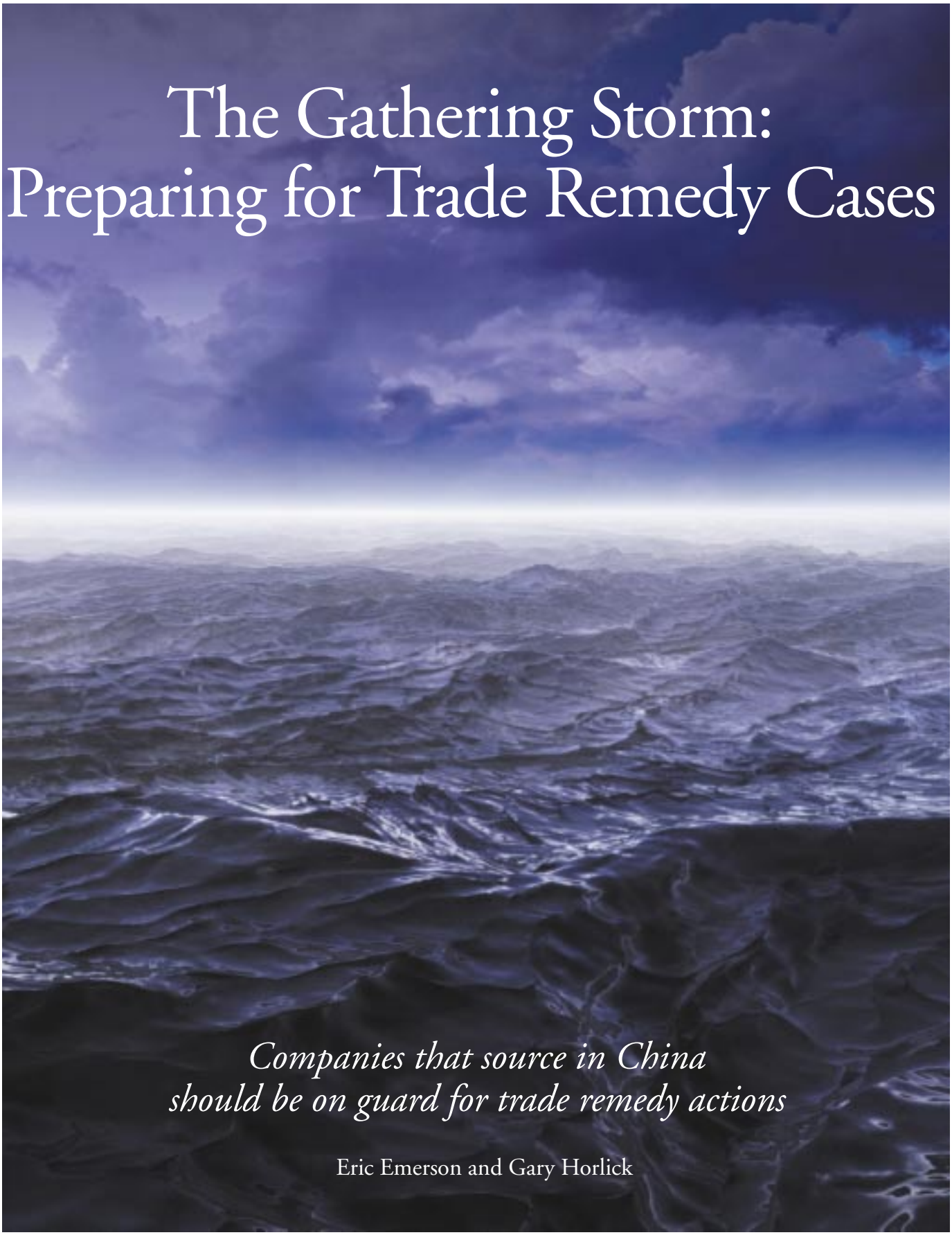

The Gathering Storm: Preparing for Trade Remedy Cases

Companies that source in China should be on guard for trade remedy actions

Eric Emerson and Gary Horlick

Recessions have historically brought sharp increases in trade remedy cases—antidumping (AD), countervailing duty (CVD), and safeguard proceedings—and there is no reason to think that this one will be any different. Indeed, World Trade Organization (WTO) statistics suggest that trade remedy cases have already begun to increase. After several years of decline, the number of AD proceedings filed worldwide in the first half of 2008 jumped 39 percent over the same period in 2007.

