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Global Trade and Customs Journal provides readers with new ideas, fresh insights, and expert views on critical practical issues affecting international trade, including export controls, trade remedies, and customs compliance, with a growing focus on international investment regulation. Written for practitioners by practitioners, the journal offers practical analysis, reliable guidance, and experienced advice to support professionals in protecting their clients’ or organization’s compliance interests.

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9. Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Tables should be numbered and should include concise titles.
10. Heading levels should be clearly indicated.

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The lack of transparency remains a major problem in the administration of trade defence instruments (TDI) by the European Union (EU) and the many World Trade Organization (WTO) members that have found inspiration in the EU TDI system. Adoption of an administrative protective order (APO) system, similar to that used by the United States (US) since 1979, seems the only solution to increasing transparency in a meaningful manner.

I Introduction

Although we come from different backgrounds and different disciplines, we have in common that we place a high value on governmental transparency in decision-making processes. In this context, we have long been struck by the huge gap in transparency in trade defence instruments (TDI) procedures and decision-making processes between the EU and the US. This gap manifests itself in major differences between the two systems regarding important elements of the investigative process such as availability of verification reports, conduct of public hearings, access to the public file and – most importantly – access to confidential information submitted by interested parties in the course of an investigation. This observation and the positive experience with the openness of the US system prompted one of us in 1987 to advocate the EU adoption of a system of disclosure of confidential information under administrative protective order (APO), similar to that existing in the US since 1979 and the other to advocate more transparency in the framework of the TDI modernization exercise.

2 The situation in the EU

Although EU authorities have from time to time half-heartedly given lip service to exploring the possibility of adoption of an APO system, no progress whatsoever has been made during the past thirty years. Although transparency was one of the main objectives of the
modernization exercise of the TDI presented by the Commission in April 2013, the Commission dismissed the efficacy of an APO in its Impact Assessment, a claim questioned in the Rapporteur’s Working Document. As a result, the lack of transparency remains the Achilles heel of EU trade defence law and practice. It may seem surprising that in a modern and open society with so much information publicly available anybody could be opposed to improving transparency and – of course – nobody will come out and openly say so. Rather, the opponents of an APO system in the EU will proffer reasons why such a system in the EU would be costly, risky or otherwise undesirable.

Perhaps tellingly, such opposition comes mostly from the EU Commission itself and EU trade associations representing EU producers, i.e., respectively the – ought-to-be neutral – administering authority and one category of interested parties. The other types of interested parties, notably exporters, importers and their trade associations, generally favour adoption of an APO system. Particularly the opposition of the EU trade associations representing domestic producers appears counter-intuitive as they would have most to gain by improved access to dumping and injury margins’ calculation details, as well as to some of the key elements of price undertakings.

If anything, the lack of transparency in EU trade defence investigations has only become more acute over time, with so many EU cases targeting non-market economies (NME) these days. This is so for two reasons. First of all, the EU NME dumping margin calculation methodology relies heavily on the cooperation of analogue country producers to establish the normal value to be compared with NME export prices. As the data provided by analogue country producers invariably are treated as confidential, none of the directly interested parties will have access to such information and, consequently, the calculation of the dumping margin remains shrouded in secrecy in such cases. Second, in most EU NME anti-dumping investigations the duties are capped by the injury margins, surprisingly often resulting in high duty rates of 49% or more. As these injury margins are based on a PCN-by-PCN comparison of the sampled NME producers’ export prices to the EU and either the sampled EU producers’ prices in the EU or target prices, calculated by reference to their costs of production plus a ‘reasonable’ profit margin, i.e., by definition confidential data, again their calculation remains a mystery.

Rovetta and Gambardella rightly point out that it may be possible to obtain access to confidential information in the course of preliminary ruling court procedures. However, these proceedings are time-consuming, long-drawn and of course typically provide the access only years after the conclusion of the administrative investigation and irrepairable damage is often done by then.

Notes
14 Market economy foreign producers at least have access to the information relating to the calculation of their dumping margins as this calculation is based on their data.
15 Ironically the USDOC factors of production test used to establish normal value in non-market economies (NME) these days. This is so for two reasons. First of all, the EU NME dumping margin calculation methodology relies heavily on the cooperation of analogue country producers to establish the normal value to be compared with NME export prices. As the data provided by analogue country producers invariably are treated as confidential, none of the directly interested parties will have access to such information and, consequently, the calculation of the dumping margin remains shrouded in secrecy in such cases. Second, in most EU NME anti-dumping investigations the duties are capped by the injury margins, surprisingly often resulting in high duty rates of 49% or more. As these injury margins are based on a PCN-by-PCN comparison of the sampled NME producers’ export prices to the EU and either the sampled EU producers’ prices in the EU or target prices, calculated by reference to their costs of production plus a ‘reasonable’ profit margin, i.e., by definition confidential data, again their calculation remains a mystery.
18 While successful applicants in court cases may get back the anti-dumping duties that they paid, they will not be able to recuperate the money that they lost as a result of decreased exports as EU courts are extremely reluctant to honour claims for damages.
3 DISCUSSION

