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Requesters

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INTERNATIONAL TRADE

Pursuit of Trade Law Remedies by Small Business





**United States
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**National Security and
International Affairs Division**

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The Honorable John Glenn, Chairman
Committee on Governmental Affairs
U.S. Senate

The Honorable Dale L. Bumpers, Chairman
Committee on Small Business
U.S. Senate

The Honorable Dan Rostenkowski, Chairman
Committee on Ways and Means
House of Representatives

The Honorable John J. LaFalce, Chairman
Committee on Small Business
House of Representatives

The Omnibus Trade and Competitiveness Act of 1988 (Public Law 100-418) (see app. II) requires GAO to study and report to your committees on the costs of pursuing certain statutory remedies against foreign trading practices. We were required to provide an analysis of the following.

1. Costs incurred by small businesses in pursuing trade law remedies.
2. The extent of assistance and information provided to businesses by the International Trade Commission's (ITC's) Trade Remedy Assistance Office.
3. The ability of small businesses to generate the information and the resources needed to pursue such remedies.
4. The costs and benefits to the federal government of reimbursing small businesses for legal expenses or providing direct legal assistance.

Estimated costs of pursuing trade remedies, based on information furnished by trade lawyers, range widely between \$20,000 and several million dollars. Within this broad range, the average cost estimates for pursuing individual remedies vary significantly. These estimates are based on historical costs of cases under trade law prior to the 1988 changes and are imperfect predictors of future costs for several reasons. These include the effect of the 1988 trade law on the costs of pursuing the various remedies, the prevalence of the relevant foreign practices,

the propensity of the agencies administering the trade laws and the President to grant relief, and the state of the U.S. economy.

Opinions vary on whether small businesses can generate the information and resources to pursue such relief effectively. Trade associations representing small businesses felt that their members were disadvantaged, but trade lawyers and officials of agencies administering the trade remedies were split in their views about whether small firms are disadvantaged.

The Trade Remedy Assistance Center, now called the Trade Remedy Assistance Office, has provided limited technical and legal assistance to help small businesses generate valid petitions. The cost of providing limited legal assistance through the Trade Remedy Assistance Center is about \$56,000 a year. The new trade law extends this help to the period after a small company files a petition.

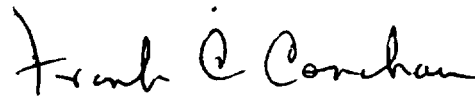
The costs and benefits of the two options for providing more extensive government assistance to small business—that is, direct legal assistance or reimbursement for legal expenses—cannot be readily quantified. ITC's General Counsel expressed concerns about the ITC providing post-petition assistance. These concerns related to conflict of interest, lawyer-client privilege, access to confidential business information, and liability coverage for government lawyers. She said that even providing pre-petition assistance gives rise to these concerns and that the difficulties are magnified when post-petition help is given. Providing direct legal assistance in the form of government lawyers to represent small business petitioners in cases that will ultimately be decided administratively by the government raises similar legal ethics concerns that need to be resolved before this option is pursued. The reimbursement option has both advantages and disadvantages (see app.I, p. 21). Either option, by reducing small businesses' costs to file for trade relief, may increase the number of cases and thus the burden and costs to government agencies administering the remedies. Alternatives to these options have been discussed. One such alternative discussed by ITC and the U.S. Chamber of Commerce would be to create a simpler set of procedures for pursuing trade remedies that small businesses can take advantage of, thus mitigating the administrative burden and costs of an increased caseload. The detailed results of our review are in appendix I.

Because of the statutory deadline, we did not obtain formal written comments on a draft of this report. We informally discussed our findings

with responsible ITC officials and have included their comments where appropriate.

We are sending copies of this report to the International Trade Commission, the Secretary of Commerce, the Office of the United States Trade Representative, and other interested parties. Copies will be made available to others on request.

This review was performed under the direction of Allan I. Mendelowitz, Senior Associate Director. Other major contributors are listed in appendix III.

A handwritten signature in black ink that reads "Frank C. Conahan". The signature is written in a cursive style with a prominent initial "F".

Frank C. Conahan
Assistant Comptroller General

Contents

Letter		1
Appendix I		6
Pursuit of Trade Remedies by Small Business	Costs of Pursuing Remedies	6
	Small Businesses' Ability to Generate the Information and Resources Needed to Pursue Trade Remedies	13
	Information and Assistance Provided by ITC's Trade Remedy Assistance Center	15
	Analysis of Government Assistance to Small Businesses	20
	Objectives, Scope, and Methodology	23
Appendix II		25
Section 8010 of the Omnibus Trade and Competitiveness Act of 1988		
Appendix III		27
Major Contributors to This Report	National Security and International Affairs Division	27
	Office of the General Counsel	27
Tables	Table I.1: Costs for Appealing Antidumping Cases	8
	Table I.2: Costs for Appealing Countervailing Duty Cases	9
	Table I.3: Costs of Pursuing Trade Remedies	13

