Relief from Unfairly Traded Imports

Kathleen W. Cannon &
Benjamin Blase Caryl

Kelley, Drye, & Warren LLP

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Introduction

This chapter will explain what CEOs, U.S. manufacturers, farmers and business managers need to know about obtaining relief from unfairly traded imports in the U.S. market. The focus of this chapter is on trade remedy practice before the U.S. International Trade Commission ("ITC"), the U.S. government agency charged with decision-making on the injury side of trade cases. As experienced international trade lawyers who practice regularly before the ITC, we provide an overview of key factors companies should consider in assessing whether use of the trade remedy laws to address injury caused by imports may be a path worth pursuing. This chapter will review the basic questions that should be considered in this assessment, including what facts support filing a petition for a U.S. trade remedy investigation, who can file a petition, the importance of the timing of filing, how to determine what product to cover in the petition, the need for foreign market research, the process and focus of the ITC in trade remedy cases, and the benefits of obtaining trade relief. Most importantly, this chapter will identify how to maximize your chances of successfully obtaining relief under the trade remedy laws.

We have provided a step-by-step overview of key considerations for companies that have been affected by injurious imports and are seeking a way to determine whether use of the trade remedy laws to address that import problem should be considered. The U.S. trade remedy laws provide relief to domestic producers who are injured by low-priced imports of a competing product. The two main trade remedy laws are antidumping ("AD") and countervailing duty ("CVD") laws. AD law addresses discriminatory pricing, in that a foreign producer or exporter is selling a product in the United States for less than it is in its home market or a third-country market. CVD law addresses subsidies provided by a foreign government to a foreign producer or exporter so that it can export goods at unfairly low prices.

Where injury to a U.S. industry as a result of these unfair practices can be demonstrated, the remedy available under the trade remedy laws is the imposition of offsetting duties on the dumped or subsidized merchandise. The additional duties may have the effect of causing the import prices to rise, import volumes to decrease or both. The benefits to U.S. manufacturers from the relief provided by trade remedies can be numerous, including regaining customer accounts lost to foreign producers, increasing prices that had been depressed by dumped imports, rehiring workers who had been laid off, and improving a company's overall trade and financial performance.

In order to have antidumping or countervailing duties ("AD/CVDs") placed on a product, U.S. producers, i.e., the companies, farmers, or assemblers of the competing domestic product must file a petition with the U.S. Department of Commerce ("Commerce") and the ITC. Commerce determines whether sales of the imports under investigation have been dumped or subsidized, while the ITC

determines if the imports under investigation are injuring the competing domestic industry. This chapter will focus primarily on the ITC side of a trade remedy case, including how to assess initially whether a possible trade action has merit, how to put a case together with other U.S. producers, the timing of a case and the analysis of the various factors on the product and industry required to pursue a case successfully.

We are uniquely situated to handle and successfully pursue trade remedy cases (antidumping and countervailing duty cases) before the ITC for a number of reasons. First, we have a large team of attorneys who regularly practice before the ITC, some of whom previously worked at the ITC. We specialize in representing domestic manufacturing and agricultural producers and workers who have been injured by unfairly traded imports. Our trade section is recognized nationally in *Chambers* and *Legal 500* and most of our trade partners are individually recognized in numerous national award publications (*e.g.*, *Chambers*, *Best Lawyers*, *Legal 500*, and *Superlawyers*) as well. We have participated in over 150 different trade remedy cases over the past thirty years and have a high record of success.

Second, unlike some firms who focus primarily on representing a few companies or industries in the trade area, we have represented a wide range of manufacturing and agricultural companies in trade cases. We have experience successfully bringing trade cases at the ITC on behalf of producers of such products as carbon and stainless steel (flat-rolled and long-products), brass sheet and strip products, dynamic random access memory semiconductors, large power transformers, wire rod, wire products such as pre-stressed concrete steel wire strand and kitchen and appliance shelving, consumer products including tissue paper, television sets and bicycles, and agricultural products that include garlic, honey, mushrooms, and salmon. This broad client base gives us an unparalleled perspective into different ways of pursuing trade remedies before the ITC, depending upon the product and industry involved.

Third, we are unique in having an in-house economic consulting firm that works closely with us in trade remedy cases. Georgetown Economic Services ("GES"), our in-house economic consulting firm, is composed of economists, accountants, programmers, and customs and export controls experts. Many members of GES worked previously with U.S. government agencies that implement the trade laws, including the ITC. GES provides us with significant assistance in preparing for and participating in trade remedy cases before the ITC. Their work includes collecting and analyzing company-confidential data, undertaking detailed analysis and assessments of the data and other corporate reports, foreign market research and preparing analyses for and testifying at the ITC in trade cases.

Finally, we have a substantial Government Relations and Public Policy group of attorneys and government relations experts, many of whom worked on Capitol Hill and held other positions within the executive branch of the federal

government who can provide assistance in trade remedy cases on legislative and policy issues. The combination of our experienced legal, economic and government relations team provides us with an ability to address all facets of a company's problems with import-related injury.

I. Should My Company Consider Using the Trade Remedy Laws?

If your company is a domestic manufacturer or agricultural producer that is having difficulty competing in the U.S. market with low-priced imports, you should consider use of the trade remedy laws. The primary trade remedy laws used to address injury caused by imports are the antidumping law, which addresses unfair price discrimination, and the countervailing duty law, which addresses foreign government subsidies. These trade remedies are pursued by filing petitions for relief with agencies of the U.S. government, specifically the ITC and Commerce.

A major advantage to the use of trade remedy laws to address import problems is the speed of relief. Statutory deadlines require that these cases be completed within roughly one year from the time the petition is filed and preliminary duties may be imposed within six months of the petition filing. The AD and CVD duties, which are often at double-digit percentage levels, can have significant commercial effects in curtailing imports or causing those imports to price fairly.

