

DEFENSE OF A 5-YEAR “SUNSET” REVIEW

1. What are five-year (sunset) reviews?

The Uruguay Round Agreements Act, approved in late 1994, amended the antidumping and countervailing duty laws in several respects. One of the most significant changes is the provision requiring the Department of Commerce and the International Trade Commission to conduct reviews no later than five years after an antidumping or countervailing duty order is issued to determine whether revoking the order would be likely to lead to continuation or recurrence of dumping or subsidies (Commerce) and of material injury (Commission).

This requirement resulted in reviews of all outstanding antidumping and countervailing duty orders in existence as of January 1, 1995, over a three-year "transition period" that began in July 1998 and ended in June 2001. Original first reviews of antidumping and countervailing duty orders issued after January 1, 1995, are conducted five years after the effective date of the original order. Subsequent reviews (i.e., second reviews, third reviews, etc.) are conducted five years after the effective date of any continuation order.

2. How will reviews proceed?

Five-year reviews of all antidumping and countervailing duty orders that are issued after January 1, 1995, including any continuation orders, are initiated by the Department of Commerce (“Commerce”) by approximately 30 days prior to their five-year anniversary.

Commerce conducts an initial analysis of the sunset review by evaluating the following: (1) the interest of the domestic industry in continuation of the orders; (2) the non-responsiveness of foreign exporters in participating in reviews; and (3) the adequacy of the responses by both domestic and foreign interested parties.

All parties wishing to participate in the sunset review must file a substantive response no later than 30 days after the date of publication of the initiation notice. Substantive responses must include certain specific information as identified in Commerce’s regulations and procedures manuals. Commerce makes an active determination with respect to the adequacy of the substantive response(s) submitted by domestic and respondent interested parties. For domestic interested parties, the Department will consider it an adequate response if at least one domestic interested party submits a complete substantive response. For respondent interested parties, the Department will consider it an adequate response if the respondent interested parties submit complete substantive responses, and account on average for more than 50 percent by volume (or value, if appropriate), of the total exports of subject merchandise to the United States during the 5-year sunset review period. Where there are no exports from the country, the Department has usually found the substantive response of respondent interested parties inadequate.

If the substantive response(s) are adequate, the Department shall conduct a full sunset review which normally takes 240 days to complete. If the domestic interested party substantive response is inadequate, the Department will issue a final determination revoking the order (or terminating the suspended investigation) no later than 90 days after the initiation notice. If the respondent interested party substantive response is inadequate, the Department will conduct an

expedited sunset review, and issue a final determination no later than 120 days after the initiation notice.

Simultaneously, the International Trade Commission (“ITC”) will institute its five-year review and set its schedule in a published Federal Register notice that will be effective the same day as the Commerce’s initiation of the five-year review. The ITC's notice in each review is made available to trade practitioners and can assist counsel in preparing their clients for the review process.

Approximately 95 days after publication in the Federal Register of the ITC’s notice of institution of the five-year review, the ITC will decide whether to conduct a full or expedited five-year review. If the ITC decides to conduct a full five-year review, it will typically complete the review within 360 days of initiation. However, if interested party responses to the ITC's notice of institution are inadequate, the ITC can make an expedited determination within 150 days. Both Commerce and the ITC have the authority to extend these deadlines by up to 90 days in all transition reviews and other extraordinarily complicated cases.

In five-year reviews, the ITC determines whether revocation of the antidumping or countervailing duty order would be likely to lead to continuation or recurrence of material injury to the U.S. industry. If the ITC’s determination is affirmative, the order will remain in place. If the ITC’s determination is negative, the order will be revoked.

The central tasks to be performed by a foreign company's legal counsel in these 5-year or sunset reviews include the following:

- Collect data on the U.S. market for the subject product and the levels of domestic production, consumption, and imports;
- Develop theories of the case to refute any allegations that the U.S. industry continues to be materially injured and that imports continue to be a cause of injury, including consultations with the foreign manufacturer, its U.S. importers, and its customers;
- Assist the foreign producer and its importers to respond to ITC questionnaires;
- Evaluate data submitted by U.S. producers and compare their responses with foreign producers' data to further develop and support theories of case;
- Prepare presentation for ITC hearings, including coordinating with other respondents' counsel, working with economists, and preparing witnesses to support theories; participate in the ITC hearings;
- Draft and file post-hearing briefs to the ITC, which may require preparation of affidavits of company officials, importers, and/or customers.

The Law Offices of Nithya Nagarajan, LLC can assist your company in preparing all responses and arguments to ensure that all factors considered by the DOC and ITC are fully explained such that your company can present arguments in the most favorable light and increase the chances of success.