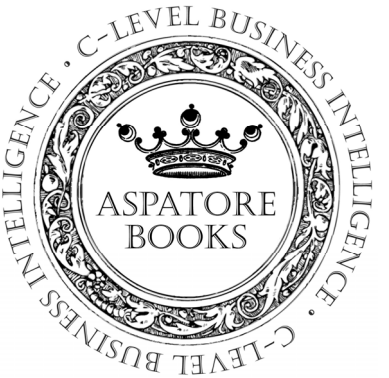
INSIDE THE MINDS

International Trade Legal Strategies

Leading Lawyers on Key Issues Relevant to Client Transactions and Cross-Border Commerce



First Printing, 2008
10 9 8 7 6 5 4 3 2 1

Confronting and Countering Import Competition

James R. Cannon Jr.
Partner
Williams Mullen

Potential Remedies for Businesses Facing International Competition

A number of remedies are available to assist businesses struggling to compete with imported merchandise and international trade. Imported goods may be subsidized, may benefit from price discrimination ("dumping"), or may be misappropriating intellectual property. Otherwise, a U.S. business may simply face competitors with substantially lower costs. Companies competing in export markets also may require assistance defending themselves against any of the foregoing trade problems. Or competition in offshore markets may violate international agreements, particularly under the WTO.

In each case, legal remedies ought to be part of any corporate strategy to cope with international competitors. Unfair import competition is subject to remedies under the antidumping and countervailing duty laws or under Section 337 of the Trade Act of 1974. Even "fair" import competition may be addressed under the "Escape Clause" if a U.S. industry needs temporary relief to restructure or adjust. And, in the case of import competition in foreign countries, Section 301 of the Trade Act of 1974 establishes a process for petitioning the U.S. Trade Representative to defend U.S. exporters' rights under international trade agreements.

This chapter will briefly describe some of the legal remedies available under U.S. law to address import competition. It will then consider in greater detail the strategies that can be applied, illustrated by reference to antidumping and countervailing duty law as applied to imports of merchandise into the United States.

Areas of International Trade Law

The remedy available to address foreign competition depends upon the nature of the competition and its impact on a U.S. industry or market. Briefly, the U.S. international trade laws offer the following remedies, each suited to a different trade problem:

Antidumping (AD) law (Section 731 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673)	The antidumping law provides a remedy for unfair price discrimination across international borders. Relief in the form of antidumping duties is available when imported goods (1) are sold at prices below the normal price in the country of exportation or below the full cost of production and (2) cause or threaten to cause material injury to an industry producing like products in the importing country.
Countervailing duty (CVD) law (Section 701 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671 et seq.)	The countervailing duty law is intended to address the impact of foreign government subsidies on goods shipped across international borders. Relief in the form of countervailing duties is available when imported goods (1) benefit from an actionable subsidy and (2) cause or threaten to cause material injury to an industry producing like products in the importing country.
Safeguard Action, aka the "Escape Clause" (Section 201 of the Trade Act of 1974, as amended, 19 U.S.C. § 2251)	The Escape Clause provides temporary relief from import competition (fair or unfair) where imports are causing "serious injury" to a domestic industry. The standard for "serious" injury is higher than the "material" injury required for relief under the AD or CVD laws. Imports must be increasing and must be no less important than any other source of injury to the industry.
Section 301 of the Trade Act of 1974, 19 U.S.C. § 2411	Section 301 provides relief to U.S. exporters that encounter violations of trade agreement rights in a foreign market or that suffer "nullification or impairment" of benefits granted by trade agreements.
Unfair import investigation (Section 337 of the Tariff Act of 1930, 19 U.S.C. §	Section 337 provides relief to companies that suffer from violations of patents, trademarks or copyrights by imported goods. Relief is also available with respect to misappropriation of

1337)	trade secrets, trade dress infringement or other forms of unfair competition by imports.
Section 421 of the Trade Act of 1974, 19 U.S.C. § 2451	Section 421 operates very much as an "Escape Clause" with respect to imports from China. Section 421 provides temporary relief from import competition (fair or unfair) where imports are a "significant cause of serious injury" to a domestic industry. The standard for "significant cause of serious" injury is higher than "material" injury required for relief under the AD or CVD laws, but lower than the "serious injury" threshold set under Section 201. However, relief under this law is within the discretion of the president. Since the law was enacted, no domestic industry has yet succeeded in obtaining relief.

The first issue for companies considering a potential legal action is to define the problem; once it has been defined, the appropriate remedy can then be identified and assessed. For example, if a U.S. company is confronted with imports that benefit from foreign government subsidies and are therefore being sold at low prices in this market, the company should consider whether it would be appropriate to file a countervailing duty (CVD) petition. Alternatively, the same problem might be addressed by filing a section 301 petition and enlisting the support of the U.S. government to challenge the foreign subsidies under the WTO Agreement on Subsidies and Countervailing Measures.

If a U.S. company finds that its foreign competitors are selling goods in the U.S. market at prices below the price level in the country of origin (or below the full cost of production), then the company should consider if an antidumping (AD) action is warranted. If the foreign imports are fairly traded but the U.S. industry needs assistance to adjust to import competition, the client would then consider seeking relief under Section 201. Or, if imported goods are infringing on a client's patents, that client should consider whether an action under section 337 would be the best response.

In some cases, domestic companies confronted with injurious import or export competition may find that more than one remedy is available and no single remedy is adequate to address the problem in a comprehensive manner. A foreign competitor may be dumping and also receiving subsidies from its government. At the same time, the U.S. client may be suffering injury not only in the U.S. market, but also in export markets where it similarly competes with dumped and subsidized merchandise. Moreover, market barrier can prevent the U.S. producer from selling in the competitor's home market. To address these problems, it may be necessary to file AD and CVD cases in the United States, as well as to seek relief under the WTO Agreements by filing an action under Section 301.

Legal Fees

Fees for the simplest cases involving foreign subsidies, dumping, or unfair trade actions are substantial. An action may take one year or more from the petition to an AD or CVD order. The cost for these cases varies depending on:

- The number of countries and foreign producers
- The number of U.S. producers
- The relative importance of the product in terms of its share of annual exports by the foreign country
- The complexity of the market transactions or, in the case of a CVD investigation, the subsidies involved

If the appropriate remedy includes an AD or CVD order, the petitioner must then consider whether to bring multiple actions simultaneously. As discussed below, the law provides that the International Trade Commission (ITC) may cumulatively assess the impact of dumped and subsidized imports from any number of countries, so long as the petitions are filed simultaneously. Purely from the standpoint of economy, bringing more than one case at the same time can reduce the costs of the ITC investigation by combining several investigations into one proceeding.

At the same time, if the domestic industry includes several companies, prosecution of the injury case will involve many responses to the ITC questionnaire, additional witnesses from each of the petitioning companies, additional witness preparation time, and the need for more coordination

and resources. Hence, although a group of domestic producers has the advantage of splitting legal fees, the total costs are likely to be higher for an industry with several producers.

The political profile of the case will also impact the time and resources that must be devoted to prepare and prosecute the petition. A product that is relatively unimportant in the context of the U.S. economy may be very important to the exporting country. The foreign producers may have substantial support from their government, including diplomatic contacts with the United States. A petitioner must anticipate these demands and plan accordingly.

Adding Value for the Client

Antidumping and Countervailing Duty Orders

The AD and CVD laws provide relief in the form of duties. Importers of merchandise covered by an AD order must provide to Customs a cash deposit upon entry of the covered merchandise into the United States.[1] For example, if Commerce determines that imported widgets from Australia are being sold at a price, on average, 20 percent below the average price in Australia, the AD duty deposit rate will be set at 20 percent of the Customs Value of the imported goods.[2] Imports of widgets from Australia that are covered by an AD order will have to pay a 20 percent duty deposit at the time of entry into the United States.

The effect of the AD and CVD laws is to eliminate the benefit of unfair trade practices. In the case of foreign government subsidies, for example, a CVD order will impose duties on imported merchandise in an amount that offsets the subsidy bestowed on those imports. In principle, this will eliminate the market distortion caused by the foreign subsidy. Similarly, an AD order will impose duties on imported merchandise in an amount that offsets any price discrimination between the home market and the U.S. market (or in an amount that represents the difference between the full cost of production and the U.S. price). Again, the duty is intended to return the

[1] 19 U.S.C. § 1677e.
[2] The Customs Value is typically the f.o.b. foreign port price.

market price of the imported goods to the level that would exist under conditions of fair trade.

By eliminating unfair trade and market distortions caused by subsidies or dumping, the laws permit U.S. industries to compete on equal footing with imported merchandise.[3] Typically, when AD or CVD duties are applied to offset subsidies or eliminate dumping, prices in the U.S. market will rise. Clients benefit either by raising their own prices or by recapturing sales previously lost to unfair import competition, or both. The end result is an increase in revenues and profits.

In addition, AD and CVD orders become the basis for maintaining conditions of fair trade over a period of many years. If an AD duty is imposed equal to 20 percent of the value of the imported goods, foreign producers cannot simply reduce their prices by 20 percent to negate the impact of the duty and maintain existing price levels. This is because the duties are retroactive. That is, the final amount of AD or CVD duty owed with respect to a particular shipment of imported merchandise is calculated well after the imports have arrived and entered U.S. commerce.

Every year during the anniversary month of an AD order, importers and U.S. producers have the option of requesting an "administrative review" of the imports during the previous year. If such a review is requested, Commerce will review the sales and determine whether dumping occurred and, if it did, the average difference between the normal value and the export price of the goods (the so-called "dumping margin"). Following an administrative review, any AD duty deposited will be refunded to the extent that the review determination finds no dumping or a margin lower than the deposit rate. In the foregoing example, if the Commerce review of Australian widgets found an AD margin of 5 percent, then importers would receive a refund of the difference between the 20 percent deposit and the 5 percent dumping margin. Moreover, the new deposit rate for future imports would be reduced to 5 percent.

[3] For a detailed analysis of the economic principles at work in antidumping cases, see Greg Mastel, *Antidumping Laws and the U.S. Economy* (M.E. Sharpe 1998).

On the other hand, if the administrative review results in a finding of dumping by a margin of 25 percent, then the importers would be required to pay an additional 5 percent in duties, and the new deposit rate would be increased to 25 percent. Thus, foreign producers cannot simply lower their U.S. prices and offset an AD duty. By lowering their prices, if no other circumstance changes, they would simply increase the amount of dumping and the amount of the duty owed.

If no administrative review is requested by any interested party, then the duty deposits become final and the duty deposit rate remains in place. In the example, if no administrative review is requested with respect to the imported goods, then the final duty will be identical to the duty deposit of 20 percent. In that event, the imported goods are owed a final duty, the "liquidated" duty, of 20 percent of the customs value of the merchandise.

The countervailing duty law operates in the same manner, except that the duty deposit rate is based upon the value of the subsidies received by the exporting company divided by the value of the merchandise covered by the CVD order.

The value of an AD or CVD order thus derives from the elimination of unfair trade in the particular market for the subject merchandise—on a continuous and self-adjusting basis. When the benefit conferred by a subsidy is eliminated from the price of imported merchandise, then the imports compete on the same basis as other goods in the market. Similarly, when companies cannot charge higher prices in one market than another, they cannot use profits on higher priced sales in one market to support sales at lower prices in another.

Typically, when an AD or CVD order is put in place, the price of imported goods in the U.S. market will stabilize or increase, and the volume of imports will stop growing or even decline. Manufacturers in the U.S. will then be able to increase prices (and profit margins), increase market share (and sales volume), or both. In one case, following the imposition of an AD order, my client was able to add a third shift at its plant and bring 400 employees back to work. In another, the AD order caused the imports to cease shipping to the U.S. market entirely. The U.S. producers were then

able to regain their entire lost market share, thereby filling their production capacity and covering their fixed costs.

Escape Clause Actions

Relief in an Escape Clause action differs fundamentally from the remedies under the AD and CVD law. First, unlike in an AD or CVD case, the remedy in an Escape Clause action will be applied to all imports from all countries. Typically, a remedy under the Escape Clause will be in the form of increased duties or a tariff rate quota imposed on imports from all countries for a three-year period.[4] Fairly traded imports are not exempt from the duties or quota.[5]

Secondly, the amount of duty imposed under the Escape Clause also differs from the amounts imposed under the AD or CVD laws. In the case of unfairly traded imports covered by an AD or CVD order, remedy is intended to combat unfair trade. A CVD duty, for example, is intended to offset the amount of the "net countervailable subsidy" bestowed on the imported goods.[6] AD duties are imposed to redress price discrimination between the foreign market and the U.S. market. By contrast, the remedy imposed under the Escape Clause is not determined by the actions of the foreign producers or government. Escape Clause remedies are premised upon the condition of the U.S. industry and are based upon the industry's adjustment plan, the amount of time needed to adjust to import competition, the amount of duty calculated to slow surging imports or to increase U.S. price levels, and other similar considerations.[7]

Stated differently, the remedy provided by the Escape Clause is limited to the measures necessary to alleviate the serious injury suffered by the U.S.