Abbreviations

CAFC	Court of Appeals for the Federal Circuit
GAO	General Accounting Office
ITC	International Trade Commission
OUSTR	Office of the U.S. Trade Representative
TRAC	Trade Remedy Assistance Center

Pursuit of Trade Remedies by Small Business

Costs of Pursuing Remedies

In response to the Omnibus Trade and Competitiveness Act of 1988, we studied, among other things, the costs of pursuing seven statutory remedies against foreign trading practices. We identified, with the help of specialists in trade law, 26 trade lawyers who have represented petitioners. In interviews, they told us that the costs of pursuing a particular trade remedy vary widely depending on the nature of the specific case. Factors affecting the petitioner's cost include the number of respondent countries and companies, the complexity of the case, the number of products involved and their nature (simple or complex), and how much data is available. Thus, each trade lawyer provided us with a range of costs for pursuing each remedy. Some lawyers said that their billing could be adjusted for small businesses that could not afford their help otherwise. But some lawyers said that lower costs meant less complete legal services for the small business.

Generally, we took the minimum and maximum values of the lawyers' range of cost estimates and averaged them to derive an average cost range for each remedy. We omitted lawyers' estimates that had either an indeterminate lower or upper bound. Because most indeterminate values tended to be large values for the upper bound, our average cost ranges tend to understate the actual costs of pursuing the remedy.

These estimates are based on historical costs of cases under trade law prior to the 1988 changes and are imperfect predictors of future costs for several reasons. These include the effect of the 1988 trade law on the costs of pursuing the various remedies, the prevalence of the relevant foreign practices, the propensity of the agencies administering the trade laws and the President to grant relief, and the state of the U.S. economy.

Descriptions¹ of each remedy and summaries of the lawyers' cost estimates follow.

Protection of Intellectual Property

Section 337 of the Tariff Act of 1930, as amended, has been used primarily as a remedy against thefts or infringements of U.S. intellectual property rights, principally patents, trademarks, and copyrights.

¹We used The Omnibus Trade and Competitiveness Act of 1988: A Straightforward Guide to Its Impact on U.S. and Foreign Business, published by the U.S. Chamber of Commerce, in describing the seven trade remedies.

Before the Omnibus Trade and Competitiveness Act of 1988 took effect, to receive relief, the U.S. company filing a complaint had to demonstrate that a foreign company had infringed its intellectual property rights and that the infringement had substantially injured or threatened to injure its domestic business. The new law no longer requires the complainant to prove injury in most cases. If the International Trade Commission (ITC) decides to grant relief, it can issue a (1) general exclusion order that prohibits the importation of the goods covered by the order, (2) limited exclusion order that prohibits imports of the violating goods made by specified foreign firms, and/or (3) cease and desist order that requires the respondent to refrain from engaging in an unfair practice. The President can disapprove an ITC order within 60 days of its issue date for policy reasons. If the President does not act, the ITC order stands.

The minimum cost estimates for cases under section 337 averaged about \$310,700 and the maximum averaged about \$715,000. Although the costs of an appeal to the Court of Appeals for the Federal Circuit (CAFC) can vary widely, a few lawyers came up with minimum estimates averaging about \$53,000 and maximum averaging about \$65,000.

The section 337 remedy is one of the most expensive kinds of trade relief, because the formal proceedings required resemble patent litigation in a court and because the cases are usually complex. In addition, and in contrast to the other six kinds of trade relief, the complainants and respondents have a greater role in undertaking the investigation. Many of the cases, however, are settled before the administrative law judge conducts hearings, thus mitigating some of the cost. Eliminating the need for the petitioner to prove injury in most cases may reduce expenses.

Antidumping

Section 731 of the Tariff Act of 1930 provides for antidumping duties. Generally, dumping occurs when a country sells goods in the U.S. market at a lower price than in its home market or other export markets. The purpose of the duties is to offset dumping and “level the playing field” between the U.S. industry and its foreign competition rather than to deter dumping or compensate the domestic industry.

After a petition is filed by a domestic industry and accepted by the Commerce Department, Commerce must find that dumping is occurring and measure the extent, and ITC must find that the dumping materially

injures the U.S. industry before duties can be imposed. The duties generally offset the difference between the price of the foreign goods in the U.S. market and the higher price in the country's home market or in other export markets, as calculated by Commerce. During their investigations, both Commerce and ITC hold hearings and make preliminary and final determinations. ITC also sends comprehensive questionnaires to the domestic producers, importers, and customers to obtain information for its injury determination.

The minimum cost estimates for antidumping cases averaged about \$151,000 and the maximum averaged about \$553,300. Consistent with these estimates, the U.S. Chamber of Commerce, in a paper on the antidumping and countervailing duty laws, estimated the cost of pursuing an antidumping case at between \$100,000 and \$500,000.

A few lawyers estimated the range of additional costs to appeal Commerce or ITC determinations to the Court of International Trade and the CAFC and for any requested Commerce yearly administrative reviews of a case (to see if the original duties need to be altered). The averages of their minimum and maximum estimates are shown in table I.1.

