

FTA Trade Perspectives

Transparency in Anti-Dumping Investigations

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Foreign Trade Association

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Editorial



Dear readers,

Welcome to the last edition in 2015 of FTA's Trade Perspectives, our quarterly newsletter that focuses on a specific international trade topic while also offering an update on FTA's activities along with noteworthy news and events. This edition focuses on an issue with which FTA has been concerned for many years; the lack of transparency in EU anti-dumping and anti-subsidy investigations.

FTA believes in "free trade"; a liberalised framework that facilitates commerce, but not at all costs. We support the EU in addressing unfair trade practices by third countries via the use of anti-dumping and anti-subsidy measures; however, the lack of transparency remains a serious inadequacy in the system. Although interested parties, such as FTA, have access to the non-confidential file, details are limited, making independent verification impossible.

FTA stands by its recommendation already published in a [position paper in July this year](#), that the solution to this problem is the introduction of a system similar to that used in the US known as "APO" (Administrative Protective Order). This is basically a non-disclosure agreement permitting authorised persons access to confidential data along with decisions taken by the examining authority throughout the investigation process. The benefits of this system are described by top US trade attorney, Patrick Togni (King & Spalding), interviewed in this issue.

The matter was also discussed at FTA's [5th Round Table](#) which took place on 24 November and received a positive response from the participants. I was also pleased to see that the Commission's recent trade strategy "Trade For All" contains the promise to improve access to anti-dumping and anti-subsidy investigation files by legal representatives of interested parties.

I hope you enjoy reading about this issue in more detail and I invite you to visit our [website](#) where you can find out more about the work we do towards our goal of free and sustainable trade for importers, retailers and brand-name companies.

Christian Ewert
FTA Director General

Top Story: Is a Truly Transparent EU Anti-Dumping System Possible?

Involving oneself in an anti-dumping investigation is, at least in the EU, somewhat frustrating. From the beginning (when an investigation starts without warning), to the end (when just ten days are given to comment on a proposal to impose duties) attempting to properly examine the course of an investigation is extremely difficult.

The EU Commission's anti-dumping investigation teams collect a huge amount of data throughout the course of an investigation. However, access by interested parties is restricted to the non-confidential files. Both the WTO and the EU legislation state that the information on this file should be "...in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence." Unfortunately, this is seldom the case with data either missing entirely or presented in an indexed format.

In the US, the situation is somewhat different. For the past 35 years, a far more transparent system has been in operation; the Administrative Protective Order (APO). FTA's [position paper](#) examines the faults in the EU system, takes a close look at the APO, and addresses the arguments against a similar system being adopted in the EU.

In essence, there could be little difference between the US system and an EU system. Access to confidential material (other than information such as trade secrets) by authorised persons such as lawyers, consultants and experts would be granted, provided the strict requirements concerning non-disclosure, relevant use, proper storage, and reporting of abuse are met. In addition, sanctions for any violation – such as disbarment for the offender *et al* from practising before the Commission, non-access to Business Proprietary Information (BPI) in future cases, etc. (or the possibility of fines) – would be imposed. Access to data could be obtained either by interested parties forwarding the information to authorised persons when they submit it to the Commission, or via a secure data room (similar to EU competition cases).

Although the argument for greater transparency would seem to be clear there have been opposing voices. The two main concerns are the possibility that confidential material may be leaked or that additional costs may be incurred.

The potential that confidential information may be leaked is indeed a matter of some concern. However, FTA does not believe that a member of the legal provision, nor a consultant or expert, would risk the punitive or reputational damage that would occur. In this regard, it is interesting to note that in the US, from a conservative estimate of 4,500 APOs that are issued each year, there are on average just nine breaches – and these are very minor. In fact, there has been no record that confidential material has been leaked since the APO was introduced 35 years ago.

The extra legal costs may be a more realistic concern – after all, if better access to a greater amount of data is permitted then it is likely that lawyers in particular will spend more time on a particular investigation therefore increasing costs. However, FTA believes that this additional time spent would be worthwhile and would not restrict anti-dumping to large firms with deep pockets. Firstly, a budget would be proposed for lawyers to follow, limiting their financial demands. For SMEs, FTA suggests either they join forces in order to fund this work, or to use the services of an expert in a trade association such as the FTA.

Another concern raised is that with increased access to files, there will be increased reasons to litigate. FTA would welcome this if it were to lead to an effective outcome. However, it is more likely that the increase in access to files would lead to a decrease in litigation as errors will more likely be detected and rectified before the final imposition of measures. A further, related, concern is that the increased scrutiny of the files would reduce the level of discretion the Commission has when conducting investigations. However, FTA considers that this would be a distinct improvement as the wide discretion the Commission enjoys is the main reason APO is needed in the EU.

Finally, a lack of resources in the European Commission has been raised as reason why the system would not be viable in the EU. FTA is disappointed by this argument, particularly if the Commission has a serious objective to increase transparency.