[4] The statute authorizes the Commission to recommend an increase in duties, a tariff-rate quota, quantitative restrictions, adjustment measures such as trade adjustment assistance, or any combination of such measures. 19 U.S.C. § 2452(e)(2). In addition, the Commission may recommend that the president should "initiate international negotiations" to address the problem. 19 U.S.C. § 2452(e)(4)(A).

[5] It may be noted, however, that imports from Canada and Mexico, as a result of the North American Free Trade Agreement (NAFTA)

[6] 19 U.S.C. § 1671.

[7] The statute provides that the Commission should consider all of these factors and more. 19 U.S.C. § 2252(e)(5)(B).

industry. For example, in the *Steel* case decided in 2002, increased duties and tariff-rate quotas were both used, and were applied to imports of certain flat-rolled steel, hot-rolled bar, cold-finished bar, rebar, certain welded tubular products, carbon and alloy fittings, stainless steel bar, stainless steel rod, tin mill products, and stainless steel wire. A tariff rate quota was applied to imports of steel slabs. The duties were progressively reduced over a three-year period, as follows: 30 percent to 8 percent ad valorem in the first year; 24 percent to 7 percent ad valorem in the second year; and 18 percent to 6 percent ad valorem in the third year.

Unlike AD or CVD duties, however, relief under the Escape Clause is discretionary. After an investigation, the International Trade Commission recommends a remedy to the president. However, the president need not follow the Commission's recommendation. Following an affirmative determination of "serious injury" and a recommendation concerning relief, the investigation moves to an interagency committee, chaired by the U.S. Trade Representative (USTR). The committee includes representatives from the Commerce Department, Labor Department, State Department, Treasury Department, Office of Management and Budget, and Council of Economic Advisors.[8]

During the injury and remedy phases of the investigation before the Commission, parties submit pre-hearing and post-hearing briefs and are permitted to present testimony at a public hearing. Typically, the Commission hearing will involve domestic producers that support the Section 201 relief, foreign producers and importers that oppose, and U.S. users of the products in question.

Similarly, during the final phase before the interagency committee, parties are invited to submit written comments and responses. However, the interagency committee does not hold public hearings. Instead, USTR will typically chair *ex parte* meetings with interested parties. In these meetings, parties representing different interests do not appear together or oppose one another. USTR and other agency representatives meet separately with domestic producers and with foreign producers and importers.

[8] Commerce, Labor, Agriculture, State, and Treasury are required members of the interagency trade group. 19 U.S.C. § 1872(a)(3). OMB and the Council of Economic Advisors are invited members.

In the *Steel* Section 201 investigation, USTR first invited domestic producers to submit comments regarding their plans to adjust to import competition. Responses by opposing parties were invited two weeks later. Next, USTR requested that all interested parties submit any requests to exclude particular products from the scope of the investigation, again with opposing comments due two weeks later. Final comments addressing the actions that the president should take were due some twenty days after the responses to any exclusion requests.

Because the Section 201 remedy is ultimately at the discretion of the president and because U.S. users and importers are likely to launch government relations campaigns, U.S. domestic manufacturers also typically deploy their lobbyists. Counsel must either direct the government relations campaign or assist in the strategy. In this regard, the remedy phase of the proceeding before the interagency committee is unlike the adversarial proceedings in AD and CVD cases. Duties will not be imposed as a result of an arithmetic comparison of home market prices and U.S. prices or the calculated per unit amount of subsidies bestowed on exports. Rather, counsel and clients must meet with the relevant Cabinet Departments and explain the merits of their adjustment plan.

Also unlike AD or CVD duties, the remedy under the Escape Clause is temporary. By statute, any relief is limited to three years, with the possibility for an extension if conditions warrant. The purpose of the provision is to provide temporary protection to the U.S. industry so that it can adjust to the import competition. Thus, the domestic industry must submit a plan to the Commission concerning the steps that it intends to take during the period in which the remedy is in place. As the investigation proceeds and assuming that a remedy is recommended to the president, the interagency committee will likewise consider the industry's condition, the impact of imports, and the likely impact of the plan for adjustment on the industry, U.S. users of the products, and consumers.

Section 421

Section 421 of the Trade Act of 1974 provides relief from "market disruption" specifically caused by imports from the People's Republic of China. To establish the basis for relief, a petitioner must show that a

Chinese product is being imported "in such increased quantities or under such conditions as to cause or threaten to cause market disruption" in the U.S. market.[9] Market disruption is defined to exist whenever imports of an article are "increasing rapidly, either absolutely or relatively" and such Chinese imports are "a significant cause of material injury, or threat of material injury, to the domestic industry."[10]

The "significant cause" language found in Section 421 distinguishes this statutory provision from the Escape Clause. To prevail in a Section 421 case, the statute requires only that the import "contributes significantly to the material injury of the domestic industry…."[11] In this regard, the Chinese imports must be a significant cause of material injury, "but need not be equal to or greater than any other cause."[12] Thus, the standard to be applied in granting relief is somewhat lesser than the "serious injury" standard under the Escape Clause.

The factors to be considered by the Commission, however, are similar to the factors considered in an investigation under Section 201—with one notable exception: the statute does not require the domestic industry to submit an adjustment plan. Also, as in a Section 201 investigation, if the Commission finds market disruption, it then goes on to make a recommendation to the president concerning relief.

Notwithstanding that the requirements of Section 421 appear easier to satisfy than the requirements of the Escape Clause, as of the publication of this chapter, no U.S. industry has obtained relief under the statute. Indeed, although the Commission has recommended relief in four cases, the president has in every case declined to provide relief, typically citing the adverse impact on U.S. users of the Chinese imports. In *Wire Hangers*, for example, the Commission recommended tariffs of 25 percent in the first year, 20 percent in the second, and 15 percent in the third.[13] The president

[9] 19 U.S.C. § 2451(a).
[10] 19 U.S.C. § 2451(c).
[11] 19 U.S.C. § 2451(c)(1).
[12] 19 U.S.C. § 2451(c)(2).
[13] *Certain Steel Wire Garment Hangers from China,* Inv. No. TA-421-2, USITC Pub. 3575 at 26 (February 2003).

refused to provide any relief, finding that import duties would harm "small, family-owned cleaning businesses" that use the wire hangers.[14]

This lack of relief has led some lawmakers to discuss new legislation that would limit the president's discretion.[15] Nevertheless, U.S. companies seriously injured by Chinese imports may steer away from this remedy, preferring instead to use the AD or CVD laws to address import competition. Because of the lack of presidential discretion with respect to the remedy—and the resulting reduction in fees from government relations consultants—the AD and CVD laws are generally preferable remedies, at least when dumping or subsidies can be established. In the case of wire hangers, for example, the U.S. producers having lost their bid for Section 421 relief filed an AD case in 2007.[16]

Section 301

Section 301 provides the legal mechanism used by U.S. industries which encounter violations of U.S. rights in foreign markets. Under Section 301, private industry can petition the president (USTR)[17] for relief under an international trade agreement or obligation. If, for example, a U.S. industry finds that its foreign competitors are violating the terms of a WTO Agreement, the U.S. industry can use Section 301 to petition USTR for relief. If the petition is accepted and the subsequent investigation results in an affirmative finding, USTR may then invoke the WTO dispute settlement procedures on behalf of the affected U.S. industry.

Moreover, Section 301 applies to actions by foreign countries that constitute a "nullification or impairment" of rights bestowed by an international agreement. That is, the actions complained of need not explicitly violate the language of an agreement. It is sufficient to invoke

---

[14] *Presidential Determination on Wire Hanger Imports from the People's Republic of China: Memorandum for the Secretary of Commerce, the Secretary of Labor, and the United States Trade Representative*, 68 Fed. Reg. 23,019 (April 29, 2003).
[15] *See, e.g.*, "Baucus Raises Possible Tightening of Chinese Safeguard At Hearing," Inside U.S. Trade, June 15, 2007.
[16] The preliminary ITC determination in the AD case was affirmative and the case is pending at this writing. *Wire Garment Hangers from China,* Inv. No. 731-TA-1123 (Preliminary), USITC Pub. 3951 (September 2007).
[17] The president has delegated this function to the U.S. Trade Representative (USTR).

Section 301 that the foreign measures nullify or impair the benefits anticipated as a result of the international agreement.

Before filing a Section 301 petition, however, it is first advisable to identify the problem and to have USTR include a description of the issue in the *National Trade Estimate of Foreign Trade Barriers*, or the "NTE." The NTE is published once a year and summarizes by country the trade disputes between the United States and its trading partners. In effect, the NTE sets the U.S. trade agenda for bilateral negotiations. If a private industry has a problem with practices in a foreign country not identified in the NTE, it is difficult to put the issue on the United States' agenda. Hence, unless the dispute itself requires emergency measures, long before filing a Section 301 petition it is best to raise the issue with USTR and obtain a mention in the annual NTE.

In practice, Section 301 petitions are often submitted to USTR as "drafts" rather than formal petitions. USTR may then address the problem through negotiations without the need for filing a formal petition. Section 301 petitions can also be part of an integrated strategy, using AD and CVD petitions to address unfair imports and a Section 301 petition to address the effects of those unfair trade practices in third country markets.

For example, in *Engineered Gas Turbo-Compressors from Japan*, the domestic industry filed an AD case to address the impact of price discrimination—dumping—by one Japanese competitor.[18] At the same time, though, the U.S. industry was unable to penetrate the higher-priced Japanese market because of Japanese safety standards and regulations.[19] The U.S. industry therefore drafted a petition under Section 301 to address these practices in the Japanese market. In response, USTR observed that ongoing U.S.-Japan negotiations might be the best vehicle to resolve the issue. The U.S. industry thereafter monitored U.S.-Japan negotiations, provided input to

[18] *Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete, From Japan,* 62 Fed. Reg. 32,584 (June 16, 1997)(antidumping order).

[19] Dumping is often symptomatic of a protected home market in which prices are high and foreign competition does not exist. As a result, exports to the United States will tend to be at prices that are lower than the home market price level.

the U.S. negotiating team, and ultimately succeeded in opening the Japanese market.

Potential Challenges in International Trade and Transactions Law

Define the Scope of the Case

In the early stages of preparing the case, it is essential to define the scope of the investigation carefully. If the products are defined too broadly, the petitioners may lack the necessary standing to represent the industry. Otherwise, if the product is broadly defined, the domestic industry will also be broadly defined, and the financial results of the industry as a whole may not establish material injury to the same extent as the financial results of the petitioner.

In *Activated Carbon*,[20] for example, two U.S. producers filed an antidumping petition against imports without having consulted with a third U.S. producer, Mead-Westvaco. The petition covered activated carbon made by a process using steam or carbon dioxide (the petitioners' method), as well as activated carbon made using a chemical process (Mead-Westvaco's method). After the petition was filed, the Commerce Department questioned whether the two petitioners had standing to represent the entire industry. To avoid a potential negative determination, the petitioners withdrew and re-filed the antidumping petition, narrowing the scope of the case to include only activated carbon manufactured using steam or carbon dioxide.[21]

At the same time, a company or group of companies considering whether to pursue a remedy under the trade laws must resist the temptation to define the product in a manner that does not reflect market reality. Although it may be tempting to limit the scope of the case to improve the

[20] The first petition was filed on January 26, 2006 and covered all "activated carbon." Subsequently, that petition was withdrawn, the scope of the investigation was revised, and the petition was re-filed.

[21] The petition was withdrawn, revised and resubmitted on March 8, 2006, and the second investigation was initiated on April 4, 2006. *Certain Activated Carbon from the People's Republic of China,* 71 Fed. Reg. 16,757 (April 4, 2007). *See, e.g.*, Water and Waste Digest, online http://www.wwdmag.com/Producers-of-Activated-Carbon-Refile-Antidumping-Petition--NewsPiece11203, last visited September 9, 2007.

injury case, the ITC "looks for clear dividing lines among possible like products and disregards minor variations."[22] The Commission will carefully examine the "like product" and the domestic industry to ensure that the definition reflects the physical characteristics of the product, its uses, consumer expectations, channels of distribution, and whether the merchandise is produced on the same equipment and by the same employees used to produce other products.[23]

Check for Affiliations Between Parties

Another trap for the unwary is to overlook affiliations between foreign producers and U.S. importers. In *Pigment Dispersions*,[24] for example, virtually all of the imports from India had been imported by a U.S. affiliate of the Indian producer. This affiliate imported a particular grade of pigment dispersion not used by customers in the U.S. market. It then processed the imported material before sale. In these circumstances, the Commission found that the imports did not compete directly with the U.S. producers, and it made a negative determination at the preliminary stage.