There are several factors that signal a company should at least consider pursuing possible trade relief:

1. The presence of low-priced imports in the U.S. market that compete with your products;

2. Increasing volumes of imports from one or more countries;

3. Decreases in your domestic sales, particularly lost sales that can be traced back to the imports;

4. Lost market share (even if your sales volumes are not decreasing, they may not be increasing in line with any increase in U.S. market demand);

5. Pricing pressure, either in the form of decreasing sales prices or sales prices that are not able to increase enough to cover any increased production costs;

6. Decreases in your domestic production and capacity utilization;

7. Worker layoffs or reductions in the number of shifts, working hours, or worker wages;

8. Closures or temporary shut-downs at your domestic manufacturing facilities;

9. Decreases in capital investments and research and development related to your domestic manufacturing facilities; and/or

10. Decreases in your profitability and return on investment related to your domestic manufacturing operations.

All of these factors are not necessary to pursue a trade remedy case, but the more that apply the better your case will be. Also relevant will be details about the foreign producers that are shipping the low-cost goods to the United States and causing the problems, to assess whether unfair pricing and/or subsidization is occurring, although those factors are generally not known to companies and will require foreign market research by the law firm and its consultants. This further examination of the foreign producers will also consider the degree of export-orientation and level of production capacity of such producers (See below at Step VI: Foreign Market Research).

II. What Information Will Be Needed to Make the Initial Assessment of the Possible Merits of a Trade Case?

The ITC must determine whether the dumped or subsidized imports cause or threaten to cause "material injury" to your industry. The Commission's analysis of material injury is highly fact-specific. In order to evaluate the feasibility of filing a trade remedy petition, the petition filed with the U.S. government will need to present specific supporting data showing that the product/business line is being adversely affected by the imports. That information will need to include:

1. Estimates of the size of the total U.S. market and levels and trends in import data of the product under investigation: the ITC looks at whether there has been a significant increase in the volume of imports from the country or countries of concern;

2. A consideration of which country or countries to target in the trade action, based on an examination of import volumes and trends as well as an assessment of which imports are causing U.S. producers to lose sales;

3. U.S. market pricing data for U.S. products and imports: the ITC will look to see if the subject imports are underselling the U.S. product and if U.S. prices are decreasing;

4. U.S. sales and competitive bid data: the ITC will look to see if you have lost sales or revenue to subject imports;

5. Production cost data: the ITC will look to see if U.S. prices are being suppressed (*i.e.*, not increasing sufficiently to cover rising raw material costs); and

6. Other internal company data, including financial, sales, production, capacity, and employment data: the ITC will look to see if there have been any actual or potential negative effects on your output, sales, market share, profits, productivity, employment, wages, growth, ability to raise capital, and return on investments.

Trade remedy cases are data-driven. The initial step of considering the possible merits of a trade remedy case is the completion of a survey of a company's basic trade and financial data for the past three years—the period of investigation usually examined by the ITC. We have standard surveys that our economists can readily adapt to the product and industry interested in undertaking such an assessment. Much of the data for an initial case assessment will be generated by the U.S. producer or producers involved. These data are highly confidential information of U.S. producers and are treated as such by our firm and our consultants. No company-specific data is provided to another company or otherwise publicly disseminated. If a case is pursued, the data will be presented in confidence to the ITC and released only to attorneys who are parties to the case under protective order. The time and information demands on companies in gathering these data are not insignificant but are typically less burdensome than those experienced in court or litigation because there is no discovery in trade remedy cases.

III. How Do We Determine What Product and Industry Should Be Investigated and Which Country or Countries to Target?

It is extremely important first to properly define the "scope" of the investigation. The scope identifies the imported product that is covered by the case and that would be subject to antidumping and countervailing duties if the case is successful (known as the "subject import"). The product definition should be narrow enough to only cover products that are directly competing with the U.S. producers and causing injury to the U.S. industry. At the same time, the scope should not be so narrow that foreign producers are able to circumvent the order by making minor adjustments to the imported product.

Once the subject import product is identified, the ITC must determine the "domestic like product," or the U.S. product that is most like the subject imports. The definition of the domestic like product, in turn, determines what manufacturing operations in the United States are to be examined in assessing

injury to an industry. The factors that are considered in defining the domestic like product are:

1. physical characteristics and end uses;
2. interchangeability;
3. customer and producer perceptions;
4. production processes, facilities, and employees;
5. channels of distribution; and
6. prices.

No single factor is determinative in order to reach a conclusion concerning a proposed domestic like product. Generally, the Commission will define the "domestic like product" to mirror the "scope" definition as set forth in a petition. For example, if a petitioning U.S. industry defines the scope of its case as large power transformers within a particular dimensional range, the Commission generally defines the competing U.S. product with the same dimensional range. In some cases, however, the Commission may decide to expand the domestic like product beyond the parameters of the scope definition, or alternatively to subdivide the scope into two or more separate like products.

In addition to identifying the product to target, an initial case assessment requires the identification of which country or countries to target in the action. When more than one country is subject to a case involving the same product, a provision of the statute requires the Commission to "cumulate" or add together the volumes of imports from all target countries, assuming those imports compete with one another and with the U.S. product. Typical considerations in choosing countries to target in a case include how large the volume of imports is from each possible source country, whether import volumes and market shares are increasing over the past three years, whether prices of the imports are lower than U.S. prices, and whether U.S. industry competition with the imports is costing U.S. producers sales or causing them to cut prices to injurious levels in order to compete.

IV. Who Can File a Case and What U.S. Companies are Needed to Support a Case?

U.S. trade remedy petitions must be filed on behalf of the domestic industry that is producing the domestic-like product. Cases may be filed by domestic producers of the like product as well as by trade associations of producers or workers who produce the like product. Statutory threshold production-

percentage requirements exist that domestic producers must satisfy in order to have standing to pursue a trade remedy action, as discussed below. In some cases, one company may account for the great majority of U.S. production of the product and can bring a case on its own. In most cases, however, multiple U.S. producers that are producing a product join together to bring a trade action.

In order to meet the AD/CVD law's standing requirement for pursuing trade relief, companies filing the action must account for 25% of production of the like product and 50% of production by those companies expressing a position (for or against) the case. If a U.S. producer opposes the case because it is either a significant importer of the targeted foreign product or it is affiliated with a foreign producer who has been targeted in the case, that U.S. producer's opposition will generally be disregarded in calculating the standing percentages.

