

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 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.

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.