prevention of price increases which would normally have occurred), profits, return on capital employed, cash flow and employment.[117]

In terms of a positive obligation to gather evidence itself, the safeguard regulation is relatively lax, simply calling on the Commission to seek all information it deems to be "necessary" and, "where it considers it appropriate", to endeavor to check this information with importers, traders, agents, producers, trade associations and organizations.[118]

The Community institutions are also bound in safeguard proceedings by Article 253 EU Treaty, which requires them to state the reasons on which any decision is based, to enable judicial review of their decisions.

7.3 Is there a duty of care imposed on decisionmaker to consider and respond to all relevant submissions by the parties (a dialogue requirement)?

---

111 Anti-dumping Regulation, art. 18(3) and Anti-subsidy Regulation, art. 28(3).

112 Anti-dumping Regulation, art. 18(4) and Anti-subsidy Regulation, art. 28(4).

113 Safeguards Regulation, art. 5(2).

114 [General Agreement on Tariffs and Trade 1994, art. XIX:1(a)] – case law – EU defendant

115 Safeguards Regulation, art. 16(1) [I'd rather say it's art. 5(a) and (b)].

116 Safeguards Regulation, art. 10(1)(a) and (b).

117 Safeguards Regulation, art. 10(1)(c).

118 Safeguards Regulation, art. 6(2).

According to the Court:

> […] In any event, the undertakings concerned should have been placed in a position during the administrative procedure in which they could effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence relied on by the Commission in support of its allegation concerning the existence of dumping and the resultant injury […].[119]

In anti-dumping and anti-subsidy cases, the regulations impose on the Community institutions the obligation to disclose "the details underlying the essential facts and considerations" on the basis of which provisional measures have been adopted and at the time that the Commission makes a proposal for definitive measures or the termination of an investigation or proceedings without the imposition of measures.[120] Interested parties have an opportunity to comment on disclosure, and the Commission will, where it considers it necessary, respond to their submissions in the regulations it proposes for adoption to the Council.

7.4 Is there a reasonableness requirement imposed on discretionary decisions? If so, how is it stated? Misuse of power? Failure to consider all relevant factors? Manifest error? Is there a requirement of proportionality? How defined?

The Community institutions can be sanctioned for unreasonable exercise of their discretion by the European Courts, on the basis of lack of competence, infringement of an essential procedural requirement, infringement of the EU Treaty or of any rule of law relating to its application or misuse of power.[121] In terms of "reasonableness", respect of the EU Treaty also means that the Community institutions must respect fundamental principles of Community law, one of which is proportionality, in coming to their decisions. However, it can be commented that the standard of review in trade remedies cases tends to grant the Community institutions a great deal of latitude.

7.5 What remedies are available to the Commission? Cease and desist orders? Divestiture? Invalidation of intellectual property? Declaratory relief? Civil money penalties? Restitution? License revocation? Other sanctions?

No remedies other than those provided for by the basic Anti-dumping, Anti-subsidy and Safeguards Regulations may be imposed.

7.6 Is the full decision publicly available? How is it publicized?

In anti-dumping and anti-subsidy cases, both the provisional regulations and the definitive regulations are published in full in the Official Journal of the European Communities.[122]

---

119 Ajinomoto Co. Inc. and The NutraSweet Company v. Council of the European Union, Joined cases T-159/94 and T-160/94, 1997 E.C.R. 2461, para. 83.

120 Anti-dumping Regulation, art. 20 and Anti-subsidy Regulation, art. 30.

121 Treaty Establishing the European Community (Consolidated version established after the Treaty of Nice), art. 230.

122 Anti-dumping Regulation, art. 14(2) and Anti-subsidy Regulation, art. 24(2).

While the safeguard regulation does not specifically require publication in the Official Journal of the European Communities of formal action, such publication does occur, in the same way as in anti-dumping and anti-subsidy cases.

7.7 Process resulting in a rule: We recognize that Commission proceedings sometimes result in an individualized decision and sometimes in a rule of general application. Does the process in your sector sometimes result in adoption of a rule rather than a decision? If so, please provide additional information about when and how this might occur.

In trade remedies cases, final decisions are in the form of regulations, which are of general application. In anti-dumping and anti-subsidy cases measures provided by them are individualized together with a measure of general application.