The key here is that support should be obtained from as many companies as possible that are not importing the product or affiliated with the foreign industry members. Even if one company comprises 50% or more of U.S. production and therefore could bring a case on its own, it is always better to have the support and data from other major domestic producers as well in assessing the merits of pursuing a case and in pursuing the action. The ITC must determine whether subject imports have caused injury to the industry as a whole, not whether they have injured one company; thus, the better practice is to try to examine all of the industry's data before a case is filed.

The need for comprehensive data, however, has to be balanced against the risks involved in attempting to collect data from a competitor that may be unsupportive of the action because of ties to a foreign producer. For example, sometimes, companies may be reluctant to approach a competitor that also imports the product for fear that the competitor will tip off the foreign producer that is exporting the merchandise, which might allow the exporter to mask the unfair trading practice through various means and thereby undermine the case.

Thus, an early step in pursuing a possible trade case is deciding whether and when to approach other domestic competitors that may also be injured by imports and that may have a similar interest in pursuing a case. This outreach is generally made by company members who have other industry contacts, to assess interest in possible trade action, but may also be made through the legal representative.

There is an exemption under the antitrust laws that permits domestic companies to work together to pursue trade action, although that exemption does not permit sharing of confidential data or discussion of pricing information. To ensure compliance with antitrust laws, once an initial contact is made to discuss possible interest in a trade action, it is best to work through the lawyers and economists that are in a position to gather data and to keep company-specific information confidential. U.S. producers should not discuss or share individual

company information, prices, production costs or other competitively sensitive data. Only disclosure of industry-wide information in aggregate form by industry representatives is permitted, if there are enough responding companies to ensure confidentiality of that aggregate data.

V. Understanding the Industry's Market Drivers, Production, Sales Processes, and Other Competitive Conditions

While basic product attributes and sales considerations may seem obvious to company members, those facts are important to the assessment of a case. We spend significant time before a case is filed learning about a product, the production process, sales methods and overall market-demand drivers, as these factors will be very important to the ITC's ultimate analysis in a case. To break these down, the following competitive factors will need to be examined by the attorneys/economists and ultimately by the U.S. government agencies if a case is filed:

1. The basic production process and major raw material inputs;

2. The basic sales process—are sales made pursuant to long-term contracts or spot sales? Are they made to distributors or end-users? Are there long lead times? What are the industry's typical sales terms? Are discounts typical?

3. Factors showing interchangeability between the domestic product, imports from the countries targeted in the trade case, and "non-subject" imports (imports of the investigated product from non-investigated countries);

4. Substitutability between the products investigated and products falling outside the scope of the investigation;

5. Supply and demand of the U.S. market, including any recent trends or predictions for future levels, and the role/presence of non-subject imports;

6. The main factors affecting purchasing decisions—price, quality, delivery, supply, etc.; and

7. Any other conditions of competition that matter to the industry.

VI. Research Foreign Competitors and Markets

In addition to gathering information on the U.S. industry and market, the U.S. government agencies will need to examine the foreign industries and markets as well. The U.S. Department of Commerce is charged with making a determination of whether imports are dumped or subsidized, so information in the petition will need to provide specifics alleging dumping or subsidies. That information is typically gathered from U.S. industry members, from foreign market consultants and from independent research conducted by our law firm and our economists. Information on the foreign market is also relevant to the ITC injury analysis. The ITC will examine foreign producers and markets, including the following:

1. Foreign producers' total production and capacity, along with any plans to increase capacity;

2. Export levels and trends and the overall export orientation of foreign producers, including data on their major export markets; and

3. Global supply, demand and pricing data, especially for the subject country home market and major export markets.

Occasionally foreign producers do not respond to government questionnaires in trade cases, leaving the ITC and Commerce with limited data on the foreign industry. It is important for domestic producers to provide in the petition or in written comments all information they can gather on foreign production, capacity, sales, affiliations, exports, and export markets, so the government agencies will have as full a picture as possible upon which to make their determinations. In many cases, foreign market research is required. We have extensive experience conducting foreign market research for trade remedy cases through consultants located in countries around the world and other sources developed over our years of practice.

One other factor bears emphasis in terms of foreign market research—confidentiality. If foreign producers become aware that a potential trade case is being considered, it becomes very difficult for foreign-based market consultants to gather the necessary pricing and subsidy information needed to pursue the action. The less that is said publicly about a potential trade case, the greater the chance of being able to gather the data needed to bring the action.

VII. When Should We File a Trade Remedy Petition?

The timing of filing a petition is absolutely critical to the success of the case. Accordingly, companies and their counsel must work closely together to ensure not only that the data support a case but that the timing of the case will present a meaningful and supportive period in which to assess the injury alleged.

In making its injury determination, the Commission looks at trade and financial data for the most recent three-year period, as well as any interim period of the most recent year. If a case were filed in May 2013, the ITC typically would look at annual data for 2010, 2011 and 2012, as well as data for the first quarter of 2012 and first quarter of 2013. The data for the period examined needs to show that subject imports are a cause of the material injury that the domestic industry is suffering. Ideally, this would entail an increase in subject import volumes over the three years, either on an absolute basis or relative to domestic consumption (market share), as well as a decrease in the domestic industry's trade and financial data over the same time.

Subject imports do not have to be the sole or predominant cause of material injury to satisfy the legal causation standard in a trade case. Other factors such as declines in demand may also be a cause of some of the domestic industry's problems, and an industry should still be able to obtain a successful result in a trade case. In fact, where factors such as declining demand exist, those factors may make an industry even more susceptible to injury from dumped or subsidized imports.

U.S. trade remedy law addresses the effects of imports on the domestic industry in the present tense as well as in the imminent future. First, it authorizes the imposition of antidumping and countervailing duties if the ITC determines that an industry in the United States is currently experiencing material injury. If imports had caused injury at some point in the past but are no longer causing injury, relief is not available. Second, import relief is also available if the domestic industry, while not currently being injured, is confronted by a real and imminent "threat" of material injury. The statutory factors the Commission considers when analyzing the threat of injury include whether there has been a rapid increase in subject imports and whether the foreign producers have significant excess production capacity that will likely be exported to the United States.

