Fall 1995

• Finding Shade from the "Government in the Sunshine Act": A Proposal to Permit Private Informal Background Discussions at the U.S. International Trade Commission

Michael Anthony Lawrence

Available at: https://works.bepress.com/michael_lawrence/5/
Finding Shade From the “Government in the Sunshine Act”: A Proposal to Permit Private Informal Background Discussions at the United States International Trade Commission

Michael A. Lawrence
ARTICLES

FINDING SHADE FROM THE "GOVERNMENT IN THE SUNSHINE ACT": A PROPOSAL TO PERMIT PRIVATE INFORMAL BACKGROUND DISCUSSIONS AT THE UNITED STATES INTERNATIONAL TRADE COMMISSION

Michael A. Lawrence*

I. INTRODUCTION

A fundamental principle of the American legal system is that the free and open exchange of ideas is encouraged and protected.\(^1\) To this end, decisionmakers should have the benefit of considering and debating all relevant evidence before rendering a final decision. However, this fundamental principle is not observed at the United States International Trade Commission ("ITC" or "Commission")\(^2\) when it considers antidumping

---

\* Associate Professor, Detroit College of Law at Michigan State University.

1. See, e.g., Nicholas S. Zeppos, Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation, 76 VA. L. REV. 1295, 1362 (1990) (explaining that within the United States constitutional system, a full and open exchange, debate, or inquiry of all relevant information allows for the "resolution of disputes in the marketplace of ideas"). Courts have long extolled the virtues of full and open exchanges of information. In the seminal First Amendment case of Abrams v. United States, Justice Holmes stated:

[People] may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.


2. The ITC is an independent, quasi-judicial body comprised of six Commissioners who are appointed by the President, but are not accountable to the executive branch. The Commissioners serve for a term of nine years each, and no more than three of the Commissioners may belong to the same political party. 19 U.S.C. § 1330(a), (b) (1994). In addition to the Commissioners, the ITC consists of commodity specialists, accountants, economists, and attorneys who gather facts and prepare reports for the Commissioners' use. Thomas V. Vakerics et al., Antidumping, Countervailing Duty, and Other Trade Actions 7 (1987); see also U.S. INT'L TRADE COMM'N ANN. REP. 5 (1993) (briefly discussing the ITC's responsibilities and appointment process).
and countervailing duty ("AD/CVD") cases. The Administrative Conference of the United States noted in a 1991 Report and Recommendation that "[t]he Commissioners of the ITC apparently do not normally meet as a group to discuss their views of a case before their formal deliberations." Moreover, the Commissioners apparently do not share any written opinions among themselves. Honorable Anne Brunsdale, a former Acting Chair of the Commission, expressed her concern when she wrote:

Of course, in light of the Commission's practice of voting the week before opinions are due and then not sharing opinions—not even the opinion drafted by the General Counsel for the plurality—before they are released, I do not have the benefit of my colleagues' views on the central issues in [the] case. I there-

3. The AD/CVD laws impose dumping or subsidization 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. See Vakerics, supra note 2, at 6; 19 U.S.C. §§ 1671a, 1673a (1994). AD/CVD cases are initiated when an interested party files a petition on behalf of a U.S. industry (such as a domestic manufacturer or a trade association who manufactures, produces, or wholesales a like product in the United States). 19 U.S.C. §§ 1677(a)(9), 1671a(b)(1), 1673a (defining interested party and the procedures for initiating an AD/CVD investigation).

Under 19 U.S.C. § 1673a, the procedure for instituting an antidumping duty investigation, two separate U.S. government entities are responsible for different aspects of the investigation. Michael A. Lawrence, Bias in the International Trade Administration: The Need for Impartial Decisionmakers in United States Antidumping Proceedings, 26 CASE W. RES. J. INT'L L. 1, 5-7 (1994). The two entities are the International Trade Administration's Import Association ("ITA") and the International Trade Commission ("ITC"). Id. at 5. The ITA is responsible for investigating and determining whether there are sales of foreign goods in the United States occurring at less-than-fair-value. Id. The responsibilities of the ITC includes investigating and determining "whether those sales actually caused, or threatened to cause, material injury to U.S. industry." Id.; see United States International Trade Commission, Antidumping and Countervailing Duty Handbook II-1 to II-22 (1994) [hereinafter HANDBOOK] (detailing the investigation process regarding AD/CVD cases).


5. See infra notes 6-8 and accompanying text.
fore do not know whether their arguments might have swayed me. The comments of the Administrative Conference, the ITC Commissioners, and the Court of International Trade is that aside from the formal hearing and the final vote, there are effectively no discussions or exchanges of information among the Commissioners in AD/CVD cases.

The Commission’s practice of denying itself the full benefit of a broad spectrum of views and insights regarding AD/CVD cases is antithetical to the notion that decisionmakers, and the decisionmaking process, benefit from a full and open exchange of information. The Commission’s practice is at once shortsighted and patently anti-intellectual.6


Because we have not seen the majority opinion, our references to the majority’s views are, at best, educated guesses. It is very difficult to write a dissenting opinion without seeing the majority opinion. Unfortunately, Commission practice of the last several years has been not to circulate opinions . . . . In our view, the lack of opinion-sharing at the Commission leads to inadequate, if any, joining of issues. The parties, the public, and the reputation of the Commission all suffer as a result.


7. Certain Telephone Systems and Subassemblies Thereof from Korea, USITC Pub. 2254, 1990 ITC LEXIS 44, at *21 n.10 (Jan. 1990) (stating that the investigation was prepared without the benefit of the other Commissioners’ views); Mechanical Transfer Presses from Japan, USITC Pub. 2257, 1990 ITC LEXIS 36, at *49 n.11 (Feb. 1990); Drafting Machines and Parts Thereof From Japan, USITC No. 2247, 1989 ITC LEXIS 412, at *71 n.1 (Dec. 1989).


9. Id.

10. See infra notes 64-65 and accompanying text (discussing informal meetings).

11. Indeed, trade law practitioners regard the Commission’s absence of informal background discussions during the AD/CVD process as an impediment to the ITC’s effective-
enormous economic interests at stake in AD/CVD proceedings, it is no exaggeration to assert that the Commission’s practice harms, in the largest sense, the national interests of the United States. The ITC, by denying itself a substantial portion of the resources available in AD/CVD cases—namely, access to cases and the knowledge and insights of the other individual Commissioners—produces decisions that are less cogent and fair than they could and should be.

The apparent reason for the Commission’s practice of declining to engage in formal background discussions at any point of the AD/CVD process is its desire not to violate the Government in the Sunshine Act.
The Act specifies that every agency meeting must be open to the public unless the meeting falls within a delineated exception. Although nothing under the ITC's current procedures prohibits the Commissioners from meeting publicly to exchange information regarding pending AD/CVD cases, they choose, for whatever reason, not to do so.

This Article argues that the Sunshine Act does not apply to informal background discussions that clarify issues and expose varying views, and therefore should not prevent the ITC Commissioners from engaging in such informed discussions regarding AD/CVD cases. Following a description of the Sunshine Act legislation, this Article examines the Act as it applies specifically to the Commission's AD/CVD proceedings. This Article then concludes that the language and legislative history of the Act itself, coupled with highly persuasive United States Supreme Court authority, strongly suggest that such informal background discussions by the Commissioners do not fall within the Sunshine Act's definition of "meeting."

Further, this Article contends that even if such private, informal exchanges of information and views do constitute "meetings" under the Sunshine Act, such meetings fall within the exemptions provided under the Act in § 552b(c)(10) ("Exemption 10"). By finding that such meet-

15. Government in the Sunshine Act. 5 U.S.C. § 552b(b), (h) (1994). In a recommendation to Congress, the Administrative Conference stated that the Commissioners of the ITC do not usually meet as a group to discuss AD/CVD cases because of their concerns of violating the Sunshine Act. 56 Fed. Reg. 67,144, 67,145; see, e.g., Jackson & Davey, supra note 4, at 46.

16. 5 U.S.C. § 552b(h). The exemptions are laid out in § 552b(c)(1-10).

17. See id. The very language of the Act specifically states that "every meeting of an agency shall be open to public observation," which may explain in part why the ITC chooses not to meet publicly. Id. (emphasis added). In a 1984 report to the Administrative Conference discussing the effects of the Sunshine Act on government agencies, the report's authors noted that government "officials in positions of responsibility, generally do not wish to appear unknowledgeable, uncertain, or unprincipled . . . ." David M. Welborn, et al., Implementation and Effects of the Federal Government in the Sunshine Act: Final Report for the Administrative Conference of the United States 84 (1984) [hereinafter Welborn Report] (available at United States Administrative Conference); see infra notes 49-62 and accompanying text (discussing the negative effects of the Sunshine Act on agency decisionmakers); see NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-51 (1975) (illustrating Senate and lower court concerns regarding the detrimental effects on an agency's decisionmaker and the decisionmaking process when the agency's meetings are open to the public).

By compounding the natural human impulses of agency decisionmakers to appear confident and knowledgeable with the high stakes involved in AD/CVD cases, a plausible explanation for the ITC Commissioners' reluctance to meet in a public forum is self evident. See supra notes 12-13 and accompanying text (discussing the high stakes involved in AD/CVD cases).
ings fall under Exemption 10, the ITC could close its meetings and fully benefit from each and every Commissioner’s views. Finally, this Article will restate and summarize the arguments and emphasize their importance in the context of improving the ITC’s effectiveness in its handling of AD/CVD cases.