8. Administrative reconsideration

8.1 Is there an opportunity to seek reconsideration of the Commission's decision? If so, how is reconsideration requested? Please describe the process of reconsideration. For example, who considers the reconsideration decision and how is the decision to reconsider made?

Interim reviews

In anti-dumping and anti-subsidy cases, interested parties may apply to the Commission for an interim review, provided that at least one year has elapsed since the imposition of the definitive measure.[123] Such reviews can be initiated earlier, on the initiative of the Commission or at the request of a Member State. In an "interim review", the Commission examines the need for the continued imposition of measures, on the argument that they are no longer necessary to offset dumping and/or that the injury would be unlikely to continue or recur if the measure were removed or varied.[124] An interim review can also consider the need to increase the measures, because the existing measure is not, or is no longer, sufficient to counteract the dumping which is causing injury.[125]

While an interim review is going on, the measures remain in force. The outcome of an interim review can be to repeal, confirm or modify (up or down) the measures.

Newcomer reviews

A new exporter (a company which did not export the product during the investigation period) can also ask for a newcomer review for the purpose of determining its individual margin of dumping, if any. A newcomer has to prove to the Commission that it is not related to any of the exporters or producers in the exporting country currently subject to the measures, in order to avoid that the newcomer review is simply used as a means of getting around the measures. The Commission also requires, before it enters into the review, that the newcomer prove that it has or definitely will export the product to the EU.

---

123 Anti-dumping Regulation, art. 11(3) and Anti-subsidy Regulation, art. 19(1).

124 Anti-dumping Regulation, art.11(3) and Anti-subsidy Regulation, art.19(1).

125 Anti-dumping Regulation, art. 11(3) and Anti-subsidy Regulation, art. 19(1).

During the newcomer review, the duty is suspended for that exporter and his imports are registered, so that once a duty (if any) is established for him, it can be applied retroactively.[126]

Expiry reviews

Definitive anti-dumping and anti-subsidy measures expire five years from their imposition, or five years from the date of the conclusion of the most recent review which has covered both dumping and injury, unless it is determined in an expiry review that expiry would be likely to lead to a continuation or recurrence of dumping and injury. [127]

At an "appropriate time" in the final year of the period of application of the measures, the Commission publishes a notice of impending expiry in the Official Journal of the European Communities.[128] An expiry review can be initiated on the initiative of the Commission, or upon request made by or on behalf of Community producers, and the measure remains in force pending the outcome of such review. The Community producers must lodge a review request no later than three months before the end of the five-year period.[129]

An expiry review is initiated where the request contains "sufficient evidence" that the expiry of the measures would be likely to result in a continuation or recurrence of dumping and injury. The exporters, importers, the representatives of the exporting country and the Community producers are given the opportunity to amplify, rebut or comment on the matters set out in the review request, and conclusions must take "due account" of all relevant and duly documented evidence presented in relation to the question as to whether the expiry of measures would be likely, or unlikely, to lead to the continuation or recurrence of dumping and injury.[130]

The measures remain in force during the expiry review. The outcome of an expiry review can only be to repeal or maintain the measures as they are, not modify them.

Procedure for reviews

The procedures that apply to the main investigations, except the time limits, also apply to reviews.[131]

With regard to time limits, interim and expiry reviews are supposed "normally" to be concluded within twelve months of the date of initiation of the review.[132] In anti-dumping, the regulation goes further, saying that in no event should these reviews take longer than fifteen months (for expiry reviews, for any review initiated after 20 March 2004; for interim reviews, for those initiated after 13 March 2006).[133]

---

126 Anti-dumping Regulation, art. 11(4) and Anti-subsidy Regulation, art. 20.

127 Anti-dumping Regulation, art. 11(2) and Anti-subsidy Regulation, art.18.

128 Anti-dumping Regulation, art. 11(2) and Anti-subsidy Regulation, art. 18(4).

129 Anti-dumping Regulation, art. 11(2) and Anti-subsidy Regulation, art. 18(4).

130 Anti-dumping Regulation, art. 11(2) and Anti-subsidy Regulation, art.18(4).

131 Anti-dumping Regulation, art. 11(5) and Anti-subsidy Regulation, art. 22(1).

132 Anti-dumping Regulation, art. 11(5) and Anti-subsidy Regulation, art. 22(1).

133 Anti-dumping Regulation, art. 11(5).

In anti-dumping, newcomer reviews must in all cases be concluded within nine months of the date of initiation (for reviews initiated after 13 March 2006),[134] while in anti-subsidy, although newcomer reviews are supposed to be "accelerated", they are subject to the same twelve month time limit as other reviews.[135]

8.2 Administrative appeal: is there any opportunity to appeal the decision to another administrative decisionmaker before seeking judicial review in court (CFI or EUJ)?

