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United States Antidumping Proceedings

Michael A. Lawrence

I. Introduction

One of the uncertainties and intrigues of the post-Cold War era is the form international trade will take as we move toward a new millennium. It is conceivable that the trade landscape will assume any number of shapes in the next several years. With the emergence of the European Community, the North American Free Trade Agreement, and other proposed and existing trading consortia in Asia and Latin America, perhaps the world economy will become divided into regional trading blocs, where trade between countries within the various regions will become greatly eased, but where trade between countries from different regions will become more difficult and costly. Or, if the current Uruguay Round General Agreement on Tariffs and Trade ("GATT") is concluded and ratified by the signatory nations, as appears likely with the approval of the pact by representatives of the 117 participating nations on December 15, 1993, perhaps a true global market will flourish, with lower tariffs and fewer restrictions resulting in the creation of new jobs in both the United States and worldwide. A third, extreme alternative, is if advocates of more protectionist measures carry the day in nations around the world, perhaps a retreat into a 1930s style period of


1 See, e.g., Asian Free Trade Should Be Goal For APEC, Australia Aide Says, J. COM., Mar. 30, 1993, at 4A; Kevin G. Hall, Guatemala Seeks to Follow in Mexico's Footsteps on Trade, J. COM., Mar. 17, 1993, at 1A; Richard Lawrence, U.S. Firms Eye Latin Free-Trade Growth, J. COM., Apr. 15, 1993, at 1A.

2 Peter Behr, 117 Nations' Representatives Approve Historic Trade Pact, WASH. POST, Dec. 16, 1993, at A41. However, before becoming effective, the Agreement must be ratified by the U.S. Congress and other legislatures around the world.

rising tariffs, higher prices, and decreased international trade will result.\(^4\)

Regardless of the shape international trade ultimately takes, the United States should seek to maximize its trade competitiveness by continually reevaluating the efficacy of its various trade laws and regulations. One area especially in need of reevaluation and reform by Congress is the aspect of antidumping and countervailing duty law\(^5\) which governs how antidumping proceedings shall be conducted at the Department of Commerce International Trade Administration ("ITA"). In particular, the antidumping procedures currently in place at the ITA do not provide the investigated parties an impartial tribunal. Due, at least in part, to this lack of impartiality, there exists the damaging perception in the international trade community that the ITA is unfairly biased and overly vulnerable to political pressure.\(^6\)

The perception of an ITA bias is based on a number of factors, not the least of which is that the ITA now finds fully 97% of all foreign companies it investigates guilty of dumping.\(^7\) The fact that the ITA virtually never absolves foreign producers of dumping allegations does not, by itself, prove that the ITA is unfairly biased, but it does plant more than a seed of doubt about the agency's impartiality in applying antidumping laws.

In the bigger picture, the perception that the ITA is biased damages the U.S. government’s credibility for fairness in trade matters and, ultimately, the nation’s own economic interests. For example, while the U.S. government lays much of the blame for its trade deficit with Japan at Japan’s doorstep (rightly so, given Japan’s closed markets), Japan and


\(^5\) Because U.S. antidumping law (in which the government determines whether foreign producers have injured the U.S. domestic industry by selling goods in the U.S. at less-than-fair-value) and countervailing duty law (in which the government determines whether subsidies from foreign governments to foreign producers have created an unfair advantage) are largely similar both substantively and procedurally, this article limits its discussion to antidumping law. The discussion and recommendations apply equally, however, to countervailing duty law.

\(^6\) See infra notes 51-57 and accompanying text.

Some believe that the other agency responsible for administering the antidumping law, the International Trade Commission ("ITC"), is biased as well. See James Bovard, Raiders of the Lost Kiwis, WASH. TIMES, May 14, 1992, at G1. The perception of ITC bias, however, is much less pervasive and engenders less antipathy than the perception of ITA bias. See infra notes 58-59 and accompanying text.

other countries use figures such as the ITA’s 97% affirmative antidumping rate to allege that the U.S. itself engages in unfair trade practices. Indeed, in its second annual report on unfair traders, the Japanese Trade Ministry ("MITI") cited the United States as one of the world’s three worst offenders, in large part because of the U.S.’s administration of its antidumping laws.

Nor is the notion of an ITA bias confined to foreign entities, such as Japan’s MITI, that have admittedly vested interests. The United States Court of International Trade, the appellate court in most antidumping suits, has also harshly criticized the ITA’s handling of antidumping proceedings. For example, in overruling the ITA and requiring the government to reimburse penalties assessed against a Japanese ball-bearing manufacturer, Judge Nicholas Tsoucalas stated, in a June, 1993 decision, that “Commerce [i.e. the ITA] repeatedly ignores the law and disobeys the decisions of this court.” Regarding the ITA’s propensity for using any failure on the part of a foreign company to comply with the exact letter of the ITA’s complex and voluminous questionnaires as an excuse to impose punitive measures, Judge R. Kenton Musgrave stated, in another Court of International Trade case, that the ITA’s “predatory ‘gotcha’ policy does not promote cooperation or accuracy.”

The perception of an ITA bias extends to academics and trade practitioners as well. According to Ronald Cass, dean of the Boston University Law School and a former member of the United States International Trade Commission, “[m]any people in Commerce [i.e. the ITA]

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8 See Paul Blustein, Japan Favors Trade Rules Over “Results”: MITI Report Says U.S. Breaks Global Standards in 9 of 12 Areas, WASH. POST, May 12, 1993, at F2. The other two unfair traders cited were South Korea and the European Community. Id.

9 Mark Magnier, U.S. High on List as Japan Issues Its Own Report on Unfair Traders, J. COM., May 11, 1993, at 10A. The report noted that, between 1969 and June, 1992, more than 55% of the world’s antidumping investigations were initiated by the United States and Australia, and that “[w]hen abused, anti-dumping measures disrupt existing trade, distort normal commercial practices and impose prohibitive costs on foreign companies forced to defend themselves.” Id.


11 These punitive measures involve the use of the “best information otherwise available” (i.e., information supplied by the petitioner) in place of information supplied by the foreign producer. See infra note 30.

12 Passell, supra note 10, at D1.

See Thomas P. Ondeck & Michael A. Lawrence, Court of International Trade Deference to International Trade Commission and International Trade Administration Antidumping Determinations: An Empirical Look, 25 LAW & POL’Y INT’L BUS. (forthcoming Winter 1993-94) (discussing the notion that the Court of International Trade may give more deference to the ITC than to the ITA in antidumping matters).
now see themselves as advocates for domestic business." Similarly, James Bovard, author of a book entitled *Fair Trade Fraud*, contends that "[the ITA] is on a holy crusade to find foreigners dumping" their goods.14

When combined with the fact that the number of dumping investigations worldwide is rising sharply,15 such perceptions of an ITA bias are especially alarming. The primary danger of these perceptions to U.S. interests is that U.S. trading partners may retaliate and erect more onerous trade barriers of their own, which, at the least, would hinder trade, and, at the worst, could lead to retaliatory trade wars. Indeed, the GATT’s 1993 annual report warned that trade frictions between, in particular, the United States, the European Community, and Japan, when combined with the forecast for little of no economic growth in those countries, “could lead to an all-out trade war and wreck any hope of concluding a successful [GATT] Uruguay Round trade liberalization agreement.”16 Ironically, one of the big losers in such a scenario would be American exporters, who will suffer the effects of any retaliation by the U.S.’s trading partners17 — a fact that further emphasizes the shortsightedness of ITA partisanship in antidumping matters.