II. The Sunshine Act Legislation

The Sunshine Act specifies that, with certain exceptions, “every portion of every meeting of an agency shall be open to public observation.” The Act is based on the declared policy that “the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government.” The purpose of the Act is to give the public access to agency information, protect the rights of individuals, and allow the Government to carry out its responsibilities.

The Act sets forth specific procedural guidelines for agencies to follow regarding the holding and closing of meetings. For example, the agency must publicly announce, at least one week in advance, the meeting’s time and place and the subject matter to be discussed. The agency may close meetings or withhold information about meetings pursuant to an appropriate exemption provided in 5 U.S.C. § 552b(c). If a meeting is closed, the agency must make available a full written explanation of the closing, coupled with a list of all persons, and their affiliation, expected to attend the meeting.

18. See 5 U.S.C. § 552b(c)(10) (showing that by falling under Exemption 10, the Commissioners could hold closed discussions with one another in an effort to reach the wisest decisions).
19. Id. § 552b.
20. Id. § 552b(b).
22. Id. Whether the Sunshine Act in fact has been successful in achieving its stated purpose is a subject of spirited debate. See infra notes 45-65 and accompanying text (discussing the current debate surrounding the effectiveness of the Sunshine Act).
23. 5 U.S.C. § 552b(a)-(f) (detailing at length when a meeting may be closed and what procedures an agency must follow before and after closing a meeting).
24. Id. § 552b(e)(1). The agency must also designate the name and phone number of the official responsible for responding to requests for information about the meeting. Id.
25. The agency may close meetings or withhold information about meetings pursuant to an appropriate exemption provided in 5 U.S.C. § 552b(c). See infra notes 39-44 and accompanying text (analyzing the exemptions to the Sunshine Act’s open meeting requirement).
26. 5 U.S.C. § 552b(d)(1). The agency members take a separate vote each time they propose to close or withhold information about a meeting pursuant to one of the subsection (c) exemptions. Id. Within one day of any vote to close or withhold information regarding a public meeting, the agency must make available to the public a written copy of the vote of each member. Id. § 552b(d)(3). If any portion of a meeting is to be closed, the agency must make available a full written explanation of the closing, coupled with a list of all persons, and their affiliation, expected to attend the meeting. Id.
maintain a complete transcript, recording, or set of minutes of the meeting.27

A. The Act's Reach: Determining What Constitutes a "Meeting" for Sunshine Act Purposes

The Sunshine Act's scope is restricted to activities that constitute a "meeting" under the Act.28 Determining the true meaning of the term "meeting" is probably "the most troublesome [aspect] . . . in interpreting and applying the Sunshine Act."29 The Act itself specifically defines a "meeting" as the "deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business."30

In dissecting the definition of "meeting" under the Act, it is important to consider several distinct points. First, the number of agency members present must constitute a quorum for the gathering to be considered a "meeting."31 Second, the members present must, at a minimum, "be potentially involved in the discussion."32 Third, the meeting must constitute "deliberations [which] determine or result in . . . joint conduct or disposition of official agency business."33 This last phrase is particularly prob-

27. Id. § 552b(f)(1). This transcript, recording, or set of minutes shall be made promptly available, in an easily accessible place, to the public. Id. § 552b(f)(2).
28. See id. § 552b(b) (specifically stating that every governmental agency meeting must be open to the public); Id. § 552b(a)(2) (defining the term "meeting"); see also infra notes 30-38 and accompanying text (analyzing the definition of the term "meeting" under the Act).
30. 5 U.S.C. § 552b(a)(2). The Act specifies the extent of an agency as "any agency . . . headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President . . . and any subdivision thereof authorized to act on behalf of the agency." Id. § 552b(a)(1). Furthermore, the Act defines "member" as "an individual who belongs to a collegial body heading an agency," Id. § 552b(a)(3).
31. S. Rep. No. 354, 94th Cong., 1st Sess. 19 (1975) (illustrating what constitutes a quorum under different situations). A gathering of less than a quorum will never constitute a "meeting" as defined by the Sunshine Act. Id. at 2-3.
32. Id. at 18. See also Berg and Klitzman, supra note 29, at 4-5 (further developing the definition of "meeting" in that a Commissioner's physical presence is not required, as a conference call could constitute a meeting).
33. Berg and Klitzman, supra note 29, at 5. An analysis of the various issues raised in interpreting this phrase is discussed in detail in Section III, infra. The Senate Report states that the inclusion of the word "joint" is meant to exclude situations where agency
lematic due to the ambiguity of the definitions of “deliberations”, “conduct”,34 and the phrase “determine or result in.”35 Finally, in attempting to interpret the meaning of the term “meeting”, one is left with the question of what constitutes “official agency business.”36

With respect to the types of discussions that will fall under the Sunshine Act’s open meeting requirement, one influential authority distinguished between meetings where the focus is on discrete proposals or issues, and meetings where discussions are more informational and exploratory.37 This authority concludes that in informational meetings, members would be less inclined to cultivate firm positions on issues that will come before the agency.38

B. Exemptions from the Act’s Open Meeting Requirement

Despite its seemingly broad scope, the Sunshine Act offers a number of exemptions from its open meeting requirement.39 The exemptions cover

members may be in the audience while another agency member gives a speech concerning agency business. S. Rep. No. 354, 94th Cong., 1st Sess. 18 (1975).
34. See infra note 95 and accompanying text (discussing the meaning of the terms “de-
liberation” and “conduct”).
35. See infra notes 105-108 and accompanying text (discussing the meaning of the phrase “determine or result in”).
36. See infra notes 98-100, 104-08 (discussing the interpretation of the phrase “official agency business”).
38. Id.
39. 5 U.S.C. § 552b(c)(1-10)(1994). Specifically, the Act allows an agency to close meetings when the agency determines that the meeting or the disclosure of information during the meeting is likely to:
(1) disclose matters . . . of national defense or foreign policy . . . ; (2) relate solely to the internal personnel rules and practices of an agency; (3) disclose matters specifically exempted from disclosure by statute . . . ; (4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) involve accusing any person of a crime, or formally censuring any person; (6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy; (7) disclose [certain] investigatory records compiled for law enforcement purposes . . . ; (8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; (9) disclose information the premature disclosure of which would . . . be likely to (i) lead to significant financial speculation . . . or (ii) significantly endanger the stability of any financial institution; or . . . to significantly frustrate implementation of a proposed agency action . . . ; or (10) specifically concern the agency's issuance of a subpoena or the agency's participation in a civil action or proceeding . . . or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of [Title 5 of the U.S. Code] or otherwise involving a determination on the record after opportunity for a hearing.

Id.
meetings where issues of national security or internal agency rules are involved, or where the disclosure of the contents of the meeting would result in an invasion of an individual's personal privacy. Furthermore, some exceptions delineated under the Act relate to law enforcement issues. 

Although the Act carves out various circumstances where a meeting would be exempt from the Act's requirements, the Act's legislative history emphasizes that the use of the exemption is permissive, not mandatory. Indeed, the Act specifies that any given meeting should be open "[e]xcept in a case where the agency finds that the public interest requires otherwise." Therefore, before an agency closes a meeting, it must make two determinations: first, the meeting must fall under a statutorily mandated exemption, and second, the public interest must require that the meeting be closed.

C. The Debate Over the Effectiveness of the Sunshine Act

Whether the Sunshine Act improves government accountability and openness is a matter of spirited debate. Some proponents argue that the openness of agency meetings allows the public to more clearly understand how the governmental decisionmaking process operates, thereby leading to a greater opportunity for public involvement in the process through enlightened voting and lobbying. The result of an open meetings stat-

40. Id. § 552b(c)(1,2,6).
41. Id. § 552b(c)(7).
43. 5 U.S.C. § 552b(c).
44. For example, the ITC regulations require that:
   (1) When the Commission has determined that one or more of the specific [exemptions apply] . . . , the Commission shall consider whether or not the public interest requires that such portion or portions of the meeting be open to public observation.
   (2) In making the public-interest determination . . . the Commission shall consider whether public disclosure would (i) Interfere with the Commission's carrying out its statutory responsibilities, (ii) Conflict with the individual right of privacy under the Privacy Act of 1974 (5 U.S.C. § 552a), or (iii) Place the Commission in violation of any other applicable provision of law, in addition to any other factors which it deems to be relevant to the particular meeting in question. Regulations of the United States International Trade Commission 19 C.F.R. § 201.36(c)(1995); see also BERG AND KLITZMAN, supra note 29, at 17 (discussing § 552b(c) grounds for closing meetings to the public).
45. David A. Barrett, Note, Facilitating Government Decision Making: Distinguishing Between Meetings and Nonmeetings Under The Federal Sunshine Act, 66 Tex. L. Rev. 1195, 1195-96 (1988) (citing David Cohen, Openness Works — Let's Get on with It, 38 Fed. B.J. 99, 99-100 (1979)). There is no shortage of hyperbole in such arguments. For example, one commentator stated that arguments against the Sunshine Act are "arguments against democracy." Hearings on S. 260 before the SUBCOMMITTEE ON REORGANIZA-
ute on the affected agencies is that officials are inclined to diligently prepare for their meetings thereby leading to better informed decisionmaking and increased public confidence in the government.\textsuperscript{46} Furthermore, proponents argue that by holding open meetings, the government is forced to be more responsive to the needs of the general public as opposed to submitting to the demands of special interest groups.\textsuperscript{47} Further, such increased accountability decreases the likelihood of deals being made “in the dark.”\textsuperscript{48}

