AN INTRODUCTION TO ADMINISTRATIVE PROTECTIVE ORDER PRACTICE IN ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS

(SECOND EDITION)

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CONTENTS

Appendices

I. Introduction

In antidumping and countervailing duty investigations under Title VII of the Tariff Act of 1930 (19 U.S.C. § 1671 et seq.), the Commission receives and collects significant amounts of "business proprietary information" (BPI),[1] such as data on private companies' profits, investment, and production processes. The Commission holds such BPI in strict confidence and does not publish such information in ways that would reveal the operations of individual firms.

However, the Commission gives certain representatives of certain parties to an investigation access to the BPI gathered in that investigation. This access is permitted subject to an administrative protective order (APO) which is designed to protect the confidentiality of the BPI. The APO process is governed by statute[2] and by Commission rules.[3]

This Second Edition is intended as a general introduction to the process under which BPI is disclosed under APO. **If you intend to practice in this area, however, do not rely exclusively on this introduction; consult the statute and the Commission's rules.** The APO process is governed by the statute and the Commission's rules, and this introduction should not be construed as modifying or limiting

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[1] That term is defined in section 201.6(a) of the Commission's Rules of Practice and Procedure. See Appendix B for the text of the rule.

[2] Section 777(c)(1)(A) of the Tariff Act of 1930 (19 U.S.C. § 1677f(c)(1)(A)) provides that:

> Upon receipt of an application . . . the Commission shall make all business proprietary information presented to, or obtained by it, during a proceeding (except privileged information, classified information, and specific information of a type for which there is a clear and compelling need to withhold from disclosure) available to interested parties who are parties to the proceeding under a protective order . . . .

Relevant legislative history can be found at H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess., at 622 (1988), and H.R. Conf. Rep. No. 650, 101st Cong., 2d Sess., at 121 (1990). The text of the statutory provisions and legislative history can be found in Appendix A.

[3] The most directly applicable provisions are 19 C.F.R. §§ 201.6, 207.3, and 207.7. The text of these rules can be found in Appendix B. That appendix also contains portions of the regulatory preambles that accompanied amendments to the rules and that provide additional guidance on the purpose and meaning of the rules.

Additional information on the rules can be found in the various notices of rulemaking published since the statutory amendments of 1988:

1. Notice of interim rulemaking, at 53 Fed. Reg. 33,039 (Aug. 29, 1988).
2. Notice of interim rulemaking, at 54 Fed. Reg. 5220 (Feb. 2, 1989).
3. Notice of proposed rulemaking, at 55 Fed. Reg. 24,100 (June 14, 1990).
4. Notice of final rulemaking, at 56 Fed. Reg. 11,918 (Mar. 21, 1991).
5. Notice of proposed rulemaking, at 58 Fed. Reg. 19,638 (Apr. 15, 1993).
6. Notice of final rulemaking, at 59 Fed. Reg. 66,719 (Dec. 28, 1994).

Moreover, a practitioner in the Title VII area should read the entirety of 19 C.F.R. Parts 201 and 207.

them in any way.[4]

Questions should be directed to the Docket Branch of the Office of the Secretary, room 112, tel. 202-205-1800. Hearing-impaired individuals can obtain information on this matter via the Commission's TDD terminal at 202-205-1810.

II. The APO

At the beginning of each antidumping and countervailing duty investigation, the Secretary of the Commission signs and issues an APO applicable to the investigation. The APO contains a list of obligations that a person to whom BPI is disclosed under the APO must assume. Those obligations include such requirements as not divulging BPI to unauthorized persons, using the BPI only for the relevant investigation and litigation, properly storing and transmitting BPI, and reporting possible breaches of the APO. The APO also specifies when and how BPI disclosed under the APO must be returned or destroyed, and describes the sanctions that may be imposed on a person who breaches his obligations under the APO. In most cases, the APO issued will be in a form that has been established by the Secretary and is obtainable from the Docket Branch during normal business hours, 8:45 a.m. to 5:15 p.m.[5]

III. The application process

A. Who can apply

Only certain persons are permitted under the statute and legislative history to apply for disclosure of BPI under APO. The Commission's rules call these persons "authorized applicants."[6] To qualify as an authorized applicant, a person must meet the following criteria:

1. The person must be one of the following:

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[4] On October 3, 1995, the Commission published a notice of proposed rulemaking containing proposed amendments to the rules governing Title VII investigations. 60 Fed. Reg. 51748 (Oct. 3, 1995). As of this writing, those proposed changes have not been put into effect. Practitioners should be aware that portions of the APO rules may change if those amendments are finalized.

[5] A copy of this form APO can be found in Appendix E. Persons with mobility impairment who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000.

[6] The term "authorized applicant" means an individual. Consequently, each attorney, consultant, or expert in a firm who seeks access to BPI must fill out a separate application. A person who obtains disclosure of BPI under APO must not discuss that information with a colleague in the same firm who has not filed an application that has been accepted by the Secretary.

(a) An attorney;[7]

(b) A consultant or expert under the direction and control of an attorney representing an interested party which is a party to the investigation;

(c) A consultant or expert who appears regularly before the Commission;[8] or

(d) A representative of an interested party which is a party to the investigation, if such interested party is not represented by counsel.

2. The person must represent an interested party which is a party to the relevant antidumping or countervailing duty investigation. The term "interested party" is defined in the statute.[9] The term "party" is defined in the Commission's rules.[10] In most investigations, an authorized applicant must be a representative of petitioners, of other domestic producers, or of importers (not just purchasers from importers) or foreign producers of the articles subject to investigation.

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[7] An attorney must be able to show that he or she is admitted to practice before the bar of a United States state or the District of Columbia. The purpose of this requirement is to ensure that the Commission grants APO access only to persons with respect to whom the Commission can impose effective sanctions for breaches of APOs. Nevertheless, the Commission may permit an attorney not admitted to practice in a state to gain access to BPI under the APO as a consultant or expert working under the supervision of an attorney licensed to practice in the United States. The Commission's authority to regulate the credentials of attorneys or agents appearing before it is found in 19 C.F.R. § 201.15.

[8] The Commission has not defined the term "appears regularly before the Commission." The Secretary determines whether a particular applicant falls into that category, and may request additional information from an applicant to aid her determination.

[9] See 19 U.S.C. § 1677(9), which provides that an interested party can be:

(A) a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise,

(B) the government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported,

(C) a manufacturer, producer, or wholesaler in the United States of a domestic like product,

(D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product,

(E) a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States,

(F) an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) with respect to a domestic like product, and

(G) in any investigation under this subtitle involving an industry engaged in producing a processed agricultural product, as defined in paragraph (4)(E), a coalition or trade association which is representative of either --

(I) processors,

(ii) processors and producers, or

(iii) processors and growers,

but this subparagraph shall cease to have effect if the United States Trade Representative notifies the administering authority and the Commission that the application of this subparagraph is inconsistent with the International [sic] obligations of the United States.

[10] 19 C.F.R. § 201.2, as amended. Party means "any person who has filed a complaint or petition on the basis of which an investigation has been instituted, or any person whose entry of appearance has been accepted."

3. The person must not be involved in competitive decisionmaking for an interested party which is a party to the investigation. The regulations governing Title VII investigations define "competitive decisionmaking" by incorporating the definition used in U.S. Steel Corp. v. United States.[11] Accordingly, "competitive decisionmaking" includes:

> . . . past, present, or likely future activities, associations, and relationships with an interested party which is a party to the investigation that involve the prospective authorized applicant's advise [sic] or participation in any of such party's decisions made in light of similar or corresponding information about a competitor (pricing, product design, etc.).[12]

The U.S. Steel decision was interpreted in Matsushita Electric Ind. Corp. v. United States.[13] In that case, the Court held, inter alia, that an in-house corporate counsel may not be denied disclosure of BPI under an APO on the sole ground of status as a corporate officer.[14]

B. The application

An authorized applicant wishing to obtain disclosure of BPI under APO must file an application with the Secretary of the Commission. The application **must** be made on a form approved by the Secretary and obtainable from the Docket Branch.[15] Although the form may be photocopied, it **may not** be retyped or altered in any way. Any such alteration will result in rejection of the application.

The application is essentially divided into three parts. First, the applicant must state under oath that he has authorized applicant status. Second, the applicant requests disclosure of BPI under the APO and agrees to be bound by the APO. Third, the applicant acknowledges that a breach of the APO may subject him to certain sanctions.

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[11] 730 F.2d 1465 (Fed. Cir. 1984). A copy of the court decision in U.S. Steel can be found in Appendix C.

[12] 19 C.F.R. § 207.7(a)(3)(ii).

[13] 929 F.2d 1577 (Fed. Cir. 1991), reversing, 14 CIT 674, 746 F. Supp. 1103 (1990). A copy of that decision can be found in Appendix C.

[14] 929 F.2d at 1580.

[15] A copy of this form APO application can be found in Appendix F. An example of how to fill out the application appears in Appendix H.

If you fall into one of three categories of authorized applicants,[16] you must attach to your application a written statement describing your job functions, disclosing all financial holdings you may have in the interested party you represent or its affiliates, and indicating whether you are involved in the formulation of the interested party's pricing policies.

Please note that the application form itself is only two pages long. Applicants frequently file their application with the four-page long form APO still attached, creating a needless proliferation of paper. Therefore, the Commission urges that applicants send in only the two-page application.

In most cases, an authorized applicant wants to give access to BPI disclosed under APO to a paralegal or clerical staff person such as a secretary, word processor, messenger, or other such person employed or supervised by the authorized applicant. Before such a person is allowed access, the person must fill out a form statement approved by the Secretary and obtainable from the Docket Branch.[17] This form statement provides for the person to agree to be bound by the APO and for the authorized applicant to sign in recognition of his assumption of responsibility for any breach the person might commit.

C. Deadlines for applying

Under Commission rule 207.7, you must file an application within certain time limits. You must file your application no later than twenty-one (21) days after the publication in the Federal Register of the notice of investigation in a final investigation, or seven (7) days after publication of the notice of investigation in a preliminary investigation. These are the same deadlines as those established for the filing of entries of appearance.

In some cases, one interested party which is a party to the investigation is represented by more than one authorized applicant, e.g., several attorneys from one or more law firms as well as an economist from a consulting firm. So long as one authorized applicant applies within the time limit, the deadlines are extended for other authorized applicants representing the same party. One authorized applicant must file his application by the deadline and must identify himself as "lead authorized applicant." **Only he will**

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[16] (1) an in-house counsel, (2) a consultant or expert who practices regularly before the Commission, or (3) a representative of an interested party that is not represented by counsel.

[17] The form statement by clerical staff can be found in Appendix G.

receive service of BPI in the investigation.[18] The other authorized applicants may file their applications at a later date, although no later than five (5) days prior to the deadline for filing posthearing briefs in a final investigation or postconference briefs in a preliminary investigation. However, the lead authorized applicant is not to discuss BPI disclosed under APO with another authorized applicant until the latter's application has been approved.

There is no specific deadline for the filing of form statements by paralegals and clerical staff persons employed or supervised by authorized applicants. However, you cannot give such staff access to BPI disclosed under APO until the form statements have been filed.

If you filed an APO application in a preliminary investigation and intend to continue representation in the corresponding final investigation, you need not file another application in the final investigation. However, you must notify the Docket Branch in writing that you will participate in the final investigation. Each firm is to file a letter listing the attorneys, consultants, and staff that will participate in the final investigation. Such a letter should indicate whether any persons who participated in the preliminary investigation have ended their involvement with the matter. If a new attorney or other authorized applicant is being retained, then he and his staff must file the appropriate forms.

IV. Obtaining BPI

A. The APO service list

After the deadline for filing APO applications, the Secretary will establish a list of authorized applicants whose applications have been approved. All parties must serve their business proprietary submissions to the Commission on the persons listed on that APO service list. If one interested party is represented by more than one authorized applicant, the APO service list will designate one authorized applicant as the lead authorized applicant on whom service must be made.

This APO service list is not to be confused with the public service list established by the Secretary.[19] Only submissions to the Commission with all BPI deleted are to be served on the persons

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[18] 19 C.F.R. § 207.7(a)(2).

[19] The public service list is established pursuant to Commission rule 201.11(d). All parties appear on that list, and are to be served with nonproprietary versions of documents filed in the investigation.

appearing on the public service list. To avoid confusion, the APO service list is printed on pink paper, whereas the public service list is printed on blue paper.

If the APO service list has not yet been issued, you should file documents with the Commission without serving them on anyone, but you must then serve those documents within two business days after the APO service list is issued. Petitions and briefs must be served by overnight mail or its equivalent.

B. Disclosure of BPI under the APO

Once a lead authorized applicant appears on the APO service list, he is eligible to receive BPI under the APO. Other parties must now serve him with their BPI. In addition, he may obtain BPI not normally served by other parties, such as Commission reports and nonparty questionnaire responses. He need not contact the Docket Branch to find out when this BPI is available; the Docket Branch will contact the lead authorized applicants when there is BPI available.

The Docket Branch will only give BPI to a person who appears on the approved service list. An authorized applicant may pick up BPI, or send a secretary or other member of the clerical staff employed or supervised by him who has signed the APO form statement. Please bring a picture identification. Dockets personnel will not give access to BPI to couriers and messengers not employed or supervised by an authorized applicant.

V. Filing BPI

A. The one day rule

A person who files with the Commission a brief or other submission that contains BPI must also file a public version of that submission.[20] If the submission is to be filed by a deadline set by the Commission, Commission rule 207.3 permits a submitter to file the public version within 24 hours after the confidential version is due. This "one day rule" is intended to reduce the incidence of APO breaches caused by persons failing under the pressure of deadlines to adequately sanitize the public version of their submissions.

Under the "one day rule," the BPI version of a document is due by the deadline set by the

[20] If the person is a party, the submission must also be served on all persons designated in the Secretary's service lists.

Commission. You must file that version with all BPI enclosed in brackets but with the following warning on every page: **"Bracketing of BPI not final for one business day after date of filing."** In accordance with the warning, a person to whom the submission is disclosed under APO is not to disclose information received in the document to anyone not subject to the APO until the bracketing becomes final. One business day after the deadline, submitters are to file a public version with all BPI deleted. In the event that a submitter files the confidential version on the deadline day and then finds an error in the bracketing in the confidential version, he is permitted to notify the Commission within 24 hours after the deadline day of the necessary changes to bracketing, and must file replacement pages to correct the business proprietary version of the document. Such corrections will not give rise to a breach, provided that the corrections are made within the time permitted.

The one day extension is **not** to be used to amend the submission in any way other than bracketing and deletion of BPI. Making other changes to the submission may result in striking all or part of the document from the record. If a submitter wishes to make other changes, including errata and typographical corrections, the submitter **must request leave to file such changes** and clearly itemize each requested change. Unless the submitter requests leave to file the changes, they will not be accepted.

When submitting corrections to bracketing of BPI in a brief, please do not submit an entire replacement brief; individual replacement pages are sufficient and preferable. If you choose to submit a replacement brief, please itemize each change.

The Commission instituted the "one day rule" to minimize the number of APO breaches. Please take advantage of the opportunity afforded by the rule to ensure that BPI is properly handled.

B. Certification of BPI Filings

A person who files with the Commission a brief or other submission that contains BPI must satisfy Commission rules pertaining both to filings of confidential business information and to filings of documents generally. These rules require separate certifications, and only one requires notarization. The procedure for submitting business information in confidence requires a "certification in writing under oath that

substantially identical information is not available to the public . . ."[21] As "under oath" suggests, this certification should be notarized. The rule for service, filing, and certification of documents generally requires certification "that such information is accurate and complete to the best of the submitter's knowledge."[22] This certification requires no notarization.

C. Exemption from disclosure for certain BPI

Under the statute,[23] information that is privileged, classified, or "of a type for which there is a clear and compelling need to withhold from disclosure" is exempt from disclosure and service under APO. Privileged material includes information such as that covered by the attorney-client, deliberative process, or attorney work product privilege. Classified material is covered by a national security classification such as "Secret" or "Confidential."[24] The third category, for which there is a "clear and compelling need to withhold," is not defined in the statute. According to the legislative history, the category --

> is expected to be used rarely, in situations in which substantial and irreparable financial or physical harm may result from disclosure. An example of a specific type of information which may fit this definition is trade secrets, that is, a secret formula or process having a commercial value, not patented, known only to certain individuals who use it in compounding or manufacturing an article of trade.[25]

Commission rule 207.7(g) provides a procedure for a submitter of BPI to follow if he considers that any of his information falls within the exempt categories. The submitter may request an exemption from the Secretary, who will either grant or deny the request. The Secretary will only grant such requests in rare cases, because secret formulas and other such supersensitive data are not normally involved in antidumping or countervailing duty investigations.

When requesting an exemption, a submitter is to file the request and lodge a copy of the

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[21] 19 C.F.R. § 201.6(b)(3)(iii).

[22] 19 C.F.R. § 207.3(a).

[23] 19 U.S.C. § 1677f(c)(1)(A).

[24] Prior to 1988, BPI was called "confidential business information." The name was changed to BPI to avoid confusion with information subject to the national security designation "Confidential."

[25] H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess., at 623.

information at issue with the Secretary, when possible two days before any relevant deadline. If the Secretary grants the request, the submitter is to file three versions of the document containing the now-exempt information: (1) a complete version, with the exempt information in double brackets, and with a warning that exempt information is present in the document, (2) a version with the exempt information but not other BPI deleted, and (3) a public version with all BPI deleted. The second and third versions are to be served in accordance with normal BPI and public service rules. If the Secretary denies the exemption request, she will return the information to the submitter.

VI. Sanctions

The Commission makes every attempt to preserve the confidentiality of BPI. Consequently, any breach of an APO, particularly if it results in the improper dissemination of BPI, is regarded as a serious matter. An authorized applicant who breaches the APO is subject to sanctions.

Commission rule 207.7(d), the APO, and the APO application list the responses the Commission may make to a breach. These are:

> (1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven years following publication of a determination that the order has been breached;
>
> (2) Referral to the United States Attorney;
>
> (3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;
>
> (4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of or striking from the record any information or briefs submitted by, or on behalf of, the offender or the party represented by the offender, denial of further access to BPI in the current or any future investigations before the Commission, and issuance of a public or private letter of reprimand; and
>
> (5) Such other actions, including but not limited to, a warning letter, as the Commission determines to be appropriate.

The procedure for investigating alleged breaches of APOs has two parts. First, the Commission determines whether a breach has occurred and who is responsible for it. This is done after the alleged breachers have been provided an opportunity to present their views on the matter. The first phase may conclude with the issuance of a warning letter if the Commission finds a breach has occurred but no

further action is warranted. Second, if a breach is found to have occurred and the Commission determines that further action is warranted, the Commission determines what sanction, if any, to impose. The breachers are provided an opportunity to present their views on this issue.

The Commission's most common responses to breaches have been the issuance of warning letters and private letters of reprimand. A warning letter is not a sanction, and may be issued in an instance in which the Commission determines that a sanction is not appropriate. The private letter of reprimand is a sanction. It can be expunged from the recipient's record after two years of good behavior, i.e., no further breaches. Where this sanction is imposed, the Commission keeps confidential the identity of the offender, although the Commission periodically issues a public notice describing in general terms the private letters of reprimand and other actions it has taken in response to breaches issued.[26] Similarly, all correspondence between the Commission and an alleged breacher is kept confidential by the Commission.

VII. Answers to frequently asked questions

Certain questions come up frequently when practitioners participate in the APO process. The following are some of those questions and their answers. Again, if you have questions about the APO rules and procedures, you are encouraged to call the Secretary, the Docket Branch, or the Office of the General Counsel for assistance.

1. How does the Commission determine whether industry or aggregate business information should be treated as proprietary?

The Commission has established criteria as to when it will treat as proprietary aggregate business information -- that is, information that pertains collectively to more than one company. Aggregate business information pertaining to fewer than three companies normally is always treated as proprietary. Information pertaining to three or more companies normally is treated as publishable, unless two companies account for more than 90 percent of the data, or unless one company accounts for more than 75 percent of the data. While these percentages initially applied to production shares within an industry, the Commission has maintained the flexibility to apply these percentages to other data such as import

[26] A copy of the most recently-issued notice can be found at Appendix D.

shares within an industry. In particular instances the Commission may need to provide for exceptions to the normal criteria. Accordingly, do not assume that you can disclose aggregate data to persons not authorized to have access to BPI unless the aggregate data appear in a public Commission document. When in doubt as to the status of aggregate information, please consult Commission staff.