The timing of filing a petition is important for a few other reasons as well. The domestic industry is in the unique position of selecting when to file its case, so should do so only when it has marshaled all the facts needed to pursue the case. Once a trade remedy case is filed, rapid statutory deadlines require very quick submission of briefs. A staff conference at the ITC that requires domestic industry members to participate and testify occurs only twenty-one days after a

petition is filed. Domestic industry members should be ready to present their case and have witnesses well prepared before their petition is filed.

Finally, the sooner a case is filed, the sooner an industry is able to obtain relief from injurious imports. Thus, the aggregation of needed data and preparation of witnesses must be balanced against the need to move quickly where injury is occurring so that relief in the form of AD/CVD duties against the imports may be imposed. Companies faced with declining profits, reduced production and possible plant shutdowns are not in a position to delay pursuing relief for long. A case that is delayed too long may come too late to help a company or industry in need.

VIII. Understand the Process, Timing and Methodologies of the ITC

One additional important factor to consider in pursuing a trade remedy case is selecting lawyers who understand the process, timing and methodologies used by the ITC so that the case may be presented most effectively. Our extensive experience in appearing before the ITC has permitted us to learn not only the basic laws and regulations that apply to the ITC practice, but more importantly to learn the different methodologies and analytical approaches taken by the ITC as a whole and by various members of the Commission.

As background, the ITC is composed of six commissioners, each of whom is nominated by the President and confirmed by the U.S. Senate. Commissioners serve for nine-year terms. The President designates commissioners to serve as Chairman and Vice Chairman, terms that run for two years. No more than three commissioners may be from the same political party, and the chairman and vice chairman must be from different political parties, with appointments on a rotating basis between the parties.

Like judges, every commissioner comes to the ITC with a different background and approaches ITC cases from his or her own unique perspective. Given the numerous statutory factors that commissioners are directed to consider in reaching their decision, with no single factor being determinative, each commissioner has significant latitude to exercise his/her discretion in terms of the weight accorded to particular factors. Each commissioner has his/her own approach to reviewing and weighing the record, each builds the record at the hearing with questions focused on issues of interest, and each makes his/her own final decision. Under the Sunshine Act applicable to ITC decision-making, the commissioners are not permitted to meet as a group to discuss cases or their decisions.

It is extremely helpful to know which factors are important to which commissioner in rendering determinations. We monitor all ITC decisions, appeals, and other developments regarding the ITC's trade remedy cases to

discern patterns and trends in ITC decision-making. Our participation in numerous investigations and reviews before the ITC on a regular basis also provides us with insight into the factors that the ITC as a whole, or individual commissioners, find important to their ultimate decision.

Below is a brief overview of the procedural aspects of a typical new investigation.

The ITC's investigation proceeds in parallel with the Commerce investigation (with Commerce assessing dumping/subsidies while the ITC examines injury to an industry). Twenty days after a petition is filed, Commerce determines whether to initiate the investigation. Approximately twenty-one days after the petition filing, the ITC will hold its preliminary conference. This public conference is chaired and conducted by the Commission's staff, rather than the commissioners, and is somewhat informal. Industry witnesses appear and testify and respond to questions from the ITC staff.

Parties have an opportunity to file one brief with the ITC after the staff conference, but the key additional sources of information will be responses to comprehensive questionnaires submitted to the ITC by the domestic and foreign producers and U.S. importers. The questionnaires typically have a short deadline, as the ITC must issue its preliminary injury determination within forty-five days of the petition-filing.

If the ITC makes a negative preliminary determination, the case is over. An affirmative determination continues the investigation, although it will go into an inactive period at the ITC with most of the activity shifting to Commerce. If Commerce makes an affirmative preliminary dumping or subsidy determination, importers are required to post bonds or cash deposits in the amount of the preliminary duties to bring in imports. After Commerce issues its preliminary dumping or subsidy determination, the ITC will issue new injury questionnaires seeking updated and more extensive information, including information from purchasers of subject imports. The commissioners or ITC staff members often visit one or more plants of the U.S. industry members to learn more about the product, the production process and the industry at issue.

The final phase of an injury investigation consists of the submission of updated questionnaires, the filing of prehearing briefs, and participation of all parties in a public formal hearing under oath before the commissioners. Following the hearing, post-hearing briefs and final comments are filed. The commissioners then issue a final determination based on an affirmative or negative vote by each member of the Commission. If the vote is tied (i.e., three affirmative votes to three negative votes), it is treated as an affirmative determination by law. When an affirmative final determination is issued, Commerce will issue a formal antidumping or countervailing duty order. Publication of the order puts importers on notice that duties will be imposed and cash deposits will be

required. The antidumping and countervailing duty orders will stay in place for five years, and perhaps much longer, depending on the results of subsequent sunset reviews (see below at Case Studies 2 and 3).

For a detailed timeline of the trade remedy process at both the ITC and Commerce, please refer to Attachment 1[1].

IX. The Importance of Working Closely With ITC Staff to Develop the Record

An important factor contributing to the success of a trade remedy case is the ability of U.S. producers and their legal representatives and economists to work effectively with the ITC staff in trade cases. The Commission makes its determinations on the basis of the record data. The ITC staff develops these data initially through the issuance of questionnaires, but subsequently through many follow-up discussions with the producers and their representatives. It is very important for participating producers to be responsive to ITC staff inquiries for data. It is also important to identify company personnel who will be most helpful in getting, creating, compiling and explaining all of the information and data that we will need to file a petition and complete the investigation.

Several of our economists in GES previously worked at the ITC and are familiar with how to assist companies in responding to ITC questions. Our economists work closely with the ITC economists and accountants on developing the record and answering questions regarding pricing data as well as trade/financial data. If an ITC accountant requires additional documentation to demonstrate the accuracy of data submitted, our GES economists walk company personnel through the process of identifying the data needed to respond to the request appropriately.

