

6 Reasons To Get Involved In ITC Injury Investigations

Law360, New York (September 02, 2014, 8:41 AM ET) --

Global sourcing is the norm for many U.S. industries. So what should a company do when its foreign source for a key product or input is named as respondent in an antidumping or countervailing duty investigation that could lead to additional tariffs on imports from affected countries? One option is to focus on a sourcing contingency plan and let the domestic and foreign producers fight the case among themselves. Often, however, there are good reasons for purchasers to get more directly involved. Here are a few to consider:

1. Respondents win at the ITC almost half the time, so it makes sense to invest in creating the record to support that outcome.

Between 1980 and 2014, the ITC ruled against the domestic petitioners in 49 percent of cases decided on the merits, finding no injury or threat of injury.[1] Fair odds to win mean ITC injury investigations are almost always worth contesting. A high level of participation, a complete factual record, and a compelling narrative give the ITC both the information it needs to rule in favor of responding parties and the confidence that it can successfully defend that decision on appeal. Importers and foreign producers can do a lot of the heavy lifting, but purchasers may have unique information to contribute, as the following examples illustrate.

2. The customer is (almost) always right — especially when raising valid complaints about a U.S. supplier's poor product quality or customer service.

In industries where quality or service plays a key role in who gets a sale, the ITC gives a lot of weight to purchaser testimony and experience. Often in injury investigations, the result hangs on whether purchasers turned to imports because they are cheaper than the domestic product or because they are better. If purchasers accounting for a significant share of demand can make a strong case that they prefer to buy imports for reasons other than price, they will often carry the day. In Refrigerators,[2] purchaser/retailers persuaded the commission that they bought more Samsung and LG refrigerators due to better styling and features, not because they were discounted more than Whirlpool's. In Sodium Metal[3] and Calendar Slides,[4] purchasers convinced the commission that product defects, missed deliveries, and poor customer service from the sole domestic supplier forced them to seek imported alternatives, regardless of price.



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3. Purchasers are the experts when it comes to how market segmentation affects competition.

In a trade remedy proceeding, the petitioner works with Commerce to define the scope of products subject to investigation, and the ITC defines the competing domestic like product. Sometimes these categories are broad, covering products with a range of features and intended end uses. A chemical product, for instance, may be used to make pharmaceuticals, pet food, and household cleaners — but not every batch with the same chemical formula can be used in all three applications.

In these situations, it is not uncommon for a domestic producer to claim that subject import competition prevents it from selling into certain market segments when in fact it hasn't made a product suitable for that segment in many years, if ever. When purchasers get involved, they can set the record straight on whether one or more domestic producers is a true competitor in a particular market segment. The commission has reached negative determinations premised on market segmentation or attenuated competition between domestic and subject products in cases like Coated Free-Sheet Paper,[5] Steel Wheels[6] and Silica Bricks.[7]

4. When retailers or end users import directly, they can be the best sources of price comparison information.

Normally, the ITC looks to see whether subject imports are underselling the domestic like product by comparing domestic producer and importer prices for the first arms-length sale in the United States. When retailers or end users import the subject product directly, without using unrelated importers as middlemen, the commission cannot make that comparison, because domestic producers and direct importers are not selling to customers at the same level of trade. If a large purchaser (or group of purchasers) can show that it is paying about the same or more for subject imports as it pays its domestic suppliers, persuading the ITC to rely on purchaser pricing data can be a winning strategy.

As direct imports by purchasers become the norm in many product sectors, the ITC is getting more comfortable with comparisons based on what purchasers pay for domestic and imported products. For example, in Glycine,[8] the commission relied on prices paid to domestic and foreign suppliers by Nestle, one of the largest U.S. users, to find that customers switched away from the domestic supplier due to unreliability rather than price, even though other record evidence showed underselling by subject imports.

5. In the aftermath of bidding wars for high-stakes contracts, the purchaser with a compelling narrative can have the final say.

