

NOTE FROM THE FIELD**Being an ADD/CVD Trade Remedies Litigator**

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Trade remedy litigation lies at the intersection of law, trade policy, economics, accounting, and even computer programming. Consider the requirements for trade remedy relief: a showing of dumping (unfair pricing) and/or subsidy, and causing or threatening injury to the competing U.S. industry. As a rule, the injury side of the case, before the ITC, is heavily economic and involves working closely with industry personnel to provide the needed background and data, and often with expert economists. The dumping/subsidy side of the case, before the U.S. Department of Commerce, is more variable, depending on such factors as the nature of the investigated products, the sales process and accounting records, and the number of exporting firms and/or subsidy programs investigated. But in a case of any size, the determination of the amount of dumping or subsidy is likely to involve working with company and/or government personnel to learn the basic facts, accountants and perhaps economists to evaluate the amount of the dumping or subsidy, and possibly programmers to mimic the Commerce Department's margin calculations.

In addition to orchestrating all of the above, the lawyers also have an advocacy role to play. Trade remedy cases take place within a complex environment of statutes, regulations, agency policies and practices, administrative and court precedent, and international obligations. In addition, many trade remedy cases involve a trade policy component — possibly including lobbying Congress, meeting with agency personnel, and so forth — and sometimes even working with the media and public affairs personnel.

The role of counsel for a petitioner is different from the role of counsel for a respondent. The petitioner is typically a trade industry association or group of companies. Petitioner's counsel may need to help organize and work with a, possibly large, group of companies or association members with varying interests and agendas. The petitioner is responsible for initially providing to the ITC and Commerce the data and information on which the request for import relief is based. Then, if the case is initiated, the petitioner's counsel turns to analyzing the data provided by the respondents, and arguing about its sufficiency and implications.

Respondent's counsel in an antidumping case may represent an individual company, several companies, or an entire industry association. In a subsidy case, respondent's counsel may represent an individual company, an industry association, or a government accused of providing a subsidy. Although U.S. importers of foreign products are technically liable for paying antidumping or countervailing duties, where the importer and foreign manufacturer are different, the latter is usually the real party in interest. Consequently, respondent's counsel generally will have to cope with differences in language and culture, records and accounting systems, ways of doing business, and expectations about the nature of legal proceedings and trade rules.

Trade remedy cases proceed in distinct although overlapping phases, each with its own set of activities and roles for the lawyers. In simplified terms, these include:

- Develop information on injury, possibly including expert reports, and respond to ITC questionnaires served on both domestic and foreign producers.
- Brief and argue the injury issue before the ITC. (This occurs on a preliminary basis at the very beginning of the case and then on a final basis based on a more complete and current record at the very end of the case.)
- Gather information on dumping or subsidy case, primarily through questionnaires served by the Commerce Department on the accused foreign industry and/or government. This will often involve a considerable amount of travel and meeting with client officials.
- For respondent's counsel, prepare the client for, and participate in, a verification (in the nature of an audit) of the Commerce questionnaire responses. Again, this will involve a considerable amount of travel, as well as interaction with a wide range of client personnel who might be called on to provide information to or meet with Commerce's investigators.
- Brief and argue the implications of the dumping and subsidy information.
- Of course, if import relief is granted, all of this may be followed by appeals as well as possible dispute resolution before the WTO.

Trade remedy cases are fast-paced and, at times, intense. Both the ITC and Commerce proceedings are subject to procedural rules and deadlines, many imposed by statute. While the agencies are flexible and try to be reasonable, they often have relatively little leeway. Thus, for a respondent, gathering the needed data with sufficient accuracy from companies that do not keep information in the format demanded by Commerce and that may not keep records to U.S. standards can be quite difficult in the limited time available. For the petitioner, understanding and then evaluating the information provided by the respondent can also be difficult in the time allowed.

Most trade remedy lawyers do not have an extensive accounting or economics background. Most pick up what they need through experience and get the rest from the expert consultants. A good trade remedy lawyer is a good litigator who can analyze complex factual situations and legal precedent and explain those clearly to the agencies and courts. Trade remedy litigation requires considerable organization and management skills. It is not for those who like to jump from issue to issue or case to case. There are frequent critical deadlines and other procedural and substantive requirements. Working with clients requires constant communication and monitoring to make sure the deadlines will be met. There is little margin for error.

It is also important to be conscious that trade remedy litigation can be highly disruptive for the client. Substantial time from knowledgeable personnel is required to provide, verify, and analyze the questionnaire responses. These are often employees, including top management, with many other duties that are

essential to the business. Consequently, a good trade remedy lawyer must have good people skills and the ability to communicate well with personnel from the business world, often from other cultures.

Finally, trade remedy cases are fun and interesting to litigate for two further reasons. First, they take place in the context of important larger policy issues. For example: What is a subsidy and how should it be measured? Should non-market economies, such as China, be subject to special dumping methodologies and to the countervailing duty law? How should prices be fairly compared in an antidumping calculation? What is the role of antidumping law in a modern economy? Second, these cases are often of critical importance to the client. For both the petitioner and respondent, the results of a trade remedy case may determine the economic viability of a product, a company, or even an industry. It may affect the employment of thousands of workers, as well as impact supply chains and downstream costs and production throughout the world. Your work may make that difference.

James B. Altman and John R. Magnus are members of Miller & Chevalier Chartered in Washington, D.C. Mr. Altman has nearly 20 years of experience litigating trade remedy cases, including the largest and most contentious trade remedies cases ever litigated. Mr. Altman is currently Secretary of the ITC Trial Lawyers Association. John R. Magnus has 17 years of experience litigating and advising on trade remedy cases in a wide variety of industries. Miller & Chevalier specializes in international, tax, and government contract law, and has one of the most sophisticated trade remedies litigation practices in the country.

Key Vocabulary

1930 Tariff Act	International Trade Administration (ITA)
Administrative Law Judge (ALJ)	International Trade Commission (ITC)
Amber box subsidies	Less than fair value (LTFV)
Antidumping (AD)	Market segmentation
Antidumping duties (ADDs)	Material injury
Bond	North American Free Trade Agreement (NAFTA)
Countervailing duties (CVDs)	NAFTA Chapter 19 panel
Court of International Trade (CIT)	NAFTA Extraordinary Challenge Committee (ECC)
Cumulation	Predatory pricing
<i>De minimis</i>	Red box subsidies
Domestic industry	Return on investment (ROI)
Domestic like product	Subsidy
Dumping	Sunset review
Dumping margin	
Green box subsidies	
Infant industry	