Think Ahead Regarding Any Potential Means to Evade Relief

Failing to anticipate the manner in which imports will circumvent an AD or CVD investigation is also a common problem. A petition may invite circumvention of an AD or CVD order even before the investigation is completed. In *Certain Portable Electronic Word Processors from Japan*,[25] for example, the petitioner excluded from the scope of the investigation various components and parts used in manufacturing electronic word processors. Even before the Commerce Department had reached an affirmative dumping finding, however, a major Japanese producer had begun to import components and parts and assemble word processors in the United States. Although the petitioner attempted to modify the scope of the investigation,

---

[22] *Superalloy Degassed Chromium from Japan,* Inv. No. 731-TA-1090 ("Final), USITC Pub. 3825 at 4 (Dec. 2005).
[23] *See, e.g., Nippon Steel Corp. v. United States,* 19 CIT 450, 455 (1995); *Timken Co. v. United States*, 913 F. Supp. 580, 584 (Ct. Int'l Trade 1996)
[24] *Certain Colored Synthetic Organic Oleoresinous Pigment Dispersions from India*, Inv. Nos. 701-TA-436 and 731-TA-1042 (Preliminary), USITC Pub. 3615 at 9 (July 2003).
[25] *Certain Portable Electronic Word Processors and Components and Parts Thereof from Japan,* 56 Fed. Reg. 31,101, 31,103-05 (July 9, 1991) (Final LTFV Deter.)

Commerce refused to do so, finding that the request came too late and was inadequate.[26]

In another case, petitioners obtained a CVD order covering certain *Dynamic-Random Access Memory (DRAMs)* from Korea.[27] For purposes of the CVD order, Commerce defined the origin of the merchandise as the country in which the semiconductor wafer was fabricated. Following issuance of a CVD order, the Korean producer shipped wafers from its U.S. factory back to Korea. It then completed the DRAMs in Korea and shipped the finished products—without any duties—back to the United States.

Decide Which Countries to Cover

An AD or CVD investigation can also encounter major problems if the petitioner does not cover a sufficient volume of imports, or limits the allegations to imports from only one country when other larger sources of the same merchandise also supply low-priced goods. First, by statute, material injury cannot be caused by a "negligible" volume of imports.[28] However, clients will rarely complain about truly negligible imports, much less devote resources to filing an AD or CVD case.

Second, the statute provides that imports from several countries can be "cumulated" for purposes of determining whether there is material injury to a domestic industry.[29] When the petitions are filed simultaneously and the imported goods compete simultaneously in the same geographic market, the Commission will assess whether cumulative or aggregate imports are a cause of material injury. Because a larger volume of imports is more likely to impact domestic producers, it may be less difficult to establish material injury. As important, when AD and CVD petitions are filed simultaneously

[26] *See Smith-Corona Corp. v. United States*, 16 C.I.T. 562, 796 F.Supp. 1532 (1992).
[27] *Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 47,546 (August 11, 2003) (CVD order).
[28] 19 U.S.C. § 1677(7)(24). The statute defines "negligible" to mean that imports from a single country amount to less than three percent of all imports during the most recent one-year period prior to the investigation. Also, if more than one AD or CVD petition is simultaneously filed, imports from any countries that amount to less than three percent of all imports will not be "negligible" if in the aggregate all such imports account for more than seven percent of total imports.
[29] *Bratsk Aluminum Smelter v. United States,* 19 U.S.C. § 1677(7)(G).

against imports from several countries, the Commission will consolidate the investigations, reducing overall costs.

Clients therefore must consider early on whether to include imports from more than one country. If any countries are omitted from the initial petition, the client will lose the benefits of cumulation in any subsequent AD or CVD cases.

Third, following the decision of the Court of Appeals in *Bratsk*, the ITC must consider the potential impact of non-subject imports on the U.S. market.[30] That is, the ITC must consider whether imports that not subject to an AD or CVD order would have replaced the dumped or subsidized imports. If so, the Commission may then conclude that the unfairly traded imports were not a cause of material injury. Clients can therefore undermine their case by failing to include countries that are significant producers and exporters of the subject merchandise.

For example, in *Special Quality Bar*,[31] the petitioners elected to file AD and CVD actions against imports from Brazil, but did not include imports from the largest source of special quality bar. The ITC found that the allegedly dumped imports from Brazil had a relatively small market share within the U.S. market and were not an important factor in the market. The ITC rendered a negative determination in the final investigation, in part finding that free machining bar imports from Brazil were "miniscule."[32] Had the petitioners included imports from additional countries, however, the final determination might have been different.

For all of these reasons, it is vital for a potential petitioner to consider carefully the scope of an investigation in terms of not only the product definition but also the countries covered.

---

[30] 444 F.3d 1369 (Fed. Cir. 2006).
[31] *Certain Special Quality Carbon and Alloy Hot-Rolled Steel Bars and Rods and Semifinished Producers from Brazil,* Inv. No. 731-TA-572 (Final), USITC Pub. 2663 (July 1993).
[32] USITC Pub. 2663 at 19.

Patience May Be Required

Another consideration for clients will be timing. Typically, businesses will perceive that they are materially injured well before plants are shut down or layoffs begin. Clients will often identify low-priced imports as a business problem even before imports have achieved substantial market penetration or before domestic industry price levels have been forced down. In such cases, clients may be advised to delay filing an AD or CVD petition until the case "ripens."

In general the Commission will not find "material injury" where domestic producers are earning double-digit profits, even though industry profitability is declining.[33] The ITC generally looks for single-digit profits or for losses as a bellwether of material injury. In some industries, however, far higher operating profits are the norm. Pharmaceutical companies, for example, reap substantial profits on active ingredients. Despite import competition, however, AD and CVD cases involving pharmaceutical ingredients are limited to over-the-counter painkillers, such as ibuprofen and aspirin. Although imports are just as likely to compete for sales of prescription medicines, domestic producers will generally leave the market shortly after the patent protection expires and long before their operations are incurring losses. In fact, some meritorious AD and CVD cases may never be brought because the industry is not able to endure declining profits to the level necessary to convince the ITC that there is "material injury."

Patience may also be counseled when estimated AD duties are low. Because AD duties are impacted by exchange rates, clients may have to be patient when the U.S. dollar strengthens against foreign currencies. For cases in which dumping is measured by a comparison of home market and export prices, a strong dollar will help to keep the export value at or near the home market price. Hence, it may be best to postpone seeking relief until the dollar strengthens against the currency in the country of export.

[33] See, e.g., *Certain Colored Synthetic Organic Oleoresinous Pigment Dispersions from India*, Inv. Nos. 701-TA-436 and 731-TA-1042 (Preliminary), USITC Pub. 3615 (July 2003).

Providing Value for the Client

As outlined above, the primary value of an AD or CVD order derives from the fact that the order can eliminate price discrimination (dumping) or market distortions (subsidies). In the case of an Escape Clause action, the purpose of the remedy is to restrict imports temporarily so that a domestic industry has time to adjust.

In nearly every case, submissions by opposing parties and even parties that support the petition will contain proprietary data. Companies and their employees will not be granted access to proprietary data of their competitors. Counsel, however, can access the proprietary data subject to protective orders.[34] Without access to confidential data, clients will not be able to defend against all claims made by opposing parties, including particularly any claims involving competitive prices, production costs, or specific customer accounts. Counsel are therefore vital to ensure that confidential information submitted by the opposition is analyzed, refuted or explained, as appropriate.

Moreover, trade cases often involve two or more U.S. companies that form a coalition to bring the case. In such cases, counsel can receive business proprietary data of several companies, with an appropriate non-disclosure agreement in place to prevent individual companies from obtaining confidential data of their competitors. In this manner, counsel can ensure that the companies do not share information concerning prices, output, production costs, or other proprietary subjects. Counsel thereby help to ensure that the coalition companies do not violate the antitrust laws and at the same time provide a means whereby the merits of the case can be considered on the basis of aggregate industry data.

Apart from the direct impact of an international trade case on the imported merchandise and the relevant market, clients will typically find value in the process itself and the lessons learned about their competitors, their customers, and the market. For example, compiling the evidence to support a trade case will uncover a great deal of information concerning commercial

[34] Counsel are permitted to access proprietary data under protective order in AD and CVD cases pursuant to 19 U.S.C. § 1677f.

conditions in the relevant markets. Sales managers assigned to support the AD or CVD case will immerse themselves in the details of competition in the marketplace. They will respond to questioning by the ITC Commissioners and they will hear the testimony of their competitors and customers. In these circumstances, companies regularly increase their knowledge of the competitive forces that affect their market.

Likewise, to prepare a dumping allegation, the petitioners or their counsel will typically estimate the foreign producers' production costs.[35] Many companies have not prepared a thorough analysis of their competitor's costs before undertaking an AD case. Armed with a good cost estimate, however, clients will often be able to improve their competitive offers and increase sales. Thus, the research and quantitative analysis undertaken in the course of preparing an AD petition will often have commercial applications.

Such research will often include focused market research undertaken by consultants in the foreign markets targeted by the case. Experienced U.S. attorneys maintain closely guarded relationships with foreign consultants able to uncover prices, production costs, and other commercial information in a variety of foreign markets. Although this capability is not necessary in Chinese cases, it is an important asset in cases involving market-economy countries. And the information developed by a top market research firm can add substantial value from the standpoint of the client.

Similarly, trade law experts are familiar with a wide range of statistical data, available from various sources. Companies are frequently unaware of the wealth of market information available from the U.S. Census Bureau, from private publishers of ships' manifests data, and from foreign governments. Ships' manifests can reveal the importers, consignees and ports of entry; Census data can reveal the volume and value of imports, by port and by month, and together the various sources of information can add important details to a client's own market intelligence.

[35] Dumping is defined to be the difference between normal value, which is usually the home market price, and the export price of the merchandise. 19 U.S.C. §§ 1673, 1677b(a). However, if the home market price is below cost, normal value may instead be "constructed" using the full cost of production. 19 U.S.C. § 1677b(b). Hence, production cost is often a conservative measure of normal value and the data will in any event become relevant as a case proceeds.

In the course of preparing and prosecuting an AD, CVD, or other international trade case, the client's customers will frequently be a source of pressure. Customers supplied by both domestic and foreign sources may react strongly to the filing of an international trade case, in some instances threatening the client with loss of business in retaliation. It is imperative to develop a strategy early that anticipates and addresses any adverse reaction by the client's customers. Counsel can assist the client not only in explaining the function of the law and the schedule, but also in using the process to build stronger customer relationships.

Finally, foreign producers may attend the ITC hearing or read the transcript and in some cases discover for the first time that their U.S. distributors or agents are selling their product at prices far below domestic price levels. Some foreign producers will find that their distributors are not correct when they insist that they must sell at low prices to penetrate the market. Better information concerning U.S. demand and competitive price levels in the U.S. market can cause foreign producers to increase their prices even without the pressure of AD or CVD duties applied to imports of their goods.

Strategies for Success

The outcome of an AD or CVD investigation depends primarily upon the record that is compiled by the investigating agencies. Similarly, the recommendation regarding relief in an Escape Clause action will be made on the basis of the record. As noted above, in each base counsel will have access to confidential business information, but the clients will not. Therefore, counsel must learn as much as possible about the industry, the market, the production process, the factors of production and the accounting practices used in the industry. Once the confidential data are received from foreign producers and exporters, counsel will not be able to discuss the data or question the client regarding issues raised in the confidential record.

One very useful approach is to hire an expert recently retired from the client company or industry. A consultant that works for the law firm and is independent from the company is usually allowed access to competitor information submitted to the Commerce Department under protective

order. A true industry expert not only will assist in identifying potential problems in the submissions of other parties but can save a great deal of time and money. Often, the company can identify a recently retired manager with production experience to serve as a consultant. Such experts shorten the learning curve for the legal team.

Another useful approach is to retain expert consultants from academia or from the ranks of former employees of the Commerce Department or ITC. If a critical issue will be the impact of imported agricultural commodities on the supply and demand conditions in the U.S. market, an appropriate expert might well be an economics professor from the U.S. region that produces the agriculture commodity.

It is also imperative to maintain contacts in foreign countries with the capability to gather information and conduct market research. Capable market research companies can identify prices in foreign markets, interview ex-employees of foreign producers, and otherwise collect information not available from industry publications. Foreign law firms can collect information from a variety of sources.

Various consulting firms provide certifications or conduct audits to benchmark corporation compliance with ISO 90001 standards or cGMP (current Good Manufacturing Practices). These consultants may have toured the foreign manufacturing facilities targeted by an AD or CVD case and can provide invaluable evidence concerning actual operations in the factory. The petitioning companies will often engage the same consultants used by producers in the foreign country.