Table I.1: Costs for Appealing Antidumping Cases

Place	Minimum	Maximum
Court of International Trade	\$50,000	\$83,000
CAFC	30,000	37,500
Administrative review	42,000	168,900

Antidumping cases are usually expensive because they involve quasi-judicial procedures, two complicated sets of proceedings at both Commerce and ITC, and may require gathering new information about the U.S. industry and on a foreign producer's pricing in its home market that is needed for complex calculations to measure the extent of any dumping.

Countervailing Duty

Title VII and section 303 of the Tariff Act of 1930, as amended, provide for duties that offset subsidies a foreign government may be paying to its industry. Countervailable subsidies enhance the foreign industry's competitiveness in the U.S. market relative to domestic firms.

The procedures for countervailing duty investigations are similar to those of the antidumping law. Commerce must find that an actionable

foreign subsidy exists and calculate its amount and ITC, in many cases, must find that the subsidy materially injures U.S. industry before duties in the amount of the calculated subsidy can be imposed. Both agencies make preliminary and final determinations, and the ITC sends out questionnaires to the domestic industry, importers, and customers to obtain information for its determination.

The minimum cost estimates for countervailing duty cases averaged about \$138,100 and the maximum averaged about \$399,400. These estimates were reasonably consistent with a U.S. Chamber of Commerce estimate. In a paper on antidumping and countervailing duty law, the Chamber estimated the cost of pursuing a countervailing duty case at between \$100,000 and \$500,000.

A few lawyers estimated the range of additional costs to appeal Commerce or ITC determinations to the Court of International Trade and the CAFC and for any requested Commerce yearly administrative review of a case (to see if the original duties need to be altered). The averages of their minimum and maximum estimates are shown in Table I.2.

**Table I.2: Costs for Appeal
Countervailing Duty Cases**

Place	Minimum	Maximum
Court of International Trade	\$68,300	\$106,700
CAFC	35,000	50,000
Administrative review	43,900	147,200

Although procedures for countervailing duty cases are similar to those of antidumping proceedings, the costs of pursuing a remedy are slightly lower because fewer calculations usually are needed. In contrast to dumping, where Commerce must get information on each foreign company's price in its home market and calculate dumping margins individually, a foreign government may give the same subsidy to all of its companies in a particular industry. While the government subsidy is usually on the public record, the home market prices of foreign companies may be hard to get and may require the petitioner to hire foreign consultants.

Section 301 Cases

Section 301 of the Trade Act of 1974, as amended, authorizes the President to take actions to enforce U.S. rights under international trade agreements and to respond to certain unfair foreign trade practices that restrict U.S. access to foreign markets.

The 301 process, as amended by the 1988 trade law, has certain milestones. The Office of the United States Trade Representative (OUSTR) can initiate its own investigation under section 301 or can accept a petition from a domestic industry. The investigation usually involves consultations and negotiations with the foreign country, either directly or under the auspices of the General Agreement on Tariffs and Trade, but OUSTR's final determination does not depend on completing the international dispute settlement process. Depending on the kind of case, OUSTR has 6 to 18 months after beginning a case to determine whether the foreign country is committing an unfair trade practice. OUSTR must retaliate if the foreign country's trade practice is "unjustifiable,"—that is, if it violates the international legal rights of the United States, including contravening a trade agreement—but it has flexibility of action for lesser unfair practices. Retaliation may include suspending concessions made to another country in trade agreements, imposing duties, restricting imports from the foreign nation, or pursuing agreements with the country to eliminate or to obtain compensation for the unfair practice.

The minimum cost estimates for section 301 cases averaged about \$54,700 and the maximum averaged about \$305,400. A petitioner cannot appeal a 301 case to the courts.

The costs for 301 cases vary widely depending, in part, on how much effort the petitioner chooses to exert. According to OUSTR's General Counsel and trade lawyers, a petitioner can pursue a case inexpensively by filing a petition and allowing OUSTR to complete its investigation. Alternatively, because the procedures are less rigorous and legalistic than for section 337, antidumping, and countervailing duty cases and because the administration has significant discretion about whether to pursue the complaint, a company can spend substantial sums of money lobbying government officials through personal contact and seeking public support through advertising.

Section 201 Cases

The "escape clause" of the General Agreement on Tariffs and Trade allows a nation to withdraw temporarily from its treaty obligations if increased imports, even if fairly traded, seriously injure or threaten to seriously injure a domestic industry. The United States has implemented this provision with section 201 of the Trade Act of 1974, as amended, which allows a domestic industry to seek temporary relief against fairly traded imports so that it can adjust to import competition.

The ITC, after receiving a petition from domestic industry, determines whether increases in competing imports are a substantial cause of serious injury, or threat thereof, to the domestic industry and, if so, recommends actions to the President that will most effectively assist the industry in adjusting to them. The President must decide whether to assist the industry by weighing the benefits to the industry with the costs to the rest of society. If the President decides to assist, his options include tariffs, quotas, the negotiation of orderly marketing agreements, or legislative proposals.