We also frequently schedule plant tours of a domestic industry production facility for the ITC staff and commissioners. Plant tours help the staff and commissioners better understand the domestic like product, the overall U.S. industry, and put a human face on the employment data and implications of the case. Typically, we visit a company and tour the facility before we file a trade action, so that we understand the production process and market. We thus are able to present arguments to the agencies on key issues in an effective manner.

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[1] *Antidumping and Countervailing Duty Handbook*, 13th Edition, USITC Pub. 4056 (Dec. 2008), at Appendix B.

X. Make the Most Effective and Persuasive Presentation of the Facts Supporting Your Case

In addition to working closely with ITC staff to develop the record, the domestic industry must present its case in the most effective and persuasive way possible. This includes written submissions—starting with questionnaire responses and then prehearing briefs, post-hearing briefs, and final comments—as well as testimony at the staff conference and the public hearing before the commissioners.

The post-conference brief is the only comprehensive written submission permitted to be presented to the ITC at the preliminary phase of a case. The ITC's regulations limit the brief to fifty pages and require that it be filed three business days after the conference. Therefore, it is crucial that the domestic industry has the basic information for the brief compiled in advance of the hearing and that it has a coherent and concise way to present its arguments on each of the statutory factors that must be addressed. If industry members have done a good job of presenting their data accurately in questionnaire responses, and answering the narrative questions in the preliminary questionnaire in a thoughtful manner, the questionnaires and the post-conference brief should lay the groundwork for an affirmative finding by the ITC.

At the final phase of a case, the ITC has much more time to gather data from all parties. Questionnaire responses may be more extensive and many additional follow-up questions may be raised by ITC staff. The prehearing and post-hearing briefs are both very important written submissions for the parties. Although post-hearing briefs are limited to fifteen pages, parties also respond to commissioner questions in those briefs. Answers to commissioner questions are crucial, as the commissioners are identifying key aspects of the case that are important to them in reaching a decision.

The final hearing before the ITC provides the best and perhaps only opportunity to explain in person to the commissioners the story of your case. Company witnesses—typically executives, production managers, sales representatives and labor representatives—need to be briefed on the details of ITC hearings and what type of questions they should expect to receive from the commissioners. Witnesses should be selected that know their business and market well and are familiar with the import competition being examined in the case.

Often one witness focuses on the product and production process while another explains the market and nature of sales competition. It is helpful for witnesses to review the public versions of all parties' prehearing briefs and the ITC staff report, as well as their company's own proprietary questionnaire response, and to practice their prepared testimony before participating in the hearing. Our preparation for the hearing always includes a practice question and answer

session, where questions that we anticipate may be asked are discussed, so that witnesses may present thoughtful responses to the ITC during the hearing.

When we complete a hearing, we feel that we have succeeded in our goal if our witnesses have been able to discuss their product and market in a knowledgeable way, to answer the commissioner questions thoughtfully, and to respond to arguments that may be raised by opposing foreign producers or importers. The commissioners invariably express their appreciation to all the industry members who take the time to come to the ITC to testify at the hearing, as obtaining information directly from the industry is crucial to the ITC's decision-making process. We help to ensure that the process goes smoothly by familiarizing our industry witnesses with what to expect in terms of both procedure and substance, leading generally to successful outcomes in the trade remedy cases we file.

FAQs

Question 1: *Why is your practice group so effective at trade remedy proceedings before the ITC?*

Answer: Our effectiveness in trade remedy cases stems from several factors: (1) our large number of talented and very experienced trade attorneys who have been recognized in multiple award publications, (2) our filing of a large number of cases against a wide array of products and countries, (3) our regular practice before the ITC, permitting us to stay up to date on recent developments and decision-making, (4) our in-house economic consultants in GES who are part of our injury team at the ITC, and (5) our government-relations support, who provide legislative and policy assistance as needed. Further, over the years we have developed a high level of respect and credibility with the ITC. We know how to mold the 10-step strategy outlined above to any particular case. Our success rate speaks for itself.

Question 2: *What are the most significant events or submissions to winning an ITC case?*

Answer: The most important substantive submissions to winning an ITC trade remedy case are questionnaire responses, post-conference briefs, pre-hearing briefs, post-hearing briefs and responses to commissioner's hearing questions, and final comments. The single most important event is the ITC hearing, as that is generally the only opportunity for the commissioners to ask questions directly of industry members as well as for the domestic industry and foreign producer counsel to discuss and debate legal issues. As discussed in Step 10 above, each of these opportunities to submit data and arguments is crucial to the success of a trade remedy case.

Question 3: *What happens if an industry "wins" an ITC case?*

Answer: If the Commission reaches an affirmative final determination, Commerce issues an antidumping or countervailing duty order against the targeted imports. At that point, Customs and Border Protection will require importers of the product to pay cash deposits on the dumped or subsidized merchandise equal to the margins that the Commerce calculated. Notably, this will not be the first time that importers have been required to post deposits. After an affirmative Commerce preliminary determination, Customs will begin requiring that U.S. importers post cash deposits for imports of subject merchandise for the potential duties owed. As discussed next, the requirement that importers post cash deposits at the preliminary stage is typically when the first beneficial effects of a trade remedy case are felt in the market, followed by the more permanent and concrete effects of the publication of an order and requirement of cash deposits if the U.S. industry ultimately wins the case.

Question 4: *What are the effects of an antidumping or countervailing duty order on foreign producers, importers and subject imports?*

Answer: Generally, once importers are required to pay antidumping or countervailing duties (either at the preliminary phase of the case or by the final phase of the case), the prices of the imports are likely to rise, import volumes are likely to decline, or both. The requirement that subject imports trade fairly in the U.S. market often means that the foreign producers can no longer supply product to customers who were only buying their product because of the low prices at which it was offered. Foreign producers often look instead to other markets in which no trade duties have been imposed as an outlet for their product instead of the United States.