Counsel should also urge the client to enlist loyal customers to support the case. The client's most loyal customers face the same problems that confront the client. Typically, imported goods are being sold at prices below the U.S. manufacturers' prices. The client's customers face competition from companies that are supplied with those imported goods. They also may be receiving offers from the targets of the AD or CVD case. Such customers can provide valuable information concerning competitive prices and conditions in the market. Frequently, trade counsel can obtain affidavits or other evidence from customers on a confidential basis, only to be disclosed to the relevant government agencies. In this manner, customers

may provide critical details concerning the market and conditions of competition that would not be shared with their U.S. suppliers. Moreover, the ITC particularly values the views of consumers and end users in the marketplace.

Public relations efforts may be needed as the case proceeds. When an AD or CVD petition is filed, industry trade journals or even national news organizations may seek out your client or the law firm. When a preliminary determination is announced and duties are imposed for the first time, the trade press will be looking for press releases and interviews. Counsel should prepare the client for the results before they become public and should assist the client to prepare a statement, whether the outcome is favorable or unfavorable.

Trade counsel should set up a process of review with respect to all annual reports, 10Ks, and other filings that may include references to the health of the company, market conditions, the impact of imports, or other factors that could affect the case. It is not uncommon to appear at a hearing before the ITC seeking to establish that your client is suffering material injury, only to have your opponents offer verbatim quotes from the client's annual report extolling the great performance of the company—and not even mentioning the import competition.

In Escape Clause and Section 301 investigations, in particular, the need for a presidential determination to obtain relief demands that counsel mount a government relations program. Whether through the law firm or the client's in-house government relations personnel or consultants, a campaign must start early simply to inform congressional representatives and the White House regarding the issues and process. As shown by the effectiveness of consumers of imports in thwarting relief under Section 421, the users of the imported merchandise will conduct a government relations campaign. Petitioners must respond and solicit support from their representatives and contacts in the administration to neutralize the opposing efforts.

Finally, any AD or CVD order may be appealed to the U.S. Court of International Trade.[36] Judicial review by the court is based upon the familiar

[36] 19 U.S.C. § 1516a.

standards used in administrative law cases. Although not covered by the Administrative Procedures Act, the standard of review for the court includes whether the agency determination is "arbitrary [and] capricious," "unsupported by substantial evidence," or otherwise "not in accordance with law."[37] Anticipating an appeal, counsel must take care to build a record in the agency proceeding that will support a favorable determination and withstand attack.

The Importance of Staying Informed

Beyond reading the opinions of the Commerce Department, the ITC, and the courts[38] it is important to remain abreast of current decisions by the WTO dispute panels and current developments in the WTO negotiations with respect to "rules." The Commerce Department and ITC are mindful of panel decisions and one's case may someday be challenged before a WTO dispute panel. Hence, it is important that an adequate record exists to address the factors that the WTO panels have identified as relevant—even when those factors may not be required by U.S. law or practice.

Also, decisions in major foreign jurisdictions are often relevant. In many cases an industry will first file an AD case in Europe, India, Mexico, or Australia. After AD duties are imposed, the foreign producers then shift their exports to the U.S. market, resulting in a surge in imports. Lessons learned in the foreign cases can both save time and effort and influence strategy.

To master the issues in a particular market, it is important for counsel to subscribe to trade journals and industry publications that cover the relevant markets, including markets for upstream raw materials and downstream products. Because an AD or CVD case will often take months to prepare, counsel must immerse themselves in the details of the market. Otherwise, counsel will not ask the right questions when preparing witnesses or look for the relevant documents when responding to requests from the agencies.

---

[37] 19 U.S.C. §§ 1516a(b)(1).

[38] There is a digest of Commerce and ITC cases that collects decisions on an issue-by-issue basis, found in the *International Trade Reporter Decisions*, published by the Bureau of National Affairs, Inc., Washington, DC. However, this digest does not substitute for reading opinions.

Because trade cases may be appealed to the U.S. Court of International Trade and Federal Circuit, handling litigation in other administrative fields or in different jurisdictions will not only add to your experience, but also suggest new approaches. A few AD lawyers also practice antitrust law. The economic issues presented in an antitrust case in some instances may be relevant to an AD or CVD case. Also, many trade lawyers practice Customs law. This expertise greatly assists trade counsel to understand the practical enforcement issues that will arise after an AD or CVD order is issued or duties are imposed in an Escape Clause proceeding.

However, even participating in litigation concerning an unrelated field of administrative law, such as communications law or environmental law, will suggest different approaches to obtaining and handling evidence, understanding the standard of review, or interpreting the statute. I have participated in litigation involving the USDA and the FCC, as well as litigation concerning the Commerce Department but unrelated to AD or CVD cases. In each case, lessons learned in the course of litigating before different courts against members of a different bar have later found application in trade cases.

Legal Strategies

The Goal of the Client

In meeting with a new company regarding a potential trade relief action, one early question to consider is "How is business?" A domestic client or prospective client interested in retaining an international trade lawyer is typically looking for help to address import competition. As outlined above, however, relief under the AD and CVD laws or the Escape Clause is available only if the U.S. industry is suffering "material" or "serious" injury or a threat of injury. The initial questions can therefore usefully explore whether imports are having a harmful impact on the client's business, in which geographic market the impact is occurring, which product or products are affected, and whether the client has any suspicion or information that an unfair practice (dumping or subsidies) is involved.

The client's goal generally is to improve the bottom line. However, imports may be having a negative impact because they are increasing in volume,

capturing sales accounts, and expanding their market share (thereby reducing the domestic producers' output). Alternatively, imported goods may be depressing price levels in the U.S. market, forcing the U.S. industry to reduce prices or forego price increases. And, in many cases, a client will experience both a reduction in sales or market share and depressed prices. The client's goal, therefore, will be to increase revenues, by increasing sales volume, prices, or both.

The business strategy of the client to address import competition will impact the legal strategy. In some cases, a client's business strategy is to maintain price levels, even if the volume of sales is declining at the expense of import competition. If, for example, fixed costs are relatively low and variable costs are high, a client may refuse to cut its prices in the face of import competition, instead giving up sales volume but maintaining profits. In other cases, particularly in industries with high fixed costs, the client may be attempting to hold onto its customers and sales volume, even if import competition forces it to reduce prices.

Depending upon the client's reaction to import competition, counsel will need to adjust its strategy to best present the facts in a compelling manner. For example, if the client has been ceding market share to import competition and attempting to maintain profit levels on its remaining sales, major customers may have ceased purchasing from the client and switched to an import source. In this case, counsel should obtain declarations and testimony from the client's sales force, describing the sales meetings in which long-standing customers terminated their accounts and announced their plans to shift to imports. In some cases, the client's remaining accounts will be paying higher prices for the merchandise, perhaps because they buy in lower quantities. Hence, counsel will want to focus the evidence on the lost business and explain that the apparent increase in prices does not necessarily indicate a healthy industry.

In other cases, the imports may have only obtained a small share of the U.S. market. In industries that face high fixed costs, the client may be unwilling to give up any market share to low-priced imports because of its need to fill capacity and cover fixed costs. In such cases, the volume of sales may not be declining at all, and there may not be a compelling story concerning lost sales at major accounts. In these situations, counsel must bring to light

evidence that the client has been forced to reduce prices to maintain its customer accounts. Counsel will then look for and compile evidence of the low prices at which imports were offered or used by purchasers to leverage price reductions from the client.

Also, in some cases, the client may be looking for an exit strategy or "breathing room" in which to restructure its operations. If this is the case, counsel will then consider whether an Escape Clause action would be appropriate.

The Strategic Plan

Whether AD, CVD, Escape Clause or another remedy, the relevant statute will include a series of procedural steps. To plan the process, therefore, it is useful to commence with an opinion letter organized around the procedural steps, addressing the merits of the case, and identifying the resources required. If the client is considering whether to file an AD or CVD petition, for example, the process ought to include the following stages:

- An opinion letter and preliminary assessment of the merits
- Preparation of the petition requesting relief
- Participation in the ITC preliminary injury investigation
- Securing affirmative decisions by the Commerce Department at the preliminary and final stage
- Obtaining and affirmative ITC final determination with respect to material injury

1) Opinion Letter

Counsel may prepare an opinion letter recommending the best available remedy and providing a realistic assessment of the likely outcome, to support an informed business decision by the client. To make an informed business decision whether to pursue an AD or CVD case or an Escape Clause action, a client will need assistance to determine (a) the dumping or CVD margin likely to be found by Commerce, if any; and (b) the odds that the ITC will make an affirmative determination of material injury or threat of injury. Likewise, in the case of a Section 301 or Section 337 case, the

domestic industry will benefit from a formal assessment of the merits of the case, the probability of success, and the likely remedy. Moreover, in Escape Clause and Section 301 cases, the statute is discretionary. That is, the president has discretion whether to provide relief or even proceed with a dispute. In both cases, the potential petitioner will benefit from an assessment of the political factors that will bear on a decision to pursue the matter or not.

An alternative to an opinion letter may be a conference with company executives responsible for production, sales, and finance. Working together with a team from the company that has immediate access to the relevant information, counsel may be able to go through the relevant issues, even performing dumping calculations on a blackboard or laptop and calling up relevant statistics for display by a portable projector. If the decision makers are in the room, the company may rapidly conclude whether to seek relief or not. The effort involved in a formal opinion letter can then be shifted to drafting a petition.

For example, in order to obtain relief under the antidumping law, two separate statutory requirements must be satisfied. That is, relief from dumping, in the form of antidumping duties, is available if:

(1) the administering authority [the Commerce Department] determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value
(2) The International Trade Commission determines that
(A) an industry in the United States
(i) is materially injured, or
(ii) is threatened with material injury
(B) the establishment of an industry in the United States is materially retarded by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation.[39]

[39] 19 U.S.C. § 1673 (material in brackets added).

To analyze whether an antidumping petition is an appropriate response to import competition, the following issues would need to be considered, either in a formal opinion letter or in the course of a working conference.

a. Defining the "class or kind of foreign merchandise" – the product and countries

Defining the appropriate scope of a potential AD or CVD action is often one of the most challenging aspects of the entire case. Which products should be included or excluded? Are different forms of a product different "like products" within the meaning of the law? For example, steel sheet may be coated, or corrosion-resistant, or galvanized. An antidumping or countervailing duty order that covered galvanized carbon steel sheet (i.e., zinc-coated steel sheet) may not cover "galvalum" steel or nickel-coated steel.[40]

The selection of the product has several critical implications. First, Customs will use the definition of the imported product covered by the AD or CVD investigation to enforce the resulting AD or CVD order. If the definition is too narrow, it may be relatively easy for imports to avoid the order through a minor modification to the product. A foreign producer of galvanized steel, for example, could add aluminum to the zinc coating and remove its products from an AD order limited to galvanized steel. Or, if the AD order covers only completely manufactured products—typewriters, for example—a foreign manufacturer faced with an AD order might export typewriter parts to avoid the AD order and assemble those parts after importation.

The "class or kind of foreign merchandise" identified in the petition will also define the "like product" produced in the United States and the U.S. "industry" producing that product. As discussed below, the selection of the foreign product subject to investigation therefore determines whether the petitioner has standing to seek relief or whether the industry is materially injured by the subject imports.

[40] In the early 1980s petitioners alleged dumping of "galvanized" steel sheet and strip. However, in the 1990s petitioners were filing AD cases against "corrosion resistant" flat-rolled steel to reflect that the range of coatings applied to steel sheet and strip had expanded.

In addition, imports often arrive from more than one country. An opinion letter must assess the relative merits of including various countries in the petition and investigations. When imports from more than one country compete in the same geographic markets with each other and with the domestic products, the statute provides that the ITC may "cumulate" such imports for purposes of determining material injury. Filing several AD or CVD petitions at the same time means that the ITC may cumulate the imports—making the total volume of imports larger and likely increasing the impact of imports on the domestic industry. In addition, if the ITC investigates imports from more than one country at the same time, the client will realize some economies of scale in terms of resources devoted to the investigation, as well as legal fees. It is simply less costly to participate in one investigation covering two or more countries than to file several separate cases and conduct individual investigations country-by-country.

b. Defining the "like product" and "industry"

As noted above, the definition of the imported merchandise covered by an AD or CVD case (or an Escape Clause action) will have a direct impact on the definition of the U.S. industry producing competitive merchandise. This issue will in turn have a major impact on the outcome of the case. For example, if the imports covered by the case are limited to aspirin, but the domestic "like product" includes all analgesics (aspirin, ibuprofen, acetaminophen, and naproxen sodium), then the import market share may be relatively small. On the other hand, if the domestic like product is also limited to aspirin, then only the operations of aspirin producers can determine whether an industry is injured or threatened with injury by reason of import competition.

