

# Transparency in anti-dumping: comparing the EU and US

Richard King  
Counsel  
White & Case Brussels

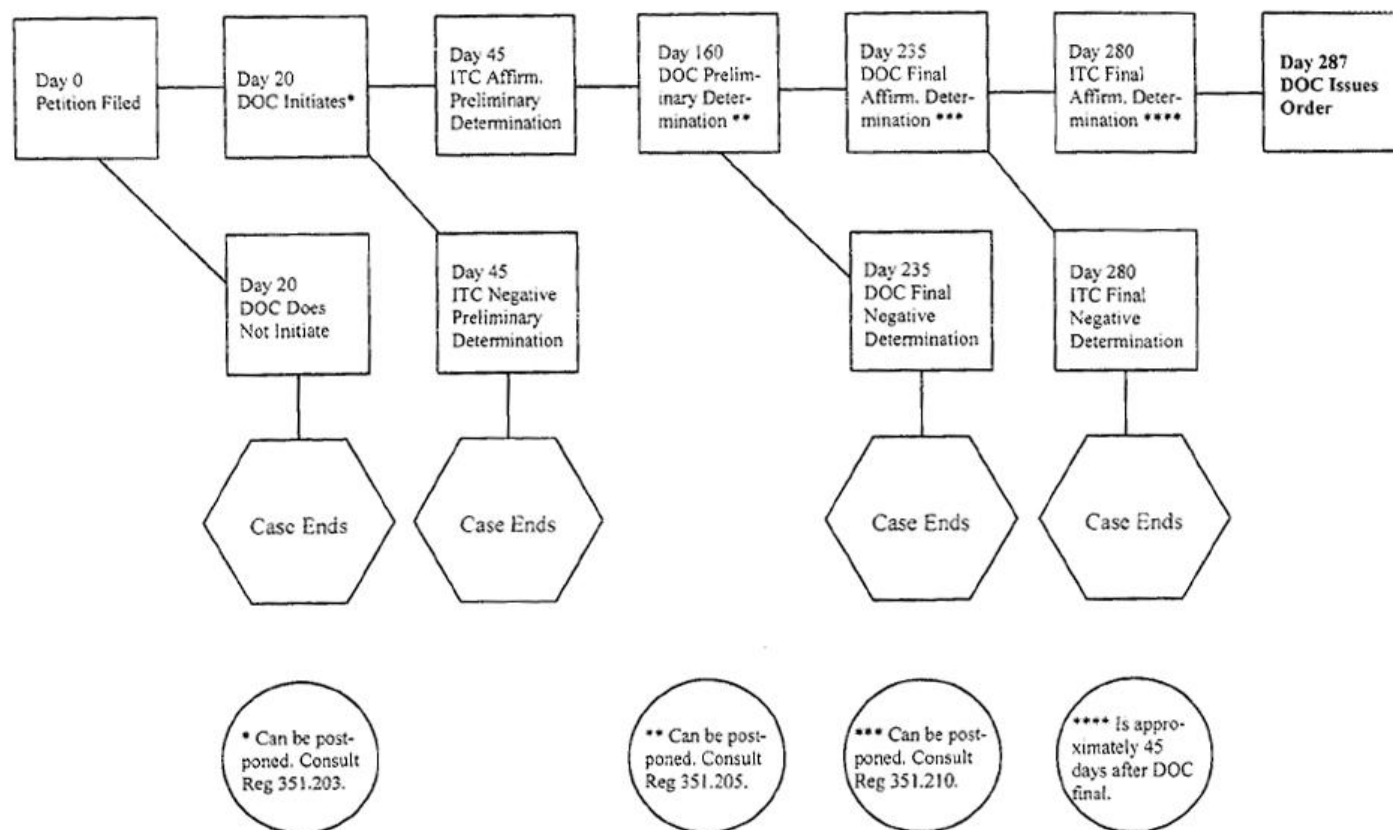
## US and EC AD Systems structures

- Structural differences in the EC and US systems
- Transparency / Parties' opportunities for defense
- Other aspects – WTO/methodology

## Comparison of EC / US structures

- EC – single authority, decisions made by Council (definitive measures)
  - EC proposes definitive measures to the Council
  - Definitive measures not imposed if a majority of Members oppose
  - Consultation with ADC at key stages
- US – bifurcated authority, decisions made by Commerce Department (standing, dumping) and ITC (injury)
  - Measures imposed if final affirmative determinations made by DOC and ITC
    - DOC:
      - Affirmative determinations in roughly 90% of cases
    - ITC:
      - Affirmative determinations in only about 60% of cases historically
      - However, recent decisions have indicated a more protectionist trend
      - Protectionist trend likely to continue in the economic crisis
  - Imposition (AD duty order) is a ministerial act – no discretion
  - No consultation with President or Congress
  - Retrospective system – more reviews