Not all commentary analyzing the Sunshine Act is positive, however. Thomas Tucker, former Assistant General Counsel at the FTC, described the Act as “neither an absolute principle nor a cure-all for the problems which face us, but rather a largely ineffective and unnecessary informational policy” with serious detrimental costs.\textsuperscript{49} Tucker conducted a study

\begin{small}
\textsuperscript{46} Jennifer A. Bercich, Seventeen Years Later: Has Government Let the Sun Shine In?, 61 Geo. Wash. L. Rev. 1475, 1485 (1993) (citing Thomas H. Tucker, “Sunshine” — The Dubious New God, 32 Admin. L. Rev. 537, 544 (1980)); see also Barrett, supra note 45, at 1196-97 (stating that “[t]he public's watchful eye might promote a higher rate of attendance at meetings, improve planning of meetings, and encourage more thorough preparation and more complete discussion of issues by participating officials”) (footnote omitted);

\textsuperscript{47} Barrett, supra note 45, at 1196 (citing 121 Cong. Rec. 35322 (1975) (statement of Sen. Ribicoff)); Jerry W. Markham, Sunshine on the Administrative Process: Wherein Lies the Shade?, 28 Admin. L. Rev. 463, 465 (1976) (stating that public scrutiny may prevent the favoring of special interest groups);


\textsuperscript{49} Tucker, supra note 46, at 550. Tucker warns that the “emotional satisfaction” of forcing government leaders to conduct their affairs in public must be balanced against the Sunshine Act’s detrimental effects on the government’s ability to operate effectively. \textit{Id.} Specifically, the author states that “[s]unshine may be a great disinfectant but it is also a desiccant and can cause sunburn and heat prostration.” \textit{Id.}

The author takes exception to the Senate Report’s comment that “contemporary arguments by commentators in opposition to such [open meeting] laws are virtually nonexistent.” \textit{Id.} at 538 (quoting S. Rep. No. 94-354, 94th Cong., 1st Sess. 1, 8 (1975)). To the contrary, extensive critical comment was had at the time. \textit{Id.} at 538 n.4. According to Tucker, any perceived absence of critical comment at the time might have resulted from
\end{small}
in which he sent questionnaires to officials of the major regulatory agencies asking about their operational experiences under the Sunshine Act during the four years following its enactment, and found that a majority of respondents believed that the presence of the press and public under open meeting statutes subtly inhibit the free exchange of ideas and opinions.

Similarly, in a 1984 report to the Administrative Conference, Professors David Welborn, William Lyons, and Larry Thomas concluded that the Act led to diminished collegiality and increased inhibitions among agency decisionmakers. These increased inhibitions have had a direct adverse effect on the ability of agency decisionmakers to engage in meaningful debate or to examine issues from multiple perspectives. Another

"the almost religious sanctity of 'openness' in the political climate of the day rather than to the absence of real concerns about [the open meetings laws'] impact on the government decision-making processes." Id. at 538.

50. Id. at 538-39. Specifically, questionnaires were sent to 28 members of 14 agencies, and responses were received from 18 members of 13 agencies. Id.

51. Id. at 545. Moreover, all but one of the respondents answered that the Sunshine Act had adversely affected their agency's ability to meet informally to discuss agency business. Id. at 547.

52. WELBORN REPORT, supra note 17. The Welborn Report used four sources to study the effects of the Sunshine Act on Federal Administrative Agencies: "judicial decisions interpreting the act; annual sunshine reports required of agencies for the years 1977 through 1981; mail survey questionnaires; and personal interviews." Id. at 7.

53. Id. at 51-52, 64-65. The lessening of collegiality caused a shift toward compartmentalized, individualist processes isolating members from one another. Id.

54. The authors provide examples of the sorts of inhibitions that occur: Open meetings were often described by respondents in terms suggesting the absence of meaningful exchanges, such as 'stiff', [sic] 'formal', 'set pieces,' and 'staged presentations.' Also diminished is the 'kidding around' . . . that can contribute to a productive work climate. There also may be restraint in the content of what members say . . . [due to] substantive uncertainty and a desire not to appear uninformed, apprehension or uncertainty about market and political repercussions, a reluctance to embarrass staff, and fear of tipping the agency's hand or revealing weak points in a proposed action . . . Another form of inhibition concerns the adjustment of positions or a change in views in the process of deliberation . . . . [There are] pressures in support of the maintenance of a position after it is announced, even if there is an inclination to alter it. They include an unwillingness to appear weak, indecisive, or unprincipled.

Id. at 51-52. See, e.g., Note, Open Meeting Statutes: The Press Fights for the "Right to Know," 75 HARV. L. REV. 1199, 1202 (1962); Barrett, supra note 45, at 1211; Cleveland, supra note 48, at 149-51 (discussing four ways in which open meetings alter the decision-making process).

55. See WELBORN REPORT, supra note 17, at 52. Similarly, the Chairman of the American Bar Association's Administrative Law section concluded nearly ten years after the Sunshine Act's enactment that the Act "may well have diminished the collegial character of agency decision making, created a reluctance of agency members even to discuss certain important agency matters, and shifted the decision-making process to one-on-one discussions between members, exchanging views at the staff level, and exchanging views by writ-
commentator observed that decisionmakers subject to the Sunshine Act's open meeting requirements may be reluctant to clarify issues while deliberating in the presence of an audience, which could lead to underdeveloped, poor decisionmaking. Concurrently, during open meetings, participants demonstrate a tendency to simplify, trivialize, and distill highly complicated matters solely for the benefit of the public. As a result, a matter's most important issues may not be discussed at all during these open meetings.

In *NLRB v. Sears, Roebuck & Co.*, the Supreme Court clearly recognized the reservations that agency decisionmakers harbor regarding open meetings. Justice White succinctly stated that "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances... to the detriment of the decisionmaking process." Similarly, in supporting a particular exemption to the Freedom of Information Act a decade earlier, the House and Senate Committee reports both noted that "exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl' and this could have detrimental effect on government operations." According to at least one commentator, "this unanimous agreement among all branches of the federal government that publicity inhibits candor and the free exchange of ideas and that these qualities are important to the effective functioning of the government."
government and consequently are worth protecting has been abruptly discarded by [the Sunshine Act]."\(^{62}\)

In response to these concerns, some commentators suggest that Congress amend the Sunshine Act to expand and define explicitly the circumstances under which decisionmakers in administrative agencies may meet beyond the Act’s scope.\(^{63}\) Specifically regarding the ITC, the Administrative Conference concluded that informal meetings regarding AD/CVD cases should not be controlled by the Sunshine Act,\(^{64}\) and that a congressional amendment to the Tariff Act is necessary to clarify this point.\(^{65}\)

III. The ITC’s Overly Restrictive Interpretation of the Sunshine Act

Congress’ purpose in enacting the Sunshine Act was to provide the public with a complete account of information regarding the federal government’s decisionmaking process\(^{66}\) while safeguarding individual rights and the duty of the Government to fully carry out its responsibilities.\(^{67}\) As interpreted by the ITC, however, the Act does not in fact allow the Government [i.e., the ITC] to carry out its responsibilities in an effective manner. By prohibiting the Commissioners from engaging in informal background discussions with one another in order to clarify issues and

---


63. See, e.g., id. at 549-50 (explaining that the Act should be amended to apply solely to final agency actions).

64. Recommendation, 56 Fed. Reg. 67,144, 67,145 (1991). The Administrative Conference’s Special Committee to Review the Government in the Sunshine Act repeated its conclusion in an October 10, 1995 proposed Recommendation. The proposed recommendation stated that the ITC “should follow ACUS Recommendation 91-10 and revisit the issue of whether its adjudications are covered by Exemption 10 of the Act.” Reform of the Sunshine Act, supra note 55, at 6 (footnote omitted); see also Jackson & Davey, supra note 4, at 46. Professors Jackson and Davey recognize that the ITC’s failure to meet privately in informal background discussions is detrimental to the decision-making process, and that in order to facilitate intelligent decisionmaking, the ITC should be encouraged to exchange drafts, opinions, and other related information prior to formal deliberations. Jackson & Davey, supra note 4, at 46. Because the Sunshine Act provides commissioners with less than complete access to all available resources, the Act should be amended. Id.

65. Recommendation, 56 Fed. Reg. 67,144, 67,146 (1991). While a discussion of a proposed congressional amendment to the Sunshine Act or the Tariff Act is beyond the scope of this Article, this Article contends that any congressionally mandated narrowing of the Act’s scope would improve the ITC’s effectiveness in handling AD/CVD cases.