This article proposes that Congress should legislate to require the ITA to employ Administrative Law Judges (“ALJs”), operating under the rubric of the Administrative Procedure Act (“APA”),18 in antidumping proceedings. Such legislation is needed to rehabilitate the ITA’s reputation for impartiality and evenhandedness — a reputation that has eroded in recent years to the point where the ITA is now widely perceived as being patently unfair and biased in its administration of antidumping laws. By taking such action to put its own house in order and to assure foreign producers and governments that they will be provided impartial hearings in U.S. antidumping disputes, Congress would send the important message that the U.S. is willing to do its share to advance the cause of fair trade around the world. This would represent an important and necessary first step in easing the potential for a continuing escalation of trade frictions between the U.S. and its trading partners.

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13 Passell, *supra* note 10, at D1, D2.
14 *Id.* at D1; JAMES BOVARD, *FAIR TRADE FRAUD* (1991).
15 According to the GATT governing body in Geneva, Switzerland, the number of dumping investigations initiated by GATT member nations rose about 35% (from 175 to 237) in the year ending June 30, 1992, from the corresponding period a year earlier. *Dumping Investigations by GATT on the Rise, J. Com.*, Apr. 30, 1993, at 4A.
16 *GATT Report Warns of Total Trade War, J. Com.*, May 14, 1993, at 3A.
17 Passell, *supra* note 10, at D1, D2.
18 See infra notes 66-86 and accompanying text.
This article proceeds in several stages. Part II provides a background of current U.S. antidumping law and takes a brief look at some of the constitutional issues that arise in the context of administrative investigations and adjudications. The ITA's vulnerability to political pressure is also discussed in Part II. Part III sets out the article's proposal that Congress should legislate to require that the ITA employ ALJs in antidumping proceedings, and discusses how the proposal dovetails with the Administrative Procedure Act. Part III also comments on related studies and proposals for reforming antidumping procedure, and provides examples of the use of ALJs in other administrative proceedings. Finally, Part IV restates the proposal and emphasizes its symbolic importance in sending a message to the international trade community that the U.S. is committed to fair trade.

II. CURRENT U.S. ANTIDUMPING LAW

A. The Antidumping Statute

United States antidumping law imposes dumping duties on foreign goods sold in the United States "at less than fair value" when a U.S. industry is "materially injured or is threatened with material injury" by reason of those sales.19 Antidumping proceedings at the administrative level are bifurcated, with two separate U.S. government entities responsible for different aspects of the inquiry: the International Trade Administration's Import Administration ("ITA") investigates and determines whether there were sales in the U.S. at less-than-fair-value, and the International Trade Commission ("ITC") investigates and determines whether those sales actually caused, or threatened to cause, material injury to U.S. industry.

An antidumping duty proceeding begins administratively when an interested party files an antidumping petition or when the ITA determines on its own initiative that an investigation is warranted.20 The ITA and the ITC each conduct a two-step administrative proceeding (preliminary and final determination) lasting nine months to one year.21

Within 45 days of the petition's filing, the ITC must issue its pre-

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liminary determination stating whether there is a "reasonable indication" that a domestic industry has been materially injured or threatened with material injury by reason of the subject imports.\textsuperscript{22} The ITC preliminary investigation includes a hearing at which the parties may present evidence. The hearing is informal (\textit{i.e.}, not subject to the requirements of the Administrative Procedure Act),\textsuperscript{23} and is usually conducted by the Commission staff, not by the commissioners themselves.\textsuperscript{24} Subsequently, the commissioners vote on the "reasonable indication" issue, with a majority vote of the six commissioners controlling.\textsuperscript{25} If the ITC finds that there is no reasonable indication of such injury, the investigation ends and there is no antidumping violation.\textsuperscript{26}

For its part, the ITA is responsible for determining the sufficiency of the petition and whether imports are being sold in the United States at less than a fair market value.\textsuperscript{27} At the preliminary stage, the ITA issues detailed questionnaires to the affected foreign producers seeking information about, for example, home market sales, sales to the United States, and all expenses connected with those sales for a defined period of time up to and including the month in which the petition was filed.\textsuperscript{28} Based on the data it receives from the responses to the questionnaire, the ITA calculates a "preliminary dumping margin,"\textsuperscript{29} which is published in the \textit{Federal Register}.

Following the preliminary determination, the ITA conducts a "verification," whereby ITA employees travel to the foreign producer’s home country facilities to examine the producer’s records.\textsuperscript{30} The purpose of

\textsuperscript{22} 19 U.S.C. § 1673b(a).
\textsuperscript{23} See infra note 42 and accompanying text.
\textsuperscript{24} 19 C.F.R. §§ 207.15, .13 (1992).
\textsuperscript{25} A 3-3 split among the 6 commissioners is considered an affirmative vote, a fact which adds to the perception that the odds are unfairly stacked against the foreign producer. See 19 U.S.C. § 1677(11) (1988).
\textsuperscript{26} 19 U.S.C. § 1673(a).
\textsuperscript{28} 19 C.F.R. § 353.31 (1993).
\textsuperscript{29} The ITA’s preliminary determination is due within 160 days of the petition’s filing. 19 U.S.C. § 1673b(b)(1).

Although the proceeding continues regardless of the ITA’s preliminary determination, an affirmative preliminary determination has an immediate impact on the foreign producer against whom it is assessed: that is, there will be a "suspension of liquidation" of all merchandise covered by the preliminary determination. In such cases, U.S. Customs will not make a final determination of duty payable on entered goods covered by the suspension of liquidation until the antidumping case is resolved. Customs will release the goods to the importer only after he posts a bond for the possible duties payable on the goods. 19 U.S.C. § 1673b(d).

\textsuperscript{30} 19 U.S.C. § 1677e (1988). If there are problems with the questionnaire response, the ITA is authorized to use the "best information otherwise available" (BIA). 19 U.S.C.A. § 1677e(c);
this procedure is to verify the accuracy of the facts and figures that had been submitted to the ITA in the producer's questionnaire response. After the verification, the ITA issues its final determination.  

The final step in the antidumping proceeding at the administrative level is the ITC's final injury determination. The final determinations of both the ITA and the ITC must be affirmative in order for there to be an antidumping violation and the resulting imposition of an antidumping duty order requiring the assessment of dumping duties.  

19 C.F.R. § 353.37 (1993). The ITA uses such information, which usually consists merely of information contained in the petitioner's allegations (which is naturally bound to be damaging to the foreign producer), on the theory that if the actual facts were better than the allegations, the foreign producer would have submitted those facts. Because the use of the "best information available" can have disastrous results for the foreign producer, the ITA can — and does — use its power and leverage to compel full compliance with its questionnaires and deadlines.