It is clear that the EU's anti-dumping system is lacking in transparency because it doesn't permit an independent analysis of the data collected, and the decisions taken on the basis of that data. This places those who are affected by any measures imposed under that system at a significant disadvantage when defending their interests. The introduction of an APO-type system would result in fairer and more accurate anti-dumping investigations and measures and would restore the confidence of EU companies in the Commission's administration.

By Stuart Newman, Legal Advisor International Trade Policy (ITP), (stuart.newman@fta-intl.org)

The US “APO” system from a practitioner’s eye – FTA interviews Patrick Togni (King & Spalding, Washington DC)

FTA supports the introduction of an “APO-type” system in the EU. However, the very absence of such a system may make it difficult for one to appreciate its advantages. Therefore, in this edition of Trade Perspectives we interview an expert with intimate experience of the system employed in the US to see just how it compares to the EU.



FTA: The APO system used in the US seems to offer unparalleled access to information on the investigation file. Is this an accurate assessment or is the reality more mundane?

Patrick Togni: There is no question that the US APO system provides authorised applicants with broad access to information on the investigation file, including business proprietary information (BPI). The US system provides limited exceptions to this disclosure (which are rarely used), such as privileged, classified, or specific information of a type for which there is a clear and compelling need to withhold from disclosure (e.g., the identity of an investigator that compiled information about a respondent's home market pricing practices that could face physical harm if disclosed).

The reality of US anti-dumping (AD) and countervailing duty (CVD) proceedings (e.g., investigations, administrative reviews, or five-year reviews of AD or CVD orders) is that the agencies tasked with making determinations require sensitive financial and commercial information to do their job. The US Department of Commerce (Commerce) is charged with determining whether imported products are dumped or subsidised. The US International Trade Commission (Commission) is a six-member independent agency which determines whether dumped or subsidised imports are materially injuring, threatening to injure, or materially retarding the establishment of a US industry producing a product that is “like” the imported merchandise.

The US Congress amended the trade laws in 1979 to permit for the first time the disclosure of certain confidential information under APO. A Senate Report explained that petitioners' ability to obtain meaningful relief in AD and CVD proceedings “has been impaired by . . . lack of access to the information presented by the exporters and foreign manufacturers,” and that “importers, exporters, and other respondents in such cases” also suffered from a “lack of access to information supplied by the domestic parties to such cases, particularly with respect to the economic health of the domestic industry involved.”

FTA: One objection to a similar system being implemented in the EU is the concern that confidential material may be leaked. Are there similar concerns in the US?

“All stakeholders in the United States recognise that confidence in the integrity of the APO system is a threshold requirement”

Patrick Togni: All stakeholders in the United States recognise that confidence in the integrity of the APO system is a threshold requirement. Creating an atmosphere of trust in the US APO system is not an empty promise. Strict obligations are imposed upon authorised applicants by statute, agency regulations, and through the terms of the APO governing the particular proceeding at issue. Several complimentary layers of protection exist under US law for proprietary information submitted during the course of US AD and CVD proceedings. For example, persons involved in, or who may become involved with, the competitive decision making activity of the interested party or of other competitors are not permitted access to APO materials.

Another hallmark of the US APO system is that the authorised applicants themselves play a central role in APO enforcement by assuming certain important obligations in exchange for obtaining access to APO materials. The US APO system also requires authorised applicants to agree to self-disclose any APO violations to Commerce and/or the Commission. These aspects of the regulatory framework stimulate APO compliance oversight on a day-to-day basis.

“Another hallmark of the US APO system is that the authorised applicants themselves play a central role in APO enforcement by assuming certain important obligations in exchange for obtaining access to APO materials”

Commerce and the Commission maintain broad authority to punish APO violators. Sanctions may be severe. For example, sanctions may include termination of the proceeding and/or revocation of the order. The individual violators and their firms also can face discipline, which in practical terms can result in an inability to engage in future cases or to access BPI, at least for a time, before the agency that issued the protective order.

FTA: Another concern is that costs would rise significantly. How do US law firms and other practitioners mitigate this concern?

Patrick Togni: Any costs associated with improved access to investigation files in EU trade defence instrument (TDI) proceedings should be considered in light of the significant benefits of increased transparency. Implementation of an APO system would enable parties to more meaningfully exercise their rights and to assess substantive and procedural aspects of TDI proceedings in ways that are impossible under the current system. In the United States, APO practice and procedure have played a pivotal role in facilitating the agencies' fact-finding and adjudicative functions in AD and CVD proceedings.

The APO system adds significant value because many of the key issues are decided on the basis of confidential information. For parties that may decide to bring a trade remedy proceeding (or who may be required to participate as a respondent), access to key information pertaining to core aspects of the proceedings is essential.

FTA: Imagine for a moment that the US suddenly adopts the EU approach; where access to trade defence investigations is restricted to the non-confidential file. How would you react?

Patrick Togni: I believe that abandoning the APO system after more than 35 years of success would have profoundly negative consequences on trade remedy proceedings in the United States. The US

APO system provides robust protection for the submission of BPI in AD and CVD proceedings. These strong protections create confidence in the system and incentivise parties to submit sensitive information and argument that are necessary for the trade agencies to perform their functions as transparently and thoroughly as possible.