67. Id.
expose varying views, the Act forces the Commissioners to operate in an informational vacuum.

This isolation among the Commissioners is wholly unnecessary, given the Sunshine Act's legislative history and the Supreme Court's interpretation of relevant portions of the Act. In light of this authority, the ITC should revise its overly restrictive interpretation of the Sunshine Act to allow the ITC Commissioners to engage in private informal background discussions that clarify issues and expose varying views.

This change in policy would be extremely beneficial. First, it would encourage Commissioners to meet and discuss AD/CVD cases. Sec-

68. Indeed, the ITC's practice is to not share even written opinions until the decision is released. See supra notes 5-8 and accompanying text.
69. See supra note 55 and accompanying text (noting the chilling effect the Sunshine Act has on agency dialogue).
70. See infra notes 79-92 and accompanying text (discussing the Supreme Court's interpretation of "meeting").
71. By contrast, the potential risks to the ITC in adopting such a policy change are relatively low. Even if the ITC did close a discussion among Commissioners that a court subsequently determined should have been held open, in all likelihood the court simply would order the ITC to publicize a transcript of the discussion. See Pan American World Airways, Inc. v. Civil Aeronautics Board, 684 F.2d 31, 36 (D.C. Cir. 1982) (stating that, in those circumstances where the agency mistakenly closed a meeting in violation of the Act, the release of transcripts constitutes a normal remedy rather than more severe invalidation of the agency's substantive action); see also Common Cause v. Nuclear Regulation Comm'n, 674 F.2d 921, 938-39 (D.C. Cir. 1982) (ordering compliance with the open meeting requirement of the Sunshine Act by releasing transcripts of closed meeting to the public); Thomas, supra note 29, at 277-78 (supporting the notion that the release of transcripts is an appropriate remedy for violating the Act). The first sentence of the legislative history of 5 U.S.C. § 552b(h)(2) states that any federal court holding appropriate jurisdiction may "inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate." 5 U.S.C. § 552b(h)(2). The conference explained, however, that it did not intend for federal courts to use their authority "to set aside agency action taken other than under section 552b solely because of a violation of section 552b in any case when the violation is unintentional and not prejudicial to the rights of any person participating in the review proceeding." H.R. Rep. No. 1441, 94th Cong. 2d Sess. 23 (1976). In addition, "[a]gency action should not be set aside for a violation of section 552b unless that violation is of a serious nature." Id. (emphasis added).

Because the change in policy that this Article proposes seeks only to allow the ITC Commissioners to engage in informal background discussions, there is no reason why such a policy should be prejudicial to the rights of any participant. As long as the ITC is scrupulous in limiting discussions to such matters, it is highly unlikely that the penalty for any unintentional violation would result in anything other than a requirement to release the transcripts of the discussions. See id.
72. Under the current open meeting policy the Commissioners do not meet, informally or formally, to clarify issues or present varying views to educate themselves fully regarding an AD/CVD case; nor do they share written opinions, even though such meetings are allowable if held pursuant to the Sunshine Act. See supra notes 4-9 and accompanying text. The only times the Commissioners convene under the current policy are at the hearing and final vote. Telephone Interview with Ruby Dionne, Chief of Docket, International Trade Commission (Mar. 31, 1995).
ond, it would allow Commissioners to ask questions, to brainstorm, and to propose innovative ideas without the apprehension that comes with knowing an unblinking public eye is fixed upon their every move.

Third, it would place Commissioners in touch with the most valuable resource available to aid in the production of well-reasoned, thoughtful, and fair decisions—the knowledge and insights of their colleagues.

A. Informal Background Discussions Among ITC Commissioners in AD/CVD Cases Are Not “Meetings” Under the Sunshine Act or the ITC Regulations

The Sunshine Act requires every portion of any agency meeting to be open to the public. Therefore, the question of what activities constitute “meetings” is at the heart of the Sunshine Act, and is subject to widely varying interpretations.

1. The Supreme Court’s Interpretation: Federal Communications Commission v. ITT World Communications, Inc.

In Federal Communications Commission v. ITT World Communications, Inc. the United States Supreme Court considered the question of

73. The value of permitting private informal discussions was addressed by the American Bar Association in its testimony before the House Government Operations Committee:

There is a need for exempting from the legislation chance encounters and informational and exploratory discussions [including informal and casual work sessions] as long as they do not predetermine agency action. Outlandish suggestions come out of those sessions. Hopefully, humorous suggestions come out of those sessions, but once in a while the brainstorming matters will lead to a new and creative and important idea.

Government in the Sunshine: Hearings on H.R. 10315 and H.R. 9868 Before a Subcomm. of the Comm. on Government Operations, 94th Cong., 1st Sess. 102 (1975) (statement of Prof. Jerre S. Williams, Chairman, Section on Administrative Law, ABA); see also Government in the Sunshine Act Implementation: Hearing Before the Subcomm. on Admin. Law and Governmental Relations of the Comm. on the Judiciary, 95th Cong., 1st Sess. 5-6 (1977) (testimony of Richard Berg, Executive Secretary, Admin. Conf. of the United States) (introducing the hotly contested problem concerning the definition of “meeting”).

74. See supra notes 49-58 and accompanying text (describing the adverse costs of having open meetings).

75. 5 U.S.C. § 552b(b) (1994).

76. Id. § 552b(a)(2). The corresponding ITC regulation is substantively identical to the Act’s language, substituting only the references to “agency” with “Commission” or “Commissioners.” 19 C.F.R. § 201.34(a)(1) (1993).

77. The definition of the term “meeting” has been described as one of the Act’s most troublesome provisions. BERG & KLitZMAN, supra note 29, at 5; see supra note 29 and accompanying text.

what constitutes “meetings” under the Sunshine Act. The Court noted that in drafting the Act’s definition of “meeting”, Congress recognized that the administrative process cannot effectively be conducted if subject to constant public scrutiny. Specifically, “[i]nformal background discussions [that] clarify issues and expose varying views” are a necessary part of an agency’s work. The procedural requirements of the Act effectively would prevent such beneficial discussions and “thereby impair normal agency operations without achieving significant public benefit.” The Sunshine Act’s application is therefore limited to meetings where, at a minimum, a quorum of Commissioners meet to conduct or resolve official agency business.

The Court concluded that Congress clearly intended to allow preliminary discussion among Commissioners, and that only those “deliberations [that] determine or result in the joint conduct or disposition of official agency business” shall be subject to the Act’s open meeting requirements. The Court observed that the Act’s legislative history suggests that the statutory language covered only those “discussions that effectively predetermine official action.” These discussions “must be sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably

79. Id. at 464-65. ITT involved discussions among three members of the FCC Telecommunications Committee who constituted a quorum and their European and Canadian counterparts in a “Consultative Process” to facilitate joint planning of telecommunications facilities through an exchange of information on regulatory policies. Id. at 465, 470.
80. Id. at 469.
81. Id. (quoting S. REP. No. 354, 94th Cong., 1st Sess. 19 (1975)) (alteration in original).
82. Id. at 470.
83. Id.
84. Id. at 472. The Court traced the evolution of the statutory language through the committee process, and concluded that Congress carefully drafted the language to explicitly limit the scope of the Sunshine Act:

For example, the Senate substituted the term “deliberations” for the previously proposed terms — “assembly or simultaneous communication,” or “gathering” — in order to “exclude many discussions which are informal in nature.” Similarly, earlier versions of the Act had applied to any agency discussions that “concern[ed] the joint conduct or disposition of agency business.” The Act now applies only to deliberations that “determine or result in” the conduct of “official agency business.” The intent of the revision clearly was to permit preliminary discussion among agency members.

Id. at 470 n.7 (alteration in original) (internal citations omitted).
85. Id. at 471 (quoting S. REP. No. 354, 94th Cong., 1st Sess. 19 (1975)) (alteration in original).
86. Id.
firm positions regarding matters pending or likely to arise before the agency.'

The Court's language in *ITT* speaks directly to the ITC. Under its current AD/CVD practice, ITC Commissioners do not conduct private informal background discussions, most likely because they fear that such meetings may overstep the provisions of the Sunshine Act. Nor do the Commissioners hold public Sunshine Act meetings aside from the mandatory hearing and the final vote. The Commissioners thus have no opportunity to engage in "necessary" informal background discussions which help clarify issues and expose varying views. As a result, the ITC's normal agency operations are impaired without achieving significant public benefit.

2. *The Definition of Meeting in The Interpretive Guide*

In *ITT*, the Supreme Court cited prominently to the Interpretive Guide to the Government in Sunshine Act ("Interpretive Guide"), a United States Administrative Conference publication. The Interpretive Guide

87. *Id.* (quoting BERG AND KLITZMAN, supra note 29, at 9). In *ITT* the Court noted that petitioner ITT neither alleged that the FCC Committee formally acted upon a matter under its authority nor that the gatherings in dispute "resulted in firm positions on particular matters pending or likely to arise before the Committee." *Id.* (emphasis added). In interpreting Congressional intent the Court concluded that the Sunshine Act's purpose was not to encompass such general background discussions. *Id.* at 471-72; see Republic Airlines, Inc. v. Civil Aeronautics Bd., 756 F.2d 1304, 1319 (8th Cir. 1985). The "discussions between Board members and staff and the circulation of memoranda among the Board members were activities common to any body of responsible public officials preparing to make an important decision." *Id.* at 1319. Such activity did not constitute a "meeting" under the Sunshine Act. *Id.*

88. See supra notes 4, 68-69 and accompanying text.

89. See supra notes 15-17, and accompanying text (discussing the lack of privately held discussions between Commissioners).