A further effect of imposition of an order is the future consequences facing the importer of record. Although Commerce has imposed an antidumping or countervailing duty at the final calculated rate, that rate may change in an administrative review of the order conducted one year later. Subject importers, therefore, are faced with uncertainty as to the exact amount of duties for which they may be liable depending upon the outcome of the administrative review—which will not be finalized for another two years after issuance of the order. This uncertainty may in turn cause the importer to reduce the volume of imports they buy, to stop importing altogether or to raise U.S. prices significantly in order to reduce the duties they will owe.

Question 5: *What are the benefits of winning a trade remedy case to domestic producers and their workers?*

Answer: A successful trade remedy case can lead to multiple benefits to U.S. producers and their workers. Domestic producers are generally able to increase production and sales to supply purchasers who were previously sourcing

imports from foreign producers. With production increases, workers who had been laid off can be re-hired and shifts can be increased. Further, elimination of dumped imports generally leads to higher prices in the U.S. market, permitting U.S. producers to cover costs and earn reasonable profits rather than suffering losses.

Customers who had been buying imports will generally turn back to domestic suppliers as an alternative source of supply in lieu of the imports. Alternatively, purchasers may seek other sources of supply, such as non-subject imports (from countries not targeted by the trade action), but such imports tend to be sold at higher prices. This alternative generally also provides a benefit to the industry, as prices that had been depressed may now rise again as only fairly-trading suppliers are competing in the market. Either way, positive benefits to the domestic industry and to its workers are almost always the result of the imposition of corrective duties on subject imports.

Finally, it bears emphasis that a major benefit to domestic producers of pursuing a trade action under the AD or CVD laws is the rapid nature of relief. Unlike much other court litigation that may take years to be resolved, these trade actions take only one year from filing the petition to issuance of the final decision by the ITC. Relief to an industry often comes even sooner than that, as preliminary duty deposits by importers are generally required about six months after the petition is filed. The very short statutory deadlines under which these cases must be processed provide an important benefit to U.S. producers and workers struggling with import-related injury.

Case Studies

Case Study 1: Original Antidumping Investigation on Large Power Transformers from Korea

The most recently completed original investigation trade remedy case in which we participated was our representation of U.S. manufacturers of large power transformers against dumped imports from Korea.

In July 2011, on behalf of the U.S. Transformer Fair Trade Coalition, an *ad hoc* coalition of three domestic producers, we filed an antidumping petition in response to a large and increasing volume of liquid dielectric large power transformers ("LPTs") from Korea over the prior three years that had injured domestic LPT producers. LPTs are components used extensively in high voltage electrical power transmission systems to transfer power by electromagnetic induction between circuits at the same frequency, usually with changed values of voltage and current.

A month later, the ITC determined that there was a reasonable indication that imports of LPTs from Korea were causing material injury to the domestic LPT industry. The ITC issued a unanimous preliminary determination, with all participating commissioners voting in the affirmative.

Following issuance of an affirmative preliminary finding of dumping by Commerce in the spring of 2012 and the posting of cash deposits by subject importers, the ITC sent questionnaires to U.S. producers, importers, purchasers, and foreign producers of LPTs. The ITC investigation team for the case compiled the questionnaire responses and incorporated the data into a pre-hearing staff report that was released to the commissioners and outside parties to review. In June 2012, parties submitted pre-hearing briefs. The brief and exhibits we submitted on behalf of domestic LPT producers was over 450 pages.

In July 2012, the Commission held a day-long public hearing. Trade remedy hearings at the ITC start with opening statements from petitioners' and respondents' counsel. Then petitioners are given one hour to make an affirmative presentation, which included testimony from executives and managers from five of the domestic producers, the Director of Georgetown Economic Services, and counsel from Kelley Drye. Following petitioners' affirmative presentation, the five participating commissioners asked the witnesses questions in circuit: each commissioner received ten-minute intervals to ask all questions of the petitioning panel. After that, respondents received one hour to give their affirmative presentation, followed by questions from the commissioners. In this case, there were two large Korean producers represented and they each had their own set of attorneys. Then each side was given time for counsel to provide short rebuttal/closing remarks.

One week after the ITC hearing, parties submitted post-hearing briefs and responses to commissioner questions that the parties were unable to answer publicly, either because they required business confidential information or because they requested specific data, legal research, or analysis.

On August 14, 2012, the ITC issued an affirmative final determination that dumped imports of LPTs from Korea were causing material injury to the domestic LPT industry. The commissioners voted five to none to grant relief to the domestic LPT industry from the dumping by Korean producers. Following that, the ITC reported its injury determination to Commerce, which then published the antidumping duty order. U.S. importers of LPTs from Korea will continue to be required to deposit estimated antidumping duties at the time of entry into the United States of 14.95% for LPTs produced by Hyundai Heavy Industries, 29.04% for those produced by Hyosung Corporation, and 22% for all other Korean producers.

Our clients were extremely pleased with the end result, because these are very substantial dumping margins for products that cost on average several million

dollars (for example, a U.S. importer would need to post a $440,000 deposit in order to import a $2 million Korean LPT). The antidumping duty order will remain in place for a minimum period of five years and may be renewed in five-year increments.

The LPT investigation was a very interesting and challenging case for several reasons. First, LPTs are large, made-to-order products, making it difficult to make apples-to-apples price comparisons of the type the Commission usually undertakes for commodity-like products. Instead of the traditional comparative pricing data, the Commission requested bid information from parties because sales of LPTs are made pursuant to bid requests from electric utilities and other companies. Second, there is a significant amount of time between when an order is placed and when the LPT is delivered, creating a lag effect for lost sales or revenue to actually manifest in the financial performance of a company. Third, many successful bids led to multi-year supply agreements, making the initial bid extremely important for future sales. The Commission ultimately found that suppliers of Korean LPTs won a substantial number of bids based on offering the lowest price, which caused domestic producers to lose U.S. market share, sales, and revenue, as well as experience significant price suppression (whereby domestic producers could not increase their prices enough to cover increases in their costs).