2. If I obtained disclosure of BPI under APO in a preliminary investigation, do I have to refile an APO application in the corresponding final investigation?

No, you do not need to refile an APO application to retain access to BPI when a final investigation follows a preliminary investigation. However, you must notify the Secretary in writing at the beginning of the final investigation of the persons who will be subject to the APO during the final investigation. Moreover, at any point the Secretary may revise the APO, and require that you refile an APO application. Furthermore, if after an investigation ends, an appeal is taken to a court, parties seeking continued access to BPI disclosed to or served upon them during the investigation should file for a Judicial Protective Order.

3. If I am participating in a final investigation but did not participate in the corresponding preliminary investigation, can I see BPI which was disclosed under APO during the preliminary investigation?

An authorized applicant whose APO application has been granted has access to all BPI disclosed during both the preliminary and final investigations.

4. If one attorney files his APO application on time, how much time does he have to add other attorneys to the list of persons with access to BPI?

The attorney who filed his application on time, i.e., within 21 days in a final investigation (or 7 days in a preliminary investigation) after publication of the notice of investigation, can add colleagues to the APO service list at any time up until 5 days before the posthearing briefs are due in a final investigation (or the postconference briefs in a preliminary investigation). The attorney who filed on time must designate himself the "lead authorized applicant," and will be the only one to receive service of BPI under the APO.

5. When one party is represented by two or more law firms and an economic consulting firm, who is served with BPI under APO?

When one interested party which is a party to the investigation is represented by several

authorized applicants, the authorized applicants must agree to designate a "lead authorized applicant," who must file his application on time and will be the only one to be served with BPI under the APO.

6. What are the service requirements prior to the issuance of the APO, particularly with respect to questionnaires?

Parties should not serve copies of submissions containing BPI on other parties before the issuance of the APO and the APO service list. Within two business days after the issuance of the APO service list, however, all parties must serve all such submissions on the designated persons on the APO service list. The Docket Branch will serve the APO service list on all lead authorized applicants. The Docket Branch will serve amended versions of the list (1) as changes are made in preliminary investigations, and (2) once a week in final investigations.

7. At a hearing, may I submit to the Commission BPI not previously submitted in my brief or elsewhere?

Any BPI to be discussed at a hearing must be filed with the Commission at least three working days before the day of the hearing, as stated in the rules governing the submission of confidential business information.[27] In the past, parties have often filed BPI intended for use at a hearing in their prehearing briefs.

8. Would the Commission grant a request that an entire hearing be held in camera?

The Commission would not likely grant such a request. Title VII of the Tariff Act provides that notice is to be published in the Federal Register prior to any Title VII hearing, and that a hearing transcript be prepared and made available to the public.[28] Accordingly, the Commission maintains a strong presumption in favor of public proceedings. In order to comply to the maximum extent possible with the principle of public disclosure, the Commission closes a portion of a hearing at a party's request only for good reason. Commission rule 207.23 describes the procedure for requesting an in camera session. The rule requires that a request be filed no later than 7 days prior to a hearing. The Commission urges parties to file such requests as early as possible.

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[27] 19 C.F.R. § 201.6(b)(2).

[28] 19 U.S.C. § 1677c(b).

9. When must I return or destroy BPI disclosed under APO if the Commission makes a negative determination? What is the schedule if the Commission makes an affirmative determination?

Pursuant to Commission rule 207.7(c), the Secretary determines when BPI is to be returned or destroyed. Currently, the schedule for return or destruction of BPI disclosed under APO is the same whether the Commission makes an affirmative or a negative determination. Each authorized applicant normally must return or destroy such BPI within sixty (60) days of the termination of the investigation, and file a certification that, to the best of his knowledge and belief, the BPI has been returned or destroyed and that no BPI has been made available to unauthorized persons. The termination of the investigation means one of the following:

* The date of publication in the Federal Register of the Commission's preliminary negative, final negative, or final affirmative determination; or

* The date of publication in the Federal Register of a Commerce Department final negative determination or determination to terminate the investigation.

In some instances, one or more interested parties seek judicial review of the Commission's determination. In view of the deadlines for seeking judicial review set out in 19 U.S.C. § 1516a, 60 days should give parties enough time to find out if review is being sought. If review is sought, the 60-day deadline for returning or destroying BPI is canceled. You may retain BPI disclosed to you under APO during judicial review proceedings, provided that you apply to the appropriate reviewing authority for a protective order agreed to by the Commission within 150 days after the completion of the investigation. If you have not applied for a Judicial Protective Order by the end of the 150 days, you must then promptly return or destroy the BPI.

If the Commission determination concerns imports from Canada or Mexico, you may retain BPI disclosed to you under APO during any binational panel review of the determination, subject to the additional terms and conditions in the then-current version of APO NAFTA Form C.[29]

10. Does the Commission prefer that I destroy or return BPI disclosed under APO? To whom would I return BPI, the Commission or the submitter?

For reasons of convenience the Commission would in most cases prefer that an authorized

[29] Copies of APO NAFTA Form C may be obtained from the Commission's Office of the Secretary.

applicant destroy BPI disclosed under APO and certify that the BPI has been destroyed, although returning the material to the Commission is acceptable as well. However, at any time the Secretary may require the return of BPI to the Commission or to the submitter if she deems it appropriate.

11. If I choose to store BPI on computer disk, does the APO's warning regarding the storage of BPI require that I use floppy disks rather than a hard disk?

No. The purpose of this warning is to caution authorized applicants that they will be held responsible for safeguarding the confidentiality of all BPI to which they are granted access, and to warn applicants about the potential hazards of storage on hard disk. In particular, applicants should understand that information supposedly deleted from a hard disk may be retrievable using a utilities program. As the Commission stated in a 1990 regulatory preamble, however, applicants are permitted "a certain amount of discretion in choosing the most appropriate method of safeguarding the confidentiality of the information."[30] While storage of BPI on floppy disks rather than a hard disk is advised, it is not mandatory. However, the authorized applicant is responsible if BPI is not adequately safeguarded.

12. If one party seeks judicial review of a Commission determination, and the party I represent does not intervene immediately in the review proceeding, may I maintain my files in case my client wishes to intervene at a later date?

Yes, you may retain the BPI disclosed under APO, but only for 150 days after the end of the investigation. If your client does not intervene and join in a proposed Judicial Protective Order acceptable to the Commission within that time, you must promptly return or destroy the BPI at the end of the 150 days, or seek leave from the Secretary to retain the BPI for a longer period.

13. What obligations do an authorized applicant and his firm have when the authorized applicant or a clerical worker subject to the APO leaves the firm before the final determination, e.g., between the preliminary and final investigations, or when the authorized applicant or support person is transferred within the firm and is no longer participating in the investigation?

Under the APO, an authorized applicant must report any changes that affect the representations he made in his application. In this instance, the authorized applicant who ends his participation in an

[30] Preamble to notice of proposed rulemaking, 55 Fed. Reg. 24,100 (June 14, 1990).

investigation must notify the Commission in writing of that fact and certify that he no longer possesses any BPI disclosed under APO. Similarly, an authorized applicant whose secretary, paralegal, or other clerical staff person has ended his participation in the investigation should notify the Commission in writing of that fact.

14. If I change law firms during the investigation but continue to represent the same interested party which is a party to the investigation, must I file a new application?

No, your initial application remains effective. However, you must inform the Secretary in writing of your new firm and address.

15. If an interested party which is a party to the investigation substitutes entirely new counsel for its prior counsel during the investigation, can the former counsel transfer its BPI disclosed under APO to the new counsel?

Yes, if before the transfer is made the new attorney applies for and is granted disclosure of BPI under the APO by the Secretary, i.e., the authorized applicant has his name added to the APO service list. However, the new attorney will not receive service of new BPI, because the former counsel is still designated lead authorized applicant. In order to receive service, the new attorney must file a written request with the Secretary to change the identity of the lead authorized applicant. In most cases of a change of attorneys, the Secretary will permit the former counsel to retain BPI until the new attorney has been granted access to BPI under the APO.

16. Why does the one day rule not apply to petitions, supplements, and general written submissions?

The one day rule (contained in 19 C.F.R. § 207.3(c)) applies only to filings subject to a Commission-imposed deadline. The Commission instituted the rule to minimize the number of errors parties made in bracketing BPI under the stress of trying to meet deadlines. That concern does not apply to the same extent to petitions and other filings not prepared under a Commission-imposed deadline.

17. Who is authorized to apply for disclosure of BPI under APO?

A person must meet a number of criteria in order to qualify as an "authorized applicant" who can apply for disclosure of BPI under APO. The person must:

(1) Be (a) an attorney, (b) a consultant or expert under the direction and control of an attorney representing an interested party which is a party to the investigation, (c) a consultant or expert who appears regularly before the Commission, or (d) a representative of an interested party which is a party to the investigation, if such interested party is not represented by counsel;

(2) Represent an interested party which is a party to the investigation; and

(3) Not be involved in competitive decisionmaking for an interested party which is a party to the investigation.

Please consult the APO and the rules for additional information about those requirements.

18. Can an attorney from a foreign country apply for disclosure of BPI under APO?

If an attorney is admitted to practice before the bar of any United States state or the District of Columbia, the attorney can apply, regardless of whether he is a U.S. citizen. If the attorney is not so admitted, the Commission may permit him to gain access to BPI under the APO as a consultant or expert working under the supervision of an attorney admitted to practice in a United States state or the District of Columbia.

19. If a complaint is filed with the U.S. Court of International Trade after the end of an investigation, and a party wishes to retain new counsel, how would the new counsel obtain access to BPI?

The new counsel would need to submit a motion to the Court for disclosure under a judicial protective order.

20. What are the procedures for requesting exemption from disclosure of BPI under APO?

In some instances, a person may wish to submit information to the Commission that the submitter considers too sensitive to disclose to other party representatives under APO. Under 19 C.F.R. § 207.7(g), the submitter can lodge a copy of the sensitive information with the Secretary along with a request for exemption from disclosure under the APO. If possible, the request should be made at least two business days prior to any deadline for filing the information. If the Secretary grants the request, the submitter must file three versions of the filing containing the exempted information: a version with the exempted information in double brackets and the warning "BPI EXEMPTED FROM DISCLOSURE UNDER APO ENCLOSED IN DOUBLE BRACKETS" on every page, and two versions omitting the exempted

information and otherwise conforming with normal filing and service rules. If the request is denied, the sensitive information will be returned to the submitter.

21. What special steps must a person take when filing or serving a submission containing BPI?

Under the APO, paragraph B(6), a person must, inter alia, transmit each document containing BPI with a cover sheet identifying the document as containing BPI. If the document is to be mailed, the person must put the document in two envelopes, the inner one sealed and marked "Business Proprietary Information -- To be opened only by [name of recipient]", and the outer one sealed and not marked as containing BPI. The Commission recommends that the two-envelope procedure be used whenever transmitting BPI, including by a messenger subject to the APO.

APPENDIX A

STATUTORY PROVISIONS AND LEGISLATIVE HISTORY

19 U.S.C. § 1677f (Section 777 of the Tariff Act of 1930), Access to information.

(a) Information generally made available

(1) Public information function

There shall be established a library of information relating to foreign subsidy practices and countervailing measures. Copies of material in the library shall be made available to the public upon payment of the costs of preparing such copies.

(2) Progress of investigation reports

The administering authority and the Commission shall, from time to time upon request, inform the parties to an investigation of the progress of that investigation.

(3) Ex parte meetings

The administering authority and the Commission shall maintain a record of any ex parte meeting between --

(A) interested parties or other persons providing factual information in connection with a proceeding, and

(B) the person charged with making the determination, or any person charged with making a final recommendation to that person, in connection with that proceeding,

if information relating to that proceeding was presented or discussed at such meeting. The record of such an ex parte meeting shall include the identity of the persons present at the meeting, the date, time, and place of the meeting, and a summary of the matters discussed or submitted. The record of the ex parte meeting shall be included in the record of the proceeding.

(4) Summaries; non-proprietary submissions

The administering authority and the Commission shall disclose --

(A) any proprietary information received in the course of a proceeding if it is disclosed in a form which cannot be associated with, or otherwise be used to identify, operations of a particular person, and

(B) any information submitted in connection with a proceeding which is not designated as proprietary by the person submitting it.

(b) Proprietary Information

(1) Proprietary status maintained

(Â) In general

Except as provided in subsection (a)(4)(A) of this section and subsection (c) of this section, information submitted to the administering authority or the Commission which is

designated as proprietary by the person submitting the information shall not be disclosed to any person without the consent of the person submitting the information, other than --

(i) to an officer or employee of the administering authority or the Commission who is directly concerned with carrying out the investigation in connection with which the information is submitted or any review under this subtitle covering the same subject merchandise, or

(ii) to an officer or employee of the United States Customs Service who is directly involved in conducting an investigation regarding fraud under this subtitle.

(B) Additional requirements

The administering authority and the Commission shall require that information for which proprietary treatment is requested be accompanied by --

(i) either --

(I) a non-proprietary summary in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence, or

(II) a statement that the information is not susceptible to summary accompanied by a statement of the reasons in support of the contention, and

(ii) either --

(I) a statement which permits the administering authority or the Commission to release under administrative protective order, in accordance with subsection (c) of this section, the information submitted in confidence, or

(II) a statement to the administering authority or the Commission that the business proprietary information is of a type that should not be released under administrative protective order.

(2) Unwarranted designation

If the administering authority or the Commission determines, on the basis of the nature and extent of the information or its availability from public sources, that designation of any information as proprietary is unwarranted, then it shall notify the person who submitted it and ask for an explanation of the reasons for the designation. Unless that person persuades the administering authority or the Commission that the designation is warranted, or withdraws the designation, the administering authority or the Commission, as the case may be, shall return it to the party submitting it.

In a case in which the administering authority or the Commission returns the information to the person submitting it, the person may thereafter submit other material concerning the subject matter of the returned information if the submission is made within the time otherwise provided for submitting such material.

(3) Section 1675 reviews

Notwithstanding the provisions of paragraph (1), information submitted to the administering authority or the Commission in connection with a review under section 1675(b) or 1675(c) of this title which is designated as proprietary by the person submitting the information may, if the review results in the revocation of an order or finding (or termination of a suspended investigation) under section 1675(d) of this title, be used by the agency to which the information was originally submitted in any investigation initiated within 2 years after the date of the revocation or termination pursuant to a petition covering the same subject merchandise.

(c) Limited disclosure of certain proprietary information under protective order

(1) Disclosure by administering authority or Commission

(A) In general

Upon receipt of an application (before or after receipt of the information requested) which describes in general terms the information requested and sets forth the reasons for the request, the administering authority or the Commission shall make all business proprietary information presented to, or obtained by it, during a proceeding (except privileged information, classified information, and specific information of a type for which there is a clear and compelling need to withhold from disclosure) available to interested parties who are parties to the proceeding under a protective order described in subparagraph (B), regardless of when the information is submitted during a proceeding. Customer names obtained during any investigation which requires a determination under section 1671d(b) or 1673d(b) of this title may not be disclosed by the administering authority under protective order until either an order is published under section 1671e(a) or 1673e(a) of this title as a result of the investigation or the investigation is suspended or terminated. The Commission may delay disclosure of customer names under protective order during any such investigation until a reasonable time prior to any hearing provided under section 1677c of this title.

(B) Protective order

The protective order under which information is made available shall contain such requirements as the administering authority or the Commission may determine by regulation to be appropriate. The administering authority and the Commission shall provide by regulation for such sanctions as the administering authority and the Commission determine to be appropriate, including disbarment from practice before the agency.

(C) Time limitation on determinations

The administering authority or the Commission, as the case may be, shall determine whether to make information available under this paragraph --

(i) not later than 14 days (7 days if the submission pertains to a proceeding under section 1671b(a) or 1673b(a) of this title) after the date on which the information is submitted, or

(ii) if --

(I) the person that submitted the information raises objection to its release, or

(II) the information is unusually voluminous or complex,

not later than 30 days (10 days if the submission pertains to a proceeding under section 1671b(a) or 1673b(a) of this title) after the date on which the information is submitted.

(D) Availability after determination

If the determination under subparagraph (C) is affirmative, then --

(i) the business proprietary information submitted to the administering authority or the Commission on or before the date of the determination shall be made available, subject to the terms and conditions of the protective order, on such date; and

(ii) the business proprietary information submitted to the administering authority or the Commission after the date of the determination shall be served as required by subsection (d) of this section.

(E) Failure to disclose

If a person submitting information to the administering authority refuses to disclose business proprietary information which the administering authority determines should be released under a protective order described in subparagraph (B), the administering authority shall return the information, and any nonconfidential summary thereof, to the person submitting the information and summary and shall not consider either.

(2) Disclosure under court order

If the administering authority denies a request for information under paragraph (1), then application may be made to the United States Customs Court for an order directing the administering authority or the Commission to make the information available. After notification of all parties to the investigation and after an opportunity for a hearing on the record, the court may issue an order, under such conditions as the court deems appropriate, which shall not have the effect of stopping or suspending the investigation, directing the administering authority or the Commission to make all or a portion of the requested information described in the preceding sentence available under a protective order and setting forth sanctions for violation of such order if the court finds that, under the standards applicable in proceedings of the court, such an order is warranted, and that --

(A) the administering authority or the Commission has denied access to the information under subsection (b)(1) of this section,

(B) the person on whose behalf the information is requested is an interested party who is a party to the investigation in connection with which the information was obtained or developed, and

(C) the party which submitted the information to which the request relates has been notified, in advance of the hearing, of the request made under this section and of its right to appear and be heard.

(d) Service

Any party submitting written information, including business proprietary information, to the administering authority or the Commission during a proceeding shall, at the same time, serve the information upon all interested parties who are parties to the proceeding, if the information is covered by a protective order. The administering authority or the Commission shall not accept any such information that is not accompanied by a certificate of service and a copy of the protective order version of the document containing the information. Business proprietary information shall only be served upon interested parties who are parties to the proceeding that are subject to protective order; however, a nonconfidential summary thereof shall be served upon all other interested parties who are parties to the proceeding.

(e) [Repealed.]

(f) Disclosure of proprietary information under protective orders issued pursuant to the North American Free Trade Agreement or the United States-Canada Agreement

(1) Issuance of protective orders

(A) In general

If binational panel review of a determination under this subchapter is requested pursuant to article 1904 of the NAFTA or the United States-Canada Agreement, or an extraordinary challenge committee is convened under Annex 1904.13 of the NAFTA or the United States-Canada Agreement, the administering authority or the Commission, as appropriate, may make available to authorized persons, under a protective order described in paragraph (2), a copy of all proprietary material in the administrative record made during the proceeding in question. If the administrating authority or the Commission claims a privilege as to a document or portion of a document in the administrative record of the proceeding in question and a binational panel or extraordinary challenge committee finds that in camera inspection or limited disclosure of that document or portion thereof is required by United States law, the administering authority or the Commission, as appropriate, may restrict access to such document or portion thereof to the authorized persons identified by the panel or committee as requiring access and may require such persons to obtain access under a protective order described in paragraph (2).

(B) Authorized persons

For purposes of this subsection, the term "authorized persons" means --

(i) the members of, and the appropriate staff of, the binational panel or the extraordinary challenge committee, as the case may be, and the Secretariat,

(ii) counsel for parties to such panel or committee proceeding, and employees, and persons under the direction and control, of such counsel,

(iii) any officer or employee of the United States Government designated by the administering authority or the Commission, as appropriate, to whom disclosure is necessary in order to make recommendations to the Trade Representative regarding the convening of extraordinary challenge committees under chapter 19 of the NAFTA or the Agreement, and

(iv) any officer or employee of the Government of a free trade area country (as defined in section 1516a(f)(10) of this title) designated by an authorized agency of such country to whom disclosure is necessary in order to make decisions regarding the convening of extraordinary challenge committees under chapter 19 of the NAFTA or the Agreement.