As the number of trade remedy cases increases, manufacturers in China and importers that rely on their products are particularly at risk. Of the 10 AD and CVD petitions filed in the United States in 2008, nine included Chinese imports; globally, more than half of the AD cases initiated in the first six months of 2008 were against China. In addition to AD and CVD cases, Chinese companies that export to the United States face an additional risk: Section 421 of the Trade Act of 1974 permits the United States to limit imports from China if those products are being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to a competing US industry, even without an allegation of unfair pricing or subsidization. Though no measures to limit imports have been taken in the six cases filed to date under Section 421, which was added to the Trade Act in 2000, the Obama administration may find itself under pressure to do so.

Quick Glance

- Chinese manufacturers and their US importers are particularly at risk of trade remedy proceedings being brought against them during economic downturns.
- Companies should pay attention to rumors about trade remedies, scour trade publications for evidence of industry-wide support, monitor exporters' activities, and follow trade actions in other jurisdictions.
- Depending on the risk of a trade action being filed, companies should take various steps to prepare for a possible case.

Because trade remedy cases proceed quickly, early preparation can pay handsome dividends. In US AD and CVD cases, the US International Trade Commission (ITC) sends questionnaires to parties almost immediately after a petition is filed, holds a merits hearing 21 days later, and calls for substantive briefs just a week after that. If the ITC determines that imports have not harmed the domestic industry (a negative determination), the case is terminated at this preliminary stage. If the ITC determines that the domestic industry has been harmed, the foreign producer(s) and US importer(s) are condemned to roughly a year of commercial uncertainty, lost sales, and the payment of provisional duties as the remainder of the investigation takes its course. Though the likelihood of a negative preliminary determination is low, minimal preparation can improve a party's chances of success. Even if a victory at the preliminary phase is unobtainable, early preparation can lay the groundwork for ultimate success in the final phases of the case. Companies that import from China or whose supply chains stretch through China would be well-advised to determine whether trade actions are likely to be filed against their key products and, if so, to take steps to increase their chances of success.

Assessing the risk of trade action

Predicting exactly which products will be subject to future trade action is extremely difficult. Nearly any product can be subject to a trade remedy proceeding; the only real prerequisite is that there be a domestic industry producing something "like" the imported good. In the United States, the principal targets for trade remedy cases have been steel, chemical, and processed-food products, but in recent years, cases that involve paper, agricultural, and aquacultural products have become more common. Petitions filed in the United States in 2008 covered products as diverse as kitchen appliance shelving racks, electrodes, matchbooks, and lawn groomers—none of which fall into any of the traditional categories. To determine whether a particular product is at risk of a trade remedy, the best information usually comes from the industry itself.

■ **Examine trends in the marketplace for indications of possible trade action** Trade cases are often filed when import volume—either absolute or relative to domestic consumption—increases as import prices fall. This trend is not uncommon in a recession, as sales from inventories of previously imported products continue while domestic production declines. This pattern can suggest that foreign producers are expanding their market share by undercutting market prices, thus potentially injuring a domestic industry.

■ **Monitor the closure or scaling back of domestic production and workforce reductions** One indicator used by the ITC to determine material injury is whether the domestic injury has reduced employment. In the current economic climate, plant closures and layoffs are common, and not every one is a harbinger of trade action. If "import competition" is mentioned in a company's press releases or securities filings as a factor in the company's decision to reduce production or employment, that industry may be laying the groundwork for trade remedy action.

■ **Pay attention to the rumor mill** Petitioners in trade cases typically want to maintain the element of surprise, particularly because the ITC's preliminary investigation period is so short. For that reason, formal announcements that AD/CVD cases will be filed are rare. At the same time, potential petitioners often need to determine the level of industry-wide support for a trade action before it is filed, as investigations can proceed only if certain thresholds of support are met, so some degree of industry chatter is almost inevitable. Sales personnel are often the

first to hear of possible trade cases through informal conversations with their customers and competitors, and they should be advised to pass that information back quickly to the company's inside counsel.

■ **Monitor trade publications** Scour trade publications for statements blaming the poor state of a domestic industry on "unfair" import competition. Though these comments can sometimes be dismissed as saber rattling or scare tactics, they can also signal that a domestic industry is trying to explain to its customers—who will likely object to trade action that raises their prices and limits their supplier choices—why such action is necessary.