Despite strictures against applying BIA too freely, see, e.g., Olympic Adhesives, Inc. v. United States, 899 F.2d 1565, 1572 (Fed. Cir. 1990) ("[T]he ITA has not been given power [under the BIA statute] that can be 'wielded' arbitrarily as an 'informal club'."), the ITA has in fact applied BIA more aggressively in recent years. For example, in one recent case, after a German steel company provided massive data on its German and U.S. sales in response to ITA questionnaires, the ITA requested further highly detailed information on sales in Germany of a type of steel not even exported to the U.S. Then, as reported by the Wall Street Journal: "On December 15, Commerce [the ITA] decided to impose BIA penalties on the German company if it did not furnish all information on all sales by December 21 — but did not inform the company of that ultimatum until January 7." Bovard, supra note 7, at A14. Such actions have become the all-too-usual modus operandi at the ITA, a fact that fuels the perception that the agency is unfair and biased.

31 Barring an extension of the statutory deadline for "extraordinarily complicated" cases, 19 U.S.C. § 1673b(c), the ITA must issue its final dumping determination within 75 days after the date of its preliminary determination. 19 U.S.C. § 1673d(a)(1).

32 The ITC's final injury determination is due 120 days after an affirmative ITA preliminary determination. 19 U.S.C. § 1673d(b)(2).


While the ITA's preliminary and final determinations set the amount of estimated duties, actual dumping duties are calculated by the ITA in an "annual administrative review." See 19 U.S.C. § 1675(a) (1988). In such a review, the ITA sends a questionnaire to the foreign producer similar to that sent during the initial investigation in order to solicit sales information for U.S. and home-market sales for the particular period covered. To the extent that the actual dumping duty calculated in the review differs from the estimated duty deposit collected pursuant to the antidumping duty order, the difference is refunded or charged to the importer. See 19 U.S.C. § 1673f (1988).

In the event an annual administrative review for a given period is not requested, the Customs Service simply keeps the duty deposits, treating them as though they are the actual dumping duties due. Producers that receive high dumping margins in an investigation very often take advantage of the annual reviews to attempt to get their dumping duty rates revised. If, for example, a company is able to reduce a dumping rate from 20% to 1% or zero in an antidumping review, the antidumping duty order will be an irritant, but not necessarily a barrier, to its making sales to the United States.
B. The ITA's and ITC's Dual Role in Antidumping Proceedings

1. Investigative and/or Adjudicative?

Implied in the foregoing description of the antidumping statutes is the notion that the ITA and ITC perform several different functions in antidumping proceedings. As noted by Professors John H. Jackson of the University of Michigan and William J. Davey of the University of Illinois in a 1991 report prepared at the request of the Administrative Conference of the United States:34 "[U]nder the relevant statutes, as interpreted by the courts, the [antidumping] process is primarily an investigative one, although there are clearly aspects of the process that resemble an adjudication . . . . [The process is] sufficiently adjudicative such that meaningful hearings with appropriate procedural protections should be held by the agencies."35 In some circumstances, the ITA performs as the prosecutor of the investigation, as well36 — a situation that places the foreign producers in the unenviable and ultimately untenable position of having to rebut and counter the ITA in its prosecutorial role while being careful not to alienate or anger the ITA in its judge and jury roles.

34 The Administrative Conference is an independent federal agency that conducts research, issues reports, and makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms in federal agencies. Conference recommendations may be implemented directly by the affected agencies or through legislative action.

The Administrative Conference is due for congressional reauthorization in 1994, and, although the Conference enjoys the strong support of bar associations and several congressional committees, the House Appropriations subcommittee, in a controversial step, eliminated all funding for the Conference in 1993. Dry Subject, Hot Fight, WASH. POST, July 17, 1993, at A16.


Professors Jackson and Davey found, by contrast, that officials at the ITA and ITC believe that antidumping proceedings are and should be solely investigative, where "those investigated . . . speak only when spoken to." Id. at 31.

36 As discussed supra note 20 and accompanying text, the ITA may initiate an antidumping investigation on its own. 19 U.S.C. § 1673a(q)(1) (1988) ("An antidumping investigation shall be commenced whenever the . . . [ITA] determines, from information available to it, that a formal investigation is warranted . . . ."). In such cases the ITA clearly prosecutes the case. Some would argue that the ITA's bias in favor of domestic producers in effect makes the ITA the de facto prosecutor even in those cases where the petition is submitted by an outside party.
2. Constitutional Issues

The question of what functions the ITA and ITC assume in antidumping proceedings is more than academic. Separation of functions at the agency level is an issue that has long been debated and litigated, for agencies typically perform many functions, including policymaking, investigation, prosecution, and adjudication of disputes. The inherent tension that exists between agencies’ sometimes conflicting roles “can result in a lack of confidence on the part of the public in the process instituted by the agency, which may rise to constitutional dimensions.” In the antidumping context, while the combination of functions in ITA and ITC procedures creates serious problems which must be addressed, the courts would find, probably, that the problems do not rise to constitutional dimensions.

One common theme that has emerged from the case law, however, is that due process considerations require at least some degree of separation of functions in administrative proceedings. In particular, due process requires a neutral, unbiased adjudicatory decisionmaker. The

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37 Paul Verkuil et al., Administrative Conference of the United States, The Federal Administrative Judiciary 128 (1992) [hereinafter Federal Administrative Judiciary] (citing, e.g., Interstate Commerce Commission, Analysis of the Report on Selected Independent Regulatory Agencies (1971) (issued by the Ash Council, George M. Stafford, Chairman) (urging reassignment of adjudicatory functions from agencies to an administrative court); President’s Committee on Administrative Management, Administrative Management in the Government of the United States (1937) (urging that no agency be given both adjudicative and prosecutorial responsibilities).


39 In Marcello v. Bonds, 349 U.S. 302 (1955), the Supreme Court upheld as constitutionally permissible an Immigration Act statute explicitly authorizing an adjudicatory decisionmaking structure in which the hearing officer reports to officials with enforcement responsibility. See also Shaughnessy v. United States ex rel. Accardi, 349 U.S. 280 (1955). More recently, in Richardson v. Perales, 402 U.S. 389, 410 (1971), the Court upheld an adjudicatory system in which the individuals responsible for conducting the adjudication also participated in the investigation. See generally Federal Administrative Judiciary, supra note 37, at 130-31.

In short, regulatory proceedings do not require the same strict separation of functions that is present in, for example, criminal proceedings in which the various functions are assigned to different institutions (i.e., the policymaking function is assigned to the legislature, the investigatory function is assigned to the police, prosecution is assigned to the district attorney, and adjudication is assigned to the courts). Id. at 128.

40 “Scholars and judges consistently characterize provision of a neutral decisionmaker as one of the three or four core requirements of a system of fair adjudicatory decisionmaking.” Federal Administrative Judiciary, supra note 37, at 124 (citing Arnett v. Kennedy, 416 U.S. 134, 171 (1974) (White, J., concurring and dissenting); Henry J. Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975); Paul R. Verkuil, A Study of Informal Adjudication Procedure, 43 U. Chi. L. Rev. 739 (1976)).
APA squarely addresses this issue by requiring in section 554(d) that the decisionmaker in the adjudication function possess a measure of independence from agency influence; however, the APA applies only to formal proceedings.\footnote{Section 554 of the APA states:
(d) The employee who presides at the reception of evidence [e.g., the ALJ] . . . may not—

\begin{itemize}
  \item (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.
\end{itemize}

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings.