(C) Review

A decision concerning the disclosure or nondisclosure of material under protective order by the administering authority or the Commission shall not be subject to judicial review, and no court of the United States shall have power or jurisdiction to review such decision on any question of law or fact by an action in the nature of mandamus or otherwise.

(2) Contents of protective order

Each protective order issued under this subsection shall be in such form and contain such requirements as the administering authority or the Commission may determine by regulation to be appropriate. The administering authority and the Commission shall ensure that regulations issued pursuant to this paragraph shall be designed to provide an opportunity for participation in the binational panel proceeding, including any extraordinary challenge, equivalent to that available for judicial review of determinations by the administering authority or the Commission that are not subject to review by a binational panel.

(3) Prohibited acts

It is unlawful for any person to violate, to induce the violation of, or knowingly to receive information the receipt of which constitutes a violation of, any provision of a protective order issued under this subsection or to violate, to induce the violation of, or knowingly to receive information the receipt of which constitutes a violation of, any provision of an undertaking entered into with an authorized agency of a free trade area country (as defined in section 1516a(f)(10) of this title) to protect proprietary material during binational panel or extraordinary challenge committee review pursuant to article 1904 of the NAFTA or the United States-Canada Agreement.

(4) Sanctions for violation of protective orders

Any person, except a judge appointed to a binational panel or an extraordinary challenge committee under section 3432 of this title, who is found by the administering authority or the Commission, as appropriate, after notice and an opportunity for a hearing in accordance with section 554 of title 5, to have committed an act prohibited by paragraph (3) shall be liable to the United States for a civil penalty and shall be subject to such other administrative sanctions, including, but not limited to, debarment from practice before the administering authority or the Commission, as the administering authority or the Commission determines to be appropriate. The amount of the civil penalty shall not exceed $100,000 for each violation. Each day of a continuing violation shall constitute a separate violation. The amount of such civil penalty and

other sanctions shall be assessed by the administering authority or the Commission by written notice, except that assessment shall be made by the administering authority for violation, inducement of a violation or receipt of information with reason to know that such information was disclosed in violation, of an undertaking entered into by any person with an authorized agency of a free trade area country (as defined in section 1516a(f)(10) of this title).

(5) Review of sanctions

Any person against whom sanctions are imposed under paragraph (4) may obtain review of such sanctions by filing a notice of appeal in the United States Court of International Trade within 30 days from the date of the order imposing the sanction and by simultaneously sending a copy of such notice by certified mail to the administering authority or the Commission, as appropriate. The administering authority or the Commission shall promptly file in such court a certified copy of the record upon which such violation was found or such sanction imposed, as provided in section 2112 of title 28. The findings and order of the administering authority or the Commission shall be set aside by the court only if the court finds that such findings and order are not supported by substantial evidence, as provided in section 706(2) of title 5.

(6) Enforcement of sanctions

If any person fails to pay an assessment of a civil penalty or to comply with other administrative sanctions after the order imposing such sanctions becomes a final and unappealable order, or after the United States Court of International Trade has entered final judgment in favor of the administering authority or the Commission, an action may be filed in such court to enforce the sanctions. In such action, the validity and appropriateness of the final order imposing the sanctions shall not be subject to review.

(7) Testimony and production of papers

(A) Authority to obtain information

For the purpose of conducting any hearing and carrying out other functions and duties under this subsection, the administering authority and the Commission, or their duly authorized agents --

(i) shall have access to and the right to copy any pertinent document, paper, or record in the possession of any individual, partnership, corporation, association, organization, or other entity,

(ii) may summon witnesses, take testimony, and administer oaths,

(iii) and may require any individual or entity to produce pertinent documents, books, or records.

Any member of the Commission, and any person so designated by the administering authority, may sign subpoenas, and members and agents of the administering authority and the Commission, when authorized by the administering authority or the Commission, as appropriate, may administer oaths and affirmations, examine witnesses, take testimony, and receive evidence.

(B) Witnesses and evidence

The attendance of witnesses who are authorized to be summoned, and the production of documentary evidence authorized to be ordered, under subparagraph (A) may be required from any place in the United States at any designated place of hearing. In the case of disobedience to a subpoena issued under subparagraph (A), an action may be filed in any district or territorial court of the United States to require the attendance and testimony of witnesses and the production of documentary evidence. Such court, within the jurisdiction of which such inquiry is carried on, may, in case of contumacy or refusal to obey a subpoena issued to any individual, partnership, corporation, association, organization or other entity, issue any order requiring such individual or entity to appear before the administering authority or the Commission, or to produce documentary evidence if so ordered or to give evidence concerning the matter in question. Any failure to obey such order of the court may be punished by the court as a contempt thereof.

(C) Mandamus

Any court referred to in subparagraph (B) shall have jurisdiction to issue writs of mandamus commanding compliance with the provisions of this subsection or any order of the administering authority or the Commission made in pursuance thereof.

(D) Depositions

For purposes of carrying out any functions or duties under this subsection, the administering authority or the Commission may order testimony to be taken by deposition. Such deposition may be taken before any person designated by the administering authority or Commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under the direction of such person, and shall then be subscribed by the deponent. Any individual, partnership, corporation, association, organization or other entity may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the administering authority or Commission, as provided in this paragraph.

(E) Fees and mileage of witnesses

Witnesses summoned before the administering authority or the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(g) Information relating to violations of protective orders and sanctions

The administering authority and the Commission may withhold from disclosure any correspondence, private letters of reprimand, settlement agreements, and documents and files compiled in relation to investigations and actions involving a violation or possible violation of a protective order issued under subsection (c) or (d) of this section, and such information shall be treated as information described in section 552(b)(3) of title 5.

(h) Opportunity for comment by consumers and industrial users

The administering authority and the Commission shall provide an opportunity for industrial users of the subject merchandise and, if the merchandise is sold at the retail level, for representative consumer organizations, to submit relevant information to the administering authority concerning dumping or a countervailable subsidy, and to the Commission concerning material injury by reason of dumped or subsidized imports.

(i) Publication of determinations; requirements for final determinations

(1) In general

Whenever the administering authority makes a determination under section 1671a or 1673a of this title whether to initiate an investigation, or the administering authority or the Commission makes a preliminary determination under section 1671b or 1673b of this title, a final determination under section 1671d or section 1673d of this title, a preliminary or final determination in a review under section 1675 of this title, a determination to suspend an investigation under this subtitle, or a determination under section 1675b of this title, the administering authority or the Commission, as the case may be, shall publish the facts and conclusions supporting that determination, and shall publish notice of that determination in the Federal Register.

(2) Contents of notice or determination

The notice or determination published under paragraph (1) shall include, to the extent applicable --

(A) in the case of a determination of the administering authority --

(i) the names of the exporters or producers of the subject merchandise or, when providing such names is impracticable, the countries exporting the subject merchandise to the United States,

(ii) a description of the subject merchandise that is sufficient to identify the subject merchandise for customs purposes,

(iii)(I) with respect to a determination in an investigation under part I of this subtitle or section 1675b of this title or in a review of a countervailing duty order, the amount of the countervailable subsidy established and a full explanation of the methodology used in establishing the amount, and

(II) with respect to a determination in an investigation under part II of this subtitle or in a review of an antidumping duty order, the weighted average dumping margins established and a full explanation of the methodology used in establishing such margins, and

(iv) the primary reasons for the determination; and

(B) in the case of a determination of the Commission --

(i) considerations relevant to the determination of injury, and

(ii) the primary reasons for the determination.

(3) Additional requirements for final determinations

In addition to the requirements set forth in paragraph (2) --

(A) the administering authority shall include in a final determination described in paragraph (1) an explanation of the basis for its determination that addresses relevant arguments, made by interested parties who are parties to the investigation or review (as the case may be), concerning the establishment of dumping or a countervailable subsidy, or the suspension of the investigation, with respect to which the determination is made; and

(B) the Commission shall include in a final determination of injury an explanation of the basis for its determination that addresses relevant arguments that are made by interested parties who are parties to the investigation or review (as the case may be) concerning volume, price effects, and impact on the industry of imports of the subject merchandise.

Legislative history: 1. H.R. Conf. Rep. 576, 100th Cong., 2d Sess., 622-624 (1988)

2. H.R. Conf. Rep. 650, 101st Cong., 2d Sess. 121-122 (1990)

?1. Access to information (sec. 158 of House bill; sec. 327 of Senate amendment; sec. 1332 of conference agreement)

Present law

Section 777 sets forth procedures for interested parties to submit, and to obtain access to, confidential information involved in an antidumping or countervailing duty proceeding. Current law permits, but does not require, the Commerce Department or the ITC to release confidential information submitted by a party to the investigation.

House bill

The House bill amends section 777:

(1) to permit release by the Commerce Department or by the ITC of all confidential information under an administrative protective order, except privileged or classified information or information of a type deemed not appropriate for release;

(2) to impose reasonable time limits on decisions by the Commerce Department regarding releasability of information;

(3) to require Commerce to return information submitted by a person who refuses to make it available under protective order;

(4) to require service of information to all parties to a proceeding; and

(5) to require submission of information to the Commerce Department on a timely basis within a reasonable deadline, with a reasonable period for comment by other parties.

Senate amendment

The Senate amendment also amends section 777 with respect to proceedings before the ITC:

(1) to require the ITC to make proprietary information submitted by any person in connection with an investigation available under administrative protective order; and

(2) to allow application to the Court of International Trade for an order directing the ITC to make the information available (removes the limitation restricting such application).

Conference agreement

The conferees agreed to a substitute amendment which essentially merges the House and Senate provisions. The substitute amendment requires both the Commerce Department and the ITC to release, under administrative protective order, to interested parties who are parties to the proceeding, all business proprietary information presented to or obtained by it during an antidumping or countervailing duty proceeding, with a limited exception for (1) privileged information, (2) classified information, and (3) specific information for which there is a clear and compelling need to withhold from disclosure.

Under this standard, the general rule is that business proprietary information shall be subject to disclosure under administrative protective order; the exceptions authorized are intended to be very narrow and limited exceptions. The first two exceptions ("privileged" and "classified" information) are standard exceptions, with a commonly understood meaning. The third exception ("specific information for which there is a clear and compelling need to withhold from disclosure") is expected to be used rarely, in situations in which substantial and irreparable financial or physical harm may result from disclosure.

An example of a specific type of information which may fit this definition is trade secrets, that is, a secret formula or process having a commercial value, not patented, known only to certain individuals who use it in compounding or manufacturing an article of trade.

An expectation on the part of the Commerce Department or the Commission, however, that disclosure of a certain type of information would have a "chilling effect" on its efforts to collect data clearly does not establish a "clear and compelling need to withhold from disclosure."

The parties who may have access to business proprietary information under administrative protective order are limited to authorized representatives of interested parties who are parties to the proceeding. Authorized representatives include outside legal counsel for interested parties, and consultants or other experts if either (a) such individuals are under the control and advice of legal counsel and legal counsel has signed on their behalf or if (b) such individuals regularly appear before Commerce or the ITC (and the agency thus has effective sanctions to be applied against them) or (c) in other instances in which the agency has effective sanctions to be applied against the individuals. In determining whether in-house counsel may properly be given access, Commerce and the ITC should be guided by the factors enumerated in *United States Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984).

The conferees recognize that effective enforcement of limited disclosure under administrative protective order depends in part on the extent to which the private parties have confidence that there are effective sanctions against violations. The ITC is directed to establish procedures and regulations with respect to the application

of these amendments, and to report back to the Committee on Ways and Means and the Committee on Finance within one year on the implementation of these provisions, including whether there is a need for further authority to impose sanctions.

The provision requires timely submission of information by the parties, in order to provide other parties a reasonable opportunity to comment on it. The conferees recognize that the ITC often seeks out particular items of information in the final days or hours before its determination; the conferees do not intend for the ITC to be prohibited from continuing to doing so. The requirement for timely submission of information is meant to address the voluntary submissions of information from private parties, and is not meant to restrict the Commission's ability to seek out information which it does not have but views as important to make the best possible determination it can. If the Commission seeks out such information and there remains insufficient time to disclose it and allow for comment on it by parties prior to the Commission's determination, the Commission may nevertheless consider such information but must release it as soon as practicable.

The conferees also recognize the administrative burden that would be imposed if all the day-to-day working papers and notes of agency staff were to be subject to this disclosure requirement, and therefore do not intend that such documents be subject to disclosure. This reflects the understanding of the conferees that the content of such documents will either be reflected in a document that is released (such as the ITC staff report) or they are unlikely to have a bearing or impact on the outcome or the basis for the agency's determination.

It is not the intent of the conferees to alter the current authority of the Commerce Department or the ITC to withhold business proprietary information from release in accordance with the Freedom of Information Act.

b. Amendments to antidumping and countervailing duty laws

Present Law

Section 777 of the Tariff Act of 1930 sets forth procedures for interested parties to obtain access to business proprietary information in investigations involving antidumping or countervailing duties. The Omnibus Trade and Competitiveness Act of 1988 amended section 777 to require, for the first time, that the ITC make such information available to interested parties under administrative protective order (APO), subject to certain exceptions.

House Bill

No provision.

Senate Amendment

Section 4007(b) makes the following changes relating to the administration of the 1988 Trade Act's amendments to section 777: (1) authorizes the administering authority (Department of Commerce) and the ITC to withhold customer names from release under APO; and (2) authorizes the administering authority and the ITC to withhold from inquiries under the Freedom of Information Act (FOIA) files of investigations of violations of APOs.

Conference Agreement

The House recedes, with an amendment to authorize limited disclosure of customer names under administrative protective order (APO) and to apply the provision explicitly to investigations involving products of Canada.

The conference agreement includes the Senate provision on FOIA disclosure, and a modified version of the Senate provision on disclosure of customer names under APO. Specifically, the conference agreement prohibits disclosure by the administering authority (Department of Commerce), under APO, of customer names until either an order is published, or the investigation is suspended or terminated. The ITC may delay disclosure under protective order of customer names until a reasonable time prior to any hearing in the final injury phase of the investigation. The provisions only apply, with respect to both the administering authority and the ITC, in investigations which require an injury determination by the ITC.

The conferees are disturbed to learn, from ITC staff, about the suspected practice of some legal counsel who approach customers (other than their own clients' customers) and provide unsolicited advice or coaching on the so-called "appropriate" written or oral responses to provide to the ITC. Such coaching practices present serious questions relating to the integrity of the information received by the ITC. In title VII investigations, customers provide critical information on a variety of issues, such as purchase quantities, prices, like product definitions, and cumulation determinations. It is imperative that the responses to ITC inquiries be as candid, complete, and objective as possible.

It is the view of the conferees that the use by any party of customer names obtained under an APO issued by either the Department of Commerce or the ITC, to approach customers and attempt

to influence the customers' responses (either written or oral) to the ITC is an inappropriate use of information obtained under a protective order.

The conference agreement provision is intended to minimize the opportunities for such abusive practices to occur, while at the same time providing interested parties a reasonable period of time during which access to customer names would be allowed, for legitimate purposes of analyzing and presenting arguments to the Commission relating to lost sales and conditions of competition.

In order to ensure the effectiveness of this rule as it applies to the ITC, the Commerce Department is prevented from disclosing customer names until the investigation is concluded, either by publication of an order, or suspension or termination of the investigation. The intent of the provision is to prevent any disclosure until the appropriate point in time during final injury stage of the investigation.

It is the view of the conferees, after consulting with ITC investigative staff and representatives of the private trade bar, that release of customer names at the same time as the release of the prehearing staff report under APO would serve the balance of interests to be protected.

This amendment prohibiting early disclosure of customer names is not meant to preclude or prohibit disclosure of customer names under protective order by the Department of Commerce during investigations that do not require an injury determination, or in proceedings subsequent to the original investigation, such as administrative reviews. The conferees also do not intend to preclude or prohibit disclosure of customer names under judicial protective order or during U.S.-Canada binational panel review under section 516A. In compliance with section 404 of the United States-Canada Free-Trade Agreement Implementation Act of 1988, the provision expressly states that these amendments shall apply to investigations involving products of Canada.

It is also the view of the conferees that the Commission should publish in the Federal Register, as soon as practicable, a summary of the actions taken by the Commission in response to APO violations. Thereafter, the Commission should either publish a notice each time an action is taken, or periodically (at least annually) publish a summary of actions taken.

Extension of time for preparation of report on supplemental wage allowance demonstration projects under the Worker Adjustment Assistance Program (section 126 of House bill; section 136 of conference agreement)

Present Law

Section 246 of the Trade Act of 1974, as added by section 1423(d) of the Omnibus Trade and Competitiveness Act of 1988, requires the Secretary of Labor to establish and carry out demonstration projects during fiscal years 1989 and 1990 on a supplemental wage allowance as an option for facilitating worker adjustment under the Trade Adjustment Assistance (TAA) program.

Section 246(d) requires the Secretary to transmit a report to the Congress no later than 3 years after the date of enactment of the

APPENDIX B

SELECTED PROVISIONS OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE AND REGULATORY PREAMBLES

§ 201.6 Confidential business information.

(a) Definition. Confidential business information is information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information. The term "confidential business information" includes "proprietary information" within the meaning of section 777(b) of the Tariff Act of 1930 (19 U.S.C. 1677f(b)).

(b) Procedure for submitting business information in confidence. (1) A request for confidential treatment of business information shall be addressed to the Secretary, United States International Trade Commission, 500 E Street SW., Washington, D.C. 20436, and shall indicate clearly on the envelope that it is a request for confidential treatment.

(2) In the absence of good cause shown, any request relating to material to be submitted during the course of a hearing shall be submitted at least three (3) working days prior to the commencement of such hearing.

(3) With each submission of, or offer to submit, business information which a submitter desires to be treated as confidential under paragraph (a)(2) of this section, the submitter shall provide the following, which may be disclosed to the public:

(i) A written description of the nature of the subject information;

(ii) A justification for the request for its confidential treatment;

(iii) A certification in writing under oath that substantially identical information is not available to the public;

(iv) A copy of the document (A) clearly marked on its cover as to the pages on which confidential information can be found, and (B) with information for which confidential treatment is requested clearly identified by means of brackets (except when submission of such document is withheld in accord with paragraph (b)(4) of this section); and

(v) A nonconfidential copy of the documents as required by § 201.8(d).

(4) The submission of the documents itemized in paragraph (b)(3) of this section will provide the basis for rulings on the confidentiality of submissions, including rulings on the confidentiality of submissions offered to the Commission which have not yet been placed under the possession, control, or custody of the Commission. The submitter has the option of providing the business information for which confidential treatment is sought at the time the documents itemized in paragraph (b)(3) of this section are provided or of withholding them until a ruling on their confidentiality has been issued.

(c) Identification of business information submitted in confidence. Business information which a submitter desires to be treated as confidential shall be clearly labeled "confidential business information" when submitted, and shall be segregated from other material being submitted.

(d) Approval or denial of requests for confidential treatment. Approval or denial of requests shall be made only by the Secretary or Acting Secretary. A denial shall be in writing, shall specify the reason therefor, and shall advise the submitter of the right to appeal to the Commission.

(e) Appeals from denial of confidential treatment. (1) For good cause shown, the Commission may grant an appeal from a denial by the Secretary of a request for confidential treatment of a submission. Any appeal filed shall be addressed to the Chairman, United States International Trade Commission, 500 E Street SW., Washington, D.C. 20436, and shall clearly indicate that it is a confidential submission appeal. An appeal may be made within twenty (20) days of a denial or whenever the approval or denial has not been forthcoming within ten (10) days (excepting Saturdays, Sundays, and Federal legal holidays) of the receipt of a confidential treatment request, unless an extension notice in writing with the reasons therefor has been provided the person requesting confidential treatment.

(2) An appeal will be decided within twenty (20) days of its receipt (excepting Saturdays, Sundays, and Federal legal holidays) unless an extension, notice in writing with the reasons therefor, has been provided the person making the appeal.