In addition, the members of the U.S. industry will have an impact on whether the potential petitioner has standing to initiate an investigation. To possess standing in an antidumping investigation, the petitioner and industry members in support of the petition must in the aggregate account for at least 25 percent of total domestic production. In addition, among the U.S. producers (or workers) expressing an opinion with respect to the petition, at least 50 percent must support the petition.[41] For purposes of

[41] 19 U.S.C. § 1673a(c)(4)(A).

determining petition support, U.S. producers that oppose the petition but are affiliated with foreign producers subject to investigation, or that import the subject merchandise, are disregarded.[42]

Hence, for a petition to be initiated, either the petitioner must account for 25 percent of U.S. production, or the petitioner must be joined by another domestic producer. The Commerce Department will poll the other domestic producers, who may indicate their position in confidence. It is therefore generally preferable to first contact any other U.S. producers before filing an AD or CVD petition. Not only might these producers share the costs and become co-petitioners, but access to their statistical data for purposes of developing a case would be invaluable.

The definition of the "like product" will in turn dictate the relevant scope of the industry and the various companies that would be interested parties in an investigation. In some cases, U.S. producers will be related to foreign producers of the relevant merchandise. Difficult questions arise whether to contact such companies and seek support. Indeed, if the potential opponents of an AD or CVD case account for a larger share of U.S. production than do the proponents, deciding whether to use the AD or CVD law at all may become an issue.[43]

c. Estimating AD or CVD margins

As reviewed above, antidumping margins equal the difference between the "normal value" and the export price of the relevant merchandise. In cases involving market economies, "normal value" is based upon the sales price of the merchandise in the country of exportation.[44] Or, if the home market sales are too small, Commerce may instead use sales prices to the largest third-country market.[45] And, if the sales prices are below the full cost of production, Commerce will instead use a "Constructed Value" as the

[42] 19 U.S.C. § 1673a(c)(4)(B).
[43] U.S. law does provide that for purposes of determining standing, opposition by a U.S. producer related to a target of the case or importing from the country under investigation may be disregarded by Commerce. However, the petitioner and its supporters must still satisfy the minimum 25-percent-of-production threshold.
[44] 19 U.S.C. § 1677b(a)(1)(B)(i).
[45] 19 U.S.C. § 1677b(a)(1)(B)(ii).

benchmark for comparison.[46] Constructed Value is based upon the full cost of production, including selling, general and administrative expenses, and normal profits.[47]

Clients typically have a great deal of information concerning import prices in the U.S. market. They will also have a great deal of information concerning their own prices and costs. But, the foreign producers' home market prices and costs are often not available. Indeed, U.S. companies commonly believe that "dumping" involves a comparison of their own costs with the foreign producers' U.S. prices. Hence, adequate information is often an early obstacle.

To overcome this obstacle, legal counsel must have access to relevant data from various sources. For example, antidumping cases require detailed information concerning market prices in the United States and in the country or countries of origin. Such information may be obtained from various sources, including the following:

- Company records of sales calls, market conditions, competitor pricing, and production costs
- Published statistics (*e.g.*, Census, U.S. Bureau of Labor Statistics, U.S. Geological Survey data, ships' manifest data, World Trade Atlas, Eurostat, Revenue Canada and similar sources)
- Market research by independent investigators
- Annual reports of publicly traded companies suspect of dumping
- Press releases and published information concerning the relevant product, particularly from industry-specific journals and publications or from trade associations
- Antidumping decisions in other jurisdictions

A CVD petition must present detailed documentation of the nature and value of government subsidies provided to the foreign producers. In CVD cases, desk research by the law firm can often uncover foreign laws, regulations, resolutions, or other official government measures that confer subsidies. Sources for such research can include:

[46] 19 U.S.C. § 1677b(a)(4).
[47] 19 U.S.C. § 1677b(e).

- Notifications of foreign subsidies to the WTO
- Annual reports of publicly traded companies
- Foreign laws and legislative materials
- Assistance of foreign counsel or consultants.

The value of the opinion letter concerning likely AD or CVD margins depends upon the accuracy and reliability of the data uncovered by the client and outside counsel. In this regard, it is useful to calculate antidumping margins or subsidy rates using several different methods to increase confidence in the likely outcome of an investigation. An opinion letter that presents a range of potential outcomes and some probability attached to each outcome will be more useful to the client who must make a business judgment whether to proceed with a petition.

d. Assessing evidence of material injury or threat of injury

In considering the impact of imports on the domestic industry, the International Trade Commission is directed by statute to consider the following factors:

(i) Actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity
(ii) Factors affecting domestic prices
(iii) Actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment
(iv) Actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product
(v) The magnitude of the margin of dumping.[48]

To compile evidence concerning each of the foregoing factors, clients can usefully complete a model ITC questionnaire early in the process. These data will become the basis for the opinion letter, the petition itself, and the

[48] 19 U.S.C. § 1677(7).

eventual formal response to the questionnaire issued by the ITC after a case is initiated.

In addition, the client's sales personnel should be interviewed to determine the quality of available evidence concerning lost sales and lost revenues. An AD or CVD petition must include allegations of lost sales and lost revenues. To assess the strength of the case—as well as to estimate the resources needed to prosecute the case—interviews with key salespeople will uncover evidence of import penetration at major customer accounts (or not). If, for example, import competition has captured a "name-brand" account with a well-known product, such as Coca-Cola™, the facts supporting an injury can be organized around a familiar company. A U.S. producer might start its CVD petition by explaining that it has lost its most important customer account, worth millions in sales, to subsidized import competition. The goal is to tell a compelling story.

Also during the first phase, counsel should review SEC filings and annual reports, and Webcasts or other statements to the financial markets, including financial analysts' reports. Clients may be sending a somewhat optimistic message to financial markets that does not dwell on import competition in one segment of their business. If so, counsel should anticipate that opposing parties will call attention to forward-looking documents that do not even mention import competition.

To obtain information needed to draft the opinion letter, the company should identify a team that includes representatives from the production, sales, and finance departments. This team should answer the draft questionnaire and provide information to counsel. The company management should make the trade remedy case a priority for these employees.

Armed with the foregoing information, counsel can prepare a thorough opinion letter, setting forth the strengths and weakness of the injury case. The client will then have an adequate basis on which to make the business case for pursuing legal relief, or not.

2) Preparing the Petition

If the decision is made to proceed with a trade relief case, the next step is to transform the opinion letter into a petition. Organizing the opinion letter in the format of a petition allows this task to be accomplished in a matter of days or weeks after the decision is made to seek relief. Timing of the petition can then be adjusted to market conditions. If the petition is to be filed a calendar quarter or more after the opinion letter is drafted, it will likely be necessary to update all of the information in the course of preparing the petition.

Although the opinion letter will have considered the appropriate scope of the case, the issue should be reexamined in drafting the petition. The agencies that accept the petition and determine whether to initiate an investigation will be focused on the product or products covered. The intended scope of the investigation should be clearly defined in terms used in commerce, by industry associations, in the scientific literature, and by any standard-setting bodies. In addition, counsel must review prior trade remedy cases involving identical or similar products. To the extent that a petition may involve some segment of the product line covered by an earlier proceeding, the petition should articulate all similarities and differences in terms of the scope of the case.

In the case of a petition seeking the imposition of AD or CVD duties, the Commerce Department has rigorous criteria for initiation of petition. Commerce uses a checklist (the AD checklist is found in Appendix C) to determine whether a petition alleges all of the necessary elements to support an investigation. The opinion letter may not cover all of the various items on the Commerce checklist, requiring additional time to add supporting data. Generally, in the case of an antidumping petition, Commerce will look for the following evidence to support the petition:

- Support documentation for the alleged prices or costs and claimed adjustments
- Any market research reports including an affidavit referring to sources and how information was obtained

- Current price data (no more than one year old) with respect to sales in the United States and in the country of exportation[49]

In a CVD case, the Commerce checklist differs and the following evidence is critical:

- Support documentation to establish the existence and nature of each government program benefiting the subject imports
- Any information establishing actual receipt of benefits under each government program by companies producing the subject merchandise
- Support documentation to establish benchmarks for commercial loan or equity rates (as appropriate) in the country of exportation.

In either case, supporting documentation must identify its source. Actual market prices, for example, are best established by the submission of copies of actual commercial invoices. Company production costs likewise can be established by internal accounting documents or financial statements. To the extent that U.S. or foreign market prices or costs are based upon market research, Commerce will demand detailed information concerning the sources of information and methodology used to collect and identify data.

An AD or CVD petition must not only allege dumping or subsidization but also material injury or threat of injury. Supporting evidence at a minimum will include the volume and value of imports, the imports' market share, import and domestic prices, and the profit-and-loss performance of the petitioner or petitioners. Import statistics are available online from the International Trade Commission. Other data, however, must be obtained from the client, through market research, or otherwise.

In drafting the petition, it may be sufficient to provide evidence of material injury and threat of injury without presenting the full case or attempting to describe the impact of imports in precise terms. As noted above, the facts of each case are likely to differ. In some cases, injury will be established by virtue of lost sales volume and increasing import market penetration. In other cases, the petitioning companies will have retained their market share

[49] See Appendix J (AD Initiation Checklist).

at the expense of lower prices and impaired profits. It is not necessary for the petition to characterize the injury case in one manner or another. In fact, counsel should probably focus on building a complete record and let the Commissioners decide which theory of injury to apply.

First, opposing parties will prepare their defense based upon the facts and theory of the case described in the petition. Second, after the ITC staff conference is over, counsel may realize that the clients do not know the full story. Evidence from additional U.S. producers, importers or customers can cast the case in a different light. To avoid adopting a theory of the case that does not fit the complete record, keep the petition simple. After a more complete record is developed, counsel can then explain how the law applies to the record evidence as a whole.

Once the petition is drafted, the Commerce Department and ITC staff prefer that counsel circulate a draft petition and meet to discuss the draft. Both agencies appreciate the opportunity to preview the petition. Commerce must decide whether to initiate a case within twenty days after the petition is filed. However, if a draft is submitted for comment, Commerce will typically respond with a list of issues so that many potential problems can be avoided before the petition is filed.

ITC also appreciates the chance to preview the petition and will typically assign staff and establish the schedule for a preliminary investigation. Because the ITC must make a preliminary determination in forty-five days, a pre-filing meeting can both resolve issues, such as the scope language, and permit the agency to avoid staffing conflicts. Typically, ITC staff will confirm the staff conference date at a pre-filing meeting. This allows the petitioners to get a head start making travel arrangements for management.

3) The ITC Preliminary Injury Determination (AD and CVD Cases)

In an AD or CVD case, you must obtain an affirmative determination at the preliminary stage for the investigation to proceed. As important, however, you will be returning to the Commission at the final stage of the case again seeking to obtain an affirmative determination. Thus, the preliminary injury investigation not only is the basis for a determination

but also becomes the foundation for the later, final injury determination. To prepare effectively, counsel must::

- Establish a schedule, particularly for the top executives;
- Review questionnaire responses (manage the time limits);
- Identify and prepare witnesses
- Rehearse for the staff conference

The Commission has forty-five days from the filing of an AD or CVD petition in which to determine whether the record evidence establishes a "reasonable indication" that the domestic industry is materially injured or threatened with injury.[50] Within this period, the ITC staff will issue questionnaires to the domestic producers, hold a staff conference, accept post-conference briefs, issue a preliminary staff report, and otherwise compile a record. Time is of the essence. Petitioners can assist the staff to build the case by timely submitting responses to the questionnaires, by providing knowledgeable witnesses, and by promptly responding to staff questions.

4) The Commerce Preliminary and Final Determinations

Once the preliminary injury determination has been issued, it is a risky strategy, at best, to assume that the Commerce Department can investigate the foreign producers without input or assistance. As soon as the ITC phase is completed, or sooner, deploy your experts. Any information developed concerning the product, the production process, the foreign producer's market prices, or the costs of production should be consulted to identify potential issues. The goal is to identify early the issues that could confuse Commerce or waste valuable time. Because the agency is not an expert with respect to the product or market, the domestic producers must educate the agency staff. Otherwise, import issues will be overlooked or missed entirely.

[50] 19 U.S.C. §§ 1673(b)(a)(1) and 1673b(a)(2)(A)(i). If the Commerce Department extends the deadline for initiation to verify the petitioner's standing, the Commission has 25 days from the date on which Commerce initiate the investigation in which to make a preliminary injury determination. 19 U.S.C. § 1673b(a)(2)(A)(ii).