5 U.S.C. § 554(d) (1988).}

As noted by the Supreme Court in Pension Benefit Guaranty Corp. v. LTV Corp.,\footnote{See infra notes 76-82 and accompanying text. Antidumping proceedings in the ITA and ITC, by contrast, are “informal.” “Informal” adjudications are those that are not required to use an ALJ pursuant to the APA requirements. See infra notes 83-84 and accompanying text.} absent due process considerations, an agency in an informal adjudication is \textit{not} required to provide the trial-like procedures of a formal adjudication set out in sections 554, 556, and 557 of the APA.\footnote{4' Pension Benefit, 496 U.S. at 655.} Rather, the minimum requirements for “informal” adjudications and proceedings are those described in section 555 of the APA\footnote{4' Id. at 655-56. Pension Benefit and the cases noted supra note 39 “make clear that these unusually powerful safeguards of decisional independence [required by the APA for formal adjudications] are not required by due process” for informal adjudications. FEDERAL ADMINISTRATIVE JUDICIARY, supra note 37, at 131.} (\textit{e.g.}, the right to appear, to be represented, to be entitled to a decision in a reasonable time, to have a copy of the transcript or other record, to subpoenas otherwise authorized by law, and to notice of and a statement of reasons for an adverse decision).

One might conclude from the Court’s language in Pension Benefit that impartial tribunals are not required in informal adjudications such as antidumping proceedings. However, the Court’s failure to mention section 554’s impartial tribunal provisions should \textit{not} be interpreted to imply that informal adjudications do not require impartial tribunals. It would be highly surprising for the Court to require impartial tribunals in formal adjudications on the one hand, while allowing “not-impartial” (\textit{i.e.}, biased) tribunals in informal adjudications on the other hand. If
such were the case, the very foundation upon which the U.S. legal system is based — i.e., the impartial weighing of facts and even-handed application of law regardless of the circumstances of individual cases — would be breached.

C. Effect of Politics on ITA and ITC Antidumping Investigations

1. Vulnerability of ITA and ITA to Political Pressure

To see how politics can influence the ITA’s and ITC’s antidumping decisionmaking, it is necessary to understand in general terms how the two entities are staffed and structured. The ITA is a typical executive branch agency, with several layers of civil servants reporting to upper management consisting of presidential political appointees. Specifically, the ITA operates with a total of about 220 case analysts and 15 program managers in the Office of Investigations and Office of Compliance,46 two Division Directors in each office, one Office Director in each office, a Deputy Assistant Secretary for Compliance and a Deputy Assistant Secretary for Investigations, and finally, the Assistant Secretary of Commerce for Import Administration.47 The ITC, by contrast, is composed of six commissioners appointed to fixed nine-year terms by the President. Not more than three of the commissioners may be of the same political party.48 Besides the commissioners, the ITC consists of a staff of commodity specialists, accountants, economists, and attorneys who gather relevant facts and prepare reports for the commissioners’ use in their decisionmaking.49 The commissioners review the evidence and reports prepared by the staff and hear whatever questions and views are

46 The Office of Investigations is responsible for conducting antidumping and countervailing duty investigations. The Office of Compliance is responsible for ensuring that antidumping and countervailing duty orders are properly administered and for conducting administrative reviews. THOMAS V. VAKERICS ET AL., ANTIDUMPING, COUNTERVAILING DUTY, AND OTHER TRADE ACTIONS 4-5 (1987).
47 The deputy assistant secretaries and the assistant secretary are political appointees.

Typically, once the ITA investigative team (the composition of an investigative team varies by case, but might typically consist of two case analysts, one program manager, and one division director) makes its determination after completing its antidumping investigation or review, the determination is reviewed in turn through the various levels of the ITA hierarchy. Some in the trade bar believe that ITA case analysts, “who must shoulder the bulk of the investigative burden, are often ill-trained and stay too short a time in their positions . . . . As a result, important decisions are in fact made at only one of the many review levels, causing delay and redundant analysis.” Peter O. Suchman, A Cost-Benefit Examination of Trade Cases in an Era of Austerity: An Outline of the Problem and Some Suggestions 5 (Oct. 28, 1992) (on file with United States Court of International Trade).
49 VAKERICS ET AL., supra note 46, at 7.
expressed by the other commissioners, but each commissioner ultimately
makes his or her own specific findings of fact and conclusions of law
independently of the other five.\textsuperscript{50}

For a number of reasons, many believe that the ITA and ITC are
overly vulnerable to political pressure in administering the antidumping
laws. As stated by Professors Jackson and Davey in their 1991 report to
the Administrative Conference:

Since the Assistant Secretary at the ITA and the Commissioners at the
ITC are presidential appointees, confirmed by the Senate, ... [the
cconcern is] that these individuals might tilt their [antidumping] deci­sions in favor of domestic industry because of their connection with
the political process. Moreover, lower echelon employees might act to
favor domestic interests on the belief that such favoritism would be
noticed by their superiors and redound to the benefit of their careers
over the long run.\textsuperscript{51}

The ITA is viewed by many as being especially vulnerable to polit­
cical pressure.\textsuperscript{52} Indeed, some members of Congress actively seek to
influence the ITA's day-to-day decisionmaking. In particular, Senator
Ernest F. Hollings, chairman of the Senate Commerce Committee, is
considered to be "an 800-pound tiger out there making sure the dump­ing laws are enforced," according to a spokesman for the senator.\textsuperscript{53}

The degree to which many in the international trade community
believe that the ITA is biased in its administration of antidumping laws
is demonstrated by the actions and comments of officials involved in
various trade matters. For example, a major reason for the Canadian
government's insistence that a binational panel review process be includ­
ed in antidumping and countervailing duty disputes under the U.S.-Can­
da Free Trade Agreement\textsuperscript{4} was the belief that the ITA's decisions are
biased and politically motivated. As stated by Canadian International
Trade Minister Pat Carney during the Agreement's negotiations in 1987:
"We want impartial mechanisms. For example, if the U.S. alleges that
our stumpage programs are subsidies, we want an impartial, binational

\textsuperscript{51} JACKSON & DAVEY REPORT, supra note 35, at 34.
\textsuperscript{52} Id. at 34. See, e.g., Joseph A. Vicario, Jr., The Anatomy of Antidumping Proceeding: A
Case Study of the Antifriction Bearings Investigations, 15 N.C. J. INT'L L. & COM. REG. 249,
265 (1990) ("The opinion held by many [is] that the [ITA's] administration of the antidumping
law is politically sensitive with domestic industries and their congressional supporters.").
\textsuperscript{53} Passell, supra note 10, at D1, D2.
tribunal to deal with the issue, not the U.S. Department of Commerce." More recently, after wrangling with the ITA for months over imports of live pigs from Canada, the special binational committee commented in October, 1992, that the ITA "failed to conform to the express holding and reasoning of this panel," and accordingly dismissed the ITA's judgment against the Canadians.

Similarly, a 1991 Journal of Commerce article reported: "The investigation [of flat panel display screens from Japan] has become so politically charged that some, including House Majority Leader Richard Gephardt, D-Mo., are worried the outcome is already 'fixed' and could have nothing to do with the department's actual findings."