(3) The justification submitted to the Commission in connection with an appeal shall be limited to that presented to the Secretary with the original or amended request. When the Secretary or Acting Secretary has denied a request on the ground that the submitter failed to provide adequate justification, any such additional justification shall be submitted to the Secretary for his consideration as part of an amended request. For purposes of paragraph (e)(1) of this section, the twenty (20) day period for filing an appeal shall be tolled on the filing of an amended request and a new twenty (20) day period shall begin once the Secretary or Acting Secretary has denied the amended request, or the approval or denial has not been forthcoming within ten (10) days of the filing of the amended request. A denial of a request by the Secretary on the ground of inadequate justification shall not obligate a requester to furnish additional justification and shall not preclude a requester from filing an appeal with the Commission based on the justification earlier submitted to the Secretary.

(f) Appeals from approval of confidential treatment. An appeal from an approval of a request for confidential treatment of a submission shall be made to the Secretary, United States International Trade Commission, 500 E Street SW., Washington, D.C. 20436, shall comply with § 201.17 through § 201.19 of the Commission's rules of practice and procedure implementing the Freedom of Information Act, and shall show that a copy thereof has been served upon the submitter.

(g) Granting confidential status to business information. Any business information submitted in confidence and determined to be entitled to confidential treatment shall be maintained in confidence by the Commission and not disclosed except as required by law. In the event that any business information submitted to the Commission is not entitled to confidential treatment, the submitter will be permitted to withdraw the tender unless it is the subject of a request under the Freedom of Information Act or of judicial discovery proceedings.

(h) Scope of provisions. The provisions of §§ 201.6(b) and 201.6 (d) through (g) shall not apply to adjudicative investigations under Subchapter C, Part 210, of the Commission's rules of practice and procedure.

§ 207.3 Service, filing, and certification of documents.

(a) Certification. Any person submitting factual information on behalf of the petitioner or any other interested party for inclusion in the record, and any person submitting a response to a Commission questionnaire, must certify that such information is accurate and complete to the best of the submitter's knowledge.

(b) Service. Any party submitting a document for inclusion in the record of the investigation shall, in addition to complying with § 201.8 of this chapter, serve a copy of each such document on all other parties to the investigation in the manner prescribed in § 201.16 of this chapter. If a document is filed before the Secretary's issuance of the service list provided for in § 201.11 of this chapter or the administrative protective order list provided for in § 207.7, the document need not be accompanied by a certificate of service, but the document shall be served on all appropriate parties within two (2) days of the issuance of the service list or the administrative protective order list and a certificate of service shall then be filed. Notwithstanding § 201.16 of this chapter, petitions, briefs, and testimony filed by parties pursuant to §§ 207.10, 207.15, 207.22, 207.23, and 207.24 shall be served by hand or, if served by mail, by overnight mail or its equivalent. Failure to comply with the requirements of this rule may result in removal from status as a party to the investigation. The Commission shall make available to all parties to the investigation a copy of each document, except transcripts of conferences and hearings, business proprietary information, privileged information, and information required to be served under this section, placed in the record of the investigation by the Commission.

(c) Filing. Documents to be filed with the Commission must comply with applicable rules, including § 201.8 of this chapter. If the Commission establishes a deadline for the filing of a document, and the submitter includes business proprietary information in the document, the submitter is to file and, if the submitter is a party, serve the business proprietary version of the document on the deadline and may file and serve the nonbusiness proprietary version of the document no later than one business day after the deadline for filing the document. The business proprietary version shall enclose all business proprietary information in brackets and have the following warning marked on every page: "Bracketing of BPI not final for one business day after date of filing." The bracketing becomes final one business day after the date of filing of the document, i.e., at the same time as the nonbusiness proprietary version of the document is due to be filed. Until the bracketing becomes final, recipients of the document may not divulge any part of the contents of the document to anyone not subject to the administrative protective order issued in the investigation. If the submitter discovers it has failed to bracket correctly, the submitter may file a corrected version or portion of the business proprietary document at the same time as the nonbusiness proprietary version is filed. No changes to the document other than bracketing and deletion of business proprietary information are permitted after the deadline. Failure to comply with this paragraph may result in the striking from the record of all or a portion of a submitter's document.

§ 207.7 Limited disclosure of certain business proprietary information under administrative protective order.

(a) (1) Disclosure. Upon receipt of a timely application filed by an authorized applicant, as defined in paragraph (a)(3) of this section, which describes in general terms the information requested, and sets forth the reasons for the request (e.g., all business proprietary information properly disclosed pursuant to this section for the purpose of representing an interested party in investigations pending before the Commission), the Secretary shall make available all business proprietary information contained in Commission memoranda and reports and in written submissions filed with the Commission at any time during the investigation (except privileged information, classified information, and specific information of a type which there is a clear and compelling need to withhold from disclosure, e.g., trade secrets) to the authorized applicant under an administrative protective order described in paragraph (b) of this section. The term

"business proprietary information" has the same meaning as the term "confidential business information" as defined in § 201.6 of this chapter.

(2) Application. An application under paragraph (a)(1) of this section must be made by an authorized applicant on a form adopted by the Secretary or a photocopy thereof. An application on behalf of a petitioner, a respondent, or another party must be made no later than the time that entries of appearance are due pursuant to § 201.11 of this chapter. In the event that two or more authorized applicants represent one interested party who is a party to the investigation, the authorized applicants must select one of their number to be lead authorized applicant. The lead authorized applicant's application must be filed no later than the time that entries of appearance are due. Provided that the application is accepted, the lead authorized applicant shall be served with business proprietary information pursuant to paragraph (f) of this section. The other authorized applicants representing the same party may file their applications after the deadline for entries of appearance but at least five (5) days before the deadline for filing posthearing briefs in the investigation, or the deadline for filing briefs in a preliminary investigation, and shall not be served with business proprietary information.

(3) Authorized applicant. (i) Only an authorized applicant may file an application under this subsection. An authorized applicant is:

(A) An attorney for an interested party which is a party to the investigation;

(B) A consultant or expert under the direction and control of a person under paragraph (a)(3)(i)(I) of this section;

(C) A consultant or expert who appears regularly before the Commission and who represents an interested party which is a party to the investigation; or

(D) A representative of an interested party which is a party to the investigation, if such interested party is not represented by counsel.

(ii) In addition, an authorized applicant must not be involved in competitive decisionmaking for an interested party which is a party to the investigation. Involvement in "competitive decisionmaking" includes past, present, or likely future activities, associations, and relationships with an interested party which is a party to the investigation that involve the prospective authorized applicant's advice or participation in any of such party's decisions made in light of similar or corresponding information about a competitor (pricing, product design, etc.).

(4) Forms and determinations. (i) The Secretary may adopt, from time to time, forms for submitting requests for disclosure pursuant to an administrative protective order incorporating the terms of this rule. The Secretary shall determine whether the requirements for release of information under this rule have been satisfied. This determination shall be made concerning specific business proprietary information as expeditiously as possible but in no event later than fourteen (14) days from the filing of the information, or seven (7) days in a preliminary investigation, except if the submitter of the information objects to its release or the information is unusually voluminous or complex, in which case the determination shall be made within thirty (30) days from the filing of the information, or ten (10) days in a preliminary investigation. The Secretary shall establish a list of parties whose applications have been granted. The Secretary's determination shall be final for purposes of review by the U.S. Court of International Trade under section 777(c)(2) of the Act.

(ii) Should the Secretary determine pursuant to this section that materials sought to be protected from public disclosure by a person do not constitute business proprietary information or were not required to be served under paragraph (f) of this section, then the Secretary shall, upon request, issue an order on behalf of the Commission requiring the return of all copies of such materials served in accordance with paragraph (f) of this section.

(iii) The Secretary shall release business proprietary information only to an authorized applicant whose application has been accepted and who presents the application along with

adequate personal identification; or a person described in paragraph (b)(1)(iv) of this section who presents a copy of the statement referred to in that paragraph along with adequate personal identification.

(iv) An authorized applicant granted access to business proprietary information in a preliminary investigation may, subject to paragraph (c) of this section, retain such business proprietary information during any final investigation corresponding to that preliminary investigation, provided that the authorized applicant has not lost his authorized applicant status (e.g., by terminating his representation of an interested party who is a party). When retaining business proprietary information pursuant to this paragraph, the authorized applicant need not file a new application in the final investigation, but shall list in his entry of appearance in the final investigation the authorized applicants in the same firm and the persons employed or supervised by the authorized applicant who continue to participate in the investigation.

(b) Administrative protective order. The administrative protective order under which information is made available to the authorized applicant shall require him to submit to the Secretary a personal sworn statement that, in addition to such other conditions as the Secretary may require, he shall:

(1) Not divulge any of the business proprietary information obtained under the administrative protective order and not otherwise available to him, to any person other than

(i) Personnel of the Commission concerned with the investigation,

(ii) The person or agency from whom the business proprietary information was obtained,

(iii) A person whose application for access to business proprietary information under the administrative protective order has been granted by the Secretary, and

(iv) Other persons, such as paralegals and clerical staff, who are employed or supervised by the authorized applicant; who have a need thereof in connection with the investigation; who are not involved in competitive decisionmaking for an interested party which is a party to the investigation; and who have submitted to the Secretary a signed statement in a form approved by the Secretary that they agree to be bound by the administrative protective order (the authorized applicant shall be deemed responsible for such persons' compliance with the administrative protective order);

(2) Use such business proprietary information solely for the purposes of the Commission investigation then in progress or for judicial or other review of such Commission investigation;

(3) Not consult with any person not described in paragraph (b)(1) of this section concerning such business proprietary information without first having received the written consent of the Secretary and the party or the attorney of the party from whom such business proprietary information was obtained;

(4) Whenever materials (e.g., documents, computer disks, etc.) containing such business proprietary information are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container;

(5) Serve all materials containing business proprietary information as directed by the Secretary and pursuant to paragraph (f) of this section;

(6) Transmit all materials containing business proprietary information with a cover sheet identifying the materials as containing business proprietary information;

(7) Comply with the provisions of this section;

(8) Make true and accurate representations in the authorized applicant's application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (e.g., change in personnel assigned to the investigation);

(9) Report promptly and confirm in writing to the Secretary any breach of the

administrative protective order; and

(10) Acknowledge that breach of the administrative protective order may subject the authorized applicant to such sanctions or other actions as the Commission deems appropriate.

(c) Final disposition of material released under administrative protective order. At such date as the Secretary may determine appropriate for particular data, each authorized applicant shall return or destroy all copies of materials released to authorized applicants pursuant to this section and all other materials containing business proprietary information, such as charts or notes based on any such information received under administrative protective order, and file with the Secretary a certificate attesting to his personal, good faith belief that all copies of such material have been returned or destroyed and no copies of such material have been made available to any person to whom disclosure was not specifically authorized.

(d) Commission responses to a breach of administrative protective order. A breach of an administrative protective order may subject an offender to:

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven years following publication of a determination that the order has been breached;

(2) Referral to the United States Attorney;

(3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;

(4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of or striking from the record any information or briefs submitted by, or on behalf of, the offender or the party represented by the offender, denial of further access to business proprietary information in the current or any future investigations before the Commission, and issuance of a public or private letter of reprimand; and

(5) Such other actions, including but not limited to, a warning letter, as the Commission determines to be appropriate.

(e) Breach investigation procedure. (1) The Commission shall determine whether any person has violated an administrative protective order, and may impose sanctions or other actions in accordance with paragraph (d) of this section. At any time within sixty (60) days of the later of the date on which the alleged violation occurred or, as determined by the Commission, could have been discovered through the exercise of reasonable and ordinary care, or the completion of an investigation conducted under Subpart B or C of this part, the Commission may commence an investigation of any breach of an administrative protective order alleged to have occurred at any time during the pendency of the investigation, including all appeals, remands, and subsequent appeals. Whenever the Commission has reason to believe that a person may have breached an administrative protective order issued pursuant to this section, the Secretary shall issue a letter informing such person that the Commission has reason to believe a breach has occurred and that the person has a reasonable opportunity to present his views on whether a breach has occurred. If subsequently the Commission determines that a breach has occurred and that further investigation is warranted, the Secretary shall issue a letter informing such person of that determination and that the person has a reasonable opportunity to present his views on whether mitigating circumstances exist and on the appropriate sanction to be imposed, but no longer on whether a breach has occurred. Once such person has been afforded a reasonable opportunity to present his views, the Commission shall determine what sanction if any to impose.

(2) Where the sanction imposed is a private letter of reprimand, the Secretary shall

expunge the sanction from the recipient's record two (2) years from the date of issuance of the sanction, provided that

(i) the recipient has not received another unexpunged sanction pursuant to this section at any time prior to the end of the two year period, and

(ii) the recipient is not the subject of an investigation for possible breach of administrative protective order under this section at the end of the two year period.

Upon the completion of such a pending breach investigation without the issuance of a sanction, the original sanction shall be expunged. The Secretary shall notify a sanction recipient in the event that the sanction is expunged.

(f) Service. (1) Any party filing written submissions which include business proprietary information to the Commission during an investigation shall at the same time serve complete copies of such submissions upon all authorized applicants specified on the list established by the Secretary pursuant to paragraph (a)(4) of this section, and, except as provided in § 207.3, a nonbusiness proprietary version on all other parties. All such submissions must be accompanied by a certificate attesting that complete copies of the submission have been properly served. In the event that a submission is filed before the Secretary's list is established, the document need not be accompanied by a certificate of service, but the submission shall be served within two (2) days of the establishment of the list and a certificate of service shall then be filed.

(2) A party may seek an exemption from the service requirement of paragraph (f)(1) of this section for particular business proprietary information by filing a request for exemption from disclosure in accordance with paragraph (g) of this section. The Secretary shall promptly respond to the request. If a request is granted, the Secretary shall accept the information into the record. The party shall file three versions of the submission containing the information in accordance with paragraph (g) of this section, and serve the submission in accordance with the requirements of § 207.3(b) and paragraph (f)(1) of this section, with the specific information as to which exemption from disclosure under administrative protective order has been granted redacted from the copies served. If a request is denied, the copy of the information lodged with the Secretary shall promptly be returned to the requester.

(3) The Secretary shall not accept for filing into the record of an investigation submissions filed without a proper certificate of service. Failure to comply with paragraph (f) of this section may result in denial of party status and such sanctions as the Commission deems appropriate. Business proprietary information in submissions must be clearly marked as such when submitted, and must be segregated from other material being submitted.

(g) Exemption from disclosure. (1) In general. Any person may request exemption from the disclosure of business proprietary information under administrative protective order, whether the person desires to include such information in a petition filed under § 207.10, or any other submission to the Commission during the course of an investigation. Such a request shall only be granted if the Secretary finds that such information is privileged information, classified information, or specific information of a type for which there is a clear and compelling need to withhold from disclosure.

(2) Request for exemption. A request for exemption from disclosure must be filed with the Secretary in writing with the reasons therefor. At the same time as the request is filed, one copy of the business proprietary information in question must be lodged with the Secretary solely for the purpose of obtaining a determination as to the request. The business proprietary information for which exemption from disclosure is sought shall remain the property of the requester, and shall not become or be incorporated into any agency record until such time as

the request is granted. A request should, when possible, be filed two business days prior to the deadline, if any, for filing the document in which the information for which exemption from disclosure is sought is proposed to be included. The Secretary shall promptly notify the requester as to whether the request has been approved or denied.

(3) Procedure if request is approved. If the request is approved, the person shall file three versions of the submission containing the business proprietary information in question. One version shall contain all business proprietary information, bracketed in accordance with § 207.3(c), with the specific information as to which exemption from disclosure was granted enclosed in double brackets. This version shall have the following warning marked on every page: "BPI exempted from disclosure under APO enclosed in double brackets." The other two versions shall conform to and be filed in accordance with the requirements of § 207.3, except that the specific information as to which exemption from disclosure was granted shall be redacted from those versions of the submission.

(4) Procedure if request is denied. If the request is denied, the copy of the information lodged with the Secretary shall promptly be returned to the requester.

Selected Regulatory Preambles

1. Preamble to notice of proposed rulemaking, 58 Fed. Reg. 19,638 (April 15, 1993):

Section 201.13(a) is amended to (1) provide for closed sessions in hearings in any investigation in order to allow parties, upon a specific request that identifies the subjects to be discussed, the amount of time requested, and justifies the need for a closed session with respect to each subject, to address confidential business information, and (2) provide for a closed session in every hearing held by the Commission in an investigation conducted under section 202 of the Trade Act of 1974, as amended, following the public presentation of petitioner(s) and that of each panel of respondents, in order to allow Commissioners to question parties concerning such information.

Section 207.7(a)(3)(D)(ii) is amended to define "competitive decisionmaking," in order to clarify the Commission's practice.

Section 207.7(b)(10) is amended to conform with § 207.7(d), as amended, providing that APO breach investigations may result in "other actions" in addition to the sanctions already provided for.

Section 207.7(d) is amended to provide that APO breach investigations may result in "other actions" in addition to the sanctions already provided for, in order to clarify the Commission's practice.

Section 207.7(e)(1) is amended to provide for issuance by the Secretary of a single letter of inquiry concerning possible APO breaches requesting not only comments on the alleged breach but also the recipient's views on an appropriate sanction, should the Commission determine that a breach has occurred, in order to simplify the Commission's procedures.

Section 207.7(f) is amended to conform to the amended procedures provided for in section 207.7(g) for requests for exemption from disclosure under APO.

Section 207.7(g) is amended to change the procedure for requesting exemption from disclosure under APO of BPI either in a petition or during the course of an investigation, by requiring persons seeking such exemption to file a written request and justification therefore, and simultaneously lodge one copy of the material in question solely for the purpose of obtaining a determination on the request, thereby allowing the submitter the option of withdrawing the material if the request is denied, in order to clarify the Commission's practice.

Section 207.22 is amended to require the filing of pre-hearing briefs four business days before the hearing, in order to ensure the Commission adequate time to consider them.

Section 207.23(a) is amended to specify that a request for a closed session must identify the subjects to be discussed and the amount of time requested, and justify the need for a closed session with respect to each subject, and to provide for a closed session in every hearing held by the Commission in an investigation under title VII of the Tariff Act of 1930, as amended, following the public presentation of petitioner(s) and that of each panel of respondents, in order to allow Commissioners to question parties about matters involving business proprietary information. The proposed requirements for requesting a closed session, including justifying the need for a closed session with respect to each subject to be discussed, reflect the Commission's policy to scrutinize such requests closely and carefully before acting on them.

Section 207.23(b) is amended to require the filing of witness statements two business days prior to hearings, in order to clarify the Commission's practice, and to conform the provision regarding discussion of business proprietary information at hearings to the new provision for closed sessions provided for in section 207.23(a).

2. Preamble to notice of final rulemaking, 59 Fed. Reg. 66,719 (Dec. 28, 1994):

Sections 201.13 and 207.23

Sections 201.13 and 207.23 are amended as described in the notice of proposed rulemaking to modify the procedure for closing to the public a portion of Commission hearings to permit the discussion of confidential or proprietary information.

CITBA commented that it understood that the closed sessions are also intended to apply to the conduct of staff conferences, since section 207.15, governing those conferences, incorporates by reference the procedures in section 201.13. CITBA suggested that the Commission consider shortening the period for requesting a closed session in a preliminary conference, in view of the short time period in preliminary title VII investigations. CITBA suggested that three days would be appropriate. CITBA also suggested that, as a cosmetic change to improve clarity, the Commission should make the provisions governing closed sessions of hearings separate subsections, rather than including them within subsection (a) of rules 201.13 and 207.23. S&S expressed general support for the closed session amendment, but stated a concern that increasingly large closed portions would make hearings less understandable to clients and reduce their opportunity to respond.

The Commission agrees with CITBA that the provisions for closing hearings should be applied to conferences in preliminary title VII investigations, with a shorter time period as suggested by CITBA. The final version of rule 201.13 incorporates that change. The

Commission has also adopted CITBA's proposed cosmetic change. The final version of the rules establishes separate subsections of rules 201.13 and 207.23 providing for closed sessions.