As noted above, counsel can retain an expert in the industry in some cases among those persons recently retired from the client company. Counsel and the expert should stay in close contact with the Commerce staff as the questionnaire is developed and after the responses return. For example, an AD questionnaire will ask foreign producers how to match sales of the subject merchandise in the home market with sales of comparable merchandise for export. Because dumping is defined by the difference between prices in the two markets, matching sales can be determinative. Left alone, Commerce staff may not detect that technical differences between products are not meaningful in the market. Or, foreign producers may disguise dumping by comparing sales of different grades of product without adequately accounting for different physical characteristics.

Stated differently, counsel should maintain pressure on the foreign producers by assisting Commerce to ask the right questions, by monitoring the responses carefully, and by limiting the ability of the foreign producers to omit information or avoid scrutiny.

In cases involving imports from China, the antidumping law includes special provisions for determining whether dumping is occurring.[51] Because China is not a market economy, its home market prices do not reliably indicate "fair value." Hence, U.S. law contemplates that Commerce will construct the normal value of Chinese merchandise by identifying the factors of production used to manufacture the subject merchandise. Commerce then assigns values to those factors based upon the values in a surrogate market economy.

In cases involving imports from China, it is even more important to assist the Commerce Department and participate in the investigation. Because the benchmark determining whether there is dumping is not a market price or even cost recorded in audited financial statements, a factor of production can easily be omitted or undervalued. The additional complexity of the non-market-economy methodology demands that the petitioner's counsel and experts fully explain the production process and identify the factors of production early in the case. Otherwise, valuable time may be wasted simply ensuring that the Chinese producers have submitted complete data.

[51] *See generally* 19 U.S.C. § 1677b(c) and 19 C.F.R. § 351.408.

The Commerce AD investigation includes a preliminary determination by the agency 140 or, if extended, 190 days after the case is initiated.[52] In a CVD case, a preliminary determination must be made sixty-five days or, if extended, 130 days after the case is initiated.[53] These deadlines may vary if the petitioner waives verification (not advisable) or, in the case of a CVD investigation, if a simultaneous AD investigation concerns the same product and country. In any case, at the preliminary stage, commerce will typically assume that data submitted by foreign producers are correct and will base its determination upon those data.

After the preliminary determination, though, commerce will schedule "verification." Verification amounts to a quasi-audit of the foreign producer's questionnaire response. Commerce will schedule a one-week (more or less) trip to the foreign producer's plant or corporate headquarters. It will then tie the figures in the questionnaire response to audited financial statements of the company. In the course of verification, Commerce will test random sales for accuracy by comparing the sales and shipping documents with the company ledger, accounts receivables, accounts payables, evidence of payment, and other internal reports.

Prior to verification, counsel and any experts should submit comments concerning the foreign producer's responses. These comments ideally will focus on technical issues, omissions or other issues raised by the foreign producer responses that would not necessarily be apparent to commerce personnel unfamiliar with the industry. Companies and their experts can add considerable value to the process simply by educating the Commerce officials with respect to those areas of the foreign producer's response that deserve scrutiny. At the same time, it is counterproductive to identify every issue and every section of the response as deserving thorough verification. Because time is limited, counsel should identify those few areas of greatest concern or those issues that will have the most impact on the AD or CVD duty rate.

[52] 19 U.S.C. §§ 1673b(1)(A) and 1673b(c).
[53] 19 U.S.C. §§ 1671b(1) and 1671b(c).

5) The ITC Final Investigation

After Commerce has made a preliminary determination, the ITC will then commence the final phase of its injury investigation. Before issuing a questionnaire, ITC staff will typically circulate a draft questionnaire for comments by the parties. The draft questionnaire deserves attention, whether or not any comments are filed. The selection of topics and the questions posed will reveal issues that the ITC staff or particular commissioners are interested in developing. All departures from the standard questionnaire are noteworthy. For example, if the draft questionnaire seeks to subdivide the shipment or sales data into several categories, staff or particular commissioners may be considering whether the "like product" identified in the petition should be divided into two or more products. In that event, it might be appropriate to suggest additional questions designed to bring out those facts tending to show that the petition appropriately defined the like product.

At the preliminary stage, the ITC staff may limit questionnaires to the domestic producers, foreign producers, and importers. In the final phase of the investigation, however, the ITC will typically send questionnaires to purchasers. Because purchasers will generally be familiar with the domestic and the competing foreign products, their responses can be valuable. However, in some cases the purchasers may have an incentive to oppose the AD or CVD investigation because an AD or CVD order could result in higher market prices overall. And, because the purchasers are usually also the client's customers, the company should be prepared for customer backlash. Particularly if there is a high preliminary AD or CVD duty and questionnaires arrive from the ITC, customers may become anxious or angry concerning the case. The client needs to prepare in advance to handle telephone calls from customer accounts.

In some cases, customers may place orders or make inquiries for unusually large, unscheduled sales. Such requests may have an ulterior motive—building a factual record on which to argue that the client lacks capacity to supply the market. Counsel should prepare the company for such tactics and establish a procedure so that customer inquiries are monitored.

The ITC opinion from the preliminary determination will have identified various issues that the Commission intends to investigate in its final investigation. When the final phase commences, or sooner, these issues should be revisited. The questionnaire response is the best vehicle for building the record with respect to issues identified at the preliminary stage. Information submitted with the questionnaire response will in most cases be included in the staff report and, therefore, will be readily available to the Commissioners even before the briefing and hearing.

Following the Commerce Department's final determination, and assuming that determination is affirmative,[54] the ITC will hold a hearing. Generally, the hearing takes place on the next business day following the commerce determination. In deciding the date for filing the petition, therefore, counsel and the client can predict the schedule of events. Because the final ITC hearing will require industry witnesses, make sure early in the process that the necessary witnesses will be available.

Roughly two weeks before the hearing, the ITC staff will release a pre-hearing staff report, including a summary of all of the information contained in the questionnaire responses. One week later, the parties will file pre-hearing briefs. The briefs can be prepared based upon the issues identified from the preliminary ITC determination and the questionnaire responses. However, many issues identified in the pre-hearing staff report will need to be addressed in the pre-hearing brief.

Even before the brief is filed, the petitioners will want to identify witnesses and prepare written testimony. Because the ITC will typically allow one hour for direct testimony, it is rare for counsel to examine witnesses using a question-and-answer format. Instead, witnesses deliver prepared testimony, in some cases accompanied by handouts, slides or a video presentation. This approach allows the key points to be delivered more efficiently.

The heart of the hearing is the question-and-answer session that follows the direct presentations. In an ITC hearing, the commissioners take turns questioning the witnesses. Each commissioner will take ten minutes, and

[54] If the Commerce final determination is negative, the case terminates. 19 U.S.C. § 1673d(c)(2). At that point, the company may file an appeal with the U.S. Court of International Trade. 19 U.S.C. § 1516a(a)(2).

then the questioning will move to the next commissioner. The process continues in rounds of questions until all of the Commissioners have asked all of the questions that they would like to ask.

Witnesses for the petitioner and in support of the petition appear in the morning in a panel. After the one-hour direct statements, the questions by the commission will often last into the afternoon. When the questions are completed, the witnesses in support of the petition are dismissed and the opponents move to the witness tables. The opponents to the petition then have an hour for their direct testimony, again followed by questions from the commission.

Because questions from the commissioners matter, the company must prepare for likely questions. The commission will obtain written briefs from counsel concerning the applicable law, so the questions raised are generally factual and should be answered by the company witnesses. Moreover, each commissioner typically has ten minutes before the questions pass to the next commission. If counsel and witnesses take too much time responding to a given question, the commissioner's time can run out and questioning will move to the next commission. When this occurs, it is difficult for a dialog to develop or for the commissioner to ask follow-up question. A witness that has prepared for the likely questions will be less likely to provide a rambling answer that uses up a commissioner's time. Counsel should remind the witnesses, however, any answers that would reveal confidential information should be saved for a post-hearing brief.

Following the hearing, counsel and the client will want to hold a meeting or conference call to make assignments. A post-hearing brief and responses to commission questions not answered during the hearing is typically due within one week after the hearing. The brief itself is limited to fifteen pages, but answers to questions by the Commissioners are not limited.[55] Therefore, review the questions and make assignments so that the client's team can efficiently compile the information needed for the post-hearing submission.

Several weeks later, the ITC staff will release a final staff report as well as any confidential information in the record that has not already been

[55] 19 C.F.R. § 207.25.

released. The parties will then have two or three days in which to submit final comments, limited to fifteen pages, and intended to address any new information.[56]

Working With the Client to Set Realistic Goals

If counsel has carefully explained the law and the process in an opinion letter or otherwise, the company should be able to set realistic goals. Nevertheless, in some cases the client's goals may be unrealistic or unattainable. For example, if the amount of the realistic AD or CVD duty will not offset the price differential between domestic and imported goods, an AD or CVD petition is not going to deliver adequate relief. Or, if the market share held by imported merchandise is too small or not increasing, it may be unrealistic to pursue relief under Section 201 or even under the AD or CVD law.

It is common for a client to consult counsel regarding import competition even before the case has "ripened" to the point likely to yield an affirmative determination. Clients are involved intensely in a specific market. They monitor price levels, market share, output, inventory levels, orders, return on investment, and a host of other market factors. Based on this information, clients predict conditions and events often years into the future. At the least, most businesses are setting budgets and calculating standard costs at least one year ahead.

Consequently, clients tend to project the impact of even a small volume of imports into the future. Clients will take note of low prices offered by a relatively small volume of imports and calculate that the foreign product may within a few years obtain a commanding market share. Or, in some industries, clients may face high fixed costs such that they cannot afford to lose even a few percentage points of market share without a decline in profitability on their remaining sales.

Having therefore carefully analyzed and considered the impact of imported goods, client companies will often bring a potential case to counsel well before the evidence satisfies all of the statutory criteria. For example,

[56] 19 C.F.R. § 207.30.

because a client may be considering capital investments to increase capacity some five years in the future, it could be understandably alarmed by even a small volume of dumped or subsidized imports if it can project that those imports will grow and will imperil its planned investment. In such circumstances, the client may want to file an AD or CVD case before commencing with its investment plans.

The ITC, however, tends to assess the "threat" of material injury over a relatively short period. The threat must be "real and imminent." Although conditions in particular markets may affect that assessment, generally the ITC looks for injury to occur within about one year to support an affirmative determination. The client may be anxious to file an action to avoid reducing output, laying off workers, and suffering a decline in profits. However, based upon ITC precedent, some of those events may need to take place before the ITC will make an affirmative determination.

While waiting for the case to ripen, some options deserve mention. Quarterly or periodic monitoring of import levels, ports of entry, and prices may be appropriate. Or a company may seek a Section 332 study concerning the industry.[57] Although this proceeding does not result in any specific relief, it does provide an opportunity to learn about an industry or market, to educate the Commission concerning the industry, and to obtain information concerning import competition.

In addition, if the imported products are not separately identified in the Harmonized Tariff Schedules, the client may wish to obtain a statistical breakout that will more closely correspond to the particular imported goods of concern.

Factors Impacting Counsel Strategy

As explained in the opening section of this chapter, the problem itself is the most important factor affecting the selection of an appropriate legal

[57] Pursuant to Section 332(g) of the Tariff Act of 1930, 19 U.S.C. § 1332(g), the President, the House Ways and Means Committee or the Senate Finance Committee can request the International Trade Commission to study the competitive conditions in a particular industry or market.

strategy. The nature of the import competition will typically call for a particular remedy or remedies.

In some cases, however, other factors may influence the selection of a remedy. For example, whether there is evidence of dumping or foreign subsidies, if the client business has been very seriously injured, and if the volume of imports is increasing, it may be appropriate to seek relief under the Escape Clause rather than under the AD or CVD law. The Escape Clause proceeding is faster; it does not require any determination by the Commerce Department concerning dumping or subsidies and relief can be provided in the form of a tariff-rate quota that will effectively stop the increase in imports or even roll back the volume of imports to previous levels.

Another factor to weigh when considering the Escape Clause is the political importance of the industry and the product. Because relief is within the sole discretion of the President, government relations are likely to have a greater impact than in an AD or CVD determination. A company or industry with many plants in many districts may be better positioned to present its case to the administration and the Congress or to respond to lobbying efforts by opponents. Indeed, in recent Escape Clause cases, U.S. users of the imported merchandise have become increasingly active, both participating at the administrative level and mounting government relations campaigns to oppose any relief. Petitioners must anticipate and prepare to meet such opposition.

Once an appropriate remedy is selected, several additional factors may impact the overall strategy. The first, also discussed above, is to define the scope of the case by defining the merchandise subject to investigation. Beyond identifying the product, there will be numerous issues to contend with. For example, in an AD case, a petitioning company will confront the following issues, among others:

- When should the petition be filed? In some cases, a petitioner has timed the filing of the petition and the preliminary determination so that it will coincide with an annual contract negotiation period. Following an affirmative determination of dumping or subsidies,

the company may be seeking a price increase or a larger sales volume at its customer accounts.