Patrick Togni, Associate, King & Spalding's International Trade and Litigation Practice Group

Mr. Togni assists clients in all aspects of international trade law, and has substantial experience in trade remedy proceedings, litigation, and regulatory compliance.

He has participated in anti-dumping, countervailing duty, and safeguard proceedings before the US Department of Commerce and the US International Trade Commission, and in appeals before North American Free Trade Agreement Chapter 19 Binational Panel reviews and the US Court of International Trade.

In addition, Mr. Togni has written a number of published articles and is a frequent speaker on international trade.

FTA Activities

- [Meetings with Member States on transparency in anti-dumping investigations \(5-7 October\)](#)
 - [FTA Director General pays visit to Bangladesh and Myanmar \(11 to 17 October\)](#)
 - [Meeting with Ambassador of Thailand \(20 October\)](#)
 - [Meeting with high level officials at Indonesian Embassy \(2 December\)](#)
 - [Meeting with Bangladesh Ambassador \(4 December\)](#)
 - [FTA delegation to WTO Ministerial in Nairobi \(15-18 December\)](#)
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Meetings with Member States on transparency in anti-dumping investigations (5-7 October)

FTA Legal Advisor, Stuart Newman met with trade defence experts from Cyprus, Hungary and Denmark to discuss the ways in which transparency in anti-dumping investigations could be improved.

FTA Director General pays visit to Bangladesh and Myanmar (11 to 17 October)

Christian Ewert participated in a stakeholder roundtable in Dhaka and met with the Personal Advisor to the Prime Minister, Prof. Rizvi. [Christian Ewert was interviewed by The Daily Star](#), Bangladesh's largest daily English-language newspaper, about capacity building in the garment sector. In Myanmar, meetings were held with major business associations.

Meeting with Ambassador of Thailand (20 October)

Christian Ewert, together with Pierre Gröning, Head of Trade Policy, and Verónica Rubio, BSCI Senior Manager on Strategic Issues, met with H.E. Ambassador Nopadol Gunavibool to discuss actions taken by the Thai authorities in fighting abuses in the fishery sector.

Meeting with high level officials at Indonesian Embassy (2 December)

Pierre Gröning and Junior Trade Advisor Milan Pajic met with the Trade Attaché from the Mission of Indonesia to the EU, Olvy Andrianita, to discuss EU-Indonesia trade relations and the current status of free trade negotiations, as well as specific issues that European companies are encountering when doing business in Indonesia.

Meeting with Bangladesh Ambassador (4 December)

Christian Ewert and Pierre Gröning met with H.E. Mrs. Ismat Jahan to discuss recent trade developments and the common objective of increasing the labour and building safety standards in the Bangladeshi garment and textile sector. FTA presented the FTA Focus "[Is Bangladesh a success case?](#)" to Ambassador Jahan.

FTA delegation to WTO Ministerial in Nairobi (15-18 December)

Pierre Gröning participated as Adviser to the EU Delegation to support a meaningful outcome of the conference. Different FTA activities were rolled-out: a high-level panel discussion as part of the Trade and Development Symposium (TDS), a [joint statement with business associations worldwide](#), and a dedicated [FTA position Paper](#).

European Trade News

- [11th Round of TTIP negotiations concluded \(23 October\)](#)
 - [EU and New Zealand leaders meet to discuss potential free trade agreement \(29 October\)](#)
 - [Commissioner Malmström in Ukraine \(12 November\)](#)
 - [Kazakhstan becomes 162nd member of the WTO \(30 November\)](#)
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11th Round of TTIP negotiations concluded (23 October)

The 11th Round of the TTIP negotiations ended with progress on market access, regulatory cooperation and trade rules. Proposals on product-specific rules of origin were exchanged and the EU put forward its proposal for sustainable development, including labour and the environment.

EU and New Zealand leaders meet to discuss potential free trade agreement (29 October)

EU Trade Commissioner, Cecilia Malmström and New Zealand Trade Minister, Tim Groser met to discuss the growing trade levels between the two trading nations and the possibility of a trade agreement.

Commissioner Malmström in Ukraine (12 November)

The Commissioner met with the Ukrainian President, Petro Poroshenko, the Prime Minister, Arseniy Yatsenyuk and other high ranking officials to discuss the implementation of the Deep and Comprehensive Free Trade Agreement as from 1 January 2016.

Kazakhstan becomes 162nd member of the WTO (30 November)

After depositing its "Instrument of Acceptance" on 31 October, today Kazakhstan acceded to the WTO after 20 years of accession negotiations.

Contact

To share your feedback, contact info@fta-intl.org

The Foreign Trade Association (FTA) is the leading business association of European and international commerce that promotes the values of free trade and sustainable supply chains. FTA represents over 1,500 retailers, importers and brand manufacturers to promote and defend free trade and supports their international business by providing information and practical solutions towards sustainability in the international supply chain.

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