Once the Community institutions have made a decision to impose measures, the only appeal is to the Court of First Instance of the European Communities, which is charged with anti-dumping cases. However, in anti-dumping and anti-subsidy cases interested parties may apply to the Commission for a "review".

9. Enforcement actions

When the dispute arises out of enforcement by the Commission of a previous decision or order, are there differences in the process of investigation, hearing or decision from cases not arising out of the enforcement of a previous decision or order?

Following adoption of an anti-dumping or anti-subsidy regulation, EU customs officials will begin applying the duties at the border. However, sometimes the Community industry subsequently complains that it has not seen any or a sufficient increase in prices. They might consider that the exporters, rather than letting the impact of the duties be felt, have lowered their prices even more or have compensated their importers otherwise, "absorbing" them. Or, the Community industry might complain that the companies targeted by the anti-dumping or anti-subsidy regulation are "circumventing" it by sending their products from another country. Both absorption and circumvention are addressed in the rules. [136]

For absorption, the rules for anti-dumping are more elaborate than those on anti-subsidy. In anti-dumping, the Community industry, any other interested party, a Member State, normally within two years from the entry into force of the measures, can ask the Commission to conduct an absorption review by submitting "sufficient information" showing that, after the original investigation period and prior to or following the imposition of measures, export prices have decreased or that there has been no movement, or insufficient movement in the resale prices or subsequent selling prices of the imported product in the Community. The Commission can self-initiate such "absorption" investigation. The investigation may, after consultation, be reopened to examine whether the measure has had effects on the abovementioned prices. Where the investigation shows that this has indeed been the case, export prices are reassessed and dumping margin is recalculated. Where the insufficient movement in prices is due to a fall in export prices that occurred after the original investigation period, dumping margins may be recalculated to take account of such lower export prices.[137] Where the reinvestigation shows increased dumping, the measures can be amended by the Council, up to twice the amount of duty imposed initially by the

134 Anti-dumping Regulation, art. 11(5).

135 Anti-subsidy Regulation, art. 22(1).

136 Absorption is addressed in Anti-dumping Regulation, art. 12, Anti-subsidy Regulation, art. 19(3); circumvention is addressed by Anti-dumping Regulation, art. 13, Anti-subsidy Regulation, art. 23.

137 Anti-dumping Regulation, art. 12(2).

Council.[138] The regulation specifies that an absorption investigation is to be carried out "expeditiously": it should normally be concluded within six months but in any event must be concluded within nine months (for absorption reviews initiated after 13 March 2006).[139] An absorption investigation is meant to focus on export price; any alleged changes in normal value are only part of the investigation where complete information on revised normal values, duly substantiated by evidence, is made available to the Commission within the time limits.[140]

As to absorption in anti-subsidy cases, an absorption review can only be launched if countervailing duties imposed were less than the amount of countervailable subsidies found. The review can be launched by request of the Community producers, any interested party, a Member State, or on the Commission's own initiative. Like in anti-dumping, the request generally has to come within two years from the entry into force of the measures. The Community producers or other interested parties have to provide sufficient evidence that, after the original investigation period and prior to or following the imposition of measures, export prices have decreased or that there has been no movement, or insufficient movement, of resale prices of the imported product in the Community. If the investigation bears this out, countervailing duties can be increased to achieve the price increase required to remove injury. However, the regulation specifies that the increased duty level shall not exceed the amount of the countervailable subsidies.[141]

As to circumvention, the anti-dumping rules and the anti-subsidy rules are more in line with each other, although they are not identical. These rules provide that anti-dumping or countervailing duties (in the "residual" amounts) may be extended to imports from third countries, of the like product, whether slightly modified or not; or to imports of the slightly modified like product from the country subject to measures; or parts thereof, when circumvention of the measures in force is taking place. Circumvention is defined as a change in the pattern of trade between third countries and the Community or between individual companies in the country subject to measures and the Community, which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence of injury or that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like product, and where there is evidence of dumping in relation to the normal values previously established for the like product, or where in the case of subsidization, the imported like product and/or parts thereof still benefit from the subsidy.[142] The anti-dumping rules on circumvention go into more detail than the anti-subsidy rules on when an "assembly operation" is considered circumvention.[143]