90. See supra note 10 and accompanying text.

91. See supra note 81 and accompanying text.

92. See supra note 82 and accompanying text; notes 49-65 and accompanying text (discussing the detrimental effects of the lack of private informal discussions).

93. FCC v. ITT World Communications, Inc., 466 U.S. 463, 471 (1984) (citing BERG AND KLITZMAN, supra note 29, at 9). The Berg and Klitzman Interpretive Guide was prepared by the office of the chairman of the Administrative Conference after extensive consultation with agencies that have been affected by the Sunshine Act. *Id.* at 471 n.10. The Interpretive Guide was created pursuant to Congressional request and in conjunction with subsection (g) of the Act, which specifies that the fifty or so agencies subject to the Sunshine Act are to promulgate implementing regulations within 180 days of the Act's date of enactment. 5 U.S.C. § 552b(g) (1994). The Act directs the affected agencies to consult with the Office of the Chairman of the United States Administrative Conference to assist in promulgating the required regulations. *Id.*; see, e.g., BERG AND KLITZMAN, supra note 29, at v (illustrating the Administrative Conference's purpose and role in drafting the Interpretive Guide); Thomas, supra note 29, at 262 (same). In the process of preparing regulations the authors of the Interpretive Guide conducted meetings with affected agency
discusses various aspects of the Sunshine Act, including the difficulties of determining what constitutes a “meeting” under the Act.\(^4\)

At a minimum, the *Interpretive Guide* notes that the Act’s legislative history suggests that a “meeting” includes any gathering of the number of Commissioners required to constitute a quorum, where they engage in a serious exchange of differing views so as to achieve a consensus on an issue of official agency business.\(^5\) The *Interpretive Guide* acknowledges, however, that the task of defining the term “meeting” is an arduous one.\(^6\)

According to the *Interpretive Guide*, the Senate Report on the Sunshine Act indicates that the distinction between discussions “which effectively predetermine official actions” and those which do not” is the controlling principle regarding the meaning of “meeting.”\(^7\) The Senate Report states that for an agency to avoid the Act’s open meeting requirement, its discussions must remain *informal and preliminary* and that the discussions should not effectively predetermine official agency action.\(^8\) On the basis of this Senate Report language, the *Interpretive Guide* contends that “briefings and exploratory or tentative discussions would not

representatives, circulated drafts and related materials from other agencies, supplied comments, both oral and written, attempted to clarify issues for agency representatives, and served as a “clearing house” for Sunshine Act information. *Berg and Klitzman*, supra note 29, at v.\(^9\)

\(^4\) *Berg and Klitzman*, supra note 29, at 3-6 (stating that “much attention was devoted in the legislative process to attempting to define when conversations among agency members rise to the level of a ‘meeting’ ”).

\(^5\) *Id.* at 5. The Act specifies that the meeting consist of “deliberations [that] determine or result in the joint conduct or disposition of official agency business.” 5 U.S.C. § 552b(a)(2) (emphasis added). Interestingly, the Senate Report noted that the terms ‘deliberation’ and ‘conduct’ were carefully selected to illustrate the necessity that “some degree of formality is required before a gathering is considered a meeting” under the Sunshine Act. *S. Rep. No. 354, 94th Cong., 1st Sess. 18* (1975) (emphasis added); *e.g.*, *Berg and Klitzman*, supra note 29, at 6 n.9; *ITT*, 466 U.S. at 470 n.7.

\(^6\) *Berg and Klitzman*, supra note 29, at 5-6. The authors of the *Interpretive Guide* addressed the difficulty of defining the word “meeting” when they stated:

> “But what of the intermediate points on the spectrum? [Does the definition include] [b]riefings to the members by staff or outsiders, which are accompanied by limited exchanges among the members? Discussions among the members which are serious but tentative and exploratory, not calculated or intended to lead to an immediate commitment by the agency to any course of action? Discussions which attempt to reach but do not achieve a consensus? Given the great variety of possible fact situations (which the preceding examples suggest but do not exhaust), it is hard to articulate a practical test of a “meeting” with any degree of confidence.”

*Id.* at 6.

\(^7\) *Id.* (quoting *S. Rep. No. 354, 94th Cong., 1st Sess. 19* (1975)).

fall within the definition of ‘meeting’ so long as no official action is effectively predetermined.

It is illuminating to compare the Senate Report with the House Committee on Government Operations Report. The House Committee Report, in discussing its definition of “meeting”, stated that agency conduct regarding decisionmaking is not limited simply to the formal decisionmaking or voting, but is intended to include all discussion relating to the agency’s responsibilities. The contradiction between the Senate Report’s “informal and preliminary” language and the House Report’s “all discussion” language supports the view that informal background discussions that clarify issues and expose differing views do not constitute “meetings” for purposes of the Sunshine Act. This view is supportable because the Conference Report definitively stated that the “Senate’s definition of ‘meeting’ was the basis for the final language” to be implemented in the Act. Moreover, although both the House and Senate Reports preliminarily defined ‘meeting’ specifically as “deliberations . . .

99. BERG AND KLITZMAN, supra note 29, at 6. Regarding the difficulty of assessing when an informal discussion evolves into predetermining official agency action, the Interpretive Guide acknowledges that to safeguard itself from violating the Act, an agency may find it desirable to conduct briefings and exploratory discussions pursuant to the Act’s procedures, even though the briefings and discussions do not technically constitute meetings under the Act. Id. at 10.

The fact that it is inherently difficult to characterize such proceedings helps explain the ITC’s failure to meet privately to conduct informal background discussions. Faced with the necessity of addressing fine distinctions to determine what may constitute informal discussions as opposed to discussions that may predetermine official agency action, the ITC may have opted to require that all discussions — formal and informal — be held in compliance with the provisions of the Sunshine Act. See id. (noting that some agencies will find it desirable to conduct briefings and exploratory discussions pursuant to the Act’s procedures).

This conservative “risk averse” approach has appealing aspects—if every discussion is held open to the public, the agency obviously will not have to deal with a challenge that a particular discussion should have been open. Moreover, a policy requiring that every discussion be open is easy to administer relative to a policy where fine distinctions would need to be understood, and determinations made as to which meetings must be open rather than closed. When blind adherence to a play-it-safe approach prevents an agency from responsibly carrying out its duties in the most effective manner possible, however, the conservative approach must give way. If a critical, in-depth analysis of the law demonstrates that certain informal discussions may in fact be closed to public observation, and by doing so the agency would carry out its responsibilities more effectively, the agency is arguably obligated to hold and to close such discussions, despite the difficulties that the change in policy may present.

100. Id. at 6.


102. See supra notes 97-101 and accompanying text.

where such deliberations concern the joint conduct or disposition of official agency business, the Conference Report amended the definition to “deliberations . . . where such deliberations determine or result in the joint conduct or disposition of official agency business . . . .” The Conference Report, however, did not explain why it substituted the phrase “determine or result in” for the more-inclusive term “concern,” but the comments of one Conference committee member are illuminating. He stated that “[o]n the issue of the definition of a ‘meeting’, the conference report accepts the Senate wording except that deliberations would have to ‘determine or result in’ the joint conduct or disposition of agency business, rather than merely ‘concern’ such activities.” Specifically, the change in language was “intended to permit casual discussions between agency members that might invoke the bill’s requirements under the less formal ‘concern’ standard.”

On the basis of this legislative history, the Interpretive Guide suggests that the definition of “meeting” under the Sunshine Act does not include deliberations concerning agency business that are “so general and tentative as not to ‘determine or result in’ the members’ adoption of firm positions regarding future agency action.” The Interpretive Guide thereby suggests that informal briefings and exploratory discussions among agency members might thereby be excluded from the Act’s open meeting requirement.

104. S. Rep. No. 354, at 18 (emphasis added); H.R. Rep. No. 880, at 8 (emphasis added). The language in the House bill is almost identical to that in the Senate Conference Report, except that the word “official” is not found in the House bill. Compare H.R. Rep. No. 880, at 8 with S. Rep. No. 354, at 18. The Conference Report, however, does not explicitly explain why the Senate Report’s version, which includes the term “official,” ultimately prevailed over the House Report’s version. See BERG AND KLITZMAN, supra note 29, at 6-8. The inclusion of the term “official” in the final Conference Report can only be interpreted as narrowing the type of agency business that would be subject to the Act. Id. at 7.


108. Id.


110. Id. Such reasoning comports with the Senate Report’s suggestion that the applicable test is to determine “whether the discussion ‘predetermine[s] official action.’ ” Id. at 8. The recommendation to exclude informal discussions clearly is appropriate in light of the practical problems regarding the daily operations of an agency. Id.
3. The Preference for a Narrow Interpretation of the Definition of “Meeting”

Other commentators who have considered the language and legislative history of the Sunshine Act together with the ITT decision, the Interpretive Guide, and other persuasive authority have concluded that certain discussions among agency officials do not constitute “meetings” under the Sunshine Act. One commentator contends that the Supreme Court’s ITT decision clearly mandates that federal courts should narrowly interpret the Act. In this commentator’s view, the Supreme Court clearly intended to narrow the scope of the Act when it stated that to be a meeting, “[i]nformal background discussions [that] clarify issues and expose varying positions’ must be ‘sufficiently focused on discrete proposals or issues’ as to ‘effectively predetermine official actions.” The commentator concluded that although informal discussions among agency officials play an important role in policy decisionmaking, such discussions are not sufficiently related to the determination of official agency action to fall within the ambit of the Act’s definition of meeting.