Section 207.7(a)(3)(ii)

Rule 207.7(a)(3)(ii) is amended to clarify the definition of "competitive decisionmaking." CITBA and AMS&S recommended including examples or additional guidelines on the factual circumstances constituting "competitive decision making." AMS&S also suggested that the Commission clarify whether "involvement" includes past, present, or future continuing relationships. The Commission has adopted the suggestion of AMS&S. The Commission finds it inappropriate to put examples or guidelines in the rules, in order to avoid limiting the Commission's flexibility in assessing specific factual situations to determine whether access to BPI by in-house counsel is appropriate. However, the Commission is willing to give parties additional guidance on this issue by providing the following examples in this preamble.

In *A. Hirsh, Inc. v. United States*, 11 CIT 208, 657 F. Supp. 1297 (1987), during judicial review of a Commission title VII determination, the U.S. Court of International Trade (CIT) denied the request of an in-house counsel for access to the BPI in the Commission's investigation record. During the Commission's investigation, this individual, the petitioner's general counsel and chief legal officer, had not had access to BPI, and the petitioner had been represented by outside counsel. The CIT concluded that the interest in guaranteeing a high degree of confidentiality in the information outweighed the individual's need for access, particularly since petitioner was represented by outside counsel. The court noted, among other circumstances, that petitioner was a family-owned and -operated company, and that the individual himself had been empowered to act as president in the absence or disability of the company president, his father. The court also noted that the individual was an officer of the company, and had familial ties with the company's operating officers, who included his father and brother, suggesting a lack of isolation from the commercial activities of the company. Although the case did not directly involve a Commission decision on whether to grant access to BPI to in-house counsel, it illustrates the sort of factors that might prompt denial of access to BPI.

With respect to a Commission determination on the status of in-house counsel in a title VII investigation, the U.S. Court of Appeals for the Federal Circuit affirmed the Commission's decision to grant access to BPI to an in-house counsel. The Commission had granted access based on the individual's certification that, in his position as general counsel for the respondent company, he was not involved in competitive decision-making. The individual had provided the Commission with a description of his duties as general counsel, senior vice president, and secretary. Those duties included supervising the company's legal staff, instituting and defending lawsuits on behalf of the company, preparing contracts, and handling securities and labor matters. He stated that he was not involved in decisions of pricing and the technical design of products. In a further submission to the Commission, he stated that he reviewed securities filings, employee benefit plans and stock purchase plans, kept the minutes of the Board of Directors, attended staff meetings where the results of the company's operations and financial reports were reviewed, attended meetings where the current state of affairs of retail outlets was examined, but that at none of these meetings were issues of pricing or product design discussed. Petitioners in the investigation sought an injunction against the grant of access. The CIT granted an injunction denying the individual access, finding that his

responsibilities constituted involvement in competitive decisionmaking, but the Federal Circuit reversed. *Matsushita Electric Industrial Co., Ltd. v. United States*, 14 CIT 674, 746 F. Supp. 1103, 1106 (1990), *rev'd*, 929 F.2d 1577 (1990).

Section 207.7(b)(10) and (d)

Paragraphs (b)(10) and (d) of section 207.7 are amended to specify that the Commission may take actions other than sanctions in response to APO breaches. AMS&S recommended that the Commission provide examples of "other actions" that would fall within the scope of the provision. The final version of the rule specifies that a "warning letter" is one of the possible actions the Commission may take. The rule also makes clear, however, that the one example is not exclusive. The Commission may take other actions as it determines to be appropriate even if they are not listed in the rule. Paragraph (d) of section 207.7 is further amended to reflect Commission practice by specifying that available sanctions include public and private letters of reprimand.

Section 207.7(e)

Section 207.7(e) is amended to establish a deadline for commencing APO breach investigations. Further, it had been proposed to amend section 207.7(e) to streamline the process of investigating alleged breaches of APOs by replacing with a one-step procedure the existing two-step process, whereby an alleged breacher is first asked for views on whether a breach occurred and is only asked for views on mitigating circumstances and the appropriate sanction after a finding of breach has been made.

CITBA expressed concern at the proposed single-step procedure. CITBA commented that the proposed procedure may, in some cases, significantly diminish a party's right to have a reasonable opportunity to present its arguments on the three issues of whether a breach occurred, whether mitigating circumstances exist, and what sanction if any is appropriate. CITBA suggested that where there are serious factual questions concerning whether the alleged breach actually occurred, a party may not be in a position to present the strongest possible case on mitigation and sanctions in the same response that addresses the alleged breach. Moreover, CITBA commented that where it can be established that the breach did not occur, it would be an unnecessary burden to require submission of comments on mitigation and sanctions. CITBA proposed that the single-step procedure should be available as an alternative, at the option of the accused party, to the existing procedure.

CITBA also proposed that the Commission establish time limits for the phases of a breach investigation, paralleling existing Commerce procedures. CITBA commented that the two year period (following all appeals, remands, and subsequent appeals) allowed for commencement of a breach investigation may be too long in some cases, prejudicing a party's ability to mitigate harm and defend him- or herself. On the other hand, CITBA suggested that two years may be insufficient in cases of intentional breach, where discovery of the breach is difficult. CITBA suggested that the Commission should adopt time limits similar to those employed by Commerce, limiting the period for commencing a breach investigation to 30 days after the alleged violation occurred, or could have been discovered through the exercise of reasonable and ordinary care, as determined by the Commission.

CITBA also suggested that the Commission adopt a time limit for issuance of a charging

letter, as Commerce has done. Finally, CITBA proposed that it would be useful for the Commission to identify deadlines for the various stages of a breach investigation. CITBA suggested Commerce's procedures as examples for consideration.

AMS&S expressed concern with the two year time limit, noting that appeals of Commission determinations can take several years to reach a final conclusion, during which time a party's memory of actions involving an alleged breach dims, making defense against a charge of alleged breach of an APO an onerous burden. AMS&S noted that the Commission's rules require return or destruction of material released under APO within 60 days of publication of a final determination, unless judicial review is commenced. If the determination is appealed, a judicial protective order (JPO) is usually entered, which may contain different provisions from the Commission's APO. AMS&S suggested that actions allowed under the JPO may be alleged to violate the APO. AMS&S noted that it may be argued that once a JPO issues, the Commission no longer has jurisdiction over the parties to consider and sanction breaches of the APO occurring during the appellate process.

AMS&S also expressed concern over the one-step procedure investigation proposed in the rules. AMS&S suggested that this procedure could deny a party a reasonable opportunity to present views about whether the alleged breach actually occurred, requiring submission of potentially contradictory arguments concerning whether the breach occurred, mitigating circumstances, and appropriate sanctions, prior to a determination that there was a breach. AMS&S suggested that a two-step procedure addressing the questions of breach and sanctions separately would be preferable.

S&S expressed concern over the proposed two year time limit for investigating breaches. S&S commented that such a long period is prejudicial to the accused party's ability to defend him- or herself, creates uncertainty, and is unnecessary to protect the confidentiality of information. S&S suggested that the Commission conform its practice to Commerce practice, as discussed above under CITBA's comments. Moreover, S&S took issue with the one-step inquiry, opining that the new procedure would jeopardize the accused person's defense, and proposed that the new procedure be made available as an option that the accused could choose.

S&S also noted that the proposed language suggests that the Commission may investigate breaches occurring during the pendency of judicial review. S&S assumed this was unintentional, noting that JPOs generally cover BPI during the appellate process. S&S suggested that the Commission may wish to clarify that it does not view its authority as extending to sanctioning breaches of JPOs, or allow a period for comment on this issue.

CITBA and S&S both suggested that the Commission address in a future notice and request for comments the agency's APO practice in general.

In view of the comments received on the point, the Commission has determined not to institute the one-step process set out in the proposed rules. However, as it has in the past and as reflected in the amended version of the rule, the Commission may conclude a proceeding in one step if it finds that a breach has occurred but that under the circumstances no further investigation is warranted.

The Commission is sympathetic to the concerns expressed by the commenters

concerning the time limit for commencing investigations of alleged APO breaches. Accordingly, that deadline is shortened from the time limit set in the proposed rules. A breach investigation is to be commenced no later than sixty days after the later of the occurrence of the alleged breach (or the date on which the alleged breach could have been discovered through the exercise of reasonable and ordinary care) or the end of the underlying antidumping or countervailing duty investigation. If a breach is alleged to occur during a preliminary or final investigation, the time limit is sixty days after the end of that investigation. If a breach is alleged to occur after such an investigation, for example during remand proceedings, an investigation into the alleged breach would need to be commenced sixty days after the alleged breach occurred or could have been discovered.

The deadline is intended to provide the Commission sufficient time to commence an investigation into an alleged breach while minimizing any harm to the defense a person might mount in a breach inquiry begun so long after the event that memories have dimmed. The time limit allows for the completion of the underlying investigation so that the Commission need not conduct both that investigation and a breach investigation at the same time, and allows an additional sixty days for the Commission to resolve any matters preliminary to the breach investigation, such as the issue of whether the information in question is business proprietary.

The Commission finds that it would be neither appropriate nor necessary to establish time limits on the various phases of a breach investigation by rule. Specific time limits in the rules could restrict the Commission's ability to seek additional information concerning an alleged breach if deemed necessary. Moreover, the press of other Commission business may hamper compliance with such time limits, necessitating Commission action to extend the deadlines. However, it remains the Commission's intention to expeditiously process APO violation investigations.

The Commission also finds that it would be inappropriate to state that in all instances the Commission will not investigate an alleged APO breach after a JPO has been entered. In some circumstances, the Commission may need to take action even though a JPO is in place.

Section 207.7(f) and (g)

Paragraphs (f)(2) and (g) of section 207.7 are amended to improve the procedure for requesting exemption from disclosure of business proprietary information under APO.

CITBA generally agreed with the proposed procedures for exemption from disclosure under APO. CITBA expressed concern, however, that the proposed rule does not adequately explain how the procedure for seeking exemption from disclosure coordinates with time limits for filing briefs. CITBA proposed that the rule expressly require that exemption be sought sufficiently in advance that the request may be acted upon in time for the party to prepare and file its brief in a timely manner. CITBA also noted that the rule does not clarify how much time the Secretary may need to act on the request, merely that she will "promptly notify" the requestor of the disposition of the request. As a cosmetic change, CITBA also proposed an alternative arrangement of section 207.7(g), with specific subsections dealing sequentially with the procedure. AMS&S and S&S supported the Commission's proposed procedure for requesting exemption from disclosure under APO and service.

The Commission is sympathetic to CITBA's desire for clearer guidelines on timing of

requests for exemption prior to filing and the Secretary's response time, but considers that a "pre-clearance" procedure would be unworkable in view of the already short time limits for filing most party submissions in title VII investigations. To shorten them even further by, in effect, requiring parties to file early in order to obtain exemption from disclosure under APO would in the Commission's view work a substantial hardship on the parties and limit their ability to fully present their arguments. A provision is being added to the final rules indicating that requests for exemption from disclosure under APO should be filed two business days prior to the deadline for filing the document in which the information is proposed to be included, although no strict requirement to that effect is imposed.

The Commission is not imposing a strict time limit for the Secretary's decision on granting the request, but it is the Commission's policy that such requests take precedence over other, more routine matters, and should be expedited so as to be decided within two business days.

The final version of section 207.7(g) largely reflects CITBA's suggested cosmetic changes. Paragraph (f)(1) is amended to make a technical correction to remove a discrepancy between sections 207.7 and 207.3, and indicates no change in Commission practice.

Section 207.22

Section 207.22 is amended to require the filing of prehearing briefs four business days prior to the hearing. CITBA suggested that the clause "The prehearing brief should present a party's case in brief" sounds tautological, and that the word "concisely" replace the phrase "in brief." The Commission has made that change in the final version of the rules. The Commission has also determined to require the filing of prehearing briefs only of interested parties who are parties to the investigation, *i.e.*, those parties with standing to challenge Commission determinations in court. Other persons may but are not required to file prehearing statements.

Section 207.23(b)

Section 207.23(b) is amended to require the filing of witness statements two business days prior to the hearing. GDL&S expressed concern with the proposed change requiring, rather than permitting, filing of witness statements. GDL&S commented that, given the logistics of travel, and the need to prepare witness statements face to face, rather than by long-distance communication, this requirement will impose substantial hardships on foreign witnesses, particularly from the Far East. GDL&S suggested that the requirement will dissuade witness from testifying, will make participation much more costly, and will tend to diminish, rather than enhance, the quality of evidence presented. GDL&S urged the Commission to reconsider this proposed change. The Commission has determined to leave the existing rule on witness statements unchanged.

APPENDIX C

SELECTED COURT DECISIONS

U.S. STEEL CORPORATION, ET AL., APPELLANTS *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, APPELLEES, AND COSIPA, ET AL., INTERVENORS

Appeal No. 84-639

730 F.2d 1465

(Decided March 23, 1984)

D.B. King, of Pittsburgh, Pennsylvania, argued for appellants. With him on the brief were *J.J. Mangan*, *C.D. Mallick*, *L. Ranney* and *P.J. Koening*.

David M. Cohen, of Washington, D.C., argued for appellee U.S. With him on the brief were *Richard K. Willard*, Acting Assistant Attorney General and *Francis J. Sailer*.

Michael H. Stein, of Washington, D.C., argued for appellee ITC. With him on the brief was *Michael P. Mabile*.

Christopher Dunn, of Washington, D.C., argued for intervenors COSIPA.

Griffin B. Bell, King & Spalding, of Atlanta, Georgia, argued for Corporate Counsel And The Corporations They Represent as Amicus Curiae. With him on the brief were *John C. Staton, Jr.* and *Scott A. Wisser*.

Nancy A. Nord, of Washington, D.C., was on the brief for Amicus Curiae American Corporate Counsel Association.

Pierre F. de Ravel d' Esclapon, of New York, New York, *Lewis E. Leibowitz*, of Washington, D.C., *Peter D. Suchman*, of Washington, D.C. and *Milo G. Coerper*, of

Washington, D.C., were on the brief for Amicus Curiae in support of appellees and intervenors.

Appealed from: U.S. Court of International Trade.
Judge WATSON.

Before MARKEY, *Chief Judge,* NICHOLS, *Senior Circuit Judge,* and KASHIWA, *Circuit Judge.*

MARKEY, *Chief Judge.*

Interlocutory appeal on a certified question arising from a decision of the Court of International Trade (CIT) [1] denying U.S. Steel's (USS) corporate in-house counsel access to confidential information. We vacate and return.

BACKGROUND

In *Republic Steel Corp., supra,* note 1, an action involving a negative preliminary injury determination by the International Trade Commission (ITC), the CIT denied a motion for access by USS' in-house counsel to certain confidential information while granting access to counsel retained by other parties. Relying on an earlier decision in *U.S. Steel Corp.* v. *United States,* 569 F. Supp. 870 (Ct. Int'l Trade 1983), *vacated on other grounds,* slip op. 84-12 (Ct. Int'l Trade Feb. 24, 1984), the court reiterated its view that the possibility of inadvertent disclosure by in-house counsel warranted denial of access. 572 F. Supp. at 276. That earlier decision, specifically incorporated into the decision on appeal here, acknowledged USS's need for the information but said that the information's nature and volume required a focus on the possibility of inadvertent disclosure. Though it accepted representations that the present in-house counsel are not involved in competitive decisions, the CIT nonetheless denied access to in-house counsel because of their "general position" and "reasonable assumptions that they will move into other roles."

The CIT certified the access question in its decision. 572 F. Supp. at 277. This court granted USS's petition for review of that question on November 10, 1983, under 28 U.S.C. § 1292(a)(1), *as amended by* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 125(a), 96 Stat. 25, 36 (1982).

The case has proceeded with access granted to retained counsel and denied to in-house counsel.

The United States joins USS in arguing that the CIT's decision constitutes a *per se* ban on access by in-house counsel and should be reversed in favor of a case-by-case balancing test without regard to whether counsel are in-house or retained.

The ITC takes no position on the present court-denial of access, but seeks to preserve its right to deny access by in-house counsel at the administrative level. Intervenors Companhia Siderurgica Paul-

[1] *Republic Steel Corp.* v. *United States,* 572 F. Supp. 275 (Ct. Int'l Trade 1983).

ista, S. A. (COSIPA) and Usinas Siderurgicas de Minas Gerais, S. A., of Brazil and Companhia Siderurgica Nacional are exporters of steel products seeking affirmance of the present denial. European exporters filed a brief *amici curiae* urging affirmance. Bethlehem Steel Corporation filed a brief *amici curiae* in support of reversal.

ISSUE

Whether the CIT erred in denying the present motion for access.

OPINION

The authority of the CIT under 19 U.S.C. § 1516a(b)(2)(B) to control access to confidential information in cases before it is not in dispute.[2] In exercising that control in this case, the CIT carefully reviewed *Atlantic Sugar, Ltd.* v. United States, 85 Cust. Ct. 133, C.R.D. 80-18 (1980) and available authorities dealing with access in other fields of law, made clear that its rationale carried no reflection on the unquestioned integrity and unblemished record of USS' in-house counsel in adhering to protective orders, and indicated that retention of outside counsel was a reasonable way for USS to satisfy its recognized need for the requested information. Serving the interest of early and just resolution, the CIT certified to this court the question of whether access may be denied solely because of counsel's in-house status.

Emphasizing congressional concern for confidentiality and the statutory provision, 19 U.S.C. § 1516a(b)(2)(B) for maintenance of confidentiality, the CIT denied access. It did so, however, only to in-house counsel, because of its concern, as it said, "solely with the greater risk of *inadvertent* disclosure within the corporate setting" (CIT's emphasis).

Because what the CIT called the "extremely potent" information in this case fills several volumes and is intermixed with nonconfidential information, the CIT said "its nature and volume place it beyond the capacity of anyone to retain in a consciously separate category" and that "it is humanly impossible to control the inadvertent disclosure of some of this information in any prolonged working relationship." The CIT recognized that those statements applied equally to retained counsel, but also recognized that applying it to both in-house and retained counsel would render adversarial proceedings impossible.

The CIT's well-taken concern for the nature and scope of the information would be eminently applicable to (and would doubtless complicate) the crafting of a suitable protective order. That concern, coupled with the CIT's emphasis on protection of confidentiality might have justified denial of access to all and sundry. Once it

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[2] 19 U.S.C. § 1516a(b)(2)(B) provides:

Confidential or privileged material.—The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.

became clear that access must be granted, however, it was error to deny access solely because of in-house counsel's "general position" and "reasonable assumptions" that present in-house counsel will move into other positions within USS.

The denial of access here rested on the court's stated general assumption that there is "a greater likelihood of inadvertent disclosure by lawyers who are employees committed to remain in the environment of a single company". Denial or grant of access, however, cannot rest on a general assumption that one group of lawyers are more likely or less likely inadvertently to breach their duty under a protective order. Indeed, it is common knowledge that some retained counsel enjoy long and intimate relationships and activities with one or more clients, activities on occasion including retained counsel's service on a corporate board of directors. Exchange of employees between a client and a retained law firm is not uncommon. Thus the factual circumstances surrounding each individual counsel's activities, association, and relationship with a party, whether counsel be in-house or retained, must govern any concern for inadvertent or accidental disclosure.

The CIT distinguished in-house from retained counsel because, as it said, "a clear and more sustained relationship can be presumed as an outgrowth of the employer-employee relationship". It therefore saw exclusion of in-house counsel as providing "a meaningful increment of protection". Like retained counsel, however, in-house counsel are officers of the court, are bound by the same Code of Professional Responsibility, and are subject to the same sanctions. In-house counsel provide the same services and are subject to the same types of pressures as retained counsel. The problem and importance of avoiding inadvertent disclosure is the same for both. Inadvertence, like the thief-in-the-night, is no respecter of its victims. Inadvertent or accidental disclosure may or may not be predictable. To the extent that it may be predicted, and cannot be adequately forestalled in the design of a protective order, it may be a factor in the access decision. Whether an unacceptable opportunity for inadvertent disclosure exists, however, must be determined, as above indicated, by the facts on a counsel-by-counsel basis, and cannot be determined solely by giving controlling weight to the classification of counsel as in-house rather than retained.[3]

Meaningful increments of protection are achievable in the design of a protective order. It may be that particular circumstances may require specific provisions in such orders. In such cases, the order would be developed in light of the particular counsel's relationship and activities, not solely on a counsel's status as in-house or retained.

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[3]The parties have referred to involvement in "competitive decisionmaking" as a basis for denial of access. The phrase would appear serviceable as shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor.