Anti-circumvention investigations must be initiated, after consultation of the Advisory Committee, on the initiative of the Commission or at the request of a Member State or any interested party on the basis of sufficient evidence regarding the existence of circumvention by a Commission Regulation which may also instruct the customs authorities to make imports subject to registration or to guarantees while the investigation is going on, so that duties can be imposed retroactively. The regulations specify that anti-circumvention investigations shall be concluded

---

138 Anti-dumping Regulation, art. 12(3).

139 Anti-dumping Regulation, art. 12(4).

140 Anti-dumping Regulation, art. 12(5).

141 Anti-subsidy Regulation, art. 19(3).

142 Anti-dumping Regulation, art. 13(1) and Anti-subsidy Regulation, art. 23(1).

143 Anti-dumping Regulation, art. 13(2).

within nine months. When circumvention is proven, the duties can be extended by the Council, acting on a proposal from the Commission, after consultation of the Advisory Committee.[144]

10. Strategic concerns

If not discussed elsewhere, this is the place to discuss strategy and tactics . For example, do you have a choice of which country to file in or which language to employ? How do you make this decision? Are there ways to speed up a process or slow it down? To preempt Commission action with a declaratory judgment action in a member state? To use public relations tactics?

In terms of strategy, anti-dumping and anti-subsidy investigations tend to proceed without interference once they have been set on the rails. Because of the legal time limits for action, the Commission has a schedule for the conduct of an investigation that it will follow. It is difficult to try to ask the Commission to act more quickly, and it cannot act more slowly without falling afoul of the legal deadlines for action.

There is some room for strategic maneuver in convincing the Commission to initiate a case, at the complaint stage. In terms of language, all anti-dumping and countervailing duty procedures are carried out in English. Although one can submit a complaint in any Community language,[145] submitting in a language other than English will not likely be appreciated, as the Commission is still bound to respect the 45 days from the lodging of a complaint to a decision on initiation. An interested party can also request a copy of the questionnaire and answer it in any one of the Community languages. However, doing so may also be strategically unwise. While the Commission cannot call it "uncooperative" to answer in a Community language other than English, submitting remarks in another language may mean that they must be translated for the case handlers to be able to read them. That may mean that they are too late to have any real impact.

The Commission cannot impose definitive duties; only the Council can do so. Therefore, there is some room for political lobbying of the members of the Council Working Group responsible for trade remedies. Often the same persons are on the Advisory Committee as in the Council Working Group, or at least they work in close collaboration with each other. Each Member State has one vote when it comes to trade remedies, and it takes a simple majority of Member States opposed to block a Commission proposal to impose anti-dumping or countervailing duties.[146]

11. Related questions

11.1 Is there a doctrine of exhaustion of administrative remedies so that a party must raise all issues at the agency level in order to raise them on judicial review? Must a party request reconsideration of decision before seeking judicial review?

[JB]

11.2 If a party raises an argument during the investigation or the hearing and the Commission fails to respond to it, could this failure be an issue on judicial review?

---

144 Anti-dumping Regulation, art. 13(3) and Anti-subsidy Regulation, art. 23(3).

145 [See Council Regulation 1/58, 1958 O.J. (P 17) 385, arts. 1 and 2 as amended.]

146 Anti-dumping Regulation, art. 9(4) and Anti-subsidy Regulation, art. 15(1).

The mere failure to discuss one of the issues that an interested party raised is not *ipso facto* reversible error. However, it can subsequently become an issue before the Court, for example as an allegation that the Community institutions made a manifest error of assessment, evinced by the fact that they did not address an issue of importance which an interested party raised.

11.3 Is a duty of care imposed on the Commission to fully and impartially discover all of the relevant facts?

The Community institutions tend to view their obligations as passive rather than active. They consider it the interested parties' responsibility to communicate all relevant information to them, which they receive and process. Should parties fail to supply relevant information, the Commission feels free to proceed on the basis of the "facts available".