Such comments indicate that there has developed a serious erosion of the trade community's confidence in the ITA's ability to render impartial and evenhanded antidumping decisions. This perception of bias in an administrative proceeding runs counter to the image of fairness and impartiality that the U.S. government seeks to project in any forum — informal or formal.

The ITC, on the other hand, with its quasi-judicial procedure and greater independence from the political branches of government, is less susceptible to political pressure than the ITA in rendering its antidumping injury determinations. As stated in a paper presented at the 1992 Judicial Conference of the U.S. Court of International Trade:

If such determinations were made by an Executive Branch

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56 Passell, supra note 10, at D1.

Further fueling the perception that the ITA is particularly vulnerable to political pressure is the fact that part of the ITA's stated mission is to "participate[] in formulating U.S. foreign trade and economic policies, working with the Office of the U.S. Trade Representative and other agencies . . . ." U.S. DEP'T OF COMMERCE, ANNUAL REPORT 1 (1992). See also, James A. Toupin, Siblings Before the Bench: The International Trade Commission and the Department of Commerce Before the Court of International Trade 2 (Oct. 28, 1992) (on file with United States Court of International Trade). The existence of a policy function within the ITA by itself is not a problem — as noted supra note 37 and accompanying text, it is not unusual for agencies to be responsible for a number of functions, including policymaking. The problem is that the ITA decisionmakers, who both investigate and adjudicate antidumping disputes, are not adequately insulated from the inappropriate influence of those with other responsibilities (including policymaking) within the agency — a fact that contributes to the perception that the ITA decisionmakers are overly vulnerable to political pressure.

Once appointed, the ITC Commissioners do not answer to the President. The ITC itself is an independent agency, while the Department of Commerce (and hence, the ITA) is an executive department.
decisionmaker, decisions about whether an industry was injured by reason of imports would be in danger of being perceived as decisions on whether the Executive regarded a specific industry as worthy of protection. The Commission scheme isolates injury determination from this perception of political considerations.\(^{59}\)

Because the great majority of the complaints of bias involve the ITA and *not* the ITC, this article asserts that the proceedings currently in place at the ITC do an adequate job of providing an impartial tribunal in antidumping disputes, and accordingly limits its reform proposal to the proceedings at the ITA.

2. U.S. Trade Policy

The political pressures upon the agencies responsible for administering the U.S. trade laws have, if anything, intensified under the Clinton Administration. The Administration has rattled its trade saber on a number of occasions in its first year in office. For example, when United States Trade Representative Mickey Kantor made his first visit to Brussels to meet with European Community officials in early April, 1993, he delivered the blunt and uncompromising message that the United States market is open, while the EC market is closed, and that the U.S. would aggressively work to change this fact.\(^{60}\) In anticipation of Japanese Prime Minister Kiichi Miyazawa’s visit to Washington in mid-June, 1993, Administration officials delivered a similarly tough message when it called on Japan to dramatically reduce its huge worldwide trade surplus over the next several years or otherwise face increasingly severe economic pressures around the world.\(^{61}\) Finally, the administration moved quickly in its first months in office to reclassify imported minivans as trucks, thus raising import tariffs on these primarily Japanese vehicles from 2.5% to 25%, despite the assessment of some government trade attorneys that such a change in classification would probably violate international trade rules against raising tariffs.\(^{62}\)


\(^{60}\) Keith M. Rockwell, *Mr. Kantor Comes to Europe*, J. COM., Apr. 6, 1993, at 8A.

\(^{61}\) Peter Behr, *Japan Urged to Slash Trade Surplus*, WASH. POST, June 8, 1993, at A1. Japan’s worldwide trade surplus in 1992 was $132 billion, $50 billion of which is attributable to the United States. See also Mark Magnier, *Clinton Impatient Over Barriers, Brown Tells Japan*, J. COM., Apr. 26, 1993, at 1A.

\(^{62}\) John Maggs, *U.S. Moves Quickly to Raise Imported Minivan Tariffs*, J. COM., Apr. 26, 1993, at 3A. President Clinton stated at a March 23, 1993, press conference that “I was astonished that the Bush administration overruled its own customs office and gave a $300-million-a-year freebie to the Japanese for no apparent reason. And we got nothing — and, I emphasize, nothing — in return.” *Id.*
It is an open question whether government should aggressively intervene in markets. The literature is replete with articles and books advocating the virtues of policies running the gamut from protectionism and "managed trade" to laissez-faire free trade. Certainly the President has the right, and responsibility, to formulate and present a cogent trade policy to Congress, and the legislation that ultimately emerges may well involve "protectionist" elements. While some may (and frequently do) quarrel with the advisability and fairness of the substance of such legislation, as long as it provides for the objective and impartial investigation and adjudication of disputes that arise in connection with the statutes, the procedure is sound.

By contrast, administrative procedures, such as those practiced by the ITA in antidumping disputes, in which the decisionmakers are inappropriately vulnerable to outside influences — thereby increasing the risk that the decisions will be skewed in favor of those outside influences — do damage to the concept of the impartial and evenhanded admin-

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63 See, e.g., Laura D'Andrea Tyson, Who's Bashing Whom? Trade Conflict in High-Technology Industries (1993). Ms. Tyson, describing herself as a "cautious activist," advocates three forms of government action to assist domestic high-technology industries: first, selective subsidies; second, the use of "aggressive unilateralism" in the form of threats to close our markets and to pry open foreign markets that we unilaterally judge to be closed to us unfairly; and third, a resort to "managed trade," which economists define as the setting of restrictive quotas on imports and targets to expand exports.

Jagdish Bhagwati, Rough Trade, THE NEW REPUBLIC, May 31, 1993, at 35 (book review). Ms. Tyson's views are particularly worthy of note, since she is the chief of President Clinton's Council of Economic Advisors and as such has the access and standing to present her ideas directly to the President. Id.


65 For example, in the antidumping duty context, Congress made certain sections of the antidumping statute significantly more onerous for foreign producers in the Trade and Tariff Act of 1984. In the 1984 Act, Congress revised the statute governing the International Trade Commission's investigation of whether imports from a particular country materially injure the United States industry, requiring that henceforth it would be mandatory for the ITC to cumulatively assess the effects of imports from that country together with imports from other countries of like competing products. 19 U.S.C. § 1677(7)(C)(iv) (1988 & Supp. IV 1992). Previously, the ITC had been allowed to decide whether to cumulate imports on a case-by-case basis.

Mandatory cumulation stiffened the antidumping law considerably, creating a presumption that goods from a certain country — although when considered by themselves might create zero impact on the domestic U.S. industry — were in fact causing material injury to the U.S. domestic industry. Realizing that the statute as enacted in the 1984 legislation was too broad and went too far in penalizing imports, Congress created an escape from mandatory cumulation in the 1988 Trade and Competitiveness Act "in any case in which the Commission determines that imports of merchandise subject to investigation are negligible and have no discernable adverse impact on the domestic industry." 19 U.S.C. § 1677(7)(C)(v) (1988) (emphasis added).
istration of justice. Taking the point a step further, even if the process is in fact perfectly objective, if the public commonly perceives that the proceedings are unfair and biased, the concept of evenhanded, impartial justice is damaged, which in turn hinders the ITA's ability to perform its job effectively.