The key to our resounding victory was following the strategies we outlined above. The foundation was the immense research, data-gathering and analysis, commencing with our tour of a U.S. manufacturing facility before we filed the petition and continuing through our submission of final comments roughly one year later. The most important part of this effort was having cooperative and knowledgeable industry members who could gather information to show the injury imports were causing on specific accounts. With that information—equal to thousands of pages of data—we needed to organize and present it in the most easy-to-understand way for the ITC to review within the short timeframe allotted for these cases.

Preparing our clients, witnesses, and ourselves for the hearing was a key element of achieving optimum presentation of the facts. The focus of the post-hearing submission was to address any unanswered questions that commissioners had at the hearing and rebut respondents' strongest arguments. The final comments provided one last chance to crystallize the remaining key issues for the commissioners.

Case Study 2: Second Full Sunset Review of Cut-to-Length Carbon Quality Steel Plate from India, Indonesia, Italy, Japan and Korea

The steel and metals industries have historically been the most frequent users of U.S. trade remedies and we have represented many such companies and industries before the ITC, ranging from the U.S. brass industry to the U.S. carbon

steel wire rod industry. These trade remedy cases are now in the sunset review phase. We represent U.S. producers in several large steel cases that are currently undergoing sunset reviews, including corrosion-resistant carbon steel flat products, clad steel plate, and hot-rolled flat-rolled steel products. Many of these trade remedy cases were brought against multiple countries, but as the orders from these trade remedy cases age, some countries are successful in getting the orders revoked as to their exports. When revocation occurs it is because the ITC determines that removing the order on that country is not likely to lead to continued or recurring material injury to the domestic industry.

As a general rule, the older the AD/CVD order, the more difficult it is to keep the order in place after a sunset review. A good example of this is the 2011 sunset review of the AD and CVD orders on cut-to-length carbon-quality steel plate ("CTL plate") from India, Indonesia, Italy, Japan and Korea. We represented ArcelorMittal USA, a very large manufacturer of CTL plate in the United States, and a subsidiary of ArcelorMittal, the largest steel company in the world.

These AD/CVD orders were imposed in 2000, but there have been U.S. trade remedy cases on cut-to-length steel products going back to 1978. In the first sunset review of the CTL plate orders, in 2005, the ITC made affirmative determinations for five countries—India, Indonesia, Italy, Japan, and Korea—but made a negative determination for France, leading to revocation of the French order.

In the second sunset review, the ITC made affirmative determinations on the existing AD and CVD orders on CTL plate from India, Indonesia, and Korea. A majority of commissioners, however, decided that revocation of the AD and CVD order on CTL plate from Italy and the AD order on CTL plate from Japan would not be likely to lead to continuation or recurrence of material injury to the domestic industry. Three commissioners voted in the affirmative for India, Indonesia and Korea; one commissioner voted in the affirmative for all five countries, one commissioner voted in the affirmative for all countries except Japan, and one commissioner voted in the affirmative for all countries except Italy. Two different four-commissioner majorities exercised their discretion to not cumulate (add together) imports from Japan and Italy with the other countries, respectively.

Each commissioner voting in the negative based his/her decision on its belief that, if the orders were revoked, subject imports from Italy and Japan would likely compete in the U.S. market under significantly different conditions of competition from subject imports from India, Indonesia and Korea. Specifically, one four-commissioner majority found that the Italian producers were not interested in the U.S. market due to a local supply strategy whereby they focused on home, European, and regional markets, where prices were higher than in the United States. The other Commission majority found that Japanese producers operated at a very high production capacity utilization level and were focused on

Asian export markets, where they had significant long-term customer relationships. As a result, the existing orders on imports of CTL plate from India, Indonesia, and Korea remained in place, while the orders on CTL plate from Italy and Japan were revoked.

Korea producers and their affiliated U.S. importers of Korea CTL plate participated throughout this sunset review and fought very hard to revoke the order on Korean CTL plate. All six commissioners, however, found that if the orders were revoked on CTL plate from India, Indonesia, and Korea, the domestic industry would be materially injured by subject imports within a reasonably foreseeable time.

Procedurally, this case was noteworthy because of the different votes and determinations for the five different countries: six commissioners voted to continue the orders on India, Indonesia, and Korea and two different sets of commissioners voted to continue the orders on Italy and Japan. Because a tie vote is an affirmative determination by law, if any one of the four commissioners that voted to revoke the orders on Italy and Japan had changed his/her vote, the outcome would have been different.

There were three sets of views (written opinions): (1) the six-commissioner majority views for the Indian, Indonesia and Korean orders, (2) separate views for the commissioner who voted affirmative for all five countries, and (3) concurring and dissenting views of the commissioner who voted affirmative for India, Indonesia, Korea, and Japan (and voted negative for Italy). The different commissioners' votes resulted from their approaches to exercising their discretion to cumulate (examine together or separately) the subject countries.

Substantively, this case was interesting because it spanned a time period that included the Great Recession of 2009 and the modest demand recovery thereafter, leading to significant questions as to likely future market conditions. The likely behavior of each of the subject foreign producers, based on relationships with U.S. producers and other factors, was also central to the ITC analysis. The Commission found that the volume of cumulated subject imports from India, Indonesia and Korea would likely increase significantly if the orders were revoked, that those additional volumes of imports would be priced in a manner that would likely undersell domestic producers, and that the domestic industry would likely lose sales to imports unless it cut prices or restrained price increases, either of which would lead to likely declines in output, market share, productivity, employment, wages, growth, and financial performance.

Thus, in the end, we (along with representatives of other U.S. steel producers involved in the case) succeeded in keeping the antidumping and countervailing duty orders in place against the three countries that seriously threatened the U.S. industry with a return to material injury. Key to this victory was following the strategies outlined above. Of particular note was a plant tour of a domestic CTL

plate mill with ITC staff and several commissioners, which helped them better understand the domestic-like product, the overall U.S. industry, and to put a face on the employment data and implications of the case. In addition, we performed significant market research, particularly on Indian, Indonesia, and Korean production capacity and export orientation to build the record for the Commission.