There are some indications in the regulations that the Community institutions have some duty to actively inquire. For example, the anti-dumping and anti-circumvention regulations say that if determinations are made on the basis of the "facts available", including the information supplied in the complaint, the Commission is supposed, "where practicable and with due regard to the time limits of the investigation" check that information by reference to information from other independent sources which may be available, such as published price lists, official import statistics and customs returns, or information obtained from other interested parties during the investigation.[147] This obligation is also stated, albeit in even more aspirational language, in the safeguards regulation:

> The Commission shall seek all information it deems to be necessary and, where it considers it appropriate, after consulting the Committee, endeavour to check this information with importers, traders, agents, producers, trade associations and organizations.[148]

However, it is submitted that the Community institutions have a more active duty to seek and check information than they generally perceive. They, after all, have to meet their burden of proof that the requisite factors permitting them to take trade remedies action are present. They should not content themselves with the information submitted to them, but should actively cross-check the information at their disposal and seek any information that is lacking.

11.4 Is there a principle of res judicata?

A case in which *res judicata* was discussed was *Industrie des Poudres Sphériques*[149] where the applicant claimed that because the Court had annulled a Council regulation, the Commission was prohibited by the principle of *res judicata* to resume the investigation. The Court disagreed, saying that the Commission could lawfully resume the proceeding on the basis of all the acts in the proceeding, which were not affected by the annulment.[150]

---

147 Anti-dumping Regulation, art. 18(5) and Anti-subsidy Regulation, art. 28(5).

148 Safeguards Regulation, art. 6(2).

149 [Industrie des Poudres Sphériques v. Council of the European Union, Case T-2/95, 2000 E.C.R. 463].

150 Industrie des Poudres Sphériques, 2000 E.C.R. 463, para. 95.

11.5 Is there a principle of equitable estoppel? For example, assume a Commission staff member gave a private party erroneous advice which caused the private party to detrimentally rely on the advice. Any relief in such a case?

No.

11.6 Is there an obligation of consistency, meaning Commission must follow existing precedent or explain why it has been departed from?

11.7 Are hearings or other proceedings open to the public?

No.

11.8 Is the Commission obliged to follow its procedural rules even if those rules were not otherwise legally required?

11.9 Is there a "harmless error" rule with regard to all of the various procedural requirements discussed above? (A "harmless Error" rule means that a court will not overturn the administrative decision even though procedural errors were committed if those errors did not affect the result.)

While there is no "harmless error" standard written into the regulations, such that a court will not overturn the administrative decision even though procedural errors were committed if those errors did not affect the result, such a "harmless error" can be read *a contrario* from the Court's judgment in the *NTN/Kyoto Seiko* case:

> In the light of those factors and bearing in mind, furthermore, the misleading or inaccurate statements in paragraphs 27, 32, 36 and 37, it is possible that in the absence of those errors of fact and law the Council would not have found that there was a threat of injury. Consequently, the forms of order sought by the applicants should be granted and the contested regulation annulled in so far as it affects them.[151]

12. Other remedies for private parties

12.1 What remedies exist in the case of alleged mal-administration aside from judicial review?

12.2 Ombudsman

An interested party may be able to turn to the European Ombudsman regarding maladministration by the Community institutions, if it is a citizen of the Union or any natural or legal person residing or having his registered office in a Member State of the Union.[152] The European Ombudsman is tasked with uncovering maladministration in the activities of the Community institutions and making recommendations with a view to putting an end to that maladministration.[153] If it is no longer possible for the institution concerned to eliminate the

---

151 NTN Corporation and Koyo Seiko Co. Ltd v. Council of the European Union, Joined cases T-163/94 and T-165/94, 1995 E.C.R. 1381, para. 115.

152 Decision of the European Parliament of 9 March 1994 O.J. (L 113) 15 as amended by Decision of the European Parliament of 14 March 2002 O.J. (L 92) 13 (on the regulations and general conditions governing the performance of the Ombudsman's duties), art. 2.

153 Decision of the European Parliament of 9 March 1994 O.J. (L 113) 15 as amended by Decision of the European Parliament of 14 March 2002 O.J. (L 92) 13 (on the regulations and general conditions governing the performance of the Ombudsman's duties) art. 3.

instance of maladministration and the instance of maladministration has no general implications, the ombudsman can make a “critical remark” about it.[154]

12.3 Quashing evidence
12.4 Damages

[154] Decision of the European Ombudsman of 8 July 2002 as amended by Decision of the European Ombudsmen of 5 April 2004 (adopting implementing provisions), art. 7.