III. A PROPOSAL TO ADD ADMINISTRATIVE LAW JUDGES TO ITA ANTIDUMPING PROCEEDINGS

This article proposes that Congress should legislate that the ITA be required to employ Administrative Law Judges ("ALJs"), operating under the rubric of the Administrative Procedure Act ("APA"), in antidumping proceedings in order to provide the impartial tribunal that is presently lacking. In the absence of explicit congressional action, the ITA should recognize that its credibility for fairness currently suffers from damaging perceptions of bias, and move to incorporate ALJs into the process on its own. The interests at stake in antidumping cases simply have become too great to leave the process as it presently exists. Were the ITA to employ ALJs, with their independence from agency influence and their quasi-judicial, impartial role in the proceedings, the agency would effectively nullify, in a single stroke, the perception that it is unfairly biased and overly vulnerable to political pressure in antidumping proceedings.69

It must be acknowledged, given past Congressional inaction in the "formal vs. informal adjudication" area, that this proposal faces an uphill battle. Since the APA's enactment in 1946, "Congress has not added significantly to those agency statutes that require 'on the record' hearings even though that invitation to the expanded use of ALJs was the basic premise of the APA."70 Furthermore, whether the ITA would vol-

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66 The APA describes the circumstances under which ALJs are utilized. See supra notes 76-82 and accompanying text.
67 See supra notes 8-17 and accompanying text.
68 See supra notes 54-57 and accompanying text.
69 The matter of cost for this proposal is covered in JACKSON & DAVEY REPORT, supra note 35, at 42. Professors Jackson and Davey suggest that the added cost required for employing ALJs could be at least partially offset by revising the chain of judicial review of antidumping cases to make the Court of Appeals for the Federal Circuit the court of first review. This would reduce the budget for the Court of International Trade, which is presently the court of first review for antidumping cases. Generally stated, the justification for such a change lies in the idea that federal administrative agency actions are usually reviewed in the federal courts of appeal, not in trial level courts. Recommendation, 1 C.F.R. § 305.75-3 (1991). This change would also be in accord with the Administrative Conference's general recommendation on appellate review of administrative action. Id. A full discussion of this issue can be found in JACKSON & DAVEY REPORT, supra note 35, at 47-48.
70 FEDERAL ADMINISTRATIVE JUDICIARY, supra note 37, at 10.
untarily give up any amount of control or influence over its antidumping domain in the absence of Congressional legislation is questionable. The ITA is part and parcel of a vast federal bureaucracy that is by its very nature resistant to change, and it is quite possible that the ITA would view a self-initiated move to install ALJs in the antidumping process as "giving away the store."

Such skepticism, however, may be unwarranted. Some agencies have instituted the formal APA-style hearing process despite the lack of a statutory mandate. Congress, in turn, has accepted such use of ALJs, which has "vastly enhanced their number and influence."\(^{71}\) For example, the Social Security Administration has used ALJs in its disability determinations for many years, even though there is no statutory on-the-record hearing requirement in that context.\(^{73}\) Furthermore, the ITA can take comfort in the fact that the APA model ensures that the agency retains ultimate control over the outcome of the proceedings over which the ALJ presides.\(^{73}\) The ALJ's decision becomes the agency's decision only at the agency's pleasure: that is, the agency has the absolute right to review and amend the ALJ's decision within a certain time period.\(^{74}\) In effect, "[t]he ALJ is independent during the course of the decision process, but once a decision is made it is not granted the respect of automatic finality or even deference."\(^{75}\)

A. Bases for the Proposal

1. The Administrative Procedure Act

Administrative law judges came into being with the enactment of the APA\(^{76}\) in 1946. The purpose of the APA was to provide the frame-
work for administrative agencies’ adherence to certain broad guidelines in their various rulemaking, adjudication and other proceedings. Accordingly, the APA “intended to leave the decision to employ ALJs to agency-specific legislation by stating that ALJs would only be required where statutes called for ‘on the record’ hearings.”77

Congress’ underlying intent in creating the ALJ position was to ensure that the persons presiding over administrative proceedings “would perform their evidentiary factfinding function free from agency coercion or influence.”78 To that end, the APA specifically forbid presiding ALJs from being subject to the direction or control of the individuals who are in charge of the investigation or prosecution of that case.79

A matter before an ALJ proceeds essentially like a trial before a court. The ALJ presides over an evidentiary hearing where both parties present their cases in which witnesses appear and are cross-examined. As previously noted,80 the ALJ’s ultimate control over the case after it is concluded is limited, however, by the APA provision which allows an appeal to the agency (or for the agency’s self-initiated review) for its de novo consideration of the ALJ’s decision.81 In its entirety, the ALJ procedural format serves several important functions:

[The format] ensures that the evidentiary facts will be found in the first instance by an official not subject to the agency’s control. At the same time, the format ensures that the agency retains full power over policy, a power it can exercise when it performs its reviewing function. Thus, policy responsibility remains exclusively with the agency


The APA in 1946 used the title “hearing examiner” for the position now known as administrative law judge. ALJs came to be known by their present title after the Civil Service Commission changed the title of hearing examiner to administrative law judge in 1972, see 37 Fed. Reg. 16,787 (1972), and when Congress established the new title by statute in 1978. Administrative Law Judges - Civil Service, Pub. L. No. 95-251, 92 Stat. 183 (1978).

77 FEDERAL ADMINISTRATIVE JUDICIARY, supra note 37, at 8. For example, the ITC must use ALJs in section 337 unfair trade cases: “Each determination . . . shall be made on the record after notice and opportunity for a hearing . . . .” 19 U.S.C. § 1337(c) (1988) (emphasis added).

78 FEDERAL ADMINISTRATIVE JUDICIARY, supra note 37, at 16.

79 5 U.S.C. § 554(d) (1988). Furthermore, the Office of Personnel Management (OPM) oversees the appointment of ALJs through a process overtly designed (i) to exclude politics from appointment decisions and (ii) to obtain the most qualified persons. Finally, the agencies have no control over ALJ compensation, and ALJs must receive a hearing before the Merit Systems Protection Board before they may be dismissed for cause. FEDERAL ADMINISTRATIVE JUDICIARY, supra note 37, at 13.