In a particular case, *e.g.*, where in-house counsel are involved in competitive decisionmaking, it may well be that a party seeking access should be forced to retain outside counsel or be denied the access recognized as needed. Because the present litigation is extremely complex and at an advanced stage, and because present in-house counsel's divorcement from competitive decisionmaking has been accepted by the CIT, forcing USS to rely on newly retained counsel would create an extreme and unnecessary hardship.

Our decision here bears no relation to, and can have no effect on, ITC's rule establishing a *per se* ban on disclosure to in-house counsel in its administrative proceedings. That rule is not before the court. The policy of an administrative agency faced with specific tasks and deadlines cannot of course control a trial court's discretion in managing the litigation before it. Congress has granted discretion to control access to confidential information, in cases like the present, to the CIT. Whether the exercise of that discretion in the course of litigation would unacceptably "chill" the willingness to disclose such information at the administrative level is a matter for the Congress. On the other hand, our holding here, that access be retained as well as in-house counsel should be governed by the facts, may serve to reassure disclosures of confidential information.

It is unnecessary for us to resolve the parties' dispute over whether the apparent emphasis on confidentiality in 19 U.S.C. § 1516a(b)(2)(B), or the asserted emphasis on discovery in Rule 26, Fed.R.Civ.P. should control in this case. Though the requirement to consider the facts rather than status of counsel sounds in Rule 26 terms, it relates here only to cases in which the court has decided to grant access in accord with the authorization in the second sentence in 19 U.S.C. § 1516a(b)(2)(B), *supra*, note 2. Nothing here said diminishes the clear authority of the CIT to deny access to all where the specific facts indicate a probability that confidentiality, under any form of protective order, would be seriously at risk. We do not here reverse the denial of access from which the certified question arose. Nor do we order a grant of access in the case listed in note 1, *supra*. We hold only that status as in-house counsel cannot alone create that probability of serious risk to confidentiality and cannot therefore serve as the sole basis for denial of access.

We have considered and find it unnecessary to discuss the arguments: that the CIT was here creating a *per se* rule requiring denial to all in-house counsel of access to any confidential information in all future cases; that the denial of access here constituted a violation of USS' right to choice of counsel or a disenfranchising of counsel without due process; that Rule 26, Fed.R.Civ.P., rather than 19 U.S.C. § 1516a(b)(2)(B), should have been applied; and that the "staleness" of the information sought should dictate access.

CONCLUSION

The certified question (whether access may be granted to retained and denied to in-house counsel solely on a presumption that inadvertent disclosure by the latter is more likely) is answered in the negative, *i.e.*, a denial of access sought by in-house counsel on the sole ground of their status as in-house counsel is error. In further proceedings, access should be denied or granted on the basis of each individual counsel's actual activity and relationship with the party represented, without regard to whether a particular counsel is in-house or retained.

DECISION

In light of the foregoing, the order denying access to in-house counsel in the case listed in note 1, *supra*, must be *vacated*, and the question *returned*.

VACATED AND RETURNED

NICHOLS, *Senior Circuit Judge*, dissenting.

I would affirm because I am not pursuaded that CIT Judge Watson abused his discretion. His decision has two things going for it this court does not mention. *First*, he conforms practice in his court to that of the ITC. We may say the ITC rule is not before us, yet we cannot overlook the anomaly that will exist if the court and the ITC enforce conflicting rules respecting the same documents. *Second*, the intervenors, original sources of the information in question, are willing for the court to allow disclosure to retained but not to in-house counsel. What they think is important because, if they consider the litigation is conducted in a manner unfair to them and in effect a nontariff barrier to their trade, they could withdraw their marbles from our game and invite their own government to take retaliatory action against United States trade.

Under all the circumstances, Judge Watson well may have thought whatever fault his disposition might suffer from—and hardly could he have imagined it was faultless—alternatives were worse. Factual inquiry into the relationship of in-house counsel with the makers of business policy in their companies, has an appearance, it cannot be denied, of greater fairness. One hopes, but does not much believe, it will not degenerate in practice into an invidious effort to throw doubt on the ability—if not the willingness—of certain members in good standing of the CIT bar, who happen to be currently employed as in-house counsel, to resist pressures to violate protective orders or not to yield "inadvertently." Not in this case, perhaps, but in cases for which this will be a precedent. At best a way is found to prolong the litigation and make it more costly. The CIT judge will have to lay out a pretty rigid method of trial of this issue, one that will keep things within

seemly limits and not take forever to implement, thus limiting the damage to what is endurable.

I would be, on remand, inclined to consider seriously adoption of a simple alternative rule which our court majority also seems not to exclude, *i.e.*, if a document is too sensitive to disclose to any counsel of record, in good standing as a member of the CIT bar, it is too sensitive to disclose to any or all other such counsel. This is, I suppose, rejected by the CIT on its theory, as explained by Judge Watson, that the second sentence of 19 U.S.C. § 1516a(b)(2)(B) nullifies the first once the court has examined the material *in camera*. Apparently the effect of the two sentences is believed to be to achieve practically nothing different from what Fed.R.Civ. P. 26 would effectuate if the Trade Agreements Act of 1979 had said nothing. The court majority here implies something different possibly to be the rule inasmuch as nothing in the second sentence requires grant of access to anyone. The supposed necessity of discriminating between retained and in-house counsel is, or may be, somewhat of a self-created dilemma. While the general rule is that sufficient necessity on the part of the discovering litigant will override any degree of sensitivity, this may not be so where § 1516a(b)(2)(B) is applicable. Such an interpretation would recognize the differences in litigation where foreign traders and governments are so strongly interested in the procedure as well as the outcome, and relieves Congress of the imputation of having enacted futile "weasel" words. The matter has not been briefed and I do not wish to seem to rule upon it, even if, writing as a minority, I could. It seems to me that, without discriminating among counsel or having to decide who is trustworthy, a court might find some other way of dealing with the problem. For example, a court appointed expert, acceptable to both sides for expertise and impartiality, might examine the documents and advise the court as to what they reveal, in sanitized terms sufficient to support a legal conclusion, yet not divulging business or trade secrets.

At any rate, the effect of the decision below, if it had stood, and if United States Steel had still refused to retain outside counsel as the CIT judge hoped it would, is not necessarily denial of justice to United States Steel, but a different thing, denial of the benefit of house counsel's advocacy. If United States Steel's counsel cannot examine these papers, it becomes incumbent on the court to examine them itself, *in camera*, and arrive at a just and lawful decision using its own very considerable intellectual powers. If this were the result, justice might possibly gain instead of losing, and I say this not meaning to denegrate the benefit to the court of adversary counsel's advocacy. This is a benefit, a great one, but one the court, if it must, can do without.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., MATSUSHITA ELECTRONICS CORP., MATSUSHITA ELECTRIC CORP. OF AMERICA, AND HOSIDEN ELECTRONICS CO., LTD., PLAINTIFFS-APPELLEES *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS-APPELLANTS, AND TANDY CORP., DEFENDANT-APPELLANT

Appeal No. 91–1033 and 91–1052

929 F.2d 1577

(Decided April 3, 1991)

William Barringer, Willkie, Farr & Gallagher, of Washington, D.C., argued for plaintiffs-appellees. With him on the brief were *Christopher Dunn* and *Daniel L. Porter*. *Louis S. Mastriani*, Adduci, Mastriani, Meeks & Schill, of Washington, D.C., argued for plaintiffs-appellees. With him on the brief was *Larry L. Shatzer, II*.

George Thompson, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for defendants-appellants. With him on the brief were *Lyn M. Schlitt*, General Counsel and *James A. Toupin*, Assistant General Counsel.

Arthur B. Wineburg, Cushman, Darby & Cushman, of Washington, D.C., argued for defendant-appellant. With him on the brief was *Marcia H. Sundeen*.

Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

Before MAYER, *Circuit Judge*, SMITH, *Senior Circuit Judge*, and MICHEL, *Circuit Judge*.

MICHEL, *Circuit Judge.*

The United States, the United States International Trade Commission (ITC), and the Tandy Corporation appeal the September 25, 1990 order of the United States Court of International Trade entering a preliminary injunction that bars Tandy's in-house counsel from gaining access to proprietary information disclosed by plaintiffs-appellees to the ITC in the course of an antidumping investigation, to which Tandy is a party. *Matsushita, et al. v. United States, et al.*, 746 F. Supp. 1103 (Ct. Int'l Trade 1990). Because the court did not apply the correct statutory standard in reviewing the ITC's decision, and because the ITC's determination to allow access was based on a correct legal interpretation of the relevant statute and was not arbitrary, capricious, or an abuse of discretion, we reverse.

BACKGROUND

This appeal arises from an antidumping petition, currently pending before the ITC and the Department of Commerce, concerning high-information content flat panel displays (FPDs). Matsushita Electric Industrial Co., Matsushita Electronics Corp., Matsushita Electric Corp. of America, and Hosiden Electronics Co. (collectively, "plaintiffs"), as well as Tandy, are parties to the proceeding.

On August 1, 1990, Herschel Winn, General Counsel of Tandy, filed an application with the ITC for release to him under an administrative protective order (APO) of business proprietary information disclosed to the ITC in the investigation, as provided for in 19 U.S.C. § 1677f(c)(1)(A) (1988). The ITC granted Winn's APO application on August 2, 1990. On August 3, 1990 plaintiffs filed letters with the ITC objecting to Winn's receiving information under the APO in light of his roles as General Counsel, Senior Vice President and Secretary of Tandy. After reviewing plaintiffs' objections, the ITC affirmed its decision to give Winn access to the information.

Plaintiffs then filed an action with the Court of International Trade, seeking permanently to enjoin the ITC from allowing Winn access under the APO. Plaintiffs also moved for a temporary restraining order (TRO) and for a preliminary injunction. The court issued a TRO. After a hearing on August 15, 1990, the court orally stated that it was finding in favor of the plaintiffs and granting their request for a permanent injunction. In a written opinion issued September 25, 1990, however, the court stated that it was granting only a preliminary injunction, but nevertheless ordered that "the ITC is directed to strike Mr. Winn's name from the list of those eligible to receive confidential information" in the investigation. *Matsushita*, 746 F. Supp. at 1107. Thus, though it labeled its order a preliminary injunction, the court effectively granted the ultimate relief requested.

Tandy, the ITC and the government filed this appeal, over which we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5) (1988). We shall treat the injunction on appeal as a permanent one.

DISCUSSION

The issue presented in this appeal—whether the Court of International Trade correctly determined that the ITC's decision was arbitrary and capricious—is a question of law which we review de novo. *See American Permac v. United States*, 831 F.2d 269, 273 (Fed. Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988); *Atlantic Sugar v. United States*, 744 F.2d 1556, 1559 (Fed. Cir. 1984). We thus review, in effect, the reasonableness of the underlying decision of the ITC itself. *See American Permac*, 831 F.2d at 273.

The statute governing dissemination of confidential information disclosed in the course of an ongoing antidumping investigation was amended by the Omnibus Trade and Competitiveness Act of 1988 (the "Trade Act") to state that

> the Commission shall make all business proprietary information presented to, or obtained by it, during a proceeding * * * available to interested parties who are parties to the proceeding under a protective order described in subparagraph (B), regardless of when the information is submitted during a proceeding.

19 U.S.C. § 1677f(c)(1)(A) (1988). The Conference Report on the Trade Act makes clear that the parties authorized to have access to confidential business proprietary information include both retained counsel and, under certain circumstances, in-house counsel: "In determining whether in-house counsel may properly be given access, Commerce and the ITC should be guided by the factors enumerated in *United States Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984)." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 623, *reprinted in* 1988 U.S. Code Cong. & Admin. News 1548, 1656. The legislative history thus indicates that Congress intended to adopt the standard for access to information set forth in our decision in *U.S. Steel*.

Similarly, the ITC's regulations regarding APO application procedures incorporate our *U.S. Steel* decision. The regulations specify that an "authorized applicant," from whom applications may be accepted, includes "[a]n in-house corporate attorney for an interested party which is a party to the investigation, if the attorney is not involved in *competitive decisionmaking* as defined in *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984)." 19 C.F.R. § 207.7(a)(3)(ii) (1990) (emphasis added).

In *U.S. Steel*, we held that access to confidential information could not be denied solely because of counsel's in-house status. 730 F.2d at 1469. Focusing on "the risk of inadvertent disclosure," we concluded that while that risk may in many cases be higher for in-house than for retained counsel, "[w]hether an *unacceptable opportunity for inadvertent disclosure* exists, however, must be determined * * * by the facts on a counsel-by-counsel basis, and cannot be determined solely by giving controlling weight to the classification of counsel as in-house rather than retained." *Id.* at 1468 (emphasis added). Although we made no ruling there, we noted that a request might properly be denied in a case

"where in-house counsel are involved in competitive decisionmaking," *id.*, a term we defined as

> shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's *advice and participation* in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor.

Id. at n.3 (emphasis added).

Applying this legal standard to the facts of the instant case, the Court of International Trade accepted plaintiffs' arguments that Mr. Winn's activities in his three roles at Tandy—as General Counsel, Senior Vice President, and Secretary—involved him in "competitive decisionmaking." The court therefore entered an injunction forbidding disclosure, effectively overturning the ITC's decision. Entering this injunction was reversible error.

In the first place, the court did not apply the correct legal standard in reviewing the ITC's determination. The Court of International Trade reviews an ITC decision allowing information to be released to determine whether the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 28 U.S.C. § 2640(d) (1988) (incorporating by reference 5 U.S.C. § 706). The court purported to follow this deferential standard of review, beginning its analysis with the statement that "[f]or plaintiffs to ultimately succeed * * * they must show that the action of the ITC in granting the APO to Mr. Winn was arbitrary and capricious, or an abuse of discretion." *Matsushita*, 476 F. Supp. at 1104. But the court's opinion, which makes de novo findings on the significance of Mr. Winn's activities and nowhere explains how the ITC acted arbitrarily and capriciously or abused its discretion, belies any deference to the ITC.

This failure to defer to the agency is particularly apparent since the court relied essentially on the same administrative record on which the ITC itself based its decision. This record, consisting of a short application and two letters, dated July 31 and August 7, from Herschel Winn to Kenneth R. Mason, the Secretary of the ITC, as well as two letters from counsel for the plaintiffs objecting to Winn's inclusion in the APO, was supplemented before the Court of International Trade with an affidavit from Mr. Winn. In all his filings, Winn described his duties at Tandy, emphasizing his isolation from competitive decisionmaking: "I am not involved in decisions of pricing and the technical design of a product," Letter from Herschel Winn to Kenneth R. Mason (July 31, 1990), Joint Appendix (Jt. App.) at 31; "My primary responsibilities are legal in nature and my administrative duties are in connection with employee benefit plans."; "I am not involved, nor do I become involved, in selection of vendors or the competitive business terms contained in these purchase orders."; "At [none of the meetings I attend] am I involved in decisions involving competing products or marketing strategies. These kind of decisions are made in Operation Meetings within the company

which neither I nor my staff attend."; "My contact with the operating personnel at the factories and in the merchandising department, who make the marketing, purchasing and strategical [sic] decisions, is very minimal and is in the context of a legal problem or an employee benefit matter." Letter from Herschel Winn to Kenneth R. Mason (Aug. 7, 1990). Jt. App. at 46-50. These statements as to Mr. Winn's job responsibilities are entirely unrebutted by any other evidence in the record, and the ITC's letter rejecting plaintiffs' objections stated: "You have provided 16us with no basis for questioning the representations made by either counsel concerning their insulation from competitive decisionmaking."[1] Letter from Kenneth R. Mason to William H. Barringer (Aug. 7 1990), Jt. App at 54.

The ITC thus focused on the proper legal criterion under 19 U.S.C. § 1677f(C)(1)(A) and 19 C.F.R. § 207.7(a)(3)(ii): whether access under the APO would create an unacceptable "risk of inadvertent disclosure" because the applicant was involved in his company's competitive decisionmaking. Furthermore, assuming that Mr. Winn's unrebutted statements are true—and even the Court of International Trade stated that it "has no reason to, and does not here, doubt Mr. Winn's veracity," 746 F. Supp. at 1106—they form a reasonable basis for the ITC to conclude that Mr. Winn was sufficiently insulated from competitive decisionmaking that there was no "risk of inadvertent disclosure" sufficient to justify denying him access under the APO. The ITC's decision to grant access to him was therefore not arbitrary, capricious, or an abuse of discretion.

The Court of International Trade, apparently conducting a de novo review of the record, overturned the ITC's determination based on its own assessment that "Mr. Winn's established positions as Senior Vice President and Secretary do not adequately isolate him from the *policymaking elements* of the corporation so as to render the risk of inadvertent disclosure minimal." 746 F. Supp. at 1106 (emphasis added). The court found that his positions brought him into "regular contact" with executives who were "involved in day-to-day pricing and policy decisions," "in the context of what necessarily are *competitive decisionmaking meetings.*" *Id.* (emphasis added). These findings are largely irrelevant, since the standard is not "regular contact" with other corporate officials who make "policy," or even competitive decisions, but "advice and participation" in "competitive decisionmaking." Moreover, the finding as to the nature of meetings Winn attended is directly contrary to Mr. Winn's own statements, which the court explicitly accepted as true. Hence, it is both non-deferential and contradictory.

It is a natural extension of the rule enunciated by this court in *U.S. Steel* that a denial of access sought by in-house counsel on the sole ground of status as a corporate officer is error. Indeed, the court's con-

[1] The letter's reference to "*either* counsel" reflects the fact that the ITC decision addressed objections to disclosure to inhouse counsel for Hitachi, Ltd. as well as to Mr. Winn. Only the disclosure to Mr. Winn is at issue in the instant case.

clusion here even seems to suggest that general counsel are automatically to be denied access to confidential information merely because they have regular "contact" with those who are involved in competitive decisionmaking, a criterion which would disqualify almost *all* in-house counsel and thus effectively constitute the very per se rule we rejected in *U.S. Steel.*

The court's order entering an injunction must therefore be reversed. The injunction is to be dissolved forthwith and the ITC decision and APO granting access to Mr. Winn are to be reinstated.

CONCLUSION

ITC's decision to grant access to proprietary business information to Tandy's in-house counsel was in accordance with the statute and the regulations, properly interpreted in light of our decision in *U.S. Steel*, and was not arbitrary, capricious, or an abuse of discretion. The judgment of the Court of International Trade overturning that ITC decision is therefore

REVERSED.

APPENDIX D

SANCTIONS NOTICE

Management Officer, Renee Poehls, (202) 736–4743, M/AS/ISS Room 930B, N.S., Washington, D.C. 20523.
Date Submitted: April 11, 1995
Submitting Agency: U.S. Agency for International Development
OMB Number: OMB 0412–0546
Form Number: AID 1550–12
Type of Submission: Renewal
Title: Request for shipment of commodities for Foreign Distributien (Foreign Government)
Purpose: An USAID Title III form is needed by which the specific needs of the recipient country can be communicated to U.S. Department of Agriculture by USAID. The form will be used to request food commodities for approved P.L. 480 Title III country programs overseas and to furnish procurement instruction and other pertinent information necessary to ship these commodities to destination ports.
Annual Reporting Burden:
Respondents: 13
Annual responses: 55
Annual burden hours: 60
Reviewer: Jeffery Hill (202) 395–7340, Office of Management and Budget, Room 3201, New Executive Office Building, Washington, D.C. 20503.

Dated: May 1, 1995.

Genease E. Pettigrew,

Chief, Information Support Services Division Office of Administrative Service Bureau of Management.