■ **Monitor the activities of all exporters in the domestic marketplace** Some trade cases have been filed after a small number of foreign competitors with aggressive, high-profile sales strategies have "stolen" business from a domestic industry. Because AD, CVD, and safeguard cases are filed on a country-specific (not a company-specific) basis, the actions of a small group of exporters could give rise to a trade action against an entire country, so companies should consider the actions of the country's exporters in their industry as a whole, not just those from which they source their products.

■ **Monitor trade actions in other jurisdictions** A trade action filed in one country will frequently be followed by similar trade cases in other countries, as producers in those jurisdictions react to concern that exports that would otherwise go to the first country to file will be diverted to their markets. This domino effect can particularly devastate exporters that seek alternative markets for their goods after their principal markets are effectively closed to their products.

Preparing for trade action

Once a possible trade action has been identified, what should a company do? The answer depends on various factors, such as the strength of the evidence that a trade action will be filed, the importance of the product to the company's business, and the amount of resources that a company can reasonably commit to the task. Taking all of these factors into account, a company can decide how to proceed.

When the risk of a trade remedy case is relatively small, a company might simply want to watch developments in the marketplace more carefully and consider potential alternative commercial strategies in case a trade action is filed. A domestic importer should notify and remain in close contact with its foreign suppliers about the possibility of trade action so that information can be shared to develop a more complete picture of the domestic industry's intentions. A company should also scour all sources of publicly available information for potentially relevant statements made by domestic industries or other indications of coming trade action. Foreign producers should refrain from making statements that could be used against them in an injury proceeding.

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If the risk of a case is perceived to be somewhat more serious, a company will need to take more concrete steps. Importers must be particularly active. Under US law, importers of record are responsible for all AD and CVD liability and cannot seek reimbursement for this liability from their foreign suppliers. For this reason, importers should first ensure that their foreign suppliers are taking the risk of trade action seriously. Importers should ask their foreign suppliers to make some back-of-the-envelope estimates of their dumping liability and identify whether they have received any government subsidies that could give rise to countervailing duty liability. In addition, importers should take some preliminary steps to identify or even pre-qualify alternative suppliers in other countries in case a principal supplier becomes unavailable. At the same time, importers should be aware that trade actions are often filed against imports from multiple countries simultaneously and that it would do no good to qualify suppliers in other countries that are at equal risk of increased duty liability. Another possibility is to form an ad hoc coalition of like-minded companies to develop factual and legal defenses, and perhaps even a public relations strategy, that could be used if a case were filed.

Where the likelihood of a trade action is high and the product of concern is at the core of a company's activities, China-based producers and their US importers need to take decisive action. This may include altering sales or production activities, foregoing benefits under certain government programs, restructuring corporate or supplier relationships, or taking other actions to reduce AD and CVD liability. Determining which of these steps to take will require a detailed analysis of potential AD and CVD liability and may even require the company to draft responses to standard questionnaires issued by ITC and the US Department of Commerce in these investigations to identify specific areas where action is needed.

China-based producers and their US importers should consider developing their legal case on an industry-wide

basis. They may want to identify potential expert witnesses who could provide meaningful testimony in the proceeding. China-based producers or their industry associations can also begin conversations with both Commerce and ITC about potential issues in the case. One of the great advantages for petitioners is the lengthy "pre-clearance" petition process, during which they may meet with Commerce and ITC staff. Commerce and ITC's doors are equally open to foreign producers and their importers, and it is highly advantageous when a foreign industry can present its side of a case before a petition is filed. Another possibility is to try to avoid the case altogether by dissuading potential plaintiffs—who may also be suppliers to the potentially affected importers—from bringing the action, or reaching some other type of settlement.

Many of these actions can only be undertaken with the assistance of counsel well-versed in trade remedy proceedings. Even where the risk of a trade remedy case is low, foreign producers and domestic importers can greatly improve their chances of success simply by identifying and retaining trade counsel so that they can mount a vigorous defense immediately if a case is filed. Any conversations with competitors about marketplace conditions, especially pricing, entail serious antitrust risks and should only be undertaken with the close involvement of counsel.

As production stalls in economies around the world, and domestic producers seek to protect their own markets and shore up prices, an uptick in trade remedy proceedings appears inevitable. Foreign producers reliant on exports and their importing counterparts would be well-advised to quantify their exposure to such actions and consider what steps they can take to reduce it. 完

US importers of record are responsible for all AD and CVD liability.

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