## Timeline of a U.S. AD case



# Transparency

- Complaints/initiation
- Access to non-confidential information
- Access to confidential information
- Verification reports
- Hearings
- Decisions
- Disclosure

## Complaints/initiation

- EC:
  - Complaints are in theory secret until initiation
  - No opportunity to comment on standing or certain other key issues (model match criteria)
- US:
  - Petitions are publicly available the day after official filing
  - Opportunity to comment on standing prior to initiation (initiation may be delayed if significant standing issues exist) and model match criteria afterward
  - Advantages to U.S. system:
    - For exporters/importers: improved opportunity for defense
  - Disadvantages to U.S. system:
    - For petitioners: more and earlier scrutiny of petition contents, possible attacks on standing (but not on other issues)

## Access to non-confidential information

- EC:
  - Access to non-confidential file – only parties to the proceeding
- US:
  - Public access to non-confidential file (DOC public inspection room, ITC website)
  - Parties (or their lawyers) serve each other with nonconfidential submissions
  - Advantages to U.S. system:
    - Parties automatically receive nonconfidential submissions, can access full nonconfidential record anytime
    - More access to precedent/facts of other cases
    - Convenience
  - Disadvantages to U.S. system:
    - None for parties/public

# Access to confidential information

- **EC: No party has access to confidential information (other than its own).**
- **US: Parties' lawyers can have access to confidential information – “Administrative Protective Order” (“APO”)**
  - **APO Access -- only lawyers for interested parties in the proceeding (and experts/assistants under lawyers' supervision)**
    - Parties must serve confidential documents on lawyers under APO. Very limited exceptions.
    - Lawyers receive confidential disclosure from agencies
    - DOC and ITC have separate but similar APOs.
  - **APO Obligations include:**
    - **Nondisclosure**
    - **Storage** – locked room, separate files
    - **Destruction** of confidential information within specified time periods after termination of proceeding and all appeals (links to “judicial protective order” system for appeals)
  - **APO Sanctions for violations:**
    - Depend on seriousness of the violation
    - range from private letter of reprimand from agency to suspension from representation before the agency (for a time or permanently).
    - Violations also can be referred to lawyer's state bar for further disciplinary action.
    - **Very few advertent/material violations; though mistakes occur**
- **Advantages to U.S. system:**
  - **Parties have enhanced ability to defend their interests**
    - Both – full view of injury data; can comment in a more informed way on injury (e.g., price undercutting)
    - Petitioners: can comment on respondents' questionnaire responses (dumping and injury) and can find errors in DOC dumping calculations that favor respondents
    - Respondents: can comment on petitioners' injury data
  - **Agencies receive more informed input; helps to avoid ministerial/calculation errors**
- **Disadvantages to U.S. system:**
  - **Possible leakage of information – but advertent/material leakage rare, sanctions taken seriously**
  - **Some burden for agency**
  - **Some additional costs for parties**



## Verification reports

- EC:
  - No verification reports available
- US:
  - Detailed DOC verification reports (confidential and non-confidential), confidential verification exhibits served on parties' lawyers under the APO
  - Advantages to U.S. system:
    - Petitioners in particular benefit by seeing report of DOC verification of respondents; enhanced ability to make arguments regarding dumping (true also of ITC verification reports on petitioners, but this is less useful). Respondents have an enhanced ability to challenge verification findings (e.g., “adverse facts available” based on verification failure).
  - Disadvantages to U.S. system:
    - For respondents, scrutiny of DOC verification report can lead to worse results (e.g., identification of items DOC overlooked) Fewer disadvantages for petitioners.