[FR Doc. 95–11523 Filed 5–9–95; 8:45 am]
BILLING CODE 6116–01–M

Public Information Collection Requirements Submitted to OMB for Review

The U.S. Agency for International Development (USAID) submitted the following public information collection requirements to OMB for review and clearance under the Paperwork Reduction Act of 1980, (44 U.S.C. Chapter 35). Comments regarding these information collections should be addressed to the OMB reviewer listed at the end of the entry. Comments may also be addressed to, and copies of the submissions obtained from the Records Management Officer, Renee Poehls, (202) 736–4743, M/AS/ISS Room 930B, N.S., Washington, D.C. 20523.
Date Submitted: April 11, 1995
Submitting Agency: U.S. Agency for International Development
OMB Number: OMB 0412–0545
Form Number: AID 1550–04
Type of Submission: Renewal
Title: Request for shipment of commodities for Foreign Distribution (Foreign Government)
Purpose: Public Law 480 states that the President may utilize nonprofit voluntary agencies (PVOs) registered with and approved by the USAID in furnishing food commodities to needy persons outside the Untied States. The USAID Form No. 1550–4 is an instrument by which the PVOs communicate their specific needs in this regard to the U.S. Government. This form is used by eligible PVOs to request food commodities for approved country programs overseas and to furnish delivery instructions and other information necessary to ship these commodities to destination ports.
Annual Reporting Burden:
Respondents: 19,
Annual responses: 1,311;
Annual burden hours: 120 (est.)
Reviewer: Jeffery Hill (202) 395–7340, Office of Management and Budget, Room 3201, New Executive Office Building, Washington, D.C. 20503

Dated: May 1, 1995.

Genease E. Pettigrew,

Chief, Information Support Services Division, Office of Administrative Service, Bureau of Management.

[FR Doc. 95–11524 Filed 5–9–95; 8:45 am]
BILLING CODE 6116–01–M

INTERNATIONAL TRADE COMMISSION

International Trade Commission, Investigations Relating to Potential Breaches of Administrative Protective Orders, Sanctions Imposed for Actual Violations

AGENCY: U.S. International Trade Commission.

ACTION: Summary of Commission practice relating to administrative protective orders.

SUMMARY: This notice provides a summary by the International Trade Commission (Commission) of its investigations of (1) breaches of administrative protective orders (APOs) issued in connection with investigations under Title VII and Section 337 of the Tariff Act of 1930, and (2) certain violations of the Commission's rules.

This notice is intended to inform the public of the Commission's experience with APO breaches. The Commission also intends that this notice will educate and alert representatives of parties to Commission proceedings as to some specific types of APO breaches encountered by the Commission. This notice is illustrative only and does not limit the Commission's rules or standard APO. The notice does not provide an exclusive list of conduct that will be deemed to be a breach of the Commission's APOs, and does not indicate how the Commission will rule in future cases.

FOR FURTHER INFORMATION CONTACT: Elizabeth C. Rose, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202–205–3113.

SUPPLEMENTARY INFORMATION: The discussion below illustrates APO breach investigations that the Commission has completed including a description of actions taken in response to breaches. The discussion covers breach investigations completed during 1994 with respect to antidumping and countervailing duty cases. Also discussed are the Commission's investigations completed during 1994 of possible violations of Commission rule 207.3, commonly known as the "one day rule." In the interest of providing as much information to practitioners as possible on APO practice, this notice also discusses breach investigations completed during 1994 with respect to investigations under section 337 of the Tariff Act of 1930.

The Commission periodically reports a summary of its actions in response to violations of Commission APOs in an effort to educate those obtaining access to business proprietary information (BPI) under an APO of the common problems encountered in handling BPI and confidential business information (CBI). This is the fifth notice of its kind, the previous ones having been published at 56 FR 4846 (Feb. 6, 1991), 57 FR 12335 (Apr. 9, 1992), 58 FR 21991 (Apr. 26, 1993), and 59 FR 16834 (Apr. 8, 1994). The Commission intends to publish summaries at least annually, and more frequently as appropriate.

As part of the effort to educate practitioners about APO practice, the Commission's Secretary issued in September 1991 An Introduction to Administrative Protective Order Practice in Antidumping and Countervailing Duty Investigations. This document is available upon request from the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW, Washington, DC 20436, telephone 202–205–2000.

I. Title VII Administrative Protective Orders

A. In General

APOs are issued in Commission investigations under Title VII of the Tariff Act of 1930 to provide access to BPI to certain party representatives under conditions designed to protect the confidentiality of such information. The

Commission is required to disclose under APO to the authorized representatives of interested parties who are parties to an investigation BPI collected by the Commission in the course of such investigations. 19 U.S.C. 1677f. The Commission has implemented procedures governing this disclosure, which is accomplished under an APO issued by the Secretary to the Commission. 19 CFR 207.7. An important provision of the Commission's rules relating to APOs is the "one day rule" that provides parties with an extra day in which to file the public version of certain submissions containing BPI. 19 CFR 207.3. The one day rule, which also permits correction of the bracketing of BPI during that extra day, was intended to reduce the incidence of APO breaches caused by inadequate bracketing and improper placement of BPI. The Commission urges parties to make use of the rule.

The Commission Secretary provides BPI only to "authorized applicants" who agree to be bound by the terms and conditions of an APO. The Commission is currently revising its standard APO forms for antidumping and countervailing duty investigations to reflect recent regulatory changes and Commission practice. The Commission has also created a new APO form for use in section 201 investigations. The standard APO form for antidumping and countervailing duty investigations issued by the Commission in 1994 required the applicant to swear that he or she would:

(1) Not divulge any of the BPI obtained under the APO and not otherwise available to him, to any person other than

(i) Personnel of the Commission concerned with the investigation,

(ii) The person or agency from whom the BPI was obtained,

(iii) A person whose application for disclosure of BPI under the APO has been granted by the Secretary, and

(iv) Other persons, such as paralegals and clerical staff, who (a) are employed or supervised by and under the direction and control of the authorized applicant or another authorized applicant in the same firm whose application has been granted; (b) have a need thereof in connection with the investigation; (c) are not involved in competitive decision-making for an interested party which is a party to the investigation; and (d) have submitted to the Secretary a signed Acknowledgment for Clerical Personnel in the form attached hereto (the authorized applicant shall also sign such acknowledgment and will be deemed responsible for such persons' compliance with the APO);

(2) Use such BPI solely for the purposes of the above-captioned Commission investigation or for judicial or binational panel review of such Commission investigation;

(3) Not consult with any person not described in paragraph (1) concerning BPI disclosed under the APO without first having received the written consent of the Secretary and the party or the attorney of the party from whom such BPI was obtained;

(4) Whenever materials (*e.g.*, documents, computer disks, etc.) containing such BPI are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container (N.B.: storage of BPI on so-called hard disk computer media is to be avoided, because mere erasure of data from such media may not irrecoverably destroy the BPI and may result in violation of paragraph C of the APO);

(5) Serve all materials containing BPI disclosed under the APO as directed by the Secretary and pursuant to section 207.7(f) of the Commission's rules;

(6) Transmit each document containing BPI disclosed under the APO:

(i) with a cover sheet identifying the document as containing BPI,

(ii) with all BPI enclosed in brackets and each page warning that the document contains BPI,

(iii) if the document is to be filed by a deadline, with each page marked "Bracketing of BPI not final for one business day after date of filing," and

(iv) if by mail, within two envelopes, the inner one sealed and marked "Business Proprietary Information—To be opened only by [name of recipient]", and the outer one sealed and not marked as containing BPI;

(7) Comply with the provisions of the APO and section 207.7 of the Commission's rules;

(8) Make true and accurate representations in the authorized applicant's application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (*e.g.*, change in personnel assigned to the investigation);

(9) Report promptly and confirm in writing to the Secretary any possible breach of the APO; and

(10) Acknowledge that breach of the APO may subject the authorized applicant and other persons to such sanctions as the Commission deems appropriate, including the administrative sanctions set out in the APO.

The APO further provides that breach of the protective order may subject an applicant to:

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven years following publication of a determination that the order has been breached;

(2) Referral to the United States Attorney;

(3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association; and

(4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of or striking from the record any information or briefs submitted by, or on behalf of, the offender or the party represented by the offender, and denial of further access to business proprietary information in the current or any future investigations before the Commission. In addition, as noted in its December 28, 1994 Notice of Final Rulemaking (59 FR 66719, 66720–21), the Commission may take actions other than sanctions, such as the issuance of letters of warning.

Commission employees are not signatories to the Commission's APOs and do not obtain access to BPI through the APO procedure. Consequently, they are not subject to the APOs' requirements with respect to the handling of BPI. However, Commission employees are subject to strict statutory and regulatory constraints concerning BPI, and face potentially severe penalties for noncompliance. See 18 U.S.C. 1905; Title 5, U.S. Code; and Commission personnel policies implementing the statutes. Although the Privacy Act (5 U.S.C. 552a) limits the Commission's authority to disclose any personnel action against agency employees, this should not lead the public to conclude that no such actions have been taken; during 1994, such action was taken.

B. Investigations of Alleged APO Breaches

In an antidumping or countervailing duty investigation, the investigation of an alleged APO breach generally proceeds as follows. The Secretary, acting under delegated authority, issues to the alleged breacher a letter of inquiry to ascertain the alleged breacher's views on whether a breach has occurred. If, based on the response made to such a letter of inquiry, the Commission determines that a breach has occurred,

the Commission often issues a second letter asking the breacher to address the questions of mitigating circumstances and possible sanctions or other actions. The Commission then determines what action to take in response to the breach. However, in some cases, the Commission has determined that although a breach has occurred sanctions are not warranted, and therefore has found it unnecessary to issue a second letter concerning what sanctions might be appropriate, and has waived the rule requiring issuance of the second letter. The Commission's December 28, 1994 Notice of Final Rulemaking formally codifies this procedure. See 59 FR 66719, 66721. The Commission retains sole authority to make final determinations regarding the existence of a breach and the appropriate action to be taken if a breach has occurred.

The records of Commission investigations of alleged APO breaches in antidumping and countervailing duty cases are not publicly available and are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552. Section 135(b) of the Customs and Trade Act of 1990, 19 U.S.C. 1677f(g).

The breach most frequently investigated by the Commission involves the APO's prohibition on the dissemination of BPI to unauthorized persons. Such dissemination usually occurs as the result of failure to delete BPI from public versions of documents filed with the Commission or of transmission of proprietary versions of documents to unauthorized recipients. Other breaches have involved: the failure to properly bracket BPI in proprietary documents filed with the Commission; the failure to immediately report known violations of an APO; and the failure to adequately supervise non-legal personnel in the handling of BPI in certain circumstances.

Sanctions for APO violations serve two basic interests: (a) Preserving the confidence of submitters of BPI in the Commission as a reliable protector of BPI, and (b) disciplining breachers and deterring future violations. As the Conference Report to the Omnibus Trade and Competitiveness Act of 1988 observed, "the effective enforcement of limited disclosure under administrative protective order depends in part on the extent to which private parties have confidence that there are effective sanctions against violation." H.R. Conf. Rep. No. 576, 100th Cong., 1st Sess. 623 (1988).

The Commission has worked to develop consistent jurisprudence, not only in determining whether a breach has occurred, but also in selecting an appropriate response. In determining the appropriate response, the Commission generally considers mitigating factors such as whether the breach was unintentional, lack of prior breaches committed by the breaching party, the corrective measures taken by the breaching party, the promptness with which the breaching party reported the violation to the Commission, and any relevant circumstances peculiar to the situation. The Commission also considers aggravating circumstances, especially whether persons not under the APO actually read the BPI.

The Commission notes that Commission rules permit economists or consultants to obtain access to BPI under the APO under the direction and control of an attorney under the APO, or upon their own responsibility, if the economist or consultant appears regularly before the Commission and represents an interested party who is a party to the investigation. See 19 C.F.R. 207.7(a)(3) (B) and (C). The Commission cautions that economists or consultants who obtain access to BPI under the APO under the direction and control of an attorney nonetheless remain individually responsible for complying with the APO. In appropriate circumstances, for example, an economist under the direction and control of an attorney may be held responsible for a breach of the APO by failing to redact APO information from a document that is subsequently filed with the Commission and served as a public document. This is so even though the attorney exercising direction or control over the economist or consultant may also be held responsible for the breach of the APO.

C. Specific Investigations in Which Breaches Were Found

The following case studies are presented to educate users about the types of APO breaches found by the Commission and the sanctions imposed and other actions taken by the Commission. In addition, the case studies discuss the factors considered by the Commission as mitigating the sanctions imposed in particular instances. The Commission has not included some of the specific facts in the descriptions of investigations where disclosure could reveal the identity of a particular breacher. Thus, in some cases, apparent inconsistencies in the facts set forth in this notice result from the Commission's inability to disclose particular facts more fully.

The following discussion covers the 8 instances in which breaches of APOs in antidumping and countervailing duty investigations were found in 1994:

Case 1: An attorney (1) failed to redact BPI in the public version of a brief, and (2) subsequently served that version on persons not subject to the APO. The public version of the brief filed with the Commission was placed in the public file and was signed out and reviewed by a person not subject to the APO. The failure to redact the BPI from the brief was not discovered by the attorney but was found by the Secretary to the Commission. After being notified, counsel retrieved copies of the document containing the confidential information and sent replacement pages to the Commission. The Commission found that the attorney had breached the APO, but that mitigating circumstances existed because the attorney had committed no prior breaches and the breaches were unintentional. The attorney was given a private letter of reprimand.

Case 2: An attorney failed to redact BPI in the public version of a brief. The Commission was informed of the incident the next day and the attorney filed corrected pages of the brief with the Commission. The public version of the brief was immediately removed from the Commission files. No one other than the Commission staff had seen the public version. The defective public version of the brief was only sent to the attorneys subject to the APO and was recovered without being disseminated to anyone not subject to the protective order. The Commission found that the attorney had breached the APO, but did not sanction the attorney because of the following mitigating circumstances: the breach was not intentional; the attorney had committed no prior breaches; when notified of the defective brief the attorney promptly retrieved the defective documents so no BPI was actually released to any unauthorized persons; and the firm immediately revised and strengthened its previously established procedures for safeguarding against the unintentional release of BPI. Two colleagues were found not to have breached, because they were not directly involved in the preparation of the public version of the brief. The breaching attorney received a warning letter.

Case 3: An attorney filed with the Commission and served upon parties a copy of the public version of a brief in which certain bracketed BPI was not deleted and other BPI was neither bracketed nor deleted. The public version of the brief filed with the Commission was placed in the public file and was signed out and reviewed by persons not subject to the APO. The failure to redact the BPI from the brief was brought to the attorney's attention

by the Secretary of the Commission. The Commission found that a breach of the APO had occurred, but that mitigating circumstances existed because the breaches were unintentional, the attorney had not previously been charged by the Commission with an APO violation, and the attorney acted promptly to mitigate the breach when notified by the Commission that the breach had occurred. However, aggravating circumstances included the fact that members of the public actually reviewed the improperly redacted documents on several occasions, the breach was not discovered by the attorney or by the attorney's firm, but by the Commission, and the attorney appeared not to have reviewed the work of a paralegal who created the public version of the brief. With respect to this last item, we note that the Commission has no specific requirement that attorneys review the work of par 'egals, but attorneys are held responsible for APO breaches by their staff who are APO signatories. The attorney was given a private letter of reprimand.

Case 4: An attorney served the public version of a brief on persons on the public service list and filed it with the Commission. However, BPI was contained in an appendix to the brief. The public version of the brief was not placed in the Commission's public files and the copies of the brief that were served on attorneys on the public service list were destroyed before dissemination to the attorneys' clients. The Commission found that a breach had occurred, but mitigating circumstances were found in that the attorney had committed no prior APO violation, the attorney took immediate steps to "cure" the breach by seeking the removal of the brief from the Commission's public file before it could be reviewed by members of the public (although the brief had not yet been placed in the public file), and the attorney notified other counsel participating in the investigations of the problem before they released the information to their clients. The breaching attorney was not sanctioned but received a warning letter.

Case 5: An attorney filed the public version of a brief in which bracketed BPI was not redacted. The brief was filed with the Commission and served on persons on the public service list, several of whom were not signatories to the APO. The attorney learned of the error that same day and immediately retrieved all copies of the defective public version of the brief from the parties on whom it had been served. The brief was retrieved before it was viewed by any non-signatories to the APO. The brief was never placed in the Commission's public file. The Commission found that the attorney had breached the APO, but decided not to sanction the attorney because of mitigating circumstances including that the breach was inadvertent, the attorney had never been sanctioned by the Commission in the past for APO breaches, immediate steps were taken to mitigate any harm arising from the breach, and no non-APO signatories viewed the confidential information. The breaching attorney received a warning letter. Three colleagues were found not to have breached the APO because they did not participate in the preparation of the public version of the brief.

Case 6: A paralegal assigned to remove bracketed BPI from the public version of a brief failed to do so, and the brief was submitted to the Commission, and served on a signatory to the APO. The error was discovered and reported to the Commission before the brief was placed in the public file. The Commission found that two attorneys responsible for supervising the paralegal breached the APO, but that there were mitigating circumstances including the facts the breach was inadvertent, none of the persons involved had been previously sanctioned by the Commission for APO breaches, steps were taken to mitigate any harm arising from the breach, and no BPI was disclosed. The attorneys were not sanctioned, but received warning letters. Two colleagues were found not to have breached the APO because they were not directly involved with the production of the document in question.

Case 7: Two attorneys served the business proprietary version of a brief on a non-APO signatory due to an error in the certificate of service. Two non-APO signatories actually viewed the defective brief before the attorneys could retrieve it. In a related incident, three attorneys also disclosed information in the public version of a brief from which BPI could be derived, but retrieved it before service was complete. That brief also was filed with the Commission's Secretary, but had not yet been placed in the public file when the attorneys reported the incident. The Commission found breaches in both incidents, but determined not to sanction the attorneys. Mitigating circumstances included the facts that the breaches were unintentional, none of the attorneys involved had been previously sanctioned by the Commission for an APO breach, the attorneys promptly reported both breaches to the Commission and took immediate action to mitigate the breaches, and no non-APO signatories viewed the brief in the second incident. The attorneys received warning letters.

Case 8: Two attorneys mistakenly served replacement pages containing BPI for the confidential version of a brief on an attorney at another law firm. Neither the law firm to which the APO material was sent, nor any of its attorneys, was included in the APO service list. The attorneys waited several days to inform the Commission of the breach. The Commission found that a breach had occurred, but that mitigating circumstances included the following: the breach was unintentional; the attorneys had no prior APO sanctions; prompt and effective measures were taken to minimize any harm resulting from the breach; and the firm conducted more training of its personnel and instituted new procedures to guard against future breaches. Aggravating circumstances included the fact that non-APO signatories of the law firm that received the misdirected copies viewed the information. The breaching attorneys received private letters of reprimand.

D. Investigations Involving the "One Day Rule"

During 1994, the Commission completed the following investigations of changes to briefs that were not in compliance with the one day rule. The Commission found no violations in these investigations. The reasons for finding no violation include:

(1) Attorneys representing two parties in the same investigation made and submitted substantive corrections to their briefs along with bracketing corrections. The attorneys were found not to be in violation because a representative of the Commission had suggested that the corrections be made and there was a misunderstanding as to the appropriate means to make such changes; and

(2) An attorney submitted bracketing changes to a brief in one letter and correction of a typographical error in the brief in a separate letter. The Commission determined that because the correction was filed separately, and not along with the bracketing changes, there was no violation of the one day rule.

E. Investigations in Which No Breach Was Found

During 1994, the Commission completed 4 additional investigations in which no breach was found. The reasons for a finding of no breach included:

(1) The information allegedly mishandled was not BPI;

(2) Partially redacted BPI was largely illegible; and

(3) The information allegedly mishandled by the alleged breacher consisted entirely of information pertaining to the alleged breacher's own client.

II. Section 337 Administrative Protective Orders

APOs are issued in section 337 investigations pursuant to the statute and the Commission's rules. 19 U.S.C. § 1337(n); 19 CFR 210.37. APO practice in section 337 investigations differs in important respects from APO practice in title VII investigations. Notably, in the section 337 context, it is the presiding Administrative Law Judge rather than the Secretary who issues the APO. The terms of the APO may differ from case to case. Further, the one day rule does not apply.

In a section 337 investigation that is no longer before the administrative law judge but is before the Commission, the investigation of an alleged APO breach generally proceeds in the following manner. The Secretary issues a letter of inquiry to ascertain the alleged breacher's views on whether a breach has occurred. If, based on the response made to such a letter of inquiry, the Commission determines that a breach has occurred, the Commission issues a second letter asking the breacher to address the questions of mitigating circumstances and possible sanctions or other actions. The Commission then determines what action to take in response to the breach. The Commission retains sole authority to make final determinations regarding the existence of a breach and the appropriate action to be taken if a breach has occurred.