- What period should be investigated? This question is answered in general by the determination when to file the petition. The period of investigation (or "POI") is based on the month in which the petition is filed and will determine the sales used to measure dumping or net subsidies and the relevant exchange rate.
- What countries should be covered by the action? For example, if two or more countries are covered by simultaneous AD or CVD petitions, the ITC has the authority to consider the impact of imports on a cumulative basis. Also, prosecution of the case may be more efficient.
- Should the petition allege that home market sales are inadequate? If home market sales amount to less than 5 percent of sales to the largest third-country market, the statute provides for the use of third country prices or production costs as the basis for the dumping comparison.[58]
- Should the petition allege that home market prices are below cost? If market prices in the country of exportation are below the full cost of production, "constructed value" will typically be used as the basis for the dumping comparison.[59]

Turning to the "material injury" portion of the case, most trade cases involve one or more of the following factors: Imports are increasing or are maintaining a substantial market share; import prices are below domestic producer prices and are either causing price depression or preventing domestic producers from raising prices; and domestic producers are either sacrificing market share and sales volume to lower priced imports, or they are reducing prices (and consequently profits) to maintain their sales volume.

The situation in which the industry finds itself is often a result of the relative level of fixed costs. In industries with relatively high fixed costs, companies will attempt to maintain their production volume to spread the fixed costs over as many units as possible. In such cases, if imports are

[58] 19 U.S.C. §§ 1677b(a)(1) and (a)(4).
[59] 19 U.S.C. § 1677b(b).

causing material injury, one will generally find that imports depress domestic producers' prices and drive down per-unit profits. Alternatively, the industry may have relatively lower fixed costs and, therefore, will sacrifice sales volume to maintain profit levels. Such companies will typically suffer declining sales and market share.

Additional factors impacting counsel strategy include the current state of the economy, the number of U.S. and foreign producers, and the importance of the product to end users and downstream industries. These factors will affect the issues that arise during the investigation as well as the resources needed to participate effectively. The sheer number of parties involved in the investigation affects the costs of the proceeding. If the product accounts for a very large portion of the costs of end users, the client's own customers may strongly oppose the case and attempt to pressure the company to carve out exclusions from the scope or otherwise weaken the effectiveness of the case. Counsel should anticipate these events and assist the company to prepare a response to such customer demands.

The Changing Face of International Trade Law

The basic statutes establishing U.S. international trade law have been in place for many years. The fist countervailing duty law was established in 1897.[60] The first antidumping law was enacted in 1921.[61] The current AD and CVD statutes were enacted as the Tariff Act of 1930. The Escape Clause and Section 301 were created by the Trade Act of 1974. These statutes have been regularly amended by Congress and interpreted by the courts.[62] Some of the most important changes, however, arise because the agencies that administer the law from time to time change their interpretation or practice.

[60] Section 5 of the Tariff Act of July 24, 1897, 30 Stat. 205. This statute was re-enacted essentially without change in 1909, 1913, 1922, 1930, and 1974. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, n.8 (1978).
[61] An Act of May 21, 1921, C. 14, 42 Stat. 9, Pub. L. 67-10.
[62] The Tariff Act of 1930 was substantially overhauled by the Trade Agreements Act of 1979. The 1979 Act, in turn, has been amended in 1984, 1988 and 1994.

For example, in 1984, the Commerce Department interpreted the CVD law such that it could not be applied to communist (non-market economy) countries.[63] This interpretation was affirmed by the courts.[64] And, as recently as 2002, Commerce refused to apply the CVD law to imports from a non-market country.[65] Just this year, however, Commerce has changed its interpretation, at least in the context of applying the CVD law to imports from the People's Republic of China.[66]

Although the application of the CVD law to China may still face court appeals, and many issues are yet to be resolved, already six CVD cases are pending against China.[67] In the short term, it is safe to say that additional CVD cases may be directed at imports from China, particularly because the last five-year plan identifies various industry sectors targeted by the government of China for support.

The ability to apply the CVD law to imports from China is a major development, in part, because the AD law has lacked effectiveness in certain circumstances. In part because Chinese companies do not maintain their books and records according to Western Generally Accepted Accounting Principles, it has proven difficult to verify whether data reported in AD cases are accurate. Because a CVD case deals with government programs providing benefits to a particular industry, building the factual case to show the existence of a program and the amount of the subsidy may, as a practical matter, prove to be a more effective remedy.

Another major development has been the impact of WTO dispute panel and Appellate Body decisions on U.S. trade law. In the Uruguay Round,

---

[63] *See Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. 19370 (May 7, 1984) (final negative CVD determination) and *Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. 19374 (May 7, 1984) (final negative CVD determination).

[64] *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

[65] In *Sulfanilic Acid from Hungary*, 67 Fed. Reg. 60,223 (Final) (2002), Commerce found that a cash grant (as well as assumption of environmental liabilities) was not countervailable even though it was bestowed only six months before Hungary was deemed to be a market economy.

[66] *Coated Free Sheet Paper from the People's Republic of China*, 72 Fed. Reg. 60,645 (Oct. 25, 2007) (Final CVD Deter.).

[67] Pending CVD investigations cover imports of raw flexible magnets, thermal paper, laminated woven sacks, light-walled rectangular pipe and tube, off-the-road tires, and circular welded carbon steel quality pipe from China.

which established the World Trade Organization (WTO),[68] the United States agreed to a stronger, more binding dispute resolution process. Disputes concerning the application of AD or CVD measures are subject to resolution under the procedures of the WTO Antidumping Agreement or the Subsidies and Countervailing Measures Agreement[69] as well as the procedures generally applied under the WTO Dispute Settlement Understanding (DSU).[70] Over the years since the WTO was created, many U.S. determinations have been reversed by WTO panel or Appellate Body opinions.

For example, the WTO Appellate Body ruled that the so-called "Byrd Amendment," which provided for the distribution of AD and CVD duties to affected U.S. producers, was inconsistent with the WTO Antidumping Agreement.[71] Consequently, Congress repealed the Byrd Amendment in 2006.[72]

In another line of cases, involving so-called "zeroing," the WTO Appellate Body ruled that AD margins must be offset to the extent that foreign-producer sales of the same product during the same period were not dumped.[73] That is, an average AD margin must include both dumped and non-dumped sales. This ruling changed the manner in which the U.S.

---

[68] The Uruguay Round concluded with the notification of acceptances of the Final Act embodying the Results of the Uruguay Round of Multilateral Trade Negotiations Done at Marrakesh on 15 April 1994, *reprinted in* H. Doc. 103-316, vol. 1 at 1324 *et seq.* (1994).

[69] The procedures are found in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, *reprinted in* H. Doc. 103-316, vol. 1 at 1453 (1994) (hereinafter, Antidumping Agreement), and the Agreement on Subsidies and Countervailing Measures, *reprinted in* H. Doc. 103-316, vol. 1, 1533 (1994) (hereinafter, SCM Agreement).

[70] Understanding on Rules and Procedures Governing the Settlement of Disputes, *reprinted in* H. Doc. 103-316, vol. 1 at 1654 (1994).

[71] *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, AB Report AB-2002-7, 16 January 2003.

[72] The Byrd Amendment was repealed by Section 7601 of the Deficit Reduction Omnibus Reconciliation Act, Pub. L. No. 109-171, 120 Stat. 4 (Feb. 8, 2006).

[73] *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"),* WT/DS294/AB/R, AB Report AB-2006-2, 18 April 2006 (06-1768); *United States—Measures Relating to Zeroing and Sunset Reviews,* WT/DS322/AB/R, AB Report AB-2006-5, 9 January 2007 (07-0081).

Commerce Department calculates AD margins, reducing AD margins calculated in AD investigations.[74]

Other issues determined by WTO dispute resolution panels have been adverse to U.S. law and U.S. interests. In the current Doha Round WTO negotiations, therefore, the Byrd Amendment and "zeroing" may be revisited, as well as several other issues.

More importantly, there is also the potential that the Doha Round will revisit and possibly change the standard of review that is applied to disputes arising under the WTO Agreements. Such a change could alter significantly the impact of dispute panel rulings.

Currently, Article 17.6 of the Anti-Dumping Agreement distinguishes the standards of review applied to factual evidence and conclusions from the standards applied to questions involving interpretation of the Agreement. With respect to questions of fact, the WTO panel is instructed to determine "whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective." With respect to questions of interpretation, the panel in the first instance applies "customary rules of interpretation of public international law."[75] If, however, the Agreement "admits of more than one permissible interpretation," then the panel should uphold any particular construction "if it rests upon one of those permissible interpretations."[76]

The United States, in the Statement of Administrative Action implementing the Uruguay Round Agreements Act, took the view that the standard for review by panels was "analogous to the deferential standard applied by U.S. courts in reviewing actions by Commerce and the Commission."[77] However, the results of dispute settlement under the WTO Agreements have led to widespread criticism that decisions under the Antidumping Agreement have not been reviewed under a deferential standard.

---

[74] Because Commerce would exclude non-dumped sales when calculating a weighted-average AD margin, eliminating "zeroing" means that the non-dumped sales will offset any dumped sales. Hence, the weighted-average dumping market can only be reduced by this methodology.

[75] Art. 17.6(i), Antidumping Agreement, *reprinted in* H. Doc. 103-316, vol. 1 at 1473.

[76] Art. 17.6(ii), Antidumping Agreement, *reprinted in* H. Doc. 103-316, vol. 1 at 1473.

[77] H. Doc. 103-316, vol. 1 at 818.

Consequently, U.S. companies have expressed a great deal of interest in revising the standard of review that is used by WTO dispute panels.

The Doha Round negotiations also include a number of potential amendments to the trade laws, such as the lesser-duty rule and mandatory sunset review provisions. Under the lesser-duty rule, countries imposing AD or CVD duties would be required to limit the amount of any duty imposed to the amount necessary to eliminate injury, up to the actual amount of dumping or the net subsidy. Under a mandatory sunset provision, AD and CVD orders would terminate after a specified number of years. These and many dozens of other proposals have been tabled for discussion in the Doha Round negotiations.

The outcome of the Doha Round, therefore, may change the U.S. statutes implementing the WTO Agreements. In the end, however, the friction that arises when tariffs are reduced is not likely to subside for many years. As countries gradually reduce and eliminate their tariffs, various industries will be exposed to a greater degree of international competition. Increased levels of international competition tend to produce winners and losers. Hence, companies that see their revenues falling, that lay off their workers or that cannot raise capital will seek legal remedies to address international competition. Thus, even as international trade rules evolve, nations will continue to make and use those rules.

James R. Cannon Jr. is a partner in the International Section at Williams Mullen. Based in the firm's Washington, D.C., office, Mr. Cannon focuses his practice on diverse international trade matters including antidumping and countervailing duty cases, market access proceedings, foreign acquisitions, foreign and domestic antitrust regulation and competition policy, and various customs matters. Mr. Cannon assists clients in opening foreign markets for their exports, obtaining tariff concessions, preserving the protection of U.S. tariffs, and obtaining harmonized rules of origin. Mr. Cannon has assisted clients to obtain benefits under the NAFTA, various regional agreements, and the World Trade Organization agreements.