After a comprehensive discussion of the merits and drawbacks of both the broad and narrow interpretations of “meeting” under the Act, another commentator concluded that a narrow interpretation, whereby initial pre-deliberative gatherings would not be subject to the Act, is preferable to a broader interpretation. He reached this conclusion because a narrow interpretation allows for free exploration of competing ideas which in turn provides the agency with the maximum number of options from which to choose the best courses of action. By contrast, the adoption of the broad view, whereby pre-deliberative gatherings would be subject to the open meeting requirement of the Act, would significantly diminish the quantity and quality of informal exchanges of views and opinions, thereby adversely affecting the agency decisionmaking process.

Clearly, parts of the ITC’s discussions regarding AD/CVD cases would fall within the Supreme Court’s ITT framework and the Administrative

---

111. See generally Thomas, supra note 29 (arguing for a narrow interpretation of the Sunshine Act); Barrett, supra note 45 (same).
112. Thomas, supra note 29, at 279.
113. Id. (alterations in original) (quoting FCC v. ITT World Communications, Inc., 466 U.S. 463, 471 (1984)).
114. Id. at 270.
115. Barrett, supra note 45, at 1216 (discussing a more narrow interpretation of the Sunshine Act to promote informal exchange of ideas and facilitating better agency decisionmaking).
116. Id.
117. Id. at 1209.
Conference's *Interpretive Guide*. According to the Supreme Court, private informal background discussions held outside of the Act's scope are necessary to help agency members clarify issues and expose different opinions and options, thereby allowing the agency to better fulfill its responsibility of informed decisionmaking.\(^{118}\) Accordingly, informal discussions whereby the ITC Commissioners do not formally act upon, or take firm positions on, the AD/CVD case at issue will not constitute "meetings" under the Sunshine Act. As long as the ITC's proceedings remain informal, in that they do not "effectively predetermine official actions,"\(^{119}\) and the agency's discussions do not cause the individual Commissioners "to form reasonably firm positions"\(^ {120}\) regarding pending AD/CVD cases, the Commission may, and should, engage in beneficial informal background discussions and utilize all resources to clarify issues, expose varying views, and formulate complete and cogent decisions.\(^ {121}\)

**B. Informal Exchanges of Views, Information, and Drafts Between ITC Commissioners Regarding AD/CVD Cases Fall Within the Sunshine Act's Exemption 10**

Assuming, *arguendo*, that informal background discussions among ITC Commissioners that clarify issues and expose varying views constitute "meetings" under the Sunshine Act, a careful reading of the statute, coupled with an analysis of persuasive case authority, suggests that such meetings fall within the ambit of the Sunshine Act's Exemption 10. Therefore, the ITC would have the power to exempt such "meetings" from the Act's open meeting requirement.\(^ {122}\)

---

118. *ITT*, 466 U.S. at 469-70; *see supra* note 84 and accompanying text (discussing the Court's examination of the legislative intent and purposes of the Act's open meeting requirements in deciding on a narrow interpretation).

119. *ITT*, 466 U.S. at 471 (*quoting* S. REP. NO. 354, at 19); *see supra* notes 97-100 and accompanying text (discussing *Interpretive Guide's* interpretation of the Senate Report's language).

120. *ITT*, 466 U.S. at 471; *see supra* notes 84-87, 103-10 and accompanying text (discussing Congressional intent as construed by the *ITT* Court and interpreted by the *Interpretive Guide*).

121. Insofar as such a change in policy would create apprehension that the ITC Commissioners would somehow abuse their newfound liberty, the ITC could allay those fears by maintaining minutes of their discussions in a manner similar to that required for meetings closed under one of the Sunshine Act's ten exemptions. *See infra* note 148 (explaining procedural guidelines under 5 U.S.C. § 552b(f)(1) (1994)); *supra* notes 39 and accompanying text (providing the specific language of the Sunshine Act's 10 exemptions).

122. *See supra* note 39 and accompanying text. Moreover, as long as the meeting satisfies Exemption 10's requirements, formal meetings could be closed as well. *See* 5 U.S.C. § 552b(c).
Exemption 10 of the Sunshine Act allows for a meeting to be closed to the public if it is concerned with one of five specifically delineated categories, exempting meetings that:

[i] "specifically concern the agency's issuance of a subpoena" [sic]; [ii] "or [that specifically concern . . .] the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal"; [iii] "or [that specifically concern . . .] an arbitration"; [iv] "or [that specifically concern . . .] the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in § 554 of this title"; [v] "or [that specifically concern . . .] the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication] otherwise involving a determination on the record after opportunity for a hearing."

The construction of the fifth category clearly suggests that Congress did not intend to exempt only those meetings specifically concerned with adjudications conducted pursuant to § 554 of the Administrative Procedure Act (APA), as described in Exemption 10's penultimate clause (item (iv) above). In fact, the statute's language appears to suggest that Congress intended that de facto formal adjudications that "otherwise involve[e] a determination on the record after opportunity for a hearing" (item (v) above) should be exempt in addition to the § 554 adjudications.

123. 5 U.S.C. § 552b(c)(10) (1994). The corresponding ITC regulation closely tracks the Act's language when it states:

(b) The Commission may close a portion or portions of a Commission meeting only when it determines that public disclosure of information to be discussed at such meeting is likely to:

(9) Specifically concern: (i) The commission's issuance of a subpoena, (ii) the Commission's participation in a civil action or proceeding, or (iii) the initiation, conduct, or disposition by the Commission of a particular case of formal Commission adjudication under 19 U.S.C. 1337 pursuant to the procedures of 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.


In conducting AD/CVD investigations, the ITC is not required by statute or regulation to comply with § 554 or any other section of the APA. 19 U.S.C. § 1677c(b); 19 C.F.R. § 207.23(b)(1995); see also infra notes 139-43 and accompanying text (presenting support for viewing AD/CVD investigations as formal adjudications for exemption purposes).


125. See infra notes 139-43 and accompanying text (discussing AD/CVD proceedings as adjudications).

126. 5 U.S.C. § 552b(c)(10). While it is true that the phrase "on the record after opportunity for a hearing," is often used as a euphemism for proceedings that must be in compliance with the APA, it is nonsensical to conclude that Congress intended that both the
Clearly, Exemption 10 provides a distinction between adjudications that fall under APA § 554 and those that involve “a determination on the record after opportunity for a hearing.”

The District of Columbia Circuit Court of Appeals recognized this very distinction between adjudications in Philadelphia Newspapers v. Nuclear Regulatory Commission. That court held that the Nuclear Regulatory Commission (“NRC”), pursuant to Exemption 10 of the Sunshine Act, could properly close a portion of a meeting even though the relevant NRC regulation did not expressly require on-the-record hearings pursuant to the procedures of 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing. The D.C. Circuit Court of Appeals suggested that the last clause of Exemption 10 superficially appears to encompass a proceeding which, while not required to comply with § 554 of the APA, is “a formal adjudication in the sense that the Commission is conducting a full-scale on-the-record hearing.” Philadelphia Newspapers Inc. v. NRC, 727 F.2d 1195, 1202 (D.C. Cir. 1984). The NRC’s AD/CVD hearing is arguably such a “full-scale on-the-record” proceeding. See infra note 135 (discussing ITC AD/CVD proceedings as “on-the-record”). The Philadelphia Newspapers court noted, however, that such a conclusion would be hindered by the legislative history, which states that the “elsewhere involving a determination on the record” clause in Exemption 10 was meant primarily to encompass formal rulemaking and not adjudication.” 727 F.2d at 1202 (quoting H.R. REP. NO. 880 (PART III), 94th Cong. 2d Sess. 9 (1976)); Time, Inc. v. United States Postal Service, 667 F.2d 329, 334 (2d Cir. 1981) (stating that the last clause of 5 U.S.C. § 552(b)(10) is not solely limited to “adjudications” but also encompasses formal rulemaking); see also Thomas, supra note 29, at 273-74 (discussing the Court’s decision in Time, Inc.). The Philadelphia Newspapers court implied, however, that the legislative history was not dispositive on the issue of how Exemption 10’s last clause should be interpreted. 727 F.2d at 1202 n.3. Specifically, the court stated that they “need not decide the difficult issue whether [the] second [i.e., last] clause covers proceedings other than formal rulemaking...” Id.