The minimum cost estimates for section 201 cases averaged about \$202,000 and the maximum averaged about \$566,000. According to several trade lawyers, appeals of 201 cases are rare because the law allows the President considerable discretion in making determinations.

The 201 remedy is fairly expensive to pursue because the petitioner is challenging imports from the entire world and because sophisticated economic analysis may be needed to prove the case. Under the 1988 amendments, two hearings at the ITC are now required, one for injury and one for remedy, and the petitioner can spend substantial resources in lobbying and advertising.

According to several trade lawyers, the new trade law, by encouraging the petitioner to provide an adjustment plan showing how the industry will become more competitive during the period of relief, will increase costs.

Section 406 Cases

Section 406 of the Trade Act of 1974, as amended, is similar to section 201 except that it provides a remedy against imports from Communist countries that disrupt the U.S. market. Congress enacted section 406 because of concern that other remedies, based on market economy concepts, could not deal with a rapid increase in imports from centrally planned economies which generally have central control over pricing levels and distribution processes.

At the request of the President, the OUSTR, the domestic industry, key congressional committees, or on its own initiative, the ITC investigates whether imports from a Communist country are disrupting the U.S. market. If the ITC determines that imports have disrupted the domestic market, it must recommend to the President rates of duty or quantitative restrictions that will prevent or remedy the disruption. Any relief given by the President is limited to 8 years, including one extension thereof.

There have been few 406 cases, so only a few of the trade lawyers we interviewed had experience pursuing the remedy. The minimum cost estimates for section 406 cases averaged about \$172,500 and the maximum averaged about \$295,000. Appeals of 406 cases are rare.

The 406 remedy costs less to pursue than section 201 because it generally covers imports only from one Communist country rather than from the world.

National Security Relief

Section 232 of the Trade Expansion Act of 1962, as amended, provides relief against imports that are harming domestic industries vital to the national security.

Commerce can start an investigation in response to a request from a domestic industry, any U.S. government agency or on its own initiative. If Commerce finds that imports impair national security, the President decides whether to grant relief and must inform Congress of his decision. The new trade law shortens the period for Commerce to complete its investigation and, for the first time, imposes deadlines on the President's decision on whether and how to act. Previously, some cases have lasted for years.

The minimum cost estimates for pursuing section 232 cases averaged about \$181,300 and the maximum averaged about \$537,500. An official administering the remedy in Commerce's Office of Industrial Resource Administration estimated the range of costs from \$10,000 to \$500,000, which is reasonably consistent with the lawyers estimates. Section 232 cases cannot be appealed.

The same official said that a petitioner can pursue a case inexpensively because the government does the investigation after the petition is filed. But according to this official, when companies decide to spend more than the minimum needed, most money is spent lobbying for positive determinations. Because the domestic industry must show that imports are damaging the national security and because the President has considerable discretion in making his decision, relief is less likely than when pursuing other remedies. Table I.1 shows the costs of pursuing each remedy.

Appendix I
Pursuit of Trade Remedies by Small Business

Table I.3: Costs of Pursuing Trade Remedies

Remedy	Range of Estimates	Average Minimum and Maximum Costs
337	\$50,000 - Several million	\$310,700 - \$715,000
Antidumping	60,000 - Several million	151,000 - 553,300
Administrative Review	20,000 - 400,000	42,000 - 168,900
Countervailing Duty	30,000 - Over 1,000,000	138,100 - 399,400
Administrative Review	25,000 - 400,000	43,900 - 147,200
301	20,000 - Over 1,000,000	54,700 - 305,400
201	75,000 - 2,000,000	202,000 - 566,000
406	75,000 - 500,000	172,500 - 295,000
232	25,000 - No outer limit	181,300 - 537,500

Small Businesses' Ability to Generate the Information and Resources Needed to Pursue Trade Remedies

Opinions of trade lawyers, officials of agencies administering trade remedies, and trade associations representing small businesses differ concerning whether small businesses are disadvantaged when pursuing trade remedies.

Representatives of four major trade associations² representing small businesses stated that smaller firms were disadvantaged in trade cases. One association representative said that the length and cost of the proceedings dissuade his member companies from seeking relief unless they do so through a trade association. He stated that most of the trade laws require showing injury to an industry but that often only small businesses are hurt or that smaller companies are injured more often than larger firms.

Whether small businesses are disadvantaged in trade remedy proceedings depends on the trade remedy, according to current and former officials of the agencies administering them. Officials in ITC's Office of Unfair Import Investigations stated that a small petitioner alleging that a large company infringed its patent or trademark may be disadvantaged in complex cases because it has more limited legal and financial resources.