80 See supra notes 73-75 and accompanying text.

while the public has assurance the facts are found in the first instance by an official not subject to agency coercion.82

Antidumping proceedings conducted by the ITA and ITC are not required by statute to comply with the APA,83 and the agencies have not instituted formal ALJ processes on their own. As stated in the legislative history to the 1979 Trade Agreements Act: "[While the] hearings in antidumping duty investigations . . . are not subject to the provisions of Title 5 of the United States Code relating to adjudicative hearings, they must be conducted in a manner designed to permit full presentation of information and views."84

Judging from this language, Congress appears to have based its decision that antidumping proceedings need not comply with the requirements of the APA at least in part on its characterization of such proceedings as solely investigative, while the APA provisions relate to adjudications. As suggested by Professors Jackson and Davey in their report to the United States Administrative Conference, however:

[E]ven as presently structured, the government's role [in antidumping proceedings] is not only investigative; it also has an adjudicative aspect. It considers the evidence and the arguments of the parties and decides whether injurious dumping . . . has occurred . . . [I]t is not necessary to believe that these proceedings are solely adjudicative . . . to conclude that they are sufficiently adjudicative such that meaningful hearings with appropriate procedural protections should be held by the agencies.85

Similarly, the Administrative Conference noted in a December, 1991 recommendation that:

given the conflicting positions of the parties before the agencies [in antidumping proceedings] — the domestic industry versus the foreign exporters — . . . the parties do and should play an important part in the process. That part could be made more useful if hearings at which the factual submissions of the two sides are tested could be conducted more effectively than at present.86

82 FEDERAL ADMINISTRATIVE JUDICIARY, supra note 37, at 16.
85 JACKSON & DAVEY REPORT, supra note 35, at 31 (emphasis added).
Under this rationale, antidumping proceedings are sufficiently "adjudicative" to be covered by the APA. In any event, the time has come for Congress to act on this matter. Perceptions in the trade community that the ITA does not administer U.S. antidumping laws impartially have become sufficiently serious in recent years to warrant Congress stepping in with legislation requiring the use of ALJs in the ITA's antidumping proceedings.

2. The Jackson & Davey Report to the Administrative Conference

The idea for using ALJs in antidumping proceedings is not new. In their 1991 report to the Administrative Conference, Professors Jackson and Davey conducted a thorough review of the current antidumping statutes and recommended certain procedural reforms. One of their conclusions was that APA-style hearing procedures, complete with ALJs, should be implemented in order to improve the process in antidumping cases.

Professors Jackson and Davey base their conclusions on a number of factors. First, they point out that "use [in the ITA] of an ALJ would mean that those persons in the agency who are charged with investigating [antidumping] matters would not be the same ones who decide the issues raised by the investigation . . . . [U]se of ALJs in [antidumping] cases would likely reduce, and perhaps even eliminate, perceptions of partiality." Second, they conclude that "the issues in an [antidumping] proceeding are the sort of issues that are appropriately considered in a trial-type hearing by an ALJ." In particular, an antidumping case involves parties offering competing versions of the facts and how the rules should be applied to those facts. An ALJ would resolve these factual and legal disputes, much like a judge would do in a trial. Third, while inserting ALJs into the antidumping process would add one to two months to the length of antidumping proceedings, Professors Jackson and Davey propose that the time saved by implementing an alternatively proposed reform would, in the end, more than make up for the

87 JACKSON & DAVEY REPORT, supra note 35, at 43-44. The report concluded that "the benefits of the use of ALJs to the parties outweigh the costs to the parties, once the system is operational. As to the government, the increased costs of ALJs to the agencies would be largely offset by cost savings obtained from [other specific reforms]." Id. at 44. See supra note 69.
88 JACKSON & DAVEY REPORT, supra note 35, at 39.
89 Id.
90 Id.
91 The alternate reform involves bypassing the Court of International Trade in the appeal process. See supra note 69.
time added at the ITA stage. In sum:

The use of ALJs would improve the hearing process at the ITA. It would also solve some of the other problems that parties now encounter in dealing with the ITA, such as surprise changes in methodology, and offer the potential of solving other problems, such as inconsistencies in ITA practices. It would likely reduce perceptions of bias or differential treatment at the hearing stage, because ALJs, like federal judges, are insulated from informal contacts by parties or their attorneys and from political pressures while the current decisionmakers in the ITA are not. Finally, it is arguable that the ALJs over time would render better initial decisions, which might in the long run reduce the number of appeals.

Subsequent to Professors Jackson and Davey submitting their report to the Administrative Conference in November, 1991, the Conference itself released its Final Recommendations on Administrative Procedures Used in Antidumping and Countervailing Duty Cases in December, 1991. The Conference acknowledged that the conflicting positions of the parties coming before the agencies in antidumping proceedings suggested that the process was more than merely investigative, and concluded that the hearings could be conducted more effectively than at present. However, the Conference stopped short of including in its recommendations the Jackson & Davey Report's suggestion to implement the use of ALJs. Instead, the Conference merely suggested that "the hearing conducted by the ITA at the end of its investigation should be presided over by a senior official, with adequate staff support, who is knowledge-

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92 JACKSON & DAVEY REPORT, supra note 35, at 41-42.
93 Id. at 43.

Regarding the logistics of implementing ALJs into the ITA’s antidumping process, Professors Jackson and Davey propose that ALJs be inserted into the proceedings at one of two points: either “at the very beginning of the case or following the ITA’s preliminary determination.” Id. at 36. Because the disruptive effects of preliminary determinations are only temporary (i.e., since the final determination is normally made within 135 days after the preliminary determination, 19 U.S.C. §§ 1671d(a), 1673d(a) (1988)), and because the ALJ’s role would be unclear and likely time-consuming in the preliminary stages of an investigation, Professors Jackson and Davey conclude that the most appropriate time for the ALJ’s insertion into the process would be after the preliminary determination.

Under such a formulation, the parties would be notified of the assignment of an ALJ to their case after the preliminary investigation is completed. From that point forward, the ALJ would assume the role analogous to that of a trial judge in a litigation: that is, the ALJ would establish ground rules, rule on any procedural questions the parties might have, and preside over an evidentiary hearing where both parties put on their cases and examine/cross-examine witnesses.

95 Id.
able about the contested issues in the proceeding and who actively participates in interchanges with counsel for the parties. 96

This vague recommendation does nothing to address the problem of bias and certainly does not go far enough in providing an impartial tribunal to the parties in antidumping proceedings. The bottom line is that the individuals in the ITA responsible for investigating and deciding whether dumping exists and, if so, what dumping margins shall issue, are overly vulnerable to agency influence and political pressure. Furthermore, even if implemented, the Conference’s recommendation would do nothing to change the perception that the ITA is biased and unfair. This perception will persist until truly impartial tribunals, such as those that are offered by APA-style proceedings, complete with ALJs, are required in antidumping proceedings.

C. ALJs in Other Administrative Proceedings

1. The ALJ/AJ Distinction

ALJs are used in a number of other administrative agency proceedings; in fact, thirty agencies employ over 1,000 ALJs. 97 In addition to ALJs, many agencies employ non-ALJs (“AJs”), 98 who operate in a broad range of cases from very informal to formal. The Frye Report summarizes the distinction between ALJs and AJs: “[W]hereas the ALJs as a group rival the federal trial judiciary and adjuncts in number and compensation, there is another group almost twice the size [i.e., numbering over 2,600] of the ALJ corps that decides more cases, but does so with less prestige, compensation and job security.” 99 As far as what types of cases AJs decide versus what types ALJs decide, there appears to be no discernable pattern: “While it might be argued that the more independent and better-compensated ALJs should be reserved for the cases that implicate more substantial individual interests, in practice this does not necessarily occur.” 100

The relevance of the ALJ/AJ distinction in the antidumping context is the striking fact that the decisionmaker in the ITA does not even rise to the level of an “AJ” in terms of independence and freedom from

96 Id. at 67,146.
97 Frye Report, supra note 38, at 263.
98 The Federal Administrative Judiciary report coined the term “administrative judge,” or “AJ,” to refer to those individuals who are not ALJs but who still “actually preside at some kind of hearing, whether formal or informal.” FEDERAL ADMINISTRATIVE JUDICIARY, supra note 37, at 3-5.
99 Id. at 7 (citing Frye Report).
100 Id. at 4.
agency influence. Rather, the ITA’s dumping determination is made by the same committee of individuals who conduct the investigation and who are not insulated in any way from the influence of their politically-appointed superiors or from others within the agency.