127. 19 C.F.R. § 201.36(b)(9). The D.C. Circuit Court of Appeals suggested that the last clause of Exemption 10 superficially appears to encompass a proceeding which, while not required to comply with § 554 of the APA, is “a formal adjudication in the sense that the Commission is conducting a full-scale on-the-record hearing.” Philadelphia Newspapers Inc. v. NRC, 727 F.2d 1195, 1202 (D.C. Cir. 1984). The NRC’s AD/CVD hearing is arguably such a “full-scale on-the-record” proceeding. See infra note 135 (discussing ITC AD/CVD proceedings as “on-the-record”). The Philadelphia Newspapers court noted, however, that such a conclusion would be hindered by the legislative history, which states that the “elsewhere involving a determination on the record” clause in Exemption 10 was meant primarily to encompass formal rulemaking and not adjudication.” 727 F.2d at 1202 (quoting H.R. REP. NO. 880 (PART III), 94th Cong. 2d Sess. 9 (1976)); Time, Inc. v. United States Postal Service, 667 F.2d 329, 334 (2d Cir. 1981) (stating that the last clause of 5 U.S.C. § 552(b)(10) is not solely limited to “adjudications” but also encompasses formal rulemaking); see also Thomas, supra note 29, at 273-74 (discussing the Court’s decision in Time, Inc.). The Philadelphia Newspapers court implied, however, that the legislative history was not dispositive on the issue of how Exemption 10’s last clause should be interpreted. 727 F.2d at 1202 n.3. Specifically, the court stated that they “need not decide the difficult issue whether [the] second [i.e., last] clause covers proceedings other than formal rulemaking...” Id.

128. 727 F.2d 1195 (D.C. Cir. 1984).
The court stated that the Commission was sufficiently and clearly conducting on the record proceedings according to the formal procedural requirements set out by APA § 554. For example, all of the Commissioners’ decisions had to be based on the record evidence, and ex parte contacts were prohibited. Therefore the court held that the Sunshine Act did not apply to “what has in substance been a Section 554 adjudication and [which is] thus functionally within Exemption 10.”

Similarly, the ITC’s AD/CVD proceedings fall squarely within the parameters set out by the Philadelphia Newspapers court. Specifically, AD/CVD proceedings at the ITC involve a de facto formal agency adjudication which substantively complies with the requirements of § 554. As stated previously, § 554 requires a full-scale on-the-record hearing, a determination made pursuant to the record evidence, and a fully docu-

---

129. Id. at 1203. The court found that the on-the-record proceeding fell substantively within Exemption 10’s penultimate § 554 clause. Id. at 1202 n.3; see supra notes 123-24 and accompanying text (discussing the five categories of Exemption 10).

130. Philadelphia Newspapers, 727 F.2d at 1203.

131. Id.

132. Id.; see also Shurberg Broadcasting of Hartford, Inc. v. FCC, 617 F. Supp. 825, 829-30 (D.D.C. 1985) (finding that a meeting may satisfy Exemption 10 and be closed to the scrutiny of the public eye even if it is not formally part of the adjudicatory process). Amrep Corp. v. FTC, 768 F.2d 1171, 1179 (10th Cir. 1985) (explaining that statutorily required agency functions similar to a court’s should be protected from disclosures as a court’s would be), cert. denied, 475 U.S. 1034 (1986).

The Philadelphia Newspapers court specifically noted that the agency could close to the public only those portions of the meeting that fell within the exemption, and not the entire meeting. 727 F.2d at 1203-04.

133. Section 554 of the APA sets forth the formal procedures for all adjudication cases that are required by statute to be determined on the record after an opportunity for a hearing. 5 U.S.C. § 554(a). Section 554 requires, for example, that an agency give notice of the time, place, and nature of the hearings to all persons involved. Id. § 554(b)(1). Furthermore, when time and public interest permit, all interested parties to the specific adjudication at bar must be given an opportunity to submit “facts, arguments, offers of settlement, or proposals of adjustment” for consideration by the agency. Id. § 554(c)(1).

134. 5 U.S.C. § 554(a). The AD/CVD statute requires that the Commission hold a hearing during the course of an investigation upon request by any party to the investigation prior to making final deliberations on the case. 19 U.S.C. § 1677c (1994). The ITC’s own regulations provide, more emphatically, that the ITC shall hold a hearing regarding an investigation prior to a final determination. 19 C.F.R. § 207.23(a) (1995).

135. 5 U.S.C. § 554(a). Hearings and other proceedings related to the AD/CVD investigation are for all intents and purposes “on-the-record,” since the regulations require that “[a] verbatim transcript shall be made of all hearings or conferences held in connection with Commission [AD/CVD] investigations. . . .” 19 C.F.R. § 207.23(c) (1995). The AD/CVD statute and the ITC regulations have stringent requirements for maintenance of the official record. The relevant ITC regulation, for example, states that the ITC secretary “shall maintain the record of each [AD/CVD] investigation conducted by the Commission . . .” and that “[a]ll material properly filed with the Secretary shall be placed in the record.” 19 C.F.R. § 207.4(a).
mented recording of any ex parte contacts.\textsuperscript{136} \textit{Philadelphia Newspapers} thus provides strong support for the assertion that portions of the Commission’s AD/CVD proceedings qualify for closure under Exemption 10’s penultimate clause, even if they fail under Exemption 10’s final clause,\textsuperscript{137} despite the fact that the proceedings are not required by law to comply with § 554 of the APA.\textsuperscript{138}

Regarding the question of whether AD/CVD proceedings are in fact “adjudications” at all, Professors Jackson and Davey concluded in their report to the United States Administrative Conference\textsuperscript{139} that the ITC’s AD/CVD proceedings are, in effect, formal adjudications.\textsuperscript{140} Jackson and Davey noted that under the current structure of the Act, the ITC’s role in AD/CVD cases involves adjudicative as well as investigative responsibilities.\textsuperscript{141} Specifically, the government weighs evidence, listens to the parties’ arguments, and makes a decision as to whether an injurious dumping has occurred.\textsuperscript{142} The legislative history to the 1979 Trade Agreements Act lends further support to the argument that AD/CVD cases are \textit{de facto} adjudications.\textsuperscript{143} The Senate Report to the Trade Agreements Act specifically states that even though the hearings in antidumping duty investigations are not subject to the APA, they still must be conducted to allow full presentation of information and views.\textsuperscript{144}

In sum, those portions of the ITC’s informal and formal “meetings” that “specifically concern” AD/CVD proceedings may be closed pursuant

\begin{itemize}
\item \textsuperscript{136} The AD/CVD statute and ITC regulations both include a requirement that the record of the proceeding include documentation of any ex parte meetings between interested parties and the Commission. 19 U.S.C. § 1677(f)(3) (1994); 19 C.F.R. § 207.5 (1995).
\item \textsuperscript{137} See supra notes 126-32 and accompanying text (discussing the distinction between adjudications that fall under APA § 554 and those that involve a determination on the record).
\item \textsuperscript{138} See supra note 128 and accompanying text.
\item \textsuperscript{139} JACkSON & DAVEY, supra note 4.
\item \textsuperscript{140} Id. at 31.
\item \textsuperscript{141} Id. Similarly, the Administrative Conference impliedly acknowledged the adjudicative nature of the AD/CVD process when it stated: “given the conflicting positions of the parties before the agencies—the domestic industry versus the foreign exporters—and their role in supplying much of the information on which the agency decisions are based, the parties do and should play an important part in the process.” Recommendation, 56 Fed. Reg. 67,144, 67,145 (1991); 1 C.F.R. pt. 305.91-10 (1977).
\item \textsuperscript{142} JACKSON & DAVEY, supra note 4, at 31.
\item \textsuperscript{143} S. REP. No. 249, 96th Cong., 1st Sess. 97 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 483 (discussing that AD/CVD hearings must be conducted so as to permit full presentation of information and views). The AD/CVD statute gives the Commission the authority to summon witnesses, issue subpoenas, take depositions, and perform other adjudicative-like functions. 19 U.S.C. § 1677(f)(7) (1994).
\item \textsuperscript{144} S. REP. No. 249, at 97.
\end{itemize}
to the Act’s Exemption 10 and the ITC’s own regulations.\textsuperscript{145} If the ITC exercised its right affirmatively to close such meetings, Commissioners would be encouraged to meet and talk with each other.\textsuperscript{146} It is axiomatic that any discussion that might aid the Commissioners in these high-stakes cases\textsuperscript{147} would be better than no discussion at all, as is currently the case.\textsuperscript{148}

By holding informal face-to-face meetings, the ITC would encourage more collegiality among its Commissioners, leading to greater frankness and openness.\textsuperscript{149} Permitting the Commissioners to engage in the open exchange of information and ideas, free from the apprehension that comes from knowing every utterance is subject to the white heat of close public scrutiny, would decidedly improve the ITC’s AD/CVD decisionmaking.\textsuperscript{150}

\section*{C. The ITC General Counsel’s View}

The Sunshine Act requires that for every meeting closed under one or more of the exemptions of the Act’s subsection (c),\textsuperscript{151} the general counsel or chief legal officer of the agency must certify that the meeting properly may be closed.\textsuperscript{152} Therefore, the ITC general counsel’s position on the matters of what constitutes a “meeting” and when (if ever) Exemption 10 should apply is of critical importance.\textsuperscript{153}