Small businesses also can be disadvantaged in antidumping and countervailing duty cases. A former official of Commerce's Office of Investigations, which administers these cases, said that the costs of pursuing the cases may inhibit small businesses from bringing them. According to an

²We interviewed representatives from the U.S. Chamber of Commerce, the Small Business Legislative Council, the National Federation of Independent Business, and National Small Business United.

official in ITC's Office of Investigations, the counterpart to the office at Commerce, only a few small businesses have filed cases and they did so without counsel. He said that antidumping and countervailing duty investigations are expensive because the petitioner has to file paperwork with both Commerce and ITC and pay its lawyers to monitor Commerce's verification of data, which no small business could afford. Another official in the same office agreed that small businesses were disadvantaged, particularly in antidumping cases, when Commerce asks for detailed data on the price of the foreign product in its home market and in both kinds of cases when ITC sends businesses comprehensive questionnaires to determine whether they have been injured by foreign imports. Data on foreign prices are hard for any company to generate but especially for a small business. ITC's questionnaire may be burdensome because it is extensive and must be done quickly.

The same official stated that smaller firms were disadvantaged less in 201 and 406 cases than in antidumping and countervailing duty cases. The petitioners need to file cases only with ITC instead of both ITC and Commerce and do not need to obtain foreign data.

Small businesses are not disadvantaged when bringing 301 cases because the government performs the investigation, thus keeping costs low for the petitioners, according to OUSTR's General Counsel. But she noted that to defray costs and achieve greater influence, small businesses usually band together in trade associations to pursue cases.

Because the costs of filing a 232 petition are generally low and the procedures for filing a petition so simple, small businesses can generate the information and resources to participate, according to an official in Commerce's Office of Industrial Resource Administration, the administering agency. He stated that the regulations for filing a petition are simple enough that a petitioner does not need a lawyer and that sophisticated economic analysis is unnecessary because Commerce does the investigation. In short, a small business is not disadvantaged if it can demonstrate that imports are harming national security.

Trade lawyers had mixed views on whether small businesses were disadvantaged when pursuing trade remedies. Those that said they were disadvantaged cited the following reasons.

- Some small businesses are unaware of the trade remedies.

- If a small business knows about the trade remedies and has a good case, it usually will spend the resources to pursue it, but generating the information and resources is difficult.
- Small businesses that need relief most are the ones least able to afford to pursue it.
- Since 1979, many trade remedies have become more juridical; this helps small businesses that normally have less political influence than larger companies but costs them more because of additional due process.
- The increased use at ITC of sophisticated economic analysis increases the cost of pursuing trade remedies.
- The ITC may release confidential data on a case to a company's lawyers but not to officials in the decision-making hierarchy of the firm; this could hurt small businesses without counsel.
- Cases are lengthy, complex, and costly; data requirements are complex; and relief is uncertain.
- Many remedies require that cases demonstrate injury to the industry, so small businesses may be forced to band together in trade associations; however, a trade association may be divided and decide not to bring a case.

Those lawyers who said small businesses were not disadvantaged cited the following reasons.

- The costs of pursuing trade remedies were roughly proportional to the size of the petitioner.
- Bringing a case through a trade association can allow small businesses to pool their data and resources.
- A small business can always bring a case without a lawyer, and some have succeeded in obtaining remedies.
- Information gathered in government investigations helps to level the playing field for small businesses.
- Special legal assistance is provided to small business by the government.

Information and Assistance Provided by ITC's Trade Remedy Assistance Center

The ITC currently provides information about trade remedies to both large and small businesses and assists them in preparing petitions, but it also gives special help to smaller firms.

Functions Under Prior Law and Information and Assistance Provided

Section 339 of Title II of the Tariff Act of 1930, as amended by the Trade and Tariff Act of 1984, provides that the Trade Remedy Assistance Center (TRAC) will provide information to the public, upon request, on remedies and benefits available under the trade laws and the petition and application procedures and filing dates.

The law also requires each agency administering a trade law to provide technical assistance to eligible small businesses in preparing and filing petitions to obtain remedies under that law. TRAC fulfills this function for the ITC.

To satisfy these informational requirements, TRAC has a separate phone line to answer calls from businessmen and lawyers concerning remedies and the procedures associated with them. Since its inception in 1984, TRAC has had about 900 contacts with the public—answering questions and sending packets of material about trade remedies and procedures, fielding complaints, calling other agencies and offices that administer trade laws and referring petitioners to them for assistance, and meeting with the callers and reviewing their draft petitions. From January through October 22, 1988, TRAC has had 190 contacts with the public. This number understates the amount of information and assistance ITC provides to businesses because contacts with the public by other ITC offices are undocumented.

ITC rules define technical assistance as “informal advice and assistance, including legal advice, to enable eligible small businesses to determine the appropriateness of pursuing particular trade remedies and to prepare petitions and complaints...under the trade laws...” The rules restrict assistance to the period before a petition is filed.

According to the ITC rule, businesses that can certify under oath that they fall within the Small Business Administration’s definition of small business, which varies by industry and is based on the firm’s number of employees or annual revenues, are eligible for technical assistance from TRAC. Trade associations applying for assistance must certify that 80 percent of their members meet the standards and unions must certify that they have less than 10,000 members within the industry for which trade relief is being sought.