2. ALJs in the National Labor Relations Board

The National Labor Relations Board (“NLRB”) uses ALJs to adjudicate alleged unfair labor practice disputes under the National Labor Relations Act. The NLRB model is an intriguing case study for a pair of reasons.

First, at one time before the enactment of the APA, the “decisions of NLRB hearing examiners were widely suspected of often being skewed for policy reasons or because the examiners were under the influence of the [agency’s] enforcement unit . . . .” The APA, once enacted, “provided statutory insulation for hearing examiners and their ALJ successors from pressures exerted by the agencies for which they work.” To further insulate the NLRB’s ALJs from the individuals charged with investigation and enforcement, Congress passed the Taft-Hartley Act in 1947, which removed the investigative and enforcement powers from the NLRB and gave them to the Board’s General Counsel. This measure left the NLRB’s ALJs with only the adjudicative function. By all indications, the implementation of formal APA proceedings giving ALJs greater independence from the agency, together with the subsequent Taft-Hartley Act measures, succeeded in quelling the widely-held perception that the NLRB’s decisionmakers were biased. The ITA’s present poor reputation can be similarly rehabilitated by a move to an APA-style process.

Second, the NLRB ALJs “must resolve difficult contested issues in cases in which the parties are well-prepared and represented by counsel . . . [Accordingly,] the pressures on the [NLRB’s] ALJs to render
carefully wrought and defensible decisions are strong . . . .”108 Similarly, antidumping proceedings in the ITA involve high economic stakes for both foreign and domestic interests; therefore, the parties are almost always well-prepared and represented by counsel. The difference is that the parties in the NLRB proceeding get the benefit of “a highly formal setting in which parties have the opportunity to cross-examine, make motions, submit briefs . . . ” and engage in other trial-like activities that increase the likelihood that the parties will receive a fair hearing before an impartial tribunal.109

3. ALJs in the International Trade Commission

Adding Administrative Law Judges to the antidumping process would not represent the first time that ALJs have been utilized in a trade context. In particular, under section 337 of the Tariff Act of 1930, the ITC must use an APA-style ALJ110 in its investigation and determination of whether there exist “[u]nfair methods of competition and unfair acts in the importation of articles” that destroy, substantially injure, or prevent the establishment of an industry in the United States.111 ALJs are injected into the section 337 process after the Commission has reviewed the petitioner’s complaint and voted to initiate the case. From that point forward, the case proceeds much like a trial in a federal court, with the opportunity for witness cross-examination and formal discovery such as interrogatories and depositions.112

Why are section 337 actions subject to the APA’s “on-the-record” hearing requirements while antidumping actions are not? The legislative history of the Trade Act of 1974 states that the “issue of the fairness of competition raised by section 337, necessitate[s] that the Commission

108 FEDERAL ADMINISTRATIVE JUDICIARY, supra note 37, at 45.
109 Id.
110 The original language in the 1930 Tariff Act’s section 337(c) read “[t]he testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of the commission shall be the official record . . . .” Section 337 was amended by the Trade Act of 1974 to state explicitly that determinations under this section “shall be made on the record after notice and opportunity for a hearing in conformity with [the APA]. All legal and equitable defenses may be presented in all cases.” 19 U.S.C. § 1337(c) (1988).
111 19 U.S.C. § 1337(a). Section 337 is most often applied to intellectual property issues: that is, infringement of patents, trademarks, copyrights, and theft of trade secrets. VAKERICS ET AL., supra note 46, at 488.
112 VAKERICS ET AL., supra note 46, at 18-19. One way in which the section 337 proceeding does not mirror that of a trial in a federal court is that the ITC must, by statute, conclude the case within twelve (or in some cases eighteen) months from the date of publication of the notice of investigation in the Federal Register. Id. at 489.
review the validity and enforceability of patents . . . in accordance with contemporary legal standards . . . .” 113 In comparing section 337’s legislative history with that of the antidumping provisions, 114 it is apparent that Congress considered the interests at stake in unfair trade cases involving intellectual property matters as sufficiently important to require formal hearings under the APA, but did not consider the interests at stake in dumping cases to be equally deserving of review “in accordance with contemporary legal standards.” 115 A possible reason for the distinction is that Congress considers section 337 actions to be “adjudications,” while it considers antidumping actions to be “investigations.” 116 Accordingly, since the APA contains provisions for rulemaking and adjudications, 117 but not for investigations, Congress has heretofore declined to impose APA requirements on antidumping proceedings.

As previously discussed, 118 however, there exist adequate grounds and ample reasons for concluding that antidumping proceedings possess the necessary adjudicative elements to justify legislation requiring that the ITA provide APA-style hearings in antidumping cases. Such measures are necessary to assure that the parties in these high-stakes disputes receive every opportunity to present their case before an impartial tribunal.

IV. CONCLUSION

Many in the international trade community believe that United States antidumping proceedings as administered by the International Trade Administration are patently biased and unfair. This belief is based on the fact that the ITA does not provide the parties being investigated an impartial tribunal. The absence of such a basic procedural safeguard, when combined with the stunning fact that the ITA now finds fully 97% of the foreign companies it investigates guilty of dumping, suggests that the time has come for Congress to reevaluate the process by which dumping allegations are investigated and decided.

This article suggests that Congress should enact legislation that

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114 See supra note 84 and accompanying text.
115 See supra note 113 and accompanying text.
116 See supra notes 84-85 and accompanying text.
118 See supra notes 85-86 and accompanying text.
requires the ITA to employ Administrative Law Judges, operating under the rubric of the Administrative Procedure Act, in its antidumping proceedings. By providing decisionmakers who are sufficiently independent and insulated from agency influence, such a measure would in a single stroke alleviate much of the basis for the trade community’s perception that the ITA is unfairly biased and overly vulnerable to political pressure.

Besides bringing the administration of antidumping proceedings into conformance with the very foundation upon which the U.S. legal system is based, that is, the impartial weighing of facts and an even-handed application of the law regardless of the circumstances of individual cases, a measure requiring ALJs in the ITA would be good policy, since perceptions that the agency is biased ultimately damage the United States’ own economic interests. The primary danger to U.S. interests of such perceptions is that circumstances could escalate to the point where U.S. trading partners retaliate and erect more onerous trade barriers of their own, which at the least would hinder trade and punish American exporters, and at the worst could lead to full-scale retaliatory trade wars.

In sum, the addition of ALJs to the antidumping process at the ITA would restore a measure of integrity to an antidumping process whose credibility for fairness has become greatly diminished in recent years, to the point where the agency is now widely perceived as being patently biased and unfair. By taking action to put its own house in order, and to assure foreign producers and governments that they will receive an impartial hearing in U.S. antidumping disputes, Congress would send the critical message that the U.S. is committed to advancing the cause of fair trade. This would represent an important and necessary first step in easing the potential for a dangerous escalation of trade frictions between the U.S. and its trading partners around the world.