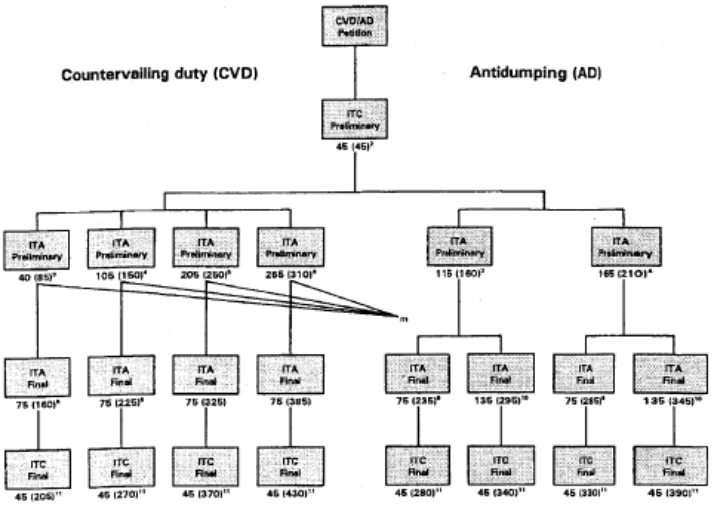
Case Study 3: Third Expedited Sunset Review on Fresh Garlic from China

When the Commission does not receive an adequate response to its notice of institution of a sunset review from foreign producers, it frequently will decide to "expedite" the review. An expedited review involves a very short timeline, no hearing, and no further requests for information by the Commission. In an expedited review, there is an opportunity for participating parties to submit an initial substantive response as well as comments on adequacy and a final set of written comments with recommendations for the ITC decision.

Typically, expedited reviews are conducted in less than six months. Because of the failure of the foreign producers to cooperate, most result in affirmative determinations and a continuance of the order(s). We recently completed an expedited sunset review on the antidumping duty order on fresh garlic from China, on behalf of the Fresh Garlic Producers Association and its individual members: Christopher Ranch LLC, The Garlic Co., Valley Garlic, Inc., and Vessey and Co., Inc. The antidumping order was imposed in 1994 and the Commission had already conducted sunset reviews in 1999 and 2006, making affirmative determinations in both reviews. In this most recent and third review, all six commissioners voted to continue the antidumping order.

The key to this victory was submitting a complete response to the Commission's notice of institution, which led the Commission to find that the domestic industry's response was adequate, while the Chinese producers failed to do so. Because the Chinese producers did not participate and the Commission decided to conduct an expedited review, the U.S. fresh garlic producers (our clients) were able to achieve an optimum result with minimal resources of time and expense. The success in this review means that the order against fresh garlic from China will remain in place for five more years at least.

Figure 1
Statutory timetables for antidumping and countervailing duty investigations



[1] Shown in incremental days and, in parentheses, total days from the filing of the petition. There will be some slippage in the schedules because of time lags in having ITA determinations published in the *Federal Register*. ITA = International Trade Administration, U.S. Department of Commerce; ITC = U.S. International Trade Commission.

[2] Normal case. ITA may extend the time allowed for it to initiate an investigation from 20 days to up to 40 days after a petition is filed if the extra time is needed to determine industry support for the petition. In the event of such an extension, the deadline for the ITC's preliminary determination and all following dates would be increased by the amount of the extension.

[3] Normal case. In AD cases, expedited determinations are authorized when "short life cycle" merchandise is involved (see section 739 of the Tariff Act of 1930). In such cases the schedule following the ITC preliminary determination would be shortened by either 40 or 60 (in the case of multiple offenders) days.

[4] Complicated case, extended at request of petitioner or on ITA's motion.

[5] Normal case with upstream subsidy allegation; extended on ITA's motion.

[6] Complicated case with upstream subsidy allegation; extended on ITA's motion.

[7] At this time, ITA may, at the request of petitioner, extend the date for its final subsidy determination to the date of its final dumping determination in simultaneously filed AD cases.

[8] It is also possible for ITA to extend an investigation after its preliminary determination for the purpose of investigating an upstream subsidy allegation. In such cases the schedule following ITA's preliminary determination would be extended by 90 days in a normal case or 150 days in a complicated case.

[9] Normal case.

[10] Extended at request of exporters.

[11] If ITA's preliminary determination was negative, add 30 days (to an incremental total of 75) to ITC's final determination.

Source: *Antidumping and Countervailing Duty Handbook*, 13th Edition, USITC Pub. 4056 (Dec. 2008), at Appendix B.

About the Authors

Kathleen Cannon is a partner in her firm's Washington, D.C. office and chair of the International Trade and Customs practice group. With more than twenty-five years of experience in international trade law, Ms. Cannon focuses her practice on assisting domestic industries that are experiencing injury due to unfairly traded imports, primarily through the use of antidumping and countervailing duty laws.

Cannon has been involved in a wide range of trade matters, including escape clause actions and World Trade Organization (WTO) international disputes and negotiations, and she has participated in implementing trade legislation and regulation. She has been involved in rules and dispute settlement issues in the ongoing Doha Round of trade negotiations, and previously was involved in the Uruguay Round of trade negotiations, and the North American Free Trade Agreement (NAFTA).

Cannon has appeared before multiple U.S. trade agencies and courts of jurisdiction, and has participated in numerous oral arguments before the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit, addressing trade matters decided by the Department of Commerce and International Trade Commission.

Benjamin Blase Caryl is an associate in his firm's Washington, D.C. office. He helps American manufacturers, farmers, workers and businesses stay competitive in the global marketplace by making foreign producers and exporters play by the rules of U.S. international trade law and the World Trade Organization (WTO). Caryl primarily represents domestic industries in antidumping and countervailing proceedings before the U.S. Department of Commerce and the U.S. International Trade Commission, two agencies at which he previously worked, to fight imports that are unfairly cheap and subsidized. Caryl also advises domestic industries on other international trade issues, including the WTO, U.S. free trade agreements and negotiations, foreign trade zones, and export controls and sanctions.

Caryl is vice chair of the District of Columbia Bar's International Trade Committee, and moderates the annual DC Bar international trade law and policy debate.

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