In practice, a business does not need to be certified to get assistance from TRAC, which provides pre-petition technical and legal assistance to both small and large companies. According to TRAC officials, the same kinds of assistance are provided to small and large businesses but more

time and resources are devoted to small companies than to large enterprises. Whether TRAC gives more extensive assistance depends more on whether the business is perceived as small rather than whether it has been formally certified. For example, a TRAC official cited a case where more extensive assistance was provided to a business that had no formal certification but was thought likely to be small; the business was reminded that it should get certified.

Since January 1985, only three businesses have filed certification forms with TRAC. TRAC officials had expected more companies to file and could not fully explain why so few did. But they stated that the availability of substantial pre-petition assistance without certification could have been an important contributing factor.

Below are some examples of technical and legal assistance provided by TRAC.

- Identify available trade remedies.
- Explain to the potential petitioner what happens during a case.
- Send rules, regulations, and requirements (including deadlines) for filing a petition.
- Identify further contacts at ITC and other agencies for the potential petitioner.
- Explain data that are needed for the petition, such as sales data, and tell the petitioner where they might be obtained.
- Provide a sample complaint or petition.
- Review draft petitions and complaints to make sure they are valid—that is, that they satisfy ITC rules—and alert the potential petitioners if they need any additional information or if any issues are likely to be a problem. TRAC provides technical and legal advice but will not draft petitions. If the potential petitioner has a weak argument, TRAC will point out the weaknesses and discuss possible alternative approaches. TRAC will tell the company if the petition is missing required information, which could lead to a negative decision.

TRAC will assign a lawyer to guide small businesses through the pre-petition process. The lawyer is available throughout the pre-petition process to answer questions.

Changes in Function Under the New Trade Law and Information and Assistance Provided

The major change in law affecting TRAC is the requirement to provide eligible small businesses with post-petition technical assistance and legal assistance and advice up through and including any administrative review or administrative appeal of an agency determination. The ITC rules implementing prior law confined TRAC's technical and legal assistance to the period before the petition was filed to avoid possible problems with advocacy for the petitioner in a case that the ITC would ultimately decide.

ITC's General Counsel expressed the following concerns about the ITC providing post-petition assistance. She said that even providing pre-petition assistance gives rise to these concerns and that the difficulties are magnified when post-petition help is given.

Conflict of Interest—The ITC's General Counsel stated that a conflict of interest may arise when an ITC lawyer provides legal assistance to a petitioner before the ITC. The lawyer has obligations to both the ITC and the petitioner, yet the agency and the petitioner may have divergent or even conflicting interests.

Lawyer-Client Privilege—According to ITC's General Counsel, uncertainty exists concerning the lawyer-client privilege; that is, there is doubt about what information the lawyer obtains may be disclosed to the ITC and what may be disclosed to the petitioner. One effect of this uncertainty is that when a small business consults a TRAC lawyer, it does not know whether it is speaking in confidence or talking to a representative of the ITC.

Confidential Business Information—The ITC's General Counsel said that the ITC may have confidential business information pertaining to a case (for example, information about the respondent's business) that the ITC lawyer has access to but the petitioner does not. Even though the lawyer may not have seen the information, having access to it while assisting the petitioner may present a problem.

Liability—According to the ITC's General Counsel, with the TRAC attorney uncertain about his conflicting obligations and the petitioner expecting too much, the petitioner could blame the attorney for a loss or even file a liability suit against the attorney in his personal capacity for failure to represent the petitioner properly.

ITC's General Counsel believes that these concerns could be alleviated, to a great extent, by clarifying by statute the TRAC attorney's role under

the present system, perhaps by specifically eliminating any attorney-client obligation to the agency.

In the new trade law, Congress created a separate Trade Remedy Assistance Office for this function, designed to broaden its scope to better assist business and to ensure its independence within ITC to eliminate conflict of interest. According to an ITC official, a part-time lawyer and a full-time paralegal will staff the new office and receive assistance from other ITC offices when giving pre-petition assistance but, because of conflict of interest and confidentiality considerations, will work alone when giving post-petition assistance. A separate office in ITC, however, may not solve all the problems noted by the ITC's General Counsel because it may not create sufficient independence.

Other changes in the law have only a minor effect on the trade remedy assistance function. The new law states that the office, in coordination with each agency administering a trade law, should also assist eligible small businesses, rather than the administering agency alone providing all assistance, as under prior law. In practice, this will have little effect because TRAC had previously provided assistance and made referrals to administering agencies, which can provide more comprehensive assistance on their remedies than can TRAC. TRAC officials stated that the new law codified existing practice.

The new law requires the office to provide assistance and advice, as well as information, about remedies and procedures to all interested parties, large and small. According to a TRAC official, this also codifies current practice with respect to pre-petition assistance.

The new law stipulates that the office give technical and legal assistance and advice to eligible small businesses rather than only the technical assistance provided under prior law. In practice, the existing TRAC rules already defined technical assistance to include legal advice, so little change is expected.