Recent issues of the Global Trade and Customs Journal have devoted considerable attention to the APO debate and the contributions on the functioning of the APO system in Canada, Mexico and the US, all indicate that the system in these jurisdictions works well. In fact, most suggestions for improvement go in the direction of making the system even more open and transparent than is currently the case.

We see no reason why a properly managed and enforced APO system along the lines advocated in the contributions of Graafsma, Antonini and Melin would not work in the EU and, like them, we do not consider the risks/adversities raised by Mueller convincing.

As regards the argument that an APO system ‘risks reducing to zero any discretion an investigating authority may currently enjoy, and an evolution towards trade defence instruments that are perihed in a dense web of precedents’, we would note that the European courts – unfortunately – grant the EU institutions a wide margin of discretion in their substantive, as opposed to procedural, administration of the TDI. Furthermore, one would think that most interested parties involved in EU TDI investigations would welcome a more consistent application of these instruments, based on precedent. Second, the transparency improvements made over time by the Commission, either voluntarily or as a result of adverse WTO Panel or Appellate Body rulings, in our view can only be characterized as marginal. As also pointed out by Graafsma, non-confidential summaries – probably unavoidably in the absence of an APO system – continue to be often meaningless. The hearing officer can play a very important role in concrete cases, but he is also bound by his mandate and most importantly faces practical constraints which prevent him and his team from spending time on, for example, checking the calculations.

Other perceived problems such as ‘the existence of a legal profession that works according to very high standards’, increased costs and appropriate sanctions, apart from the fact that none of these appear to have been challenging in the US, Canada or Mexico, can easily be solved through adoption of appropriate elements of an APO system.
Graafsma gives a detailed overview of the sanctions applicable in the US system and suggests that ‘(c)onsidering the effectiveness of the US system of sanctions…the European Commission apply the same or a similar system of sanctions’. In terms of enforcement, Antonini considers that access to confidential information should be limited to authorized persons (not necessarily lawyers) ‘established in the EU, for reasons of enforceability of sanctions’. He also points out that because of the recourse to sampling, it will normally be the largest companies that will have to provide (and check) the data and that in cases involving SMEs costs can be pooled. Indeed, such pooling of costs and acting through an association, particularly on the injury side, has become very common nowadays. These suggestions would appear to go a long way towards solving the kind of problems raised.

4 Conclusions

Some initiatives are brewing in the Brussels trade bar and parts of the Commission which hopefully will inject new life into the EU adoption of an APO system. The laudable and well-received transparency initiative taken by the new Trade Commissioner Cecilia Malmström, increasing the transparency in the ongoing TTIP negotiations, where countless documents have been published in order to restore the trust in the negotiations, could perhaps give a glimpse of hope to similar initiatives in the field of TDI. In the meantime, this article has attempted to provide a contribution to the ongoing discussion, it being understood that in view of thirty years EU stagnation in this area much of what one of us discussed in 1987 remains relevant.

Togni rightly posits that ‘U.S. APO practice and procedure has played a pivotal role in facilitating the agencies fact-finding and adjudicative functions in AD and CVD proceedings . . .’. It is to be hoped that so many years later the minds in the EU may be sufficiently ripe for adopting a similar system.

In that sense, the EU seems faced with a stark policy choice. Either it recognizes that its TDI ‘black box’ procedures are out of touch with twenty-first century open society and good governance principles and moves forward with the adoption of an APO system. Or it remains mired in its defeatist ‘cannot do’ mentality based on its 1970s view of TDI as trade policy instruments which benefit from lack of transparency because such lack affords the administering authorities maximum discretion. If the choice is made for the latter, it may be appropriate to conclude with the observation that certainly in the EU ‘(w)hat has been will be again, what has been done will be done again; there is nothing new under the sun’.

Notes

66 As Graafsma, APO and Known Unknowns, 7&8 Global Trade & Cust. J. 328–333, 327–333 (2014), points out: ‘…whether or not APO will become a reality in our lifetime will likely not depend on the strength of arguments but on policy choices. There is nothing intrinsically impossible about setting up such a system in the EU, although admittedly it may not be easy.’
Author Guide

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