In section 337 investigations that are before the presiding Administrative Law Judge, it is the judge who presides over the inquiry into any alleged APO breaches.

Breaches have involved the unauthorized dissemination of CBI; the use of CBI for purposes other than the section 337 investigation; and the failure to return or destroy CBI in a timely manner. The following is a summary of the one case in which a breach of the APO in a section 337 investigation was found in 1994:

Case 9: An attorney failed to destroy CBI in a timely manner after the termination of the investigation and after the determination was no longer appealable. The Commission determined that the attorney had breached the APO after written and oral requests by the supplier for return of the information were denied. Mitigating circumstances included the facts that this was the first APO breach by the attorney, and that while the attorney failed to return or destroy the CBI, no CBI was disclosed. The attorney received a private letter of reprimand.

Issued: May 2, 1995.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 95–11492 Filed 5–9–95; 8:45 am]

BILLING CODE 7020–02–P

[Investigation 332–362]

U.S.-Africa Trade Flows and Effects of the Uruguay Round Agreements and U.S. Trade and Development Policy

AGENCY: United States International Trade Commission.

ACTION: Institution of investigation and request for written submissions.

EFFECTIVE DATE: April 27, 1995.

SUMMARY: Following receipt on March 31, 1995, of a request from the United States Trade Representative (USTR), the Commission instituted investigation No. 332–362, U.S.-Africa Trade Flows and Effects of the Uruguay Round Agreements and U.S. Trade and Development Policy. The USTR letter also requested that the Commission prepare its first annual report under this investigation not later than November 15, 1995, and provide an update of the report annually thereafter for a period of 4 years.

FURTHER INFORMATION CONTACT: Cathy Jabara, Office of Industries (202–205–3309) or Jean Harman, Office of Industries (292–205–3313), or William Gearhart, Office of the General Counsel (202–205–3091) for information on legal aspects. The media should contact Margaret O'Laughlin, Office of Public Affairs (202–205–1819). Hearing impaired individuals are advised that information on this matter can be obtained by contacting the TDD terminal on (202–205–1810).

Background: The USTR, in his letter dated March 30, 1995, requested that the Commission, pursuant to section 332(g) of the Tariff Act of 1930 (19 U.S.C. 1332(g), conduct an investigation to provide the President a report containing the following:

1. A profile of the structure of U.S.-Africa trade flows over the 1990–94 period in the following major sectors: agriculture, forest products, textiles and apparel, energy, chemicals, minerals and metals, machinery and equipment, electronics technology, miscellaneous manufactures and services;

2. A summary of U.S. Government trade and development programs (e.g., investments, trade finance, trade facilitation, trade promotion, foreign development assistance, etc.) in Africa, including dollar amounts on an annual basis, during the 1990–94 period;

3. A summary of the literature and private sector views relevant to assessing the impact of the Uruguay Round Agreements on developing countries and Africa in particular; and

4. An assessment of any effects of the Uruguay Round Agreements, and of U.S. trade and development policy for Africa, on U.S.-Africa trade flows.

As requested by the USTR, the Commission will limit its study to the following countries in Sub-Saharan Africa: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Togo, Tanzania, Uganda, Zaire, Zambia, and Zimbabwe.

The USTR letter notes that section 134 of the Uruguay Round Agreements Act (URAA), P.L. 103–465, directs the President to develop a comprehensive trade and development policy for the countries of Africa. The President is also to report to the Congress annually over the next 5 years on the steps taken to carry out that mandate. The Statement of Administrative Action that was approved by the Congress with the URAA states that the President will direct the International Trade Commission to submit within 12 months following enactment of the URAA into law, and annually for the 4 years thereafter, a report providing (1) an analysis of U.S.-Africa trade flows, and (2) an assessment of any effects of the Uruguay Round Agreements, and of U.S. trade and development policy for Africa, on such trade flows.

The USTR letter states that as part of its trade and development policy for Africa, the Administration will be examining all measures that will foster economic development in Africa through increased trade and sustained economic reforms. The USTR asks the Commission in its report to provide, to the extent practicable, any readily available information on the role of regional integration in Africa's trade and development and on Africa's progress in implementing economic reforms.

Public Hearing: A public hearing in connection with the investigation will be held at the U.S. International Trade

APPENDIX E

FORM ADMINISTRATIVE PROTECTIVE ORDER

APO Form Revised March 1995

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

ADMINISTRATIVE PROTECTIVE ORDER
Inv(s). No(s). 701-TA-_____ and/or 731-TA-_____

(Name of Investigation)

A. Application

(1) To obtain disclosure of business proprietary information (BPI) under this Administrative Protective Order (APO), an authorized applicant, as defined in section 207.7(a)(3) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 207.7(a)(3), as amended), must comply with the terms of this APO.

(2) An application for disclosure must be made by an authorized applicant in the form attached hereto. The authorized applicant shall file an application with the Secretary of the Commission (the Secretary) within the deadlines provided in section 207.7(a)(2) of the Commission's rules. An authorized applicant need file only one application in order to obtain BPI in both the preliminary and the final phases of an investigation.

(3) In order to obtain disclosure of BPI under this APO from Commission personnel, an authorized applicant must present a copy of his application and personal identification satisfactory to the Secretary. If the authorized applicant wishes a person described in paragraph B(1)(iv) of this APO to act for him in obtaining disclosure, the person must present a copy of his Acknowledgment for Clerical Personnel and personal identification satisfactory to the Secretary.

B. Obligations of the authorized applicant

By filing an application, the authorized applicant shall agree to:

(1) Not divulge any of the BPI obtained under this APO and not otherwise available to him, to any person other than

(i) Personnel of the Commission concerned with the investigation,

(ii) The person or agency from whom the BPI was obtained,

(iii) A person whose application for disclosure of BPI under this APO has been granted by the Secretary, and

(iv) Other persons, such as paralegals and clerical staff, who (a) are employed or supervised by and under the direction and control of the authorized applicant or another authorized applicant in the same firm whose application has been granted; (b) have a need thereof in connection with the investigation; (c) are not involved in competitive decisionmaking for an interested party which is a party to the investigation; and (d) have submitted to the Secretary a signed Acknowlegment for Clerical Personnel in the form attached hereto (the authorized applicant shall also sign such acknowledgment and will be deemed responsible for such persons' compliance with this APO);

(2) Use such BPI solely for the purposes of the above-captioned Commission investigation or for judicial or binational panel review of such Commission investigation;

(3) Not consult with any person not described in paragraph (1) concerning BPI disclosed under this APO without first having received the written consent of the Secretary and the party or the representative of the party from whom such BPI was obtained;

(4) Whenever materials (*e.g.*, documents, computer disks, etc.) containing such BPI are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container (N.B.: storage of BPI on so-called hard disk computer media is to be avoided, because mere erasure of data from such media may not irrecoverably destroy the BPI and may result in violation of paragraph C of this APO);

(5) Serve all materials containing BPI disclosed under this APO as directed by the Secretary and pursuant to section 207.7(f) of the Commission's rules;

(6) Transmit each document containing BPI disclosed under this APO:

(i) with a cover sheet identifying the document as containing BPI,

(ii) with all BPI enclosed in brackets and each page warning that the document contains BPI,

(iii) if the document is to be filed by a deadline, with each page marked "Bracketing of BPI not final for one business day after date of filing," and

(iv) if by mail, within two envelopes, the inner one sealed and marked "Business Proprietary Information--To be opened only by [name of recipient]", and the outer one sealed and not marked as containing BPI;

(7) Comply with the provisions of this APO and section 207.7 of the Commission's rules;

(8) Make true and accurate representations in the authorized applicant's application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (*e.g.*, change in personnel assigned to the investigation);

(9) Report promptly and confirm in writing to the Secretary any possible breach of this APO; and

(10) Acknowledge that breach of this APO may subject the authorized applicant and other persons to such sanctions or other actions as the Commission deems appropriate, including the administrative sanctions and actions set out in this APO.

C. Return or destruction of BPI

(1) At any time, the Secretary may order the return, destruction, or transfer of any BPI disclosed under this APO, in which case the authorized applicant shall promptly return such BPI to the Secretary or to the submitter of the BPI or destroy the BPI or transfer the BPI to another authorized applicant, as the Secretary may direct. Unless otherwise directed, an authorized applicant to whom BPI was disclosed under this APO during the preliminary phase of the above-captioned investigation may retain possession of such BPI during the final phase of the investigation.

(2) Subject to paragraphs C(3) and C(4) below, within sixty (60) days after the completion of this investigation (*e.g.*, after the publication in the *Federal Register* of a Commission preliminary negative determination, a Commerce Department final negative determination, a Commission final determination, or other final termination of this investigation), or at such other time as the Secretary may direct, the authorized applicant shall return or destroy all copies of BPI disclosed under this APO and all other materials containing such BPI, such as charts or notes based on such BPI. Whenever the authorized applicant returns or destroys BPI pursuant to this paragraph, he shall file a certificate attesting that to the applicant's knowledge and belief all copies of such BPI have been returned or destroyed and no copies of such BPI have been made available to any person to whom disclosure was not specifically authorized.

(3) In the event that judicial review of the Commission's determination in the above-captioned investigation is sought, the authorized applicant shall not be required to comply with paragraph C(2) above, provided that the authorized applicant applies to the appropriate reviewing authority for a protective order agreed to by the Commission within 150 days after the completion of the investigation. If by such date such a protective order has not been applied for, the authorized applicant shall then promptly comply with paragraph C(2) above.

(4) Special rule applicable only to investigations involving imports from Canada or Mexico:

(i) An authorized applicant may retain BPI disclosed under this APO during any binational panel review of the Commission's determination in the above-captioned investigation, subject to the additional terms and conditions set forth in the current version of APO NAFTA Form C. By filing an application for disclosure of BPI under this APO, and by failing to return or destroy all copies of BPI disclosed under this APO on or before the fifteenth (15) day after a First Request for Panel Review has been filed with the NAFTA Secretariat, the authorized applicant agrees to be bound as of that date by the terms and conditions set forth in APO NAFTA Form C, and by the provisions in that form regarding sanctions for violations of those terms and conditions.

(ii) Persons described in paragraph B(1)(iv) of this APO who have filed a statement described in that paragraph shall become subject to the terms and conditions of APO NAFTA Form C on the same date as the authorized applicant, or as soon thereafter as they file a statement described in paragraph B(1)(iv).

D. Sanctions and other actions for breach of this APO.

The authorized applicant shall in the application acknowledge that, pursuant to section 207.7(d) of the Commission's rules, breach of this Administrative Protective Order may subject an offender to:

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven years following publication of a determination that the order has been breached;

(2) Referral to the United States Attorney;

(3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;

(4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of or striking from the record any information or briefs submitted by, or on behalf of, such person or the party he represent, denial of further access to business proprietary information in the current or any future investigations before the Commission, and issuance of a public or private letter of reprimand; and

(5) Such other actions, including but not limited to, a warning letter, as the Commission determines to be appropriate.

By order of the Commission.

Donna R. Koehnke
Secretary

Issued:

Attachments:

1. Form Application for Disclosure of Business Proprietary Information under Administrative Protective Order.

2. Form Acknowledgment for Clerical Personnel

APPENDIX F

FORM APPLICATION FOR DISCLOSURE OF BUSINESS PROPRIETARY INFORMATION UNDER ADMINISTRATIVE PROTECTIVE ORDER

APO Application Form Revised March 1995

ACCEPTED _____

REJECTED _____

DATE _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

APPLICATION FOR DISCLOSURE OF
BUSINESS PROPRIETARY INFORMATION
UNDER ADMINISTRATIVE PROTECTIVE ORDER
Inv(s). No(s). 701-TA-_____ and/or 731-TA-_____

(Name of Investigation)

I. Authorized applicant status

I, the undersigned, am an authorized applicant, as defined in section 207.7(a)(3) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 207.7(a)(3), as amended), for the disclosure of business proprietary information (BPI) under the administrative protective order (APO) issued in the above-captioned investigation. I represent the following interested party, as defined in 19 U.S.C. § 1677(9), which is a party to the investigation:

_____

(State the name of the interested party and its category, *e.g.*, domestic producer, importer, etc.) I am (check one):

( ) (1) An attorney, excepting in-house corporate counsel.

( ) (2) An in-house corporate attorney. I am not involved in competitive decisionmaking for the interested party I represent. I have attached a written statement describing my job functions, disclosing all financial holdings I may have in my employer or its affiliates, and indicating whether I am involved in the formulation of my employer's pricing policies.

( ) (3) A consultant or expert under the direction and control of an attorney under paragraph (1) or (2) above. That attorney has also signed this application to indicate that the attorney is held responsible for my compliance with the APO:

_____

(Name of Attorney--Please Print) (Signature of Attorney)

( ) (4) A consultant or expert who appears regularly before the Commission and is not involved in competitive decisionmaking for the interested party I represent. I have attached a written statement describing my job functions, disclosing all financial holdings I may have in the interested party I represent or its affiliates, and indicating whether I am involved in the formulation of the interested party's pricing policies.

( ) (5) A representative of an interested party that is not represented by counsel. I am not involved in competitive decisionmaking for that interested party. I have attached a written statement describing my job functions, disclosing all financial holdings I may have in the interested party I represent or its affiliates, and indicating whether I am involved in the formulation of the interested party's pricing policies.

Competitive decisionmaking: As defined in section 207.7 of the Commission's rules, involvement in "competitive decisionmaking" includes past, present, or likely future activities, associations, and relationships with an interested party which is a party to the investigation that involve the prospective authorized applicant's advice or participation in

any of such party's decisions made in light of similar or corresponding information about a competitor (pricing, product design, etc.).

II. Request for information

I hereby apply for disclosure to me, subject to the APO issued in the above-captioned investigation, all BPI properly disclosed pursuant to section 207.7 of the Commission's rules, for the purpose of representing an interested party in the investigation and filing comments on the BPI so disclosed. I agree to be bound by the provisions of the APO and section 207.7 of the Commission's Rules of Practice and Procedure.

III. Sanctions and other actions for breach of the APO

I acknowledge that, pursuant to section 207.7(d) of the Commission's rules, breach of the APO may subject me to:

(1) Disbarment from practice in any capacity before the Commission along with my partners, associates, employer, and employees, for up to seven years following publication of a determination that the order has been breached;

(2) Referral to the United States Attorney;

(3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;

(4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of or striking from the record any information or briefs submitted by, or on behalf of, me or the party I represent, denial of further access to business proprietary information in the current or any future investigations before the Commission, and issuance of a public or private letter of reprimand; and

(5) Such other actions, including but not limited to, a warning letter, as the Commission determines to be appropriate.

IV. Oath

I declare under penalty of perjury that the foregoing is true and correct. Executed on this _____ day of _____, _____, in _____
(month) (year) (city, state)

_____
Signature)

_____
(Name--Please Print)

_____
(Title--Please Print)

_____
(Firm--Please Print)

APPENDIX G

FORM ACKNOWLEDGMENT FOR CLERICAL PERSONNEL

APO Acknowledgment Form Revised March 1995

ACCEPTED _____

REJECTED _____

DATE _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

ADMINISTRATIVE PROTECTIVE ORDER
ACKNOWLEDGMENT FOR CLERICAL PERSONNEL

Inv(s). No(s). 701-TA-_____ and/or 731-TA-_____

(Name of Investigation)

We, the undersigned, are persons described in paragraph B(1)(iv) of the Administrative Protective Order (APO) issued in the subject investigation. We hereby agree to be bound by the provisions of the APO. We acknowledge that we may be subject to the sanctions described in paragraph D of the APO. The authorized applicant exercising direction and control over us in the investigation has also signed this acknowledgment to indicate that the applicant is responsible for our compliance with the APO.

We declare under penalty of perjury that the foregoing is true and correct. Executed on this _____ day of _____ (month), _____ (year), in _____ (city, state)

(Name--Please Print)	(Title)	(Signature)	(Date)
(Name--Please Print)	(Title)	(Signature)	(Date)
(Name--Please Print)	(Title)	(Signature)	(Date)
(Name--Please Print)	(Title)	(Signature)	(Date)
(Name--Please Print)	(Title)	(Signature)	(Date)

PERSON EXERCISING DIRECTION AND CONTROL:

_____

(Signature)

_____

(Name--Please Print)

APPENDIX H

EXAMPLE OF APO FORM PROPERLY FILLED OUT

APO Application Form Revised March 1995

ACCEPTED _____

REJECTED _____

DATE _____

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, DC 20436

APPLICATION FOR DISCLOSURE OF
BUSINESS PROPRIETARY INFORMATION
UNDER ADMINISTRATIVE PROTECTIVE ORDER

Inv(s). No(s). 701-TA- 501 **and/or 731-TA-** 901

WIDGETS FROM RURITANIA

(Name of Investigation)

I. Authorized applicant status

I, the undersigned, am an authorized applicant, as defined in section 207.7(a)(3) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 207.7(a)(3), as amended), for the disclosure of business proprietary information (BPI) under the administrative protective order (APO) issued in the above-captioned investigation. I represent the following interested party, as defined in 19 U.S.C. § 1677(9), which is a party to the investigation:

ACME CORP., FOREIGN MANUFACTURER

(State the name of the interested party and its category, *e.g.*, domestic producer, importer, etc.) I am (check one):

( ) (1) An attorney, excepting in-house corporate counsel.

( ) (2) An in-house corporate attorney. I am not involved in competitive decisionmaking for the interested party I represent. I have attached a written statement describing my job functions, disclosing all financial holdings I may have in my employer or its affiliates, and indicating whether I am involved in the formulation of my employer's pricing policies.

(X) (3) A consultant or expert under the direction and control of an attorney under paragraph (1) or (2) above. That attorney has also signed this application to indicate that the attorney is held responsible for my compliance with the APO:

JOHN SMITH, ESQ. — John Smith

(Name of Attorney--Please Print) (Signature of Attorney)

( ) (4) A consultant or expert who appears regularly before the Commission and is not involved in competitive decisionmaking for the interested party I represent. I have attached a written statement describing my job functions, disclosing all financial holdings I may have in the interested party I represent or its affiliates, and indicating whether I am involved in the formulation of the interested party's pricing policies.

( ) (5) A representative of an interested party that is not represented by counsel. I am not involved in competitive decisionmaking for that interested party. I have attached a written statement describing my job functions, disclosing all financial holdings I may have in the interested party I represent or its affiliates, and indicating whether I am involved in the formulation of the interested party's pricing policies.

Competitive decisionmaking: As defined in section 207.7 of the Commission's rules, involvement in "competitive decisionmaking" includes past, present, or likely future activities, associations, and relationships with an interested party which is a party to the investigation that involve the prospective authorized applicant's advice or participation in

any of such party's decisions made in light of similar or corresponding information about a competitor (pricing, product design, etc.).

II. Request for information

I hereby apply for disclosure to me, subject to the APO issued in the above-captioned investigation, all BPI properly disclosed pursuant to section 207.7 of the Commission's rules, for the purpose of representing an interested party in the investigation and filing comments on the BPI so disclosed. I agree to be bound by the provisions of the APO and section 207.7 of the Commission's Rules of Practice and Procedure.

III. Sanctions and other actions for breach of the APO

I acknowledge that, pursuant to section 207.7(d) of the Commission's rules, breach of the APO may subject me to:

(1) Disbarment from practice in any capacity before the Commission along with my partners, associates, employer, and employees, for up to seven years following publication of a determination that the order has been breached;

(2) Referral to the United States Attorney;

(3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;

(4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of or striking from the record any information or briefs submitted by, or on behalf of, me or the party I represent, denial of further access to business proprietary information in the current or any future investigations before the Commission, and issuance of a public or private letter of reprimand; and

(5) Such other actions, including but not limited to, a warning letter, as the Commission determines to be appropriate.

IV. Oath

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 4th day of MARCH (month), 1998 (year), in WASHINGTON, D.C. (city, state)

William Jones
(Signature)

WILLIAM JONES
(Name--Please Print)

ECONOMIST
(Title--Please Print)

JONES & CO.
(Firm--Please Print)