In markets where there are only a few large customers and business is awarded through annual or multiyear contracts, the stakes in every bidding contest are great and emotions among potential suppliers tend to run high. In such cases, it is not unusual for the competing domestic and foreign suppliers to offer radically different accounts of how the bidding process was conducted, what the customer said it wanted, or how the products and prices offered compared. This leaves the ITC with a he-said/she-said dilemma where the commissioners need to decide whose version of the story to believe.

The purchaser's account of what happened — always under oath and preferably through live testimony — can be key to breaking the deadlock. That is why, when a purchaser picks an imported product over a domestic one after taking bids for a major contract, it makes sense to provide the ITC with as much detail as possible about any nonprice factors that drove the selection. In Ni-Resist Piston Inserts,[9] for

instance, major purchaser Karl Schmidt convinced the commission that petitioner's proposed raw material surcharge formula was so out-of-line with industry norms as to justify awarding a contract to its Argentine supplier. In Refrigerators, a large retailer successfully justified its switch from domestic to Korean sourcing based on the foreign supplier's unique ability to provide product features sought by consumers.

6. Purchasers can participate in a targeted and cost-effective way, because they don't have to dispute every issue in the ITC investigation.

Unlike domestic producers, foreign producers and importers, purchasers are not formal parties to a trade remedy investigation and don't bear primary responsibility for putting forward arguments to the ITC. Purchaser questionnaires are typically much shorter than party questionnaires and seek a narrower set of information. This leaves purchasers free to focus only on the issues where their information can make a real difference, such as product quality, market segmentation, or pricing. Rather than a full brief, a purchaser can submit a letter or other short written submission, or even use the response to a narrative question in the purchaser questionnaire to make key arguments to the ITC. These modest communications, when directed to disputed factual issues, can be very effective.

Even more effective, when possible, is sending a purchaser witness to the ITC's public hearing. The commissioners welcome the opportunity to hear from and ask questions of purchaser witnesses, and a knowledgeable and credible witness can have an important impact on the outcome of the case. One of the best recent examples was the Home Depot appliance buyer, testifying at the Refrigerators hearing, who led the commissioners from model to model lined up at the side of the room, explaining what features and finishes made particular models best sellers in the retailer's stores. Counting up the number of times the commission's opinion cites this testimony gives a good idea how important it was to tipping the outcome in respondents' favor.

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[1] ITC data show that in 1722 antidumping and countervailing duty investigations instituted between 1980 and 1Q2014, 692 resulted in final affirmative determinations, 667 in preliminary or final negative determinations, and 363 were terminated for other reasons (negative DOC determination, withdrawal of petition, suspension agreement, etc.). By contrast, the Commerce Department rarely finds no dumping or subsidization.

[2] Bottom Mount Combination Refrigerator-Freezers from Korea and Mexico, Inv. Nos. 701-TA-1180-81 and 731-TA-477 (Final), USITC Pub. 4318 (May 2012).

[3] Sodium Metal from France, Inv. No. 731-TA-1135 (Final), USITC Pub. 4045 (Nov. 2008).

[4] Metal Calendar Slides from Japan, Inv. No. 731-TA-1094 (Final), USITC Pub. 8373 (Aug. 2006).

[5] Coated Free Sheet Paper from China, Indonesia, and Korea, Inv. Nos. 701-TA-444-46 and 731-TA-1107-09 (Final), USITC Pub. 3965 (Dec. 2007) (domestic paper sold mostly in rolls cannot be used on the same presses as imported paper in sheets).

[6] Certain Steel Wheels from China, Inv. Nos. 701-TA-748 and 731-TA-1182 (Final), USITC Pub. 4319 (May 2012) (domestic wheels sold mostly to OEMs while imported wheels are sold mostly in the after-market).

[7] Silica Bricks and Shapes from China, Inv. No. 731-TA-1205 (Final), USITC Pub. 4443 (Jan. 2014) (domestic bricks are sold mostly to the glass industry while imported bricks are sold mostly to the steel industry).

[8] Glycine from Japan and Korea, Inv. Nos. 731-TA-1112-13 (Final), USITC Pub. 3980 (Jan. 2008).

[9] Ni-Resist Piston Inserts from Argentina, Inv. No. 701-TA-460 (Final), USITC Pub. 4104 (Oct. 2009).