On November 8, 1988, ITC issued administrative order 88-14 to establish a separate Trade Remedy Assistance Office. ITC is currently revising its rules to implement the new law, including the provisions requiring post-petition assistance to small petitioners.

In response to congressional interest, ITC officials are attempting to increase public awareness of the trade remedy assistance they offer. Information packets summarizing such assistance are being prepared for

distribution at Small Business Administration seminars and regional offices, and ITC speakers will be provided for Small Business Administration conferences.

Analysis of Government Assistance to Small Businesses

In section 8010 of the new trade law, Congress asked GAO, among other things, to analyze the costs and benefits to the government of two options for assistance to small businesses.

1. Direct legal assistance—the government would provide legal assistance to a small petitioner seeking trade relief.
2. Reimbursement of legal expenses—The small business would choose its own lawyer and be reimbursed for all or some of the cost.

Under both options, small businesses, and not the U.S. government, obtain the direct benefits. Increased employment and tax payments by healthier small businesses may indirectly benefit the government. The indirect benefits are hard to quantify because of the difficulty in measuring the effect on the health of small businesses that further legal assistance would have.

To provide limited legal assistance, TRAC's costs are about \$56,000 a year, almost all of which is personnel cost. TRAC's Director estimates that the new requirement for post-petition assistance will not increase the cost of operation greatly because she expects that few small businesses will file for such assistance. She predicts that the bulk of the office's work will remain sending out information and that other ITC offices will continue to help the office provide pre-petition assistance.

The costs of providing more extensive direct legal assistance to small businesses are hard to quantify since it is not possible to estimate the cost to the government of pursuing a case. This estimate could not be made because we could find no similar precedent for providing government lawyers to represent one party in a case that the U.S. government would ultimately decide administratively. In addition, as discussed below, the number of past cases is not a good predictor of the number of future cases.

In any event, providing more extensive direct legal assistance raises questions concerning a government lawyer's ethical responsibilities. The Code of Professional Responsibility for lawyers prohibits attorneys from placing themselves in a position where competing interests may affect

their representation of clients. This provision could limit the ability of an ITC lawyer to represent a petitioner whose interests may conflict with those of the ITC. The concerns about conflict of interest, lawyer-client privilege, access to confidential business information, and liability coverage for government lawyers raised by the ITC General Counsel about the limited post-petition legal assistance under the new trade law would probably be more severe if the government provides representation for the client. Before such expansion is pursued, these issues need to be addressed and resolved.

We could not estimate the costs of the reimbursement option by using the historical costs of pursuing trade remedies. We could not quantify historical costs because we could not identify a satisfactory way to estimate the number of trade cases that were brought by small business.

Even if we had been able to estimate historical costs, it would be difficult to predict future costs of the reimbursement option for the following reasons.

- Reimbursement of legal expenses would decrease a petitioner's cost of pursuing trade remedies and, therefore, might increase the number of cases brought.
- The effect of the new trade law on the cost and number of cases brought for each remedy is uncertain. For example, many lawyers we interviewed predicted that for section 337 cases, eliminating the need for the petitioner to prove injury in most instances may reduce the cost of bringing a case. Therefore, the number of cases may increase.
- The number of trade remedy cases brought each year depends on the prevalence of the relevant foreign trade practice, the propensity of the agencies administering the trade laws and the President to grant relief, and the state of the U.S. economy, all of which are difficult to forecast.

Despite the problems of quantifying the cost of reimbursement, it is possible to explore the advantages and disadvantages of the option. To do this, we used the Senate's reimbursement plan³ for a sliding scale of payments for legal expenses. The Senate plan would have transferred TRAC's functions to the Commerce Department and authorized the Director to reimburse the expenses to a small business if he or she determined the business needed assistance. Under the plan, reimbursement not to exceed 50 percent was authorized for the first \$200,000 in expenses on a

³The plan was presented in the Senate as a floor amendment to the trade bill (Congressional Record July 14, 1988) and was passed but was dropped in conference with the House of Representatives.

case and 25 percent for expenses between \$200,000 and \$400,000. In addition, the plan would have authorized a \$3-million ceiling on total annual reimbursements.

The plan's advantages are that it

- would have eliminated legal problems caused by the direct legal assistance option;
- removed the need to create a separate, insulated government entity containing lawyers to represent small businesses (although the Senate plan provided for a new office in Commerce to make reimbursements, existing government structures could perform the task);
- provides, through varying levels of reimbursement, less incentive for small businesses to incur excessive legal bills; and
- allows the small business to choose its own lawyer rather than having one provided.

Disadvantages to the concept are that

- because it would have lowered the cost of bringing cases, small firms might have brought marginal cases and hoped to win and
- the declining rate of reimbursement does not recognize that complex cases are inherently more expensive.

Any programs, particularly direct legal assistance or the reimbursement of legal expenses, to reduce the costs of pursuing trade remedies might increase the number of cases brought and, therefore, increase the work load for agencies administering trade remedies. One former senior ITC official stated that any assistance to small business would "clog the administrative agencies" with cases.