# Hearings

- EC:
  - Hearings available if requested; held with case team; confrontation hearings possible but rarely requested – and either side can say no
- US
  - DOC:
    - Hearings available if requested; held with case team; rarely affect outcome of the case.
  - ITC:
    - Preliminary conference before ITC staff (around second week after initiation)
    - Final hearing before Commissioners
    - ITC conference and hearing are held in public but *in camera* sessions can be requested for confidential arguments
    - ITC conferences/hearings can be very important to the outcome of the case
      - ITC preliminary – opportunity for respondents and danger for petitioners. Cases can be “killed” at the very beginning (by day 45) if no reasonable indication exists of injury/threat and causation.
      - ITC final hearing – direct access to Commissioners, who ask many questions

# Decisions

- Decisions
  - EC:
    - Provisional and definitive decisions (OJ regulations) are relatively conclusory
    - Where no provisional measures imposed, EC recently began issuing decision memorandum
    - EC also issues disclosure on decisions regarding market economy treatment (not available to the public); issues letters regarding decisions on significant issues during the case (also not available to the public)
  - US:
    - Decisions detailed and non-confidential backup available
    - DOC – FR notices (short), detailed non-confidential decision memoranda available to the public
    - DOC and ITC issue memoranda to the file on key issues
    - ITC – FR notices (short), non-confidential decision of Commissioners and ITC Staff Report (typically more than 100 pages) available on the ITC website
    - Confidential decisions/memoranda/reports released to lawyers under APO
    - Advantages to U.S. system:
      - Transparency, access to precedent
    - Disadvantages to U.S. system:
      - None

# Disclosure

- **EC is relatively un-transparent** (compared to U.S.)
  - Disclosures of material facts made:
    - After imposition of provisional measures (and recently after decision not to impose provisionals); opportunity for comments (to be taken into account in the definitive determination); no provision for changing provisional measures
    - Before imposition of definitive measures
  - Often not very detailed
  - Parties see only own confidential information – e.g., exporters see summary of their dumping calculation. No computer output/program
- **US is very transparent**
  - DOC:
    - Disclosure at preliminary and final stages
    - Comments on preliminary disclosure limited to “ministerial errors,” but where “ministerial error” leads to difference of +/- 5 percentage points or 25% of the margin, DOC will amend the preliminary determination (original investigation only)
    - Disclosures include detailed memos on methodology and legal issues; full disclosure of calculations with data used and the computer program (confidential version)
  - ITC:
    - Disclosures made to parties throughout the case (confidential questionnaire responses, calculation memos, etc.); staff reports available after preliminary/final determinations
  - Advantages to US system:
    - Transparency, access to precedent
  - Disadvantages to US system:
    - None

## Methodology / WTO

- All WTO members are subject to the WTO AD Agreement – concluded in the Uruguay Round of trade negotiations in 1994 (“clarifications and improvements” under discussion in the Doha Round)
  - In theory, Members’ AD laws and procedures were brought into line with the AD Agreement after the conclusion of the Uruguay Round in 1994
  - An exporting Member may seek WTO DSB resolution if a Member imposes AD measures in a manner inconsistent with the AD Agreement

## Methodology / WTO

- U.S. methodology is highly protectionist
  - “Retrospective” system – estimated duties deposited upon entry, actual duties determined years later. Enormous uncertainty for importers (although allowed by the WTO). Burdensome for exporters/importers (many reviews conducted, same burden as original dumping investigation)
  - U.S. has persisted in using WTO inconsistent methodologies (“WTO minus”)
    - “Zeroing” has been deemed WTO inconsistent in many cases – brought by the EU and Japan in particular
    - The U.S. has nonetheless persisted in “zeroing” in administrative reviews
    - U.S. is arguing in the Doha Round to codify “zeroing” in the AD Agreement
  - U.S. DOC extensively uses “facts available” and burdensome questionnaires

## Methodology / WTO

- EC methodology – predictable duty liability, “WTO plus” provisions
  - “Prospective” system – actual duties deposited upon entry. Generally, certainty for importers (though not perfect – possibility of retrospective duties in some cases, possibility of inconsistent application by Member States) Reviews are less common than in the U.S.
  - EC’s “WTO plus” provisions
    - Lesser duty rule:
      - Often results in duties below the dumping margin
      - Other countries are emulating the EC (India), though it’s not clear whether their lesser duty rules are as effective in limiting dumping margins
      - In the Doha Round, some parties argue to codify a mandatory lesser duty rule in the AD Agreement
    - Community interest:
      - Recognizes the interests of consumers and downstream industries
      - Does not often result in negative determinations
      - In the Doha Round, some parties argue to codify a “public interest” test

## CONCLUSION

- Transparency / Parties' opportunities for defense
  - US: highly transparent – parties have more opportunities for defense, but cases are more labor intensive and costly. A
  - EC: relatively un-transparent – impairs parties' opportunities for defense. C
- Predictability of duty liability / WTO consistency
  - US: Retrospective system creates uncertainty for importers; tendency to “WTO minus” practices. C
  - EC: Prospective system provides predictability; important “WTO plus” provisions. Other countries emulate the prospective system, and the WTO plus provisions have been a basis for Doha Round proposals. A



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