\textsuperscript{146} See supra note 4 and accompanying text (explaining that aside from the hearing and the final vote, the Commissioners do not meet to discuss AD/CVD cases).
\textsuperscript{147} See supra notes 12-13 and accompanying text (explaining the impact of AD/CVD cases on the United States economy).
\textsuperscript{148} It is important to note that the Sunshine Act’s procedural guideline requires that any agency closing a meeting under Exemption 10 must maintain detailed minutes of the meeting. 5 U.S.C. § 552b(f)(1). This safeguard assures that Commissioners will be held accountable for their actions even if a meeting is closed. This compromise provides the public with the fullest practicable information regarding the decisionmaking processes of the Government, yet protects the ability of the Government to carry out its responsibilities effectively. See supra notes 21-22 and accompanying text (discussing the purpose of the Sunshine Act).
\textsuperscript{149} See supra notes 46-58 and accompanying text (illustrating the way in which the Sunshine Act has affected administrative agency decisionmaking).
\textsuperscript{150} See supra notes 49-58 and accompanying text (explaining that people tend to act differently when under pressure from the public and that this can adversely affect the decisionmaking process).
\textsuperscript{151} See 5 U.S.C. § 552b(c)(1-10) (delineating the 10 exemptions from the Sunshine Act).
\textsuperscript{152} Id. § 552b(f)(1).
\textsuperscript{153} Since any action the Commission takes must be certified by the general counsel, it is necessary to base any arguments in favor of closing the Commission’s gatherings in the context of how the general counsel, as well as the Commission itself, will view the situation. See id. (elaborating on the duties of the general counsel when a meeting is closed).
In the past, the Commission’s general counsel took the position that the Commissioners’ meetings to dispose of AD/CVD cases did not fall within Exemption 10.\textsuperscript{154} Today, however, it is uncertain what the general counsel’s position is regarding the status of informal background discussions among Commissioners. Whether the general counsel considers these discussions as “meetings” subject to the strictures of the Sunshine Act,\textsuperscript{155} and further, whether such meetings actually fall within the terms of Exemption 10 is unclear.\textsuperscript{156}

A 1984 ITC general counsel memorandum provides a context for how the general counsel has approached this issue in the past.\textsuperscript{157} The ITC drafted the 1984 memo in response to a Commission question concerning whether a tour of domestic industry facilities by a majority of the Commission would constitute a “meeting” under the Sunshine Act.\textsuperscript{158} The

\begin{itemize}
\item \textsuperscript{155} See 5 U.S.C. § 552b (defining “meeting” and establishing guidelines explaining when meetings must be open).
\item \textsuperscript{156} Since 1986, documents from the general counsel regarding internal procedures have been interpreted to constitute privileged information, and as such are unavailable to the public. Telephone Interview with Paul Bardos, ITC Administrative Attorney (Sept 12, 1994). Attempts by the author to gain access to relevant post-1986 documents through the Freedom of Information Act were unavailing.
\item The fact that the ITC promulgated regulations that are more strict than required by the Sunshine Act may offer a clue in explaining the ITC general counsel’s conservative interpretation of the Act. For example, the Sunshine Act requires agencies to make public announcement of a meeting at least one week before the meeting. 5 U.S.C. § 552b(e)(1). The original ITC regulations, by contrast, specified that the ITC make public announcement of a meeting at least 10 days prior to the meeting. 42 Fed. Reg. 11,241, 11,244 (Feb. 28, 1977); 19 C.F.R. § 201.35(a) (1977). The ITC only recently amended its regulations to reduce the notice time to the statutorily-mandated seven days. 19 C.F.R. § 201.35(a) (1995), Rules of General Application United States International Trade Commission, 1993 ITC LEXIS 570 (Sept. 14, 1993) (proposing the change from ten to seven days). In recommending the change, the ITC general counsel stated, “[s]ince only a very few agencies afford more than seven days’ notice of meetings under the Act, the amendment is also in accordance with the practice of most other agencies under the Act.” \textit{Id.} at *3. It is possible that the Commission made a conscious decision shortly after the Act’s passage to go beyond the requirements of the Act in an effort to portray the agency as an institution committed from the outset to “openness.” In short, perhaps the ITC’s history of scrupulous Sunshine Act compliance has had some effect on ITC general counsel’s current conservative position.
\item This theory is bolstered by the September, 1995 testimony of Gracia Berg, former ITC Deputy General Counsel, before the Administrative Conference Special Committee to Review the Government in the Sunshine Act. Ms. Berg stated that the Chairman of the Commission at the time of the Act’s enactment was quite sensitive to criticism from Congress and other quarters of the lack of openness in administrative agency proceedings. Reform of the Sunshine Act, \textit{supra} note 55, at 54.
\item \textsuperscript{157} Memorandum from the General Counsel to Commissioner Liebeler, 1984 ITC GCM LEXIS 75 (May 18, 1984) (hereinafter General Counsel’s Memorandum).
\item \textsuperscript{158} \textit{Id.} at *1 (regarding the Commissioner’s visits to the copper and tuna facilities).
\end{itemize}
ITC general counsel concluded that the tour did not constitute a "meeting" if the purpose of the trip was to obtain background information on the operations and conditions of the industry, and not to decide the merits of the case. The memo discussed at some length the Administrative Conference's Interpretive Guide and the Supreme Court's ITT decision to support its conclusion that general discussions between Commissioners, as well as those "between Commissioners and other parties that may occur during the upcoming trip would not violate the Sunshine Act."

Based on this memo, it would seem that the ITC general counsel could be convinced that it is possible for the Commissioners to engage in private informal background discussions that clarify issues and expose varying views without violating the Sunshine Act. For unknown reasons, however, the general counsel's memo has not prompted the Commission or Commissioners to engage in such discussions, much to the detriment of the Commission's AD/CVD decisionmaking.

IV. SUMMARY AND CONCLUSION

Under its current practice in deciding antidumping and countervailing duty cases, the Commissioners at the United States International Trade Commission do not engage in private informal background discussions due to concerns that such discussions violate the Sunshine Act. This practice significantly compromises the Commission's ability to carry out its

159. Id. at *1-2.
160. BERG & KLITZMAN, supra note 29.
161. FCC v. ITT World Communication, Inc. 466 U.S. 463 (1984); see supra notes 79-92 and accompanying text (discussing the ITT decision). The 1984 memo cites the same language from the Senate Report as the Supreme Court did in ITT. It specifically stated that "[Informal] background discussions [that] clarify issues and expose varying views' are a necessary part of an agency's work." General Counsel's Memorandum, supra note 157, at *9 (alterations in original).
162. General Counsel's Memorandum, supra note 157, at *11.
163. Either the general counsel's position has changed significantly since the 1984 memo or the Commissioners themselves have declined to risk the possibility of "meeting" in violation of the Sunshine Act. Again, it is impossible to know the precise reason for the Commission's position on this matter because attempts to gain access to the general counsel's privileged documents through the Freedom of Information Act were unavailing. See supra note 156.
164. See supra notes 12-13 and accompanying text (explaining the consequences on the nation's economy from undesirable outcomes in AD/CVD cases due to non-communication among decisionmakers). The Commission's practice, at the very least, creates the perception that the Commission is not doing all that it can to produce well-reasoned, thoughtful, and fair AD/CVD decisions. See supra note 11 and accompanying text (discussing trade law practitioners' views of the Commission's lack of communication).
responsibilities effectively. By essentially preventing the Commissioners access to a substantial portion of the resources available in these cases, including the knowledge and insights of the other individual Commissioners, the ITC produces AD/CVD decisions that are less well-reasoned, thoughtful, and fair than they might otherwise be. Such a practice is particularly troublesome given the high stakes and costs involved in AD/CVD cases.

The plain language and legislative history of the Sunshine Act, together with highly persuasive Supreme Court and academic authority, strongly suggest that private informal background discussions by the Commissioners would not constitute “meetings” violative of the Sunshine Act. As long as the ITC’s proceedings remain informal, in that they do not “effectively predetermine official actions,” or cause the individual Commissioners to form “reasonably firm positions” regarding pending AD/CVD cases, the Commission may and should engage in private informal background discussions to clarify issues and expose varying views. Even in the unlikely event that such informal discussions are “meetings” subject to the Sunshine Act, a careful reading of the statute, together with the ITC’s own regulations and persuasive case authority, suggests that those portions of meetings that “specifically concern” AD/CVD proceedings fall within the Act’s Exemption 10. Thus, the ITC would be permitted to exempt those proceedings from the Act’s open meeting requirement.

The ITC should reconsider its overly restrictive interpretation of the Sunshine Act and revise its policy to allow its Commissioners to engage in private informal background discussions among themselves. Moreover, the ITC should exercise its right affirmatively to close those portions of formal meetings that “specifically concern” AD/CVD proceedings under the Act’s exemptions. The benefits of such a change in policy would be significant. First, it would encourage the Commissioners to meet amongst themselves. Any discussion among the ultimate decisionmakers regarding issues in high-stakes AD/CVD cases is better than no discussion at all. Second, it would allow the Commissioners to ask questions, brainstorm, and float innovative ideas out of the unblinking scrutiny of the public eye. In sum, by promoting and encouraging the open exchange of information and ideas, this basic change in policy would significantly aid the ITC in achieving its goal of producing well-reasoned, thoughtful, and fair AD/CVD decisions.

165. See supra notes 6, 14, and accompanying text (explaining how the Act causes non-communication between Commissioners, and consequently, undesirable outcomes in AD/CVD cases).

166. See supra notes 28-38 and accompanying text (discussing what constitutes a “meeting” under the Sunshine Act).