Other Possible Options to Reduce the Burden on Small Businesses

Although we do not advocate whether or not to assist small businesses or any one option for doing so, during our review two other options surfaced in our discussions with trade law specialists.

One possible option is to reimburse legal expenses, using the Senate's sliding scale, only if the petitioner wins. This might reduce the number of marginal cases brought.

A variant of this option would require the loser of a case to pay the winner's legal expenses.

But because reimbursement is provided only for a case pursued to its end successfully, petitioners might have the incentive to turn down a settlement, where available, in order to recoup legal expenses. In addition, for reimbursement, a successful outcome would need to be defined. In some instances, the outcome of a case is not clear cut. For example, the outcome may be ambiguous if the industry gets a favorable administrative decision but the President does not provide the relief.

Another possible option is to create a two-track system for pursuing trade remedies, one of which has fewer procedural requirements and can therefore be pursued with less resources, thus helping small businesses. The U.S. Chamber of Commerce has proposed doing this for antidumping and countervailing duty cases by creating expedited procedures that could only be used if both parties agreed. Under the proposal, both the petitioner and respondent would agree not to file pre- and post-hearing written arguments at Commerce and ITC but would retain their rights to appeal any agency determinations in court. Another variant, originally discussed at ITC, would allow a small business without counsel and with limited resources to present a case to ITC while removing many of the procedural but not substantive requirements of cause of action and injury. A large company that was opposing the small business could still be represented by counsel.

A two-track system would reduce a small petitioner's cost of bringing a case and therefore increase the number of cases. But unlike the other options, it might mitigate the increased burden on the agencies that administer trade remedies. This, combined with a small business presenting its own case or paying for its own lawyers, might make this option more cost-effective for the government than direct assistance or any type of reimbursement.

Objectives, Scope, and Methodology

To obtain estimates of the costs of bringing trade cases, we identified, with the help of trade law specialists, trade lawyers from 26 Washington law firms which had represented petitioners. In interviews, they provided a range of costs for each remedy; we averaged the minimum and maximum estimates. Not all 26 lawyers provided estimates for each remedy. Our cost estimates for each remedy were comparable to rough

estimates developed by John Jackson, a University of Michigan law professor.⁴

We also obtained estimates on costs of pursuing particular remedies from the U.S. Chamber of Commerce and the U.S. Department of Commerce.

To obtain views about whether small businesses could generate the information and resources needed to effectively pursue trade remedies, we interviewed the four major trade associations representing small businesses and officials from ITC, OUSTR, and Commerce who administer the trade laws. We also asked the trade lawyers whether small businesses were disadvantaged when seeking trade relief.

To identify the types of information and assistance provided by the Trade Remedy Assistance Center, we collected pertinent documents and interviewed TRAC officials.

In analyzing the costs and benefits of direct legal assistance versus reimbursement for legal expenses, we interviewed officials from TRAC, ITC's Office of General Counsel, Commerce's Office of Investigations, OUSTR's Office of General Counsel, the Small Business Administration, and the Legal Services Corporation.

Our work was performed in September and October 1988 in accordance with generally accepted government auditing standards.

Because of the statutory deadline, we did not obtain formal written comments on a draft of this report. We informally discussed our findings with responsible ITC officials and have included their comments where appropriate.

⁴John H. Jackson, "Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States," University of Michigan Law Review April-May 1984: pp. 1570-1587.

Section 8010 of the Omnibus Trade and Competitiveness Act of 1988

Not later than December 1, 1988, the Comptroller General of the United States shall conduct a study and submit a report to the Committee on Governmental Affairs and the Committee on Small Business of the Senate, as well as to other appropriate committees of the Senate, and to the Committee on Small Business and the Committee on Ways and Means of the House of Representatives on the costs incurred by small businesses in pursuing rights and remedies under the trade laws. Such report shall include an analysis of -

(1) the costs incurred by small businesses (and trade associations whose membership is primarily small business) in pursuing investigations under the trade remedy laws, including -

(A) antidumping investigations and proceedings under title VII of the Tariff Act of 1930;

(B) countervailing duty investigations and proceedings under section 303 or title VII of the Tariff Act of 1930;

(C) unfair trade practice investigations under section 337 of the Tariff Act of 1930;

(D) investigations under chapter 1 of title III of the Trade Act of 1974;

(E) import relief investigations under chapter 1 of title II of the Trade Act of 1974;

(F) market disruption investigations under section 406 of the Trade Act of 1974; and

(G) national security relief investigations under section 232 of the Trade Expansion Act of 1962;

(2) the extent of assistance and information provided by the Trade Remedy Assistance Office of the United States International Trade Commission;

(3) the ability of small businesses to generate the information and resources needed for such investigations; and

(4) the costs and benefits to the Federal Government of either -

Appendix II
Section 8010 of the Omnibus Trade and
Competitiveness Act of 1988

(A) providing reimbursement to small businesses for legal expenses incurred in pursuing trade remedies; or

(B) providing direct legal assistance to small businesses.

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