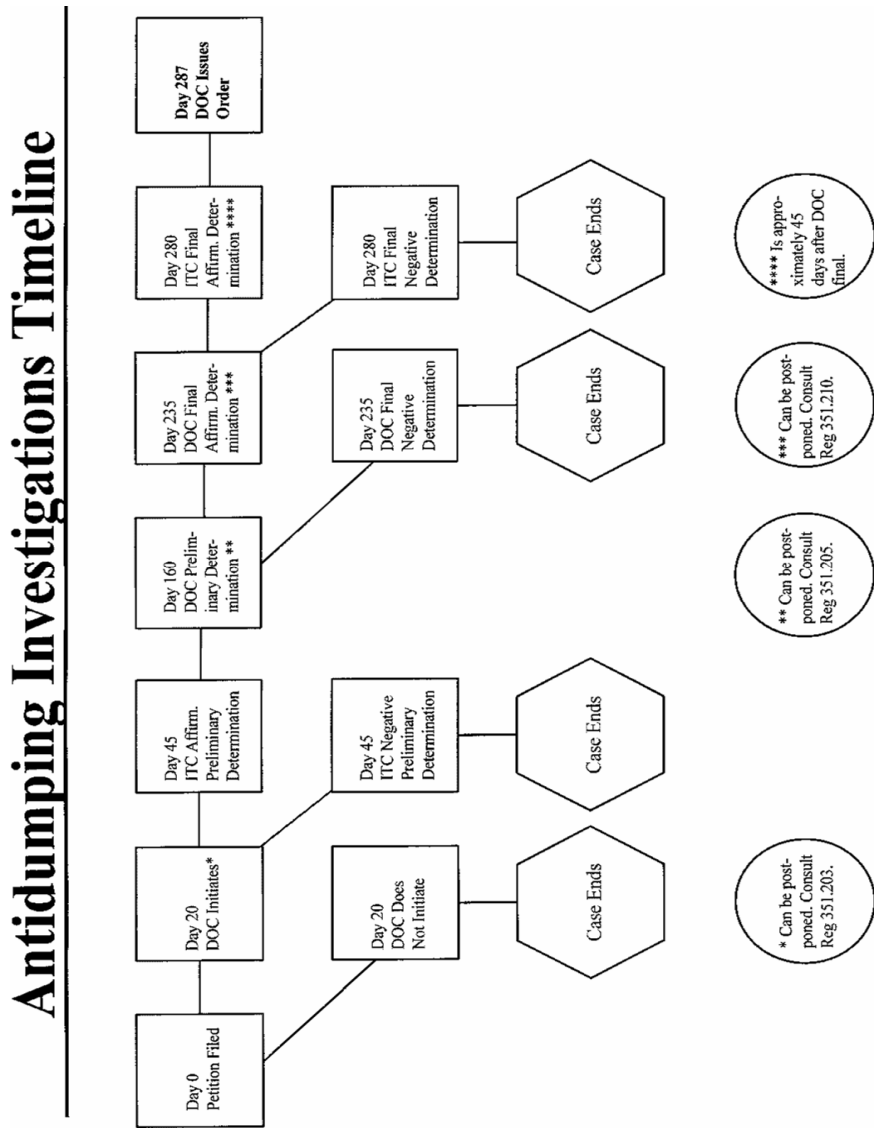
Mr. Cannon is a member of the American Agricultural Law Association; International and Administrative Law Sections of the American Bar Association; Board of Directors and Chairman of the Judicial Selection Committee for the Customs and International

Trade Bar Association; District of Columbia Bar; and Federal Circuit Bar Association. Additionally, he is the author of numerous publications and articles.

He received his B.A. from the University of Virginia (1979) and his J.D. from Washington College of Law at American University (1982).

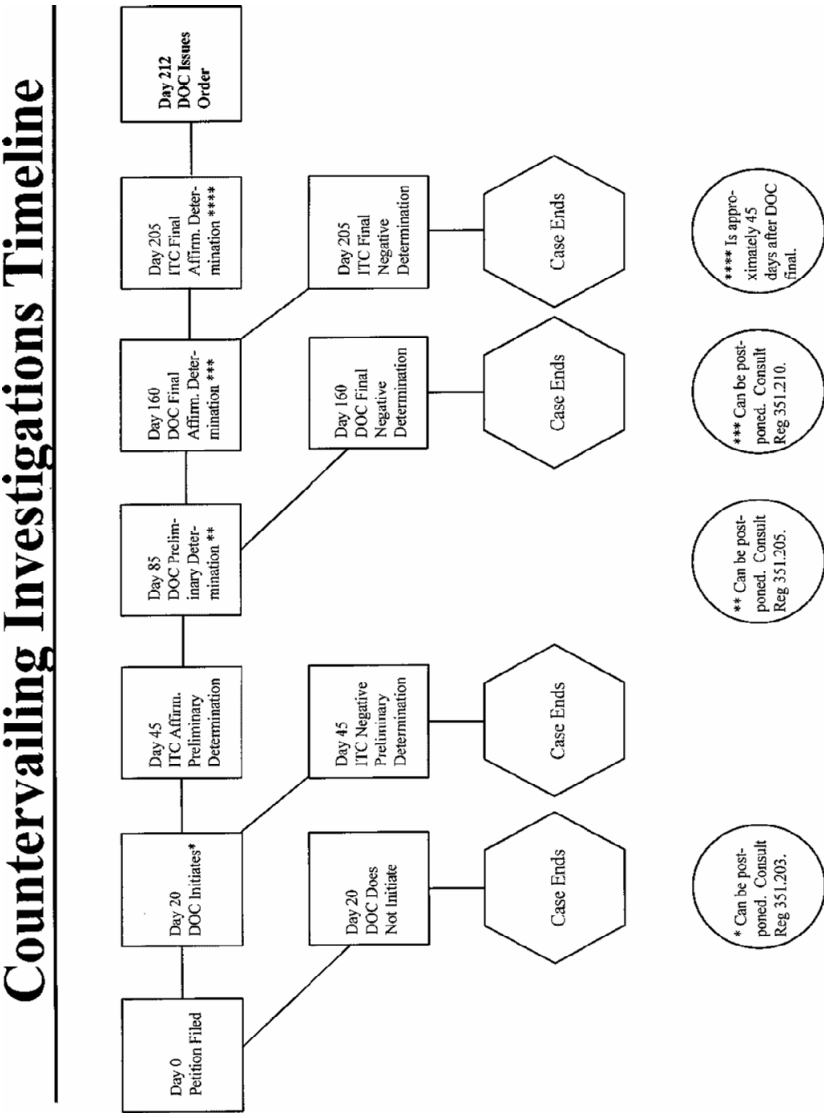
APPENDIX A

ANTIDUMPING INVESTIGATIONS TIMELINE



APPENDIX B

COUNTERVAILING INVESTIGATIONS TIMELINE



APPENDIX C

AD INVESTIGATION INITIATION CHECKLIST

IMPORT ADMINISTRATION
AD INVESTIGATION INITIATION CHECKLIST

SUBJECT:

CASE NUMBER:

PETITIONER:

COUNSEL TO PETITIONER:

POTENTIAL RESPONDENTS:

SCOPE:

IMPORT STATISTICS:

QUANTITY (Kilograms)[78]

COUNTRY	2003	2004	2005	2005 YTD	2006 YTD

CUSTOMS VALUE ($US)

COUNTRY	2003	2004	2005	2005 YTD	2006 YTD

APPROXIMATE CASE CALENDAR:

Event	No. of Days	Date of Action	Day of Week
Antidumping Duty Investigation			
Petition Filed	0		
Initiation Dave	20		
ITC Preliminary Determination	45		
ITA Final Determination*	235		
ITC Final Determination**	280		
Publication of Order***	287		

*This will take place only in the event of a preliminary affirmative determination from the ITC.

**This will take place only in the event of a final affirmative determination from the Department of Commerce (the Department).

***This will take place only in the event of a final affirmative determination from the Department of the ITC.

Note: ITC final determination will take place 45 days after a final affirmative ITA determination.

[78] Source: U.S. International Trade Commission (ITC) Dataweb available at (http://dataweb.usitc.gov)

Note: Publication of order will take place 7 days after an affirmative determination by the ITC.

INDUSTRY SUPPORT: (See Attachment II for discussion)

Do Petitioner and those expressing support for the Petition account for more than 50% of production of the domestic like product?

__ Yes
__ No

If No, do those expressing support account for the majority of those expressing an opinion and at least 25% of domestic production?

__ Yes
__ No – do not initiate
__ Not Applicable

Describe how industry support was established – specifically, describe the nature of any polling or other step undertaken to determine the level of domestic industry support.

See Attachment II below for a discussion of industry support.

Was there opposition to the Petition?

__ Yes
__ No (See Attachment II)

Are any of the parties who have expressed opposition to the Petition either importers or domestic producers affiliated with foreign producers?

__ Yes
__ No
__ Not Applicable

INJURY ALLEGATION: (See Attachment III for discussion)

Does the Petition contain evidence of causation? Specifically, does the Petition contain information relative to:

__ volume and value of imports (See Volume I of the Petitions at page 19-20, and Exhibits I-9, I-11, I-12, and I-14, and Supplement to the Petitions, dated November 9, 2006, at responses 13-15 and Exhibit 8.)

__ U.S. market share (i.e., the ratio of imports to consumption) (See Volume I of the Petitions at pages 19-21 and Exhibits I-2 and i-14, and Supplement to the Petitions, dated November 9, 2006, at response 1, and Exhibits 1 and 8.)

__ actual pricing (i.e., evidence of decreased pricing) (See Volume I of the Petitions at pages 21-24, and Exhibit I-16, and Supplement to the Petitions, dated November 9, 2006, at response 16.)

__ relative pricing (i.e., evidence of imports under-selling U.S. products)(See Volume I of the Petitions at pages 21-23, and Supplement to the Petitions, dated November 9, 2006, at response 16.)

PETITION REQUIREMENTS:

Does the Petition contain the following?:

__ The name and address of Petitioner (See Volume I of the Petition at Exhibit I-1.)

__ The names and addresses of all domestic producers of the domestic like product known to the petitioning company (See Volume I of the Petition at Exhibit I-1.)

__ The volume of the domestic like product produced by Petitioner and each domestic producer identified for the most recently completed 12 month period for which data is available (See Volume I of the Petition at Exhibit 2 – Petitioner's estimate of the volume of the other domestic producers' production using [ ].[79]

Was the entire domestic industry identified in the Petition?

__ Yes (See Volume I of the Petition at Exhibits I-1 and I-2 listing

all domestic producers known to Petitioner)

__ No

__ a clear and detailed description of the merchandise to be investigated, including the appropriate Harmonized Tariff Schedule of the United States ("HTSUS") numbers. (See Volume I of the Petition at pages 3-5.)

__ the name of each country in which the merchandise originates or from which the merchandise is exported (See Volume I of the Petition at page 6.)

__ the identity of each known exporter, foreign producer, and importer of the merchandise (See Volume I of the Petition at page 6, and Exhibits I-5 and I-8.)

__ a statement indicating that the Petition was filed simultaneously with the Department of Commerce and the International Trade Commission (See Cover Letter to the Petition, dated October 31, 2006.)

__ an adequate summary of the proprietary data (See Cover Letter to the Petition, dated October 31, 2006.)

[79] According to Petitioner [ ]. Further, Petitioner notes that [ ].

__ a statement regarding release under administrative protective order (See Cover Letter to the Petition, dated October 31, 2006.)

__ a certification of the facts contained in the Petition by an official of the petitioning firm(s) and its legal representative (if applicable) (See Cover Letter to the Petition, dated October 31, 2006, and Exhibit 1 of the Petitioner's November 9, 2006 Supplement to the Petition.)

__ import volume and value information for the most recent two-year period (See Volume I of the Petition at Exhibit I-14.)

LESS THAN FAIR VALUE ALLEGATION:

__ support documentation for the alleged prices, surrogate country data or costs and claimed adjustments.

__ any market research reports including affidavits referring to sources and how information was obtained. (N/A for market research reports but yes to affidavits).

__ current price data (no more than one year old).

__ price and cost data from contemporaneous time periods.

__ correct currency rates used for all conversions to U.S. dollars.

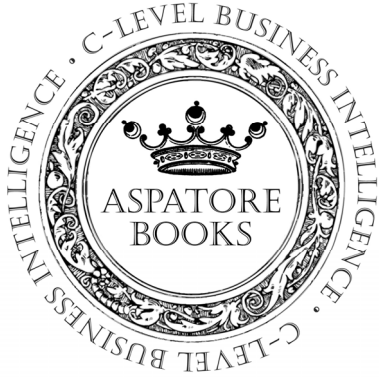
__ conversion factors for comparisons of differing units of measure

www.Aspatore.com

Aspatore Books is the largest and most exclusive publisher of C-Level executives (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies and law firms. Aspatore annually publishes a select group of C-Level executives from the Global 1,000, top 250 law firms (Partners & Chairs), and other leading companies of all sizes. C-Level Business Intelligence™, as conceptualized and developed by Aspatore Books, provides professionals of all levels with proven business intelligence from industry insiders – direct and unfiltered insight from those who know it best – as opposed to third-party accounts offered by unknown authors and analysts. Aspatore Books is committed to publishing an innovative line of business and legal books, those which lay forth principles and offer insights that when employed, can have a direct financial impact on the reader's business objectives, whatever they may be. In essence, Aspatore publishes critical tools – need-to-read as opposed to nice-to-read books – for all business professionals.

Inside the Minds

The critically acclaimed *Inside the Minds* series provides readers of all levels with proven business intelligence from C-Level executives (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies. Each chapter is comparable to a white paper or essay and is a future-oriented look at where an industry/profession/topic is heading and the most important issues for future success. Each author has been carefully chosen through an exhaustive selection process by the *Inside the Minds* editorial board to write a chapter for this book. *Inside the Minds* was conceived in order to give readers actual insights into the leading minds of business executives worldwide. Because so few books or other publications are actually written by executives in industry, *Inside the Minds* presents an unprecedented look at various industries and professions never before available.


C-LEVEL BUSINESS INTELLIGENCE •
C-LEVEL BUSINESS INTELLIGENCE •
